RECENT Developments

BANKRUPTCY TO TAXATION

Bankruptcy Law

Homestead Property

Matter of Lopez, 897 F.3d 663 (5 Cir. 2018).

In *Lopez*, the Chapter 13 debtors listed their Texas property as their homestead, which they claimed as exempt under the Bankruptcy Code and other Texas state laws. The debtors confirmed a plan that provided that the property of the estate, including property that subsequently may come into the estate, would not revest in the debtor except upon, among other things, dismissal of the case.

After plan confirmation, the debtors continually failed to make the required plan payments. To ease their financial burden, the debtors sold their home but failed to seek court permission. Two years later, the debtors filed a motion seeking to retroactively approve the sale.

At the hearing on the motion to sell, the Chapter 13 trustee cited to 5th Circuit precedent that provides that the proceeds from the sale of the homestead property became estate property if they are not reinvested in (or used to purchase) another home within six months. Because the debtors did not purchase another home, the trustee argued, the sale proceeds were no longer exempt and should be brought into the estate.

The bankruptcy court approved the sale motion but ordered that the proceeds were estate property and submitted the funds to the trustee for distribution to the debtors' creditors. After again failing to make plan payments, the bankruptcy court informed the debtors that they could (1) use some of the proceeds for medical bills but then must turn over the remaining sale proceeds to the trustee, or (2) they could dismiss their case and retain all of the proceeds, foregoing a discharge. The debtors chose to file a motion to voluntarily dismiss their case.

The trustee objected to the motion to dismiss, arguing that it was filed in bad faith in order to retain the sale proceeds, which were gained years prior without court permission, and retain a windfall at the expense of their unpaid creditors. The bankruptcy court granted the voluntary dismissal and ordered that the trustee turn over the proceeds to the debtors.

The trustee appealed, and the district court reversed, holding that the sale proceeds should be distributed to the debtors' creditors under the plan.

On appeal, the 5th Circuit explained that Section 349(b) of the Bankruptcy Code provides that dismissal of the case revests the property of the estate "in the entity in which such property was vested immediately before the commencement of the case." Because the homestead was vested in the debtors at the commencement of the case, the sale proceeds revested in the debtors on dismissal. The 5th Circuit thus agreed with the bankruptcy court, finding the district court's ruling "untenable" because it ordered distribution of funds to creditors under a defunct plan in a case that was over. Since a trustee can distribute funds to creditors only under the specific terms of a plan and because the plan was no longer in effect upon dismissal, the authority to distribute funds ended with the closing of the case.

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Corporate and Business Law

Lawyer for Agent, Director and Officer Did Not Conspire to Defraud Corporation

Covington Golf & Recreation Park, Inc. v. Keating, 17-0297 (La. App. 1 Cir. 3/7/18), ____ So.3d ____, 2018 WL 1191394.

The 1st Circuit Court of Appeal affirmed the district court's dismissal of a corporation's suit against a lawyer who had represented the corporation's agent, officer and director. The suit asserted that the lawyer had conspired with his client to defraud the corporation. Covington Golf and Recreation Park, Inc. was incorporated by Charles Gambino, Thomas E. Ketchum, Jr. and Ketchum's wife, Betty Keating, with Gambino and Ketchum serving as directors, as well as president and secretary/treasurer, respectively. Ketchum also served as agent for service of process, with his home address listed as Covington's registered office and principal place of business. Further, Ketchum and Keating owned and leased to Covington the property on which Covington operated its driving range pursuant to a 10-year lease with an option to purchase the property. Attorney Geoffrey Longenecker represented Ketchum and Keating in these transactions.

In April 2008, Longenecker sent Covington a notice-of-default letter on behalf of Ketchum as lessor for failure to pay rent for three months. The letter gave Covington 10 days to cure the default or the lease would be terminated. The letter was delivered to Ketchum's house by both certified mail and hand delivery, and Ketchum acknowledged service by signing the certified mail receipt. Subsequently, Ketchum and Keating filed suit against Covington, and service of the suit was personally made on Ketchum. After Covington failed to timely respond to the petition, a default judgment was entered against it.

After a notice to vacate was posted on Covington's premises, Covington sued Ketchum and Keating seeking a preliminary and permanent injunction, as well as declaratory judgment that the lease was valid and enforceable. Covington filed an amended pleading to add Longenecker as a defendant, alleging that he had conspired with Ketchum and Keating to commit fraud by suing Covington and obtaining cancellation of the lease.

Covington alleged that Ketchum's intent to defraud it was evident by his not informing Gambino of the suit to cancel the lease, in violation of his fiduciary duty as Covington's director, officer and agent. Further evidence of this intent to defraud was Ketchum's failure to attend two special meetings of the board of directors called by Gambino with the express intent of discussing the status of Covington's tax filings and plans for developing the property further. Ketchum also never raised the issues with the lease despite routine daily interactions with Gambino. Gambino alleged that he learned of the events only upon seeing the notice to vacate posted at Covington's premises. Covington also alleged that Longnecker, as Ketchum's personal attorney, knew of Ketchum's intent in filing suit, and, therefore, had participated in the conspiracy to commit fraud. Ketchum and Keating subsequently declared bankruptcy and were dismissed from the suit. Longenecker, thereafter, died and his estate was substituted as the sole defendant.

The trial court found in favor of Longenecker's estate, holding that Covington had failed to meet its burden of proving that Longenecker had knowledge that Ketchum and Keating were committing fraud by using the lawsuit to cancel the lease and not informing Gambino of the lawsuit. Covington appealed, contending the trial court erred in requiring Covington to prove Longenecker's actual knowledge of Ketchum's intent to commit fraud by concealing the suit instead of concluding that Longenecker had such knowledge on circumstantial grounds. The 1st Circuit affirmed the trial court, holding that the trial court had not required the plaintiff to prove actual knowledge by Longenecker. Rather, the appellate court held that the trial court clearly concluded that the plaintiff failed to meet its burden of proving of Longenecker's knowledge even by circumstantial evidence.

Judge Welch dissented from the majority opinion, stating that the record amply demonstrated Longenecker's involvement in the lawsuit for cancellation of the lease, as well as his knowledge of Ketchum's positions with Covington as agent, director and officer. At the very least, Judge Welch argued, Longenecker "would have been aware" that Ketchum had failed to act in his role as agent for Covington based on Covington's failure to timely respond to the lawsuit for cancellation of the lease. These facts and circumstances, the dissent argued, were sufficient to infer that Longenecker put himself in an "unusual and inappropriate ethical circumstance" and knew of his client's fraudulent intent.

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Environmental Law

Arguments to Combine Land Loss Suits Rejected

In Re: La. Coastal Zone Land Loss Litigation, 317 F.Supp.3d 1346 (Mem) (Multi. D. Lit. 2018.)

After being removed to federal court again (the third time for some of the cases), five judges of the United States Judicial Panel on Multi-District Litigation rejected defendants' arguments to combine the dozens of coastal-land-loss suits into a multi-district litigation format (MDL) pursuant to 28 U.S.C. § 1407. The panel, which sat for hearings in Santa Fe, NM, concluded that centralization is "not necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of this litigation."

The panel acknowledged that the 41 cases (29 pending in the Eastern District of Louisiana and 12 in the Western District of Louisiana) broadly implicated the same factual questions — namely, that the five coastal parishes were experiencing significant coastal-land loss and whether or to what extent oil and gas extraction or transmission contributed to that loss — but the panel focused on the fact that each case was specifically tailored to an "operational area" that would likely have distinct causes of action, discovery needs and different defendants.

Although the parties disagreed over the prudence of consolidation as an MDL under section 1407, the parties were mutually agreeable to some form of consolidation at the federal court level. As such, the MDL panel recognized that future consolidation by the Eastern and Western District Courts may be a possibility under 28 U.S.C. § 1404.

The 41 separate cases, which were removed on the basis that the plaintiffs' preliminary expert reports implicated federal directives issued during World War II and thus before the passage of the Coastal Zone Management Act (upon which the cases are based), now remain in federal district court and await decisions on pending motions to remand.

NORM Litigation

Lennie v. Exxon Mobil Corp., 17-0204 (La. App. 5 Cir. 6/27/18), ____ So.3d ____, 2018 WL 3131444.

In an appeal from the 24th Judicial District Court, the Louisiana 5th Circuit recently clarified its application of prescription and *contra non valentem* in NORM (naturally occurring radioactive material) litigation.

This case was a survival and wrongful death suit brought by the surviving spouse and children of a man who had worked in a pipe yard where they allege he was exposed to NORM, leading to his death from lung cancer some 16 years after his retirement.

The plaintiffs' claims were based in tort, thus carrying a one-year prescriptive period under La. Civ.C. art. 2315.1. Lennie died in 2010 — some four years prior to his family filing suit on his behalf. As such, the defendants filed prescription exceptions at the trial court, which were granted. The trial court found that the plaintiffs failed to meet their burden of proof to apply the doctrine of *contra non valentem*, which suspends the running of prescription against a claimant who is "ignorant of the existence of facts that would enable him to bring a cause of action, provided that his ignorance is not willful, negligent, or unreasonable." *Guillot v. Daimlerchrysler Corp.*, 08-1485 (La. App. 4 Cir. 9/24/10), 50 So.3d 174, 181 (citing *Wimberly v. Gatch*, 93-2361 (La. 4/11/94), 635 So.2d 206, 212). Relevant to the *Lennie* case, *contra non valentem* may apply when: 1) there has been concealment by the alleged tortfeasor; or 2) where the plaintiffs do not have actual or constructive knowledge of the cause of action even if not induced by the defendant.

More specifically, the plaintiffs alleged that "the defendants actively sought to conceal the causal link between work-related NORM exposure and lung cancer, and downplay the danger of exposure to the radioactive material in the workplace." *Lennie* at *4. In support of this claim, the plaintiffs alleged that NORM was previously discovered by the oil industry and that a trade group was established to develop a screening method to detect NORM, which was approved by the state and adopted by Lennie's employer. A similar argument was successfully made in *Lester v. Exxon Mobil Corp.*, 10-743 (La. App. 5 Cir. 5/31/12), 102 So.3d 148. However, the 5th Circuit distinguished the *Lester* case due to the plaintiffs' failure to present "any evidence of actions taken by defendants that would rise to the level of concealment, misrepresentation, or fraud directed towards them." *Lennie* at *4. In *Lester*, there was evidence suggesting that the employer showed videos to workers suggesting that NORM exposure was very unlikely.

The *Lennie* plaintiffs also sought to avail themselves of the suspensive influence of *contra non valentem* by alleging that they had no actual or constructive knowledge of the cause of action, also known as the "discovery rule."

The *Lennie* plaintiffs testified that they did not have actual knowledge that another party wrongfully caused Lennie's death until they read a newspaper article in 2013. However, the court concluded in its *de novo* review that "Mr. Lennie's diagnosis of lung cancer in January 2010 was constructive notice sufficient to put the Lennies on guard and to call for them to inquire further into the cause of his condition." *Lennie* at *8. The court found that the Lennies' lack of knowledge was due only to their lack of investigation. In so ruling, the court distinguished an earlier ruling allowing for the application of *contra non valentem* in a situation where the plaintiff has investigated the cause of an injury, but received an alternative diagnosis from a physician.

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Family Law

Succession

Sork v. Sork, 17-0300 (La. App. 1 Cir. 2/9/18), 242 So.3d 640.

Following Mr. Sork's death, 50 percent ownership of a home and the debt thereon was received by Ms. Sork, who was Mr. Sork's second wife, and the other 50 percent of the home and liability was received by his four children from his first wife. She subsequently sued the stepchildren for reimbursement for mortgage payments and for repair and maintenance expenses. After serving two of the four children, she obtained a default against those two children for one-half of the mortgage payments she had made and for one-half of the repair and maintenance expenses. The court of appeal found that the two children were liable only for their virile shares and amended the judgment to require the two children to pay one-fourth each of the mortgage expenses. The children were joint, not solidary, obligors.

Regarding the repair and maintenance expenses, the court of appeal first rejected the children's argument that those expenses should be offset by Ms. Sork's use of the home, finding that the children had never demanded occupancy of the home and been refused. The children further argued that many of the expenses were not necessary expenses. The court of appeal agreed, reducing the award to those only for expenses necessary to preserve the home and which were sufficiently proven. The dissent argued that the children should have been solidarily obligated on the debt.

In re Succession of Buhler, 17-0049 (La. App. 1 Cir. 2/22/18), 243 So.3d 39.

During the parties' marriage, Mr. Buhler executed a will in which he bequeathed all of his property to his wife. Subsequently, they divorced, and the trial court signed a judgment. Mr. Buhler then died before the delay for suspensively appealing had passed. Ms. Buhler filed a petition to probate his will, alleging that Mr. Buhler was her husband and seeking to be designated as executrix. After the trial court signed the order, Mr. Buhler's daughter, Ms. Paul, moved to revoke the appointment under La. Civ.C. art. 1608 on the grounds that the Buhlers were divorced at the time of Mr. Buhler's death and that Ms. Buhler misrepresented that she was still married to him. She argued that, because the divorce judgment was not yet final at the time of his death, it abated.

The trial court found that the divorce negated any testamentary provisions in her favor, revoked her appointment as executrix and appointed Ms. Paul as executrix. Both parties then submitted conflicting proposed judgments, and the trial court signed both, Ms. Buhler's one day and Ms. Paul's the next. The court of appeal found that Ms. Paul's judgment was an absolute nullity, as it was substantively different and could not amend the first signed judgment.

Moreover, although Ms. Buhler's proposed judgment was not circulated to opposing counsel in accordance with Rule 9.5, it had been provided to opposing counsel, and the proposed judgment noted that Ms. Paul opposed certain portions. The court of appeal thus found that the purpose for Rule 9.5 had been achieved, and that the error in not allowing the full five days for opposition comments was harmless. Regarding the status of the divorce, the appellate court found that the divorce had not abated, and, because Ms. Buhler did not appeal the divorce judgment, it was final and definitive. Further, her assignments of error regarding failure of service regarding the divorce petition and rule to show cause were rejected because she failed to file declinatory exceptions and, therefore, waived such arguments. Because the judgment of divorce was final, she was removed as executrix.

Succession of Barrios, 17-0560 (La. App. 4 Cir. 4/6/18), 243 So.3d 122, *writ denied*, 17-0049 (La. 4/15/16), 191 So.3d 592.

The parties acquired oyster leases during their marriage. Mr. Barrios died in 1975. Ms. Barrios died in 1981. The two successions were consolidated in 1984 but remained open without judgments of possession. Subsequently, after the BP oil spill, which affected the leases, one of the parties' children obtained a large recovery from BP. Other heirs sued for their shares, which the court of appeal ultimately awarded to them. The exception of prescription of one of the heirs was denied because the heirs became co-owners on the parents' deaths and their claims did not prescribe because they were co-heirs and co-owners in indivision.

Succession of Pelt, 17-0860 (La. App. 3 Cir. 4/11/18), 244 So.3d 476.

The court of appeal reversed the trial court, finding that the decedent's purported daughter's petition to intervene in the succession to establish her filiation was not prescribed because La. Civ.C. art. 197 had to be read in conjunction with art. 870, which provided that succession rights are governed by the law in effect on the date of the decedent's death. While her claim would have been prescribed but for the amendment enacting art. 197, when the two articles were read together, the Legislature's intent was clear that her claim was not prescribed. Moreover, the decedent's heirs did not acquire a vested right in the succession that would have precluded her claim. The trial court surveyed previous jurisprudence as well as the legislative history in conjunction with making its ruling that because her action was brought within one year of Mr. Pelt's death, even though after she reached age 19, her claim was not perempted.

In re Succession of Bridges, 17-1291 (La. App. 1 Cir. 2/27/18), 243 So.3d 618, *writ denied*, 17-1291 (La. 5/11/18), 242 So.3d 567.

Mr. and Ms. Bridges were divorced after their first marriage. Mr. Bridges then executed a will under which he left most of his estate to his former wife. The parties then remarried, and, again, divorced. After he died, Ms. Bridges was named executrix and obtained a judgment of possession. Mr. Bridges' son, thereafter, filed a motion seeking to annul the testament, to vacate Ms. Bridges' appointment as executrix, and to recognize his succession rights, arguing that the testamentary disposition in her favor should have been revoked under La. Civ.C. art. 1608 since the parties were divorced after the testament was executed and were divorced at the time of his death. The trial court and the court of appeal both rejected his arguments, finding that because they were not married when he executed the will, art. 1608 did not apply; and, further, his intent was for her to be the executrix and legatee, particularly since he did not change the will to grant his son any greater benefits. The court of appeal found that the parties' status at the time the will was executed controlled, and that art. 1608 contemplated that the parties be married at the time of the execution.

Community Property

Daigle Oil Distributors, L.L.C. v. Istre, 17-1069 (La. App. 3 Cir. 4/11/18), 243 So.3d 628.

Ms. Istre embezzled more than $4 million from her employer, Daigle Oil. The court of appeal affirmed the trial court's judgment that Mr. Istre was liable in solido for the debt. Even though he alleged he was not aware of it, the obligation was classified as a community obligation because it benefitted him and the community regime, and, since incurred during the community, was presumed to be a community obligation, which he failed to rebut. Moreover, he was not entitled to raise on appeal the trial court's denial of her exception of prescription as the exception of prescription is personal to the party who raises it, and he had not raised his own exception of prescription.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Liability in Multimodal Transport Contracts: Himalaya Clause

Royal SMIT Transformers BV v. Onego Shipping & Chartering, BV, 898 F.3d 543 (5 Cir. 2018).

Royal SMIT, a Netherlands company, sold three transformers to Entergy Louisiana, L.L.C., and contracted with an intermediary, Central Oceans USA, for delivery via a multimodal through bill of lading. Oceans' subcontractors Onego provided ocean carriage from Rotterdam to New Orleans; Illinois Central provided rail carriage to St. Gabriel; and Berard trucked the transformers to Entergy's substation, the final destination. The bill provided:

> [Central Oceans] shall be responsible for the acts and omissions of his servants or agents when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the Contract, as if such acts and omissions were his own.

An inspection at St. Gabriel revealed that the transformers were damaged by "excessive vibration" somewhere along the journey. Royal and its insurers sued Oceans and its subcontractors, defendants herein, for breach of contract, fault and negligence, seeking more than $1,600,000 in damages. Defendants filed a motion for summary judgment, arguing that they were protected from suit by the Himalaya Clause in Royal's contract with Central Oceans:

> **15. Defenses and limits for [Central Oceans], Servants, etc.**
>
> (b) [Royal] undertakes that no claim shall be made against any servant, agent, or other persons whose services [Central Oceans] has used in order to perform the Multimodal Transport Contract and if any claim should nevertheless be made, to indemnify [Central Oceans] against all consequences thereof.
>
> (c) However, the provisions of this Contract apply whenever claims relating to the performance of the Multimodal Transport Contract are made against any servant, agent or other person whose services [Central Oceans] has used in order to perform the Multimodal Transport Contract, whether such claims are founded in contract or in tort. In entering into this Contract, [Central Oceans] . . . does so not only on its own behalf but also as agent or trustee for such persons.

The Supreme Court has noted that through bills of lading are central to modern maritime commerce, which has embraced "door-to-door transport based on efficient use of all modes of transportation by air, water, and land," allowing a cargo owner to arrange for a complex transportation of goods in a single transaction rather than having to negotiate a separate contract for each leg.

In considering whether the clause is enforceable, the court noted:

> Himalaya Clauses "extend the bill's defenses and limitations on liability to parties that sign subcontracts to perform services contemplated by the bills." In other words, they operate much like the mountain range by the same name, creating a barrier between the cargo owner and downstream carriers that can be neither scaled nor circumvented.

Finding the Himalaya Clause in Oceans' contract to be enforceable, the court granted summary judgment, dismissing its subcontractors, the defendants herein.

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International Law

United States

Am. Inst. for Int'l Steel v. United States, U.S. Court of International Trade, Docket No. 19-00152 (June 27, 2018).

President Trump's administration is using long-dormant statutory authority to impose punitive tariffs above bound rates on numerous imported products. One of the President's actions imposed 25 percent tariffs on certain imported steel products. The tariffs are premised on Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. Section 232 delegates authority to the Secretary of Commerce to investigate the national security impact of imported products. The statute requires the Secretary of Commerce to issue a report to the President with factual findings on whether the subject articles are being imported into the United States in such quantities as to threaten to impair national security. Along with the findings, the Commerce Secretary makes recommendations to the President for appropriate action.

President Trump imposed 25 percent tariffs on certain steel products as a result of a Section 232 investigation conducted by

Secretary of Commerce Wilbur Ross. The American Institute for International Steel (AIIS) filed suit at the United States Court of International Trade in New York seeking to enjoin the steel tariff on the ground that Section 232 is an unconstitutional delegation of legislative power to the President. AIIS contends that the statute violates Article 1, Section 1 of the U.S. Constitution and "the system of checks and balances that the Constitution protects." *See*, Complaint, CIT Case No. 18-00152, at ¶¶ 8-13.

As previously reported in these Recent Developments, U.S. constitutional authority over international trade hinges on a very delicate and precarious balance between the legislative and executive branches. The legislature has exclusive economic authority over foreign commerce, while the executive enjoys substantial leeway over matters of national security and foreign affairs. In most circumstances, presidential international trade action falls under the specific congressional guidelines set forth in Trade Promotion Authority (TPA) legislation. TPA allows the President to act and negotiate on certain international trade matters under statutory criteria set forth by the legislative branch. This constitutional delegation, while not without its critics, has functioned fairly smoothly in recent history because TPA reserves for Congress the right to vote up or down on presidential trade agreements. The current trade climate, however, is markedly different from recent history. President Trump is using Section 232 for trade actions that are not subject to Congressional approval. The AIIS case raises the significant question of whether the Section 232 delegation provides sufficient intelligible principles to remain an appropriate delegation of legislative power, or if it allows the President to become a legislator under the guise of national security. AIIS filed a motion for summary judgment on July 19, 2018. As of this writing, the United States has not filed its response.

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Savings Clause Can't Save Plaintiffs' Class Action

Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612 (2018).

Epic Systems involved a combined appeal of three cases from the 5th, 7th and 9th Circuits. At issue was whether arbitration agreements that waived the employees' rights to pursue class action FLSA claims against their employers were valid.

One such agreement — emblematic of the group — provided that the employer and employee would arbitrate any disputes and that the arbitration would be individualized, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.* at 1620. The employees argued that arbitration could not be compelled because of the National Labor Relations Board's (NLRB) 2012 decision holding that the National Labor Relations Act (NLRA) trumped the Federal Arbitration Act (FAA).

Justice Gorsuch wrote for the majority and explained that Congress enacted the FAA to mandate that courts recognize arbitration agreements as "valid, irrevocable, and enforceable." *Id.* at 1621. The act specifically directed courts "to respect and enforce the parties' chosen arbitration procedures." *Id.* This applied to whom the parties choose to arbitrate with and the rules the parties decide to govern the arbitration.

The plaintiffs argued that the FAA's savings clause created an exception because it gave courts the ability to reject arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." *Id*. at 1616.

Justice Gorsuch relied on Supreme Court precedent in *AT&T Mobility, L.L.C. v. Concepcion*, 131 S.Ct. 1740 (2011), to distinguish between what the Court had held are available contractual defenses, like duress, fraud and unconscionability, and those untenable defenses that "target arbitration either by name or by more subtle methods" and "interfere with fundamental attributes of arbitration." *Id*. at 1622 (citing *Concepcion* at 1748). In *Concepcion*, the Court had recognized the "traditionally individualized and informal nature" as fundamental attributes of arbitration, *id.* at 1623, and held that a state law prohibiting class action waivers as unconscionable was not a protected defense to arbitration under the FAA because it "sacrifice[d] the principal advantage of arbitration — its informality — and [made] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*

In *Epic Systems*, none of the employees argued that the arbitration agreements were procured by fraud or duress or some unconscionable way that would defeat *any* contract. The only attack the employees made on the arbitration agreement was based on mandated individualized proceedings. For this reason, Justice Gorsuch reasoned, they sought to attack "one of arbitration's fundamental attributes." *Id.* at 1622. As the *Epic Systems* plaintiffs asserted the same type of defense to arbitration as the *Concepcion* plaintiffs, the Court found it should come as no surprise to them that "the saving clause still can't save their cause." *Id*.

The employees' next argument was that the NLRA overrides the FAA. The NLRA provides that workers have "[t]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively though representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* at 1624 (quoting 29 U.S.C. § 157). The Court rejected the employees' assertion that this language manifests congressional intent to displace the FAA where class actions are involved. While the language has been interpreted to allow unions to *bargain* to prohibit arbitration, the Court found no support for the argument that it displaces the FAA's application to contractual agreements to arbitrate.

The court employed the canon of *ejusdem generis* to reason that the term "other mutual aid or protection" in Section 7 embraces only objects similar in nature to those enumerated in the preceding words, which were limited to "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." *Id.* at 1625. Ultimately the Court found the "other concerted activities" that NLRA's Section 7 was referring to were "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than the 'highly regulated, courtroom-bound activities of class and joint litigation.'" *Id.* (quoting *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393 (6 Cir. 2017)).

Justice Gorsuch noted this interpretation was supported by the act itself, which regulates the way employees and their representatives collectively bargain, but does not regulate the adjudication of class or collective actions in court or arbitral forums. Additionally, the position was strengthened by the fact that the plaintiffs' claims arose not under the NLRA, but the FLSA, which the Court had previously held could not trump the FAA. In fact, Justice Gorsuch pointed out that the Court had previously rejected every effort to create a conflict between the FAA and any other federal statute, except for one instance since overruled.

The Court similarly rejected the employees' last argument — that it owed *Chevron* deference to the NLRB's interpretation of the NLRA's Section 7. The Court refused to agree "that Congress implicitly delegated to an agency authority to address the meaning of a second statute [that] it does not administer." *Id.* at 1629. Additionally, *Chevron* requires a statutory ambiguity, which had already been ruled out with statutory rules of interpretation.

With *Epic Systems*, Justice Gorsuch definitively resolved that arbitration agreements waiving class actions are valid and enforceable until and unless Congress explicitly decides otherwise.

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Mineral Law

Closely Watched Mineral Law Case

Gloria's Ranch, L.L.C. v. Tauren Exploration, Inc., 17-1518 (La. 6/27/18), 2018 WL 3216497.

The Louisiana Supreme Court's review of *Gloria's Ranch* has been this state's most closely watched mineral law case of the year. In it, a mineral lessor brought suit against three entities that held fractional interests in a lease and against Wells Fargo, which held a mortgage that covered one of the lessee's interest in the lease. The lessor sought unpaid royalties, a penalty based on the nonpayment of royalties, and damages for lost leasing opportunity. The damages for lost leasing opportunity were based on a theory that the lease had terminated as to much of the acreage originally covered by the lease, but that the lessees had refused to acknowledge the termination as required by Mineral Code art. 207 and that the defendants' failure to acknowledge the termination had prevented the lessor from securing a deal for a new lease at a time when companies were giving large bonuses to secure leases.

After a bench trial, the district court found that the lease had terminated in part for lack of production in paying quantities, and that the lessees' failure to acknowledge the termination of the lease had caused the lessor to lose a leasing opportunity worth $22.8 million. In addition, the court found that the lessees had not paid all the royalties that had been due. Further, the court concluded that the loan and mortgage agreements between Wells Fargo and one of the lessees had constituted an assignment of the lease. On these bases, the court entered a judgment holding that the two non-settling lessees and the mortgagee were solidarily liable for damages for the lessor's lost leasing opportunity, unpaid royalties and a penalty equal to twice the unpaid royalties under Mineral Code art. 140. (The judgment was amended to give a credit for one lessee settling before trial.)

On appeal, the Louisiana 2nd Circuit concluded that the loan agreements did not constitute an assignment of the lease, but that the loan agreements had given Wells Fargo a sufficient interest and degree of control over the lease that a judgment holding Wells Fargo solidarily liable was not manifestly erroneous. Therefore, the appellate court affirmed the trial court's judgment.

The Louisiana Supreme Court reversed the lower courts' judgments to the extent that they imposed liability on Wells Fargo. In doing so, the court rejected the appellate court's conclusion that certain elements of "control" granted to Wells Fargo made it the equivalent of an owner of the lease. The Supreme Court disagreed, concluding that the "control" rights that a lessee had granted to Wells Fargo were commonly granted rights that are designed to protect a lender's collateral when a mineral lease serves as collateral for a loan. Therefore, the lower courts erred by imposing solidary liability for lease obligations on a mere mortgagee of a lessee.

The Supreme Court also addressed an issue that has been in dispute for years — namely, the meaning of certain language in Mineral Code art. 140. The article provides that, in certain circumstances, "the court may award as damages double the amount of royalties due." The question that remained unresolved for years was whether "double" referred to the amount of the judgment or the amount of the penalty. That is, does the article authorize a total award (before attorney's fees and interest) of double the amount of royalties due (this being the sum of the royalties due and a penalty equal to the royalties due) or whether the article authorized a judgment for triple the amount of royalties due (this being the sum of the royalties due and a penalty that was double the amount of royalties due). The Court interpreted article 140 "as authority to award up to double the amount of royalties due," not treble.

In addition, the Court rejected the argument of one of the lessees that because it only owned a fractional lease interest as to shallow depths, it should not be solidarily liable for the entire lost-leasing damages.

Act 245 of the 2018 Regular Session

The Louisiana Oil Well Lien Act (LOWLA), La. R.S. 9:4861 *et seq.*, creates a privilege in favor of persons who provide services, equipment or supplies for "operations" at the "well site" of a well that is used either to explore for or produce hydrocarbons, produce water for use in oil and gas operations, or inject (for purposes of disposal) wastewater generated by oil and gas activities.

La. R.S. 9:4861(4)(b) specifies certain activities that do not constitute "operations" for purposes of LOWLA and which, therefore, do not qualify for this privilege. A category of activities that was expressly defined as not constituting "operations" includes those involving "transporting, handling, processing, treating, or otherwise dealing" with "[s]alt water or another waste substance produced in association with hydrocarbons, after it is placed in a truck, rail-car, pipeline, or other means of transportation for disposal away from the well site." *See*, La. R.S. 9:4861(4)(b)(iii). Act 245 of the 2018 Regular Session of the Louisiana Legislature repealed 9:4861(4)(b)(iii). However, the definition of "operations" was not changed. "Operations" constitute "every activity conducted by or for a lessee on a well site" for certain specified purposes. La. R.S. 9:4861(4)(a).

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Loss of a Chance

Burchfield v. Wright, 17-1488 (La. 6/27/18), ____ So.3d ____, 2018 WL 3150182.

The panel in Mr. Burchfield's case found that a breach of a standard of care caused damages. The defendant settled, and a trial against the PCF ensued. The jury found that the plaintiff had proven the defendant's breach of a standard of care and that, while damages resulted from that breach, it was not "a substantial factor" in contributing to the injuries. Instead, the jury found that the breach caused the patient to lose the chance of a better outcome. In a separate jury interrogatory, the jury determined that the value of the lost chance was $680,000. The trial court issued a judgment that reduced the jury's award to the statutory cap of $500,000 and allowed the PCF credit for the $100,000 settlement with the defendant.

The appellate court was troubled by the jury's responses to the verdict form, finding the jury "internally inconsistent, contributing to the troublesome reduction by the trial judge." *Burchfield v. Wright*, 51,459 (La. App. 2 Cir. 6/28/17), 224 So.3d 1170, 1173. While agreeing that this was a loss-of-chance-of-a-better-outcome case, the appellate court decided that the trial court erred by limiting the award to general damages subject to the MMA cap, thus awarding no damages for medical expenses or lost wages. The appellate court affirmed the trial court's $400,000 award in general damages and awarded past medical expenses of more than $692,000, lost wages of more than $490,000 and future medical care, none of which were subject to the cap.

The case proceeded to the Supreme Court, where the plaintiffs argued that the negligence was a substantial cause of the ultimate injury and, alternatively, that absent a greater than 50 percent chance that the damages would have occurred, the patient nevertheless could have had an outcome better than having to undergo a heart transplant.

The court wrote that the appellate court "misconstrued the theory of lost chance of a better outcome in a medical malpractice case," which it said is "not a separate cause of action distinct from a statutory malpractice claim." Quoting from *Smith v. State, Dep't of Health & Hospitals*, 95-0038 (La. 6/25/96), 676 So.2d 543, the court stated:

> The loss of a less-than-even chance of survival is "a distinct injury compensable as general damages" that cannot be calculated with mathematical certainty; thus, the factfinder must make a "subjective determination of the value of that loss, fixing the amount of money that would adequately compensate the claimants for that particular cognizable loss."

Juries may consider the same evidence in wrongful death and survival actions as in loss-of-chance cases, but in loss-of-chance cases, a lump sum general damage award is required. The appellate court erred when it allocated damages for specific losses, *e.g.*, wage losses and medical expenses. Furthermore, the appellate court ignored the Louisiana Supreme Court's "clear and established jurisprudence" in earlier cases by awarding not only general damages but also granting separate awards for special damages, instead of one lump sum award that encompassed all damages. Considerations of wages and medical expenses "may be appropriate, keeping in mind that a lost chance of a better outcome envisions a less than 50% chance, and thus not full recovery." As to the appellate court's ruling that lump-sum damages for loss of a chance of a better outcome "may include special damages . . . and that 'lump sum' damages should not be limited to the cap for general damages," the Supreme Court observed that "[t]here is no support for such a conclusion in this court's specific jurisprudence on the issue of the calculation of damages for lost chance of a better outcome."

The plaintiffs also argued to the jury that the award should equal 49 percent of the total damages, approximately $1,000,000. The jury awarded 35 percent of the total damages sought ($680,000), a lump sum of general damages that the Supreme Court found was not an abuse of the jury's discretion. Thus, the court reduced that amount to the $500,000 cap and allowed the PCF a credit for the $100,000 paid by the defendant.

Admissibility of Panel Opinions

Sanderson v. Tulane Univ. Hosp. & Clinic, 18-0588 (La. 6/15/18), 245 So.3d 1043 (Mem.).

The trial court disallowed the introduction into evidence of the panel opinion after deciding that there was a conflict of interest between a panel member and a defendant. In this *per curiam* opinion, the Supreme Court opined that, absent "allegations that the medical review panel superseded its statutory authority," the opinion is subject to "mandatory admission." The Court concluded: "[T]he mere fact that a member of the panel may not have disclosed a potential conflict of interest is not a ground for automatic exclusion" of the opinion, adding that the plaintiff would have "an adequate opportunity to explore any potential bias" at the trial during cross-examination, thus allowing the factfinder to assign appropriate weight to the panel opinion.

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ANSWERS for puzzle on page 202.

C	E	R	T	I	F	I	C	A	T	E		
O		E		N		N		D		N	B	
M	O	R	O	N	I	C		R	E	C	A	P
M		U		O		A				L		R
U	R	N		V	I	N	D	I	C	A	T	E
N				A		T		M		I		J
I	D	I	O	T	S		A	P	E	R	C	U
C		N		O		C		R				D
A	L	T	E	R	C	A	T	E		L	T	I
T		R				T		C		O		C
E	L	U	D	E		G	R	A	N	O	L	A
	A	T		S		U		T		F		T
		H	Y	P	O	T	H	E	C	A	T	E

Taxation

Multi-Step Transaction: Net Capital Gain Deduction

Camp v. Robinson, BTA Docket No. 10609D (6/13/18).

Samuel and Judith Camp (Taxpayers) were shareholders in Pamlab, Inc., a non-publicly traded Nevada corporation with its corporate headquarters and principal operations in Louisiana. Pamlab entered into an asset-purchase agreement and plan of reorganization with NSH Buyer, Inc., an affiliate of Nestle S.A. The acquisition was a reorganization, with no gain being recognized on Taxpayers' receipt of the Nestle shares as consideration for substantially all of the assets of Pamlab and its subsidiaries. The sale of the assets was preserved in the hands of Taxpayers until Taxpayers would dispose of the Nestle shares in a taxable transaction.

Pamlab distributed certain Nestle shares to Taxpayers in 2015, after a one-year holding period. Taxpayers subsequently sold those Nestle shares and recognized a gain that had been deferred since 2013. Taxpayers excluded the gain from the sale of the Nestle shares from their income tax return under the net-capital-gain deduction provided by La. R.S. 47:293(9)(a)(xvii). The Louisiana Department of Revenue disallowed the deduction.

The Department filed a motion for summary judgment, arguing that the transaction that gave rise to the net-capital-gains issue was Taxpayers' sale of Nestle shares in 2015 and, because Nestle S.A. is a publicly traded corporation, not commercially domiciled in Louisiana, the deduction did not apply. The Department relied on La. R.S. 47:293(9)(a)(xvii), which requires that the sale or exchange be of substantially all of the assets of a non-publicly traded corporation that is commercially domiciled in Louisiana in order to qualify for the deduction.

Taxpayers contended that they properly excluded the gain from the sale of the Nestle shares because if all transactions were viewed as interrelated steps of a single transaction, the gain would arise from the exchange of the seller's assets for the Nestle shares in 2013.

The question before the Louisiana Board of Tax Appeals was whether the gain recognized by Taxpayers in 2015 arose from the exchange of substantially all of the seller's assets for the Nestle shares in 2013.

The Board held that Taxpayers were entitled to claim the net-capital-gains deduction for the amount that they would have indisputably been able to claim had they disposed of their business in a single business transaction. However, Taxpayers then admitted to the Board that a portion of the gain recognized on the 2015 sales was the result of appreciation of the Nestle shares after the 2013 transaction. As that portion did not arise from the sale of the assets of Pamlab, the Board found that Taxpayers were not entitled to exclude that portion of the gain. Ultimately, the Board denied Taxpayers' motion for summary judgment.

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U.S. Supreme Court Decision

On June 21, 2018, the U.S. Supreme Court issued its opinion in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). The issue in *Wayfair* was whether South Dakota could impose a use-tax-collection obligation on large national retailers, *i.e.*, remote sellers, who sold products on-line for delivery into South Dakota. In *Wayfair*, the Court overturned the physical-presence substantial-nexus standard applicable to use-tax-collection requirements articulated by the Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), and *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 87 S.Ct. 1389 (1967), and created an undefined sufficiency test for determining whether substantial nexus is satisfied for purposes of the dormant Commerce Clause. The new sufficiency test appears to apply to all state tax regimes, including income, franchise, sales-and-use, gross receipts and property taxes, and may have substantial and significant implications for taxpayers and other parties subject to those regimes.

Post-*Wayfair*, for purposes of the substantial-nexus prong of *Complete Auto Transit, Inc. v. Brady*, 97 S.Ct. 1076 (1977), "[substantial nexus] is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Wayfair*, 138 S.Ct. at 2099, *citing Polar Tankers, Inc. v. City of Valdez*, 129 S.Ct. 2277 (2009). In *Wayfair*, the Court concluded that the large national retainers at issue satisfied this standard "based on both the economic and virtual contacts" they had with South Dakota. *Id.* Because the *Wayfair* decision does not contain substantive analysis of the economic and virtual contacts that create substantial nexus, that issue will ultimately be decided by the lower courts.

In response to *Wayfair*, the states are issuing guidance (or updating their tax laws) to impose use-tax-collection obligations on out-of-state vendors. While *Wayfair* provided some guidance on the requirements these laws must satisfy to survive dormant Commerce Clause scrutiny, *e.g.*, safe harbors for small businesses and prospective enforcement, it also left that issue to the lower courts to resolve. As a result, a business may have exposure to a state's tax laws (including income-tax exposure) even if the business does not have an in-state physical presence. Businesses should review their contacts with any state in which they do not have a physical presence to determine whether such exposure exists.

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