Don't Mess with the Monks

A group of Benedictine monks residing in Covington, La., wanted to sell caskets they made at their abbey to the general public. The Louisiana State Board of Embalmers and Funeral Directors (Board) took the position that the law allows only those licensed by the Board to legally sell caskets to the public. The monks filed a petition for declaratory and injunctive relief whereby they would be allowed to sell their caskets without a license issued by the Board and do so free from the threat of prosecution or fines.

In *St. Joseph Abbey v. Castille*, ____ F.Supp.2d ____ (E.D. La. 2011), the court held the statutes at issue denied due process because the Board failed to prove a rational relationship between the license requirement and the health and safety of the public, going on to state that the sale of containers did not mean that the seller was involved in handling its cargo, *i.e.*, the monks would not handle corpses, an activity that requires training if it is to be done safely. The court rendered judgment in favor of the monks, declaring the law prohibiting the sale of caskets by those without licenses issued by the Board to be unconstitutional and enjoined the Board from enforcing those portions of the law. The Board has appealed.

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GlaxoSmithKline's Avandia Mediation

GlaxoSmithKline PLC (GSK) is a pharmaceutical company headquartered in the United Kingdom. GSK manufactured a drug called Avandia, a diabetes medication that improves glycemic control in patients with Type 2 diabetes. In 2009, Avandia was the best-selling drug in the world, producing revenue exceeding $1.2 billion. The drug was distributed worldwide until 2010 when studies showed a potential link between the drug and an increased risk of heart attacks and strokes in patients. Since that time, GSK has ceased promotion of the drug and has faced lawsuits in state and federal courts throughout the United States.

Probes into GSK and Avandia began in 2004 by federal prosecutors in Colorado. The investigation covered marketing practices from 1997-2004. The United States Attorney for the Eastern District

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of Massachusetts soon took over the investigation. At the same time, the U.S. Department of Justice investigated possible violations tied to Medicaid's rebate program and the marketing of Avandia. These investigations ceased when GSK announced its intention to settle the claims against it.

There have been multiple civil and criminal probes as to whether GSK illegally marketed Avandia and other medications. Claims alleging that GSK concealed information that linked the drug's potential to cause heart attack and stroke in some patients were filed and have received media attention due to the wide usage and popularity of the medication. In November 2011, GSK announced its intention to settle these claims for $3 billion. News reports indicated GSK paid $700 million in settling more than 10,000 claims last year.

The distribution of cases covers state courts across the United States while another 2,500 cases have been brought at the U.S. District Court for the Eastern District of Pennsylvania. In the Eastern District of Pennsylvania, U.S. District Judge Cynthia Rufe assigned a mediator to settle the claims. When the claims were referred to mediation, GSK expressed enthusiasm for alternative dispute resolution in hopes of avoiding litigation.

Judge Rufe provided deadlines for mediation. In November 2011, she directed that 85 percent of the claims must be settled within a 75-day period. If this deadline was not met, Judge Rufe said she would immediately put the first 100 of the oldest suits on the calendar to begin after 60 days. As the deadline approached, it was unclear whether the attorneys would be able to settle these claims.

While the settlement of claims against GSK and Avandia spans the United States and abroad, it also has strong ties to Louisiana. Attorney Patrick A. Juneau, Jr., of the Lafayette law firm Juneau David, A.P.L.C., was chosen as the mediator by Judge Rufe. His role as mediator in the Avandia claims helped to reach agreements between GSK and plaintiff attorneys in more than 20,000 cases.

In a *Bloomberg News* article published on Feb. 14, Judge Rufe expressed admiration for both the plaintiffs' and the defenses' effort during the mediation period. "[M]ediation will no longer be the focus of this court's effort.... [W]e will resolve the remaining cases through litigation," Judge Rufe said. As of presstime, the start date of any trials in the U.S. District Court for the Eastern District of Pennsylvania is unknown.

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Concealing Assets

U.S. v. Spurlin, 664 F.3d 954 (5 Cir. 2011).

The debtors, husband and wife, were convicted of concealing bankruptcy assets and making false oaths and statements, and the debtor husband also was convicted of bankruptcy fraud. The debtors appealed the convictions to the 5th Circuit.

The debtors failed to disclose in their schedules all of their checking accounts, interests in certain companies, and transfers of property between their companies and Mrs. Spurlin's mother. At the section 341 creditors' meeting, the debtors testified that they had read the bankruptcy information sheet, petition and schedules and everything was true and correct and listed all their assets. Also, the trustee required the debtors to complete an individual questionnaire to be completed under penalty of perjury. The questionnaire asked the debtors whether their parents were living and, if they were deceased, whether they left any property to the debtors. The debtors acknowledged that Mrs. Spurlin's father had died, but that he did not leave them any property. The father had, in fact, left them property.

The wife argued that as the petition was filed on her behalf with a general power of attorney and she did not provide the information for the petition, she could not be convicted of concealing assets. The court held that general powers of attorney could be used to file bankruptcy on someone's behalf. However, it noted that abuse can be prevented by requiring the debtor to be informed and, if the debtor feels the bankruptcy is improper, the bankruptcy can be dismissed. Here, the court held the wife's petition was valid. The court found there was sufficient evidence to infer ratification of the petition on her part. There was evidence the attorney who filed the petition on Mrs. Spurlin's behalf called her to confirm the power of attorney, and she appeared at the creditors' meeting and never objected to the bankruptcy; thus, she was responsible for the bankruptcy filing.

The court then found that there was sufficient evidence to convict her of concealing assets. The 5th Circuit rejected her argument that she could not have concealed information because she did not provide information for the petition. The 5th Circuit found that "withholding information constitutes concealment," and concealment continues after the bankruptcy case is filed. She attended the creditors' meeting and failed to inform the trustee that the documents were not accurate and complete. The 5th Circuit also found that the wife knew the assets were being concealed and that she was benefitting from the sales of the property.

The court also had to address whether the debtors answered the question regarding the deceased father's property in the trustee's questionnaire falsely. The court found that no reasonable jury could have found beyond a reasonable doubt that the husband knowingly and fraudulently made a false statement because the question was ambiguous. With respect to the wife, however, she testified that she understood the answer to the question was false; thus, the 5th Circuit affirmed her conviction.

Finally, the 5th Circuit affirmed the husband's bankruptcy fraud conviction. Prior to the bankruptcy filing, Mr. Spurlin defrauded an investor and then sought bankruptcy relief to obtain a discharge from the debt owed to the investor. The court rejected the husband's argument that he did not execute or conceal the fraud through filing for bankruptcy because the fraud was already completed by that point. The court held that if he succeeded in discharging the debt, then the scheme would be concealed because the investor would have stopped investigating the issue and the scheme would not have been fully uncovered.

5th Circuit Issues Ruling

Shcolnik v. Rapid Settles., Ltd., ____ F.3d ____ (5 Cir. 2012).

The debtor, an officer of the appealing creditors, asserted that he was an owner of the two creditors and was fired. The debtor absconded with documents from the creditors' offices and threatened to disclose alleged criminal and regulatory violations against the creditors if they did not buy him out. A declaratory judgment was entered against the debtor that he was not an owner and also awarded the creditors $50,000 in attorneys' fees.

The creditors alleged that the attorneys' fees were nondischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and (a)(6). The debtor was granted summary, and the creditors appealed.

The 5th Circuit affirmed the district court's ruling that the debt was not excepted from discharge pursuant to section 523(a)(4), which excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The 5th Circuit held that the debt was not a debt *for* fraud or defalcation while *acting in* a fiduciary capacity. The court found that the attorneys' fees were not based on the debtor's absconding with the documents, but rather resulted from the arbitration that was based on his assertion that he was an

owner. Thus, the creditors failed to create a genuine issue of material fact regarding the section 523(a)(4) claim.

However, the 5th Circuit reversed and remanded the district court's ruling that the debt was not excepted from discharge pursuant to section 523(a)(6), which excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The 5th Circuit held the debtor acted in bad faith in order to extract money from the creditors by threatening to expose them and falsely claiming ownership.

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Legacy Lawsuit: Prescription and Prematurity

Kinder Gas, Inc. v. Reynolds, 11-1012 (La. App. 3 Cir. 2/1/12), ____ So. 3d ____.

The 3rd Circuit affirmed a trial court's decision to grant the exceptions of prescription and prematurity filed by gas company lessees.

In March 2010, Kinder Gas, Inc. filed a petition for declaratory judgment, seeking a declaration of "its rights, status and legal remedies" relative to a 1960 surface lease involving 15 acres of property in Kinder, La. Kinder Gas, Inc. named the landowners, members of the Reynolds family, as defendants.

The Reynolds family filed a reconventional demand against Kinder Gas, Inc. and other gas companies, alleging the companies had contaminated their soil, surface waters and groundwater by spilling and/or disposing toxic wastes on, in and adjacent to the property. The family claimed that the gas companies were liable in tort and for breach of the lease. In response to the reconventional demand, the gas companies filed the exceptions of prescription and prematurity, which the trial court granted.

On appeal, the Reynolds family presented two assignments of error. First, they claimed that the trial court erred in granting the gas companies' exception of prescription as to the tort claims. According to the Reynolds family, the trial court based the holding on its finding that the family had "requisite knowledge of *possible* contamination" more than a year prior to the filing of the lawsuit. The family argued that there was no evidence that the family had "actual or constructive knowledge of *actual* or *appreciable* damages" before Kinder Gas, Inc. filed its declaratory judgment action in 2010. Second, the Reynolds family argued that the district court erred in granting the exception of

prematurity because the surface lease was still in effect. They relied on the Louisiana Supreme Court case *Marin v. Exxon Mobil Corp*., 09-2368 (La. 10/19/10), 48 So.3d 234, for the proposition that the Louisiana Civil Code does not bar claims for damages while a lease is ongoing.

The trial court relied on Jan. 14, 2008, as the commencement of the prescriptive period for the Reynolds family's tort claims. That day, a real estate appraiser corresponded with Kinder Gas, Inc. about an offer from the Reynolds family to sell the property. The correspondence reveals that the Reynolds family was aware that "some environmental problems may be centered on the site" and that the family believed these problems were caused by Kinder Gas, Inc. and/or its predecessors. The 3rd Circuit recited evidence showing that the Reynolds family had acknowledged contamination of the property since the late 1990s. Consequently, the 3rd Circuit affirmed the trial court's decision to grant the exception of prescription. The appellate court also rejected the Reynolds family's argument that the doctrine of *contra non valentem* should have been applied because the gas companies "withheld information" regarding the extent of contamination on the property. The 3rd Circuit noted that the record is void of any evidence showing that the Reynolds family was prevented "from availing [themselves] of [their] cause of action."

As for the exception of prematurity, the 3rd Circuit stated that, at the time Kinder Gas, Inc. filed its reconventional demand, the lease was undisputedly still in effect. Citing its previous holding that claims involving obligations to restore the land on which operations are ongoing are premature and finding that the *Marin* decision does not change this result, the 3rd Circuit affirmed the grant of the exception of prematurity.

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Paternity

State ex rel. A.C. v. M.D., 10-1799 (La. App. 1 Cir. 6/17/11), 70 So.3d 159.

The father, who had formally acknowledged the child born out of wedlock, petitioned to revoke the acknowledgment. The DNA test established that he could not be the father. However, the trial court dismissed his petition as prescribed. The court of appeal reversed, finding that La. R.S. 9:406 could not be retroactively applied to divest him of his right to revoke the acknowledgment.

State v. Drew, 46,337 (La. App. 2 Cir. 6/29/11), 70 So.3d 1011.

Because Mr. Drew, who was married to the child's mother at the time of birth,

waited more than one year after he was aware of the child's birth to contest his paternity, his action to disavow was prescribed. He was presumed to be the father, and his signing the birth certificate was not an "acknowledgment" that could have been annulled.

Custody

McFall v. Armstrong, 10-1041 (La. App. 5 Cir. 9/13/11), 75 So.3d 30.

The court of appeal affirmed the trial court's finding that Mr. McFall did not meet his burden of proof that Ms. McFall had committed adultery, giving more credence to her testimony. Because the trial court found her in contempt for denying his visitation with the children, it should have awarded him make-up visitation and attorney's fees and court costs under La. R.S. 9:346, not simply deferred the sentence pending her adherence to the orders in the future. The trial court was not manifestly erroneous in requiring her to obtain an independent assessment of whether she needed treatment for substance abuse but not requiring out-patient treatment. Testimony by a social worker regarding domestic violence indicators was harmless error, despite a *Daubert* challenge, because the challenge came after the court-appointed evaluator had already recited the social worker's opinions, which the evaluator had relied on. Thus, the testimony was cumulative. The social worker's experience and training were also sufficient for her to have been admitted as an expert in domestic violence intervention and prevention. The trial court's ruling on custody was premature because it had not yet ruled on the petition for domestic abuse prevention, which had been filed before the petition for divorce.

Gerhardt v. Gerhardt, 46,463 (La. App. 2 Cir. 5/18/11), 70 So.3d 863.

The trial court's award of sole custody to Mr. Gerhardt was upheld even though he had not prayed for it, because the pleadings had been expanded based on the evidence presented and the record supported the change. Moreover, she had filed to change joint custody to sole custody in her favor, so she was on notice that custody would be at issue. The trial court did not err in not appointing an attorney for the children because Ms. Gerhardt made no prima facie showing that there had been any physical or sexual abuse of the children. Evidence she claimed was wrongfully admitted did not affect the final outcome and was thus harmless.

Porter v. Porter, 11-0460 (La. App. 3 Cir. 10/5/11), 74 So.3d 305.

The court of appeal affirmed the trial court's award of joint custody with the mother as domiciliary parent, finding that the trial court had considered all of the relevant factors under La. Civ.C. art. 134. The father argued that she had had extramarital relationships and lesbian friends, but the court found that these had no adverse effect on the children. He, on the other hand, admitted to watching pornography and that one of the children had seen him doing so. Although the parties had been following an equal physical custody schedule upon their separation, it was during the summer, and the trial court did not err in not maintaining that schedule once the school year started.

Child Support

Barnes v. Barnes, 46,417 (La. App. 2 Cir. 6/22/11), 71 So.3d 1004.

An interim award of child support had been in place, and the matter came before the court on Mr. Barnes' rule to decrease the interim award. However, the court and attorneys apparently agreed at the beginning of the hearing to treat it as the original setting of the child support. Ms. Barnes's attorney put on evidence to show that her client was not voluntarily underemployed, as she had lost her job since the interim award was set, and then rested without putting on any evidence of the parties' incomes or even that they had children. The trial court then granted Mr. Barnes's motion for involuntary dismissal, dismissing the rule with prejudice, retroactive to the date of filing. The court of appeal reversed, finding that the issue was mistakenly amended contrary to the pleadings and that the burden was improperly shifted from Mr. Barnes to Ms. Barnes, whose attorney apparently did not understand the revised nature of the proceeding. The court further found that public policy regarding child support was circumvented by not setting any child support at all and by dismissing the rule with prejudice.

State v. Gloster, 10-1091 (La. App. 5 Cir. 6/29/11), 71 So.3d 1100.

Because Mr. Gloster's overtime hours decreased, the court did not err in setting two different child support amounts for the two different periods when his income changed. This was not a "deviation" from the guidelines that required explanation by the trial court, but was simply the calculation of two different amounts based on two different incomes over two different periods.

State v. Williams, 46,520 (La. App. 2 Cir. 10/5/11), 76 So.3d 103.

The trial court did not err in denying Mr. Williams's motion to reduce child support and in setting child support at $1,000 per month when he failed to produce accurate financial records despite numerous orders. The trial court found his tax returns to be "fraudulent," and his actual present

income was indeterminable, although his previous income and his lifestyle supported an award of at least $1,000 per month. Further, making the award retroactive to the date of the mother's answer to his request that child support be set, instead of to the date she requested child support, was not erroneous under all of the circumstances in this case.

Community Property

Muller v. Muller, 10-0540 (La. App. 5 Cir. 6/29/11), 72 So.3d 364.

The trial court found that although the parties' prenuptial separate property contract was not signed in the presence of two witnesses and was thus invalid as an authentic act, it was valid as an act under private signature duly acknowledged because Ms. Muller admitted at the trial before numerous witnesses that the signature was hers. The court of appeal reversed, holding that the acknowledgment of a pre-marital contract must occur before, not after, the marriage, just as in an authentic act. The post-marital acknowledgment violated La. Civ.C. art. 2329, which requires court approval for the modification or termination of a matrimonial regime during the marriage.

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Wrongful Death: Choice of Law

Yelton v. PHI, Inc., ____ F.3d ____ (5 Cir. 2012).

Charles Wilbur Nelson III lived with his parents, Karen and Charles, in Pensacola, Fla., and worked on oil rigs in the Gulf of Mexico. In 2009, he boarded a helicopter operated by PHI, Inc. in Amelia, La., to travel to a job site at an offshore oil rig off the Louisiana coast in international waters. Seven minutes after liftoff, the chopper struck a bird and crashed outside Morgan City, killing Mr. Nelson and seven others on board. He left behind three survivors: parents Karen and Charles and a son, Landen Nelson, born to Nelson and Carly Schoen. Karen filed this suit in Florida state court on behalf of herself, her husband and grandson Landen.

After the suit was removed to a Florida federal court, the defendants filed a motion to transfer to the Eastern District of Louisiana pursuant to 28 U.S.C. § 1404(a), which was granted. The defendants moved to dismiss the suit under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The court found that under the most significant relationship test, Louisiana law applied. As Louisiana law does not permit a wrongful death claim by a decedent's parent when the decedent is survived by a child, the court granted defendant's motion to dismiss. Karen Nelson appealed.

Appellant Nelson argued that the Florida Wrongful Death Act has a "statutory directive... on choice of law" requiring application of Florida law based on Restatement (Second) Conflict of Laws § 6(1) because the statute was intended by the Legislature to have extraterritorial effect. Appellee PHI contended that the act does not trigger § 6(1) because it does not contain a statutory directive requiring that the Florida Death Act always be applied extraterritorially.

The 5th Circuit's opinion closely examines the legislative and jurisprudential history of the act, concluding that its extraterritorial application is not mandatory but permissible. "This status changed in the 1960's and 1970's when states began to abandon the *lex loci delecti* rule and adopt the most significant relationship test of the Second Restatement applicable here." The district court, examining most significant relationship factors, concluded that "nearly every factor — other than the fact that Decedent Nelson and his family live in Florida — weighed in favor of applying Louisiana law." Those factors were:

► PHI is a Louisiana corporation;

► The helicopter was maintained and repaired in Louisiana;

► Passengers boarded in Louisiana, the only state over which the helicopter flew and the only state in its intended flight path;

► The witnesses live in Louisiana, and the only survivor of the crash was treated in Louisiana;

► Everyone in the crash was working for a Louisiana company or living in Louisiana.

The 5th Circuit concluded, "We agree with this analysis and agree with the district court's conclusion that Louisiana had the most significant relationship with the occurrence and the parties." The judgment of the district court was affirmed.

Same-Sex Sexual Harassment: Standard of Proof

Cherry v. Shaw Coastal, Inc., ____ F. 3d ____ (5 Cir. 2012).

Cherry was an employee of Shaw Coastal, working on a survey crew with his supervisor, Scott Thornton, and Thornton's supervisor, Michael Reasoner. During the seven months of their employment relationship, Reasoner established a pattern of conduct that made Cherry uncomfortable, including touching and brushing against him, asking him to undress while working, and regularly commenting on Cherry's looks, despite Cherry's request that he desist. Reasoner sent Cherry text messages, saying "I want cock," "ur 2 sexy. U drive me insane . . . Ur sexy voice puts me to slumber," and "your missing the dipper," an acknowledged reference to his penis. On one occasion, Reasoner "put his hand on [Cherry's] butt" and Thornton had to intervene to keep Cherry from striking Reasoner. Thornton described Reasoner as touching Cherry "like I do my wife."

Thornton reported this conduct to Michael D'Angelo, the project manager, then to Jeff Pena, D'Angelo's supervisor, who both questioned whether it constituted sexual harassment or was simply "horsing around." Cherry was finally transferred to a different crew, but Reasoner's conduct toward him persisted. When neither D'Angelo nor Pena was responsive to Cherry's complaints, he reported Reasoner's conduct to Shaw Coastal's management, which concluded that it could not determine whether the conduct occurred because there was not enough evidence and it was "one word against the other." Cherry resigned, citing as reasons the sexual harassment and the company's failure to address it. Shortly thereafter, Reasoner was fired.

Cherry filed suit in district court, alleging battery, sexual harassment and retaliation, and requesting punitive damages. The sexual harassment claim was submitted to the jury, which asked the judge whether Reasoner had "to be considered a homosexual for sexual harassment to be proven." The judge, over plaintiff's objection, responded in open court that "there must be credible evidence that Mr. Reasoner is or was homosexual... which may be proven if you find... that Mr. Reasoner intended to have some kind of sexual contact with Mr. Cherry." The jury issued a verdict finding that the sexual harassment was sufficiently severe or pervasive to create a hostile work environment and that Shaw Coastal knew or should have known of it and failed to take prompt remedial action. The court then granted Shaw Coastal's motion for judgment as a matter of law and entered judgment for Shaw on all claims except battery.

The 5th Circuit noted Title VII's prohibition of discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's... sex," and cited the

Supreme Court's holding in *Oncale v. Sundowner Offshore Services,* 118 S.Ct. 998 (1998), that sexual harassment is a form of discriminatory treatment and applies in any situation where there is discrimination "because of" sex, whether it be between members of the same or opposite sex.

> Cherry presented more than sufficient evidence to support the conclusion that Reasoner's harassment was sexual in nature. Based on (the reported) interactions (*i.e.*, touching), coupled with the text messages that Reasoner sent Cherry, the jury was reasonable in determining that the harassment was severe and pervasive. The district court erred in granting the defendant's Rule 50 motion.

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U.S. Trade Representative and Department of Commerce

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification 77 Fed. Reg. 8101 (Feb. 14, 2012).

The United States executed Memoranda of Understanding with the European Commission (EC) and Japan to end longstanding disputes over the controversial "zeroing" practice in antidumping cases. As previously reported in this section, zeroing is a calculation methodology whereby the Department of Commerce aggregates unfairly-traded (dumped) transactions with other transactions. U.S. law and regulatory practice has consistently recognized the legality of this practice for many years. However, the World Trade Organization (WTO) Dispute Settlement Body in Geneva has found the practice inconsistent with the WTO Antidumping Agreement in several challenges initiated by the EC and Japan.

To comply with the adverse WTO rulings, the United States reached agreement with the EC and Japan to implement certain changes to its regulatory practice. The Department of Commerce published its final rule implementing the changes in the Federal Register on Feb. 14. The United States began applying a new methodology to calculate antidumping rates in new administrative-review investigations in mid-February. Antidumping rates on goods imported after May 2010 also will be re-determined without the use of zeroing. The changes will likely have a significant impact on antidumping orders with low dumping margins and will certainly alter antidumping trade practice going forward. The United States consistently maintains that zeroing conforms to the WTO Antidumping Agreement, and Ambassador Ron Kirk pledges to seek clarification of this issue through negotiations at the WTO.

U.S. Court of Appeals for the Federal Circuit

GPX Int'l Tire Corp. v. United States, 666 F.3d 732 (Fed. Cir. 2011).

The U.S. Court of Appeals for the Federal Circuit issued a major setback to U.S. industries using the trade remedy laws to

combat unfairly subsidized imported goods. The Federal Circuit affirmed a decision of the U.S. Court of International Trade and eliminated the use of U.S. countervailing duty laws against non-market economies. The two primary trade remedies available to U.S. industry facing unfairly traded goods are the antidumping and countervailing duty laws. The antidumping remedy addresses foreign goods sold into the U.S. market at less than fair value. Countervailing duty laws remedy goods that are sold into the United States at unfair value due to subsidies from a foreign government or government-controlled entity. China is by far the largest non-market economy and provider of subsidies to its industrial and agricultural industries, allotting more than $1 trillion in subsidies in its most recent five-year plan.

United States trade law originally prohibited application of countervailing duties against non-market economies because of the lack of transparency and differentiation between government and private entities. As China and other non-market economies slowly opened and adopted pseudo-capital/mercantile policies, U.S. agencies developed tools necessary to identify and account for illegal subsidies. Beginning in 2007, the Bush Administration's Commerce Department implemented a regulatory practice allowing application of U.S. countervailing duty laws against non-market economies.

The *GPX* case emanates from the first successful countervailing-duty action against China, involving impermissible subsidies on imported tires from China. The foreign tire manufacturers appealed the Commerce Department's application of the countervailing duty laws, contending that despite Commerce's regulatory practice, the U.S. countervailing duty statute does not permit courts to countervail goods from non-market economies. The Court of International Trade (CIT) in New York ruled in favor of the foreign manufacturers on the ground that applying countervailing duties in cases where antidumping duties are also in place amounts to impermissible double counting.

The Federal Circuit affirmed the CIT on different grounds entirely. The Federal Circuit reviewed the legislative history of the countervailing-duty statute and located no congressional intent to apply the law to non-market economies. Accordingly, the Federal Circuit ruled that Congress's silence on the matter equates to congressional intent *not* to apply the law to non-market economies.

The decision impacts numerous existing countervailing duty orders on China and Vietnam. If the decision stands, those orders will be removed entirely and trade relief will be denied. Perhaps more important is the future impact of the decision. No U.S. industry will have the ability to countervail unfairly subsidized goods from China or Vietnam, placing U.S. industry at a significant disadvantage. All of the U.S. trading partners have trade remedy rules that allow countervailing duties against non-market economies, and the decision could make the U.S. market an even greater target for unfairly subsidized goods. A coalition of U.S. industries is seeking a congressional solution before the decision becomes binding precedent.

Government Reorganization

On Jan. 13, President Obama presented a significant reorganization plan for various U.S. agencies with jurisdiction over international trade matters. The President proposes that Congress consolidate six trade agencies into one broad department (all under the Department of Commerce) dedicated to the promotion and protection of U.S. interests overseas. The six agencies and organizations subject to consolidation are:

- Department of Commerce (all divisions pertaining to business and trade);
- Small Business Administration;
- Office of the U.S. Trade Representative;
- Export-Import Bank;
- Overseas Private Investment Corporation; and
- U.S. Trade and Development Agency.

The proposal received a mixed reaction from interested parties in the international trade community. Proponents of smaller government and streamlined business resources applauded the move, while many congressional members fear folding

this broad trade portfolio into one office will diminish the efficacy of the various programs. Perhaps the most important criticism of the plan surrounds the impact of the reorganization on the Office of the U.S. Trade Representative (USTR). This office operates at the executive branch level with its leader holding ambassadorial rank and a cabinet position. The USTR is often cited as one of the arms of the federal government that works efficiently and within tight budgetary constraints. From a practical standpoint, the USTR must have independence from political agendas to negotiate international economic agreements on behalf of the President under the "fast track" process. Moving the USTR to the Department of Commerce could diminish that independence and hinder the United States' ability to move quickly and decisively on trade matters.

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Solidary Liability for Remediation Damages

Sweet Lake Land & Oil Co. v. Exxon Mobil Corp., 2011 WL 5825791 (W.D. La. Nov. 16, 2011).

The plaintiff was a mineral lessor that sued several defendants, alleging that its property had been contaminated by the defendants' oil and gas activity. One of the defendants was Noble Energy, a company that had acquired a fractional interest in the lessee's rights as to certain portions of the leased premises in 1959, prior to Louisiana's adoption of the Mineral Code.

Noble sought a partial summary judgment on several issues. First, Noble sought a judgment that it could not be contractually liable to the plaintiff because there was no privity of contract between the plaintiff and Noble. Noble was not the original lessor. Further, although an assignee of a mineral lessee's rights is deemed to have privity with the lessor, Noble was not an assignee. Under Louisiana jurisprudence, a mineral lessee's transfer of an interest in the lease is considered an assignment only if the lessee transfers the entirety of his lease rights or the entirety of his lease rights with respect to certain portions of the leased premises. Otherwise, the transfer is a sublease. Here, the original lessee had retained fractional ownership of the lease rights with respect to the portion of the leased premises affected by the transfer. Accordingly, the transfer was a sublease, not an assignment, and pre-Mineral Code law provided that a lessor generally could not assert contract claims against a sublessee because a lessor and sublessee lack privity.

The court agreed with most of Noble's argument, but nevertheless held that Noble could be liable in contract. The court noted that Mineral Code article 128 creates a "statutory privity" between lessors and sublessees, thereby making sublessees directly liable to lessors for lease obligations. Further, article 214 states that the Mineral Code should be applied retroactively "to the extent constitutionally permissible." The court stated that it would be constitutionally permissible to give article 128 a retroactive application, unless doing so would deprive Noble of a vested right or defense. Although pre-Mineral Code jurisprudence generally had found an absence of privity between a lessor and sublessee, pre-Mineral Code jurisprudence had not specifically addressed whether a sublessee could be contractually liable for remediation damages. Therefore, concluded the court, a retroactive application of article 128 would not deprive Noble of a vested right or defense.

Noble also sought a judgment that it could be liable only for the portion of contamination that occurred after it acquired its interest in the lease. Noble sought that judgment based on an argument that article 128 makes a sublessee liable for lease obligations that accrue only after he acquires his interest. The plaintiff disputed that interpretation of article 128. Without resolving whether a sublessee generally is liable for obligations accruing before he acquires his interest, the court rejected Noble's request for summary judgment on the issue. The court held that a sublessee who has any remediation liability is solidarily liable for the whole remediation because the duty to remediate is indivisible. The court explained that the duty to remediate is indivisible because a partial remediation would be of little value.

Finally, Noble argued that, because Act 312 provides that parties who are liable for remediation must pay to implement a remediation plan approved by the court, the Act converts an otherwise indivisible obligation to remediate property into a divisible obligation to pay money. The court rejected that argument, holding that the duty to fund the remediation is merely a remedy for breach of an indivisible obligation to remediate.

Extent of Remediation Damages

State v. La. Land & Exploration Co., 10-1341 (La. App. 3 Cir. 2/1/12), ____ So.3d ____.

The state of Louisiana and the Vermilion Parish School Board filed three lawsuits seeking remediation of certain public properties that the plaintiffs alleged had been contaminated by the oil and gas activity of Union Oil Company of California (Unocal) and other defendants.

Unocal admitted responsibility. Unocal then filed a motion for a partial summary judgment that Act 312 limited its liability to the amount of money needed to fund a "feasible plan" approved by the court pursuant to La. R.S. 30:29. The court granted the motion, and the plaintiffs appealed.

The 3rd Circuit examined the language of R.S. 30:29, including subsection (H), which states in part:

> This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Nor shall it preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section as may be required in accordance with the terms of an express contractual provision.

The 3rd Circuit concluded that "La. R.S. 30:29, by its clear language, provides for a landowner to recover damages in excess of those determined in the feasible plan whether they be based on tort or contract law." The 3rd Circuit, therefore, reversed the trial court's judgment that the defendants' liability was limited to funding the "feasible plan" approved by the court pursuant to La. R.S. 30:29.

Subsequent Purchaser Doctrine

Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 10-2267 (La. 10/25/11), ____ So.3d ____.

Resolving a split in the state's circuit courts, the Louisiana Supreme Court held that the subsequent purchaser doctrine applies under Louisiana law. The doctrine provides that a purchaser of land has no right of action against a third party for contamination of the land that occurs prior to the purchase, unless the purchaser receives an assignment of the seller's cause of action for contamination.

In *Eagle Pipe*, the plaintiff purchased land that previously had been used for activities that included removal of scale from the interior of oilfield piping. Such scale sometimes contains naturally occurring radioactive material (NORM) that originates from the formations from which oil or gas is produced. Subsequent to the purchase, the Department of Environmental Quality performed an inspection, discovered the site was contaminated with NORM and ordered a remediation. The plaintiff brought a redhibition claim against the seller. The plaintiff also brought tort claims against various oil and gas companies whose piping allegedly was cleaned at the site and against trucking companies that delivered the piping to the site.

The Supreme Court held that a cause of action for contamination belongs to the person who owned the land at the time of contamination, and absent an assignment of the cause of action, a subsequent purchaser has no right of action against third parties, such as the trucking companies and oil and gas companies, that might have fault for the contamination.

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Is the Duty to Advise a Patient of a Medical Device Recall Medical Malpractice?

Bush v. Thoratec Corp., 11-1654 (E.D. La. 10/24/11), 2011 WL 5038842.

Thoratec manufactured a heart pump that was implanted in Mr. Bush in Virginia. Two months later, the Food and Drug Administration (FDA) issued a notice advising that "wear and fatigue" of one of the leads of the device may result in serious consequences. Mr. Bush later moved to New Orleans and was treated in the "Heart Failure Department" at Tulane University Medical Center (Tulane) for over a year until his death in May 2010.

Mrs. Bush filed suit in Orleans Parish Civil District Court (CDC) against Thoratec, alleging that it had failed to notify Mr. Bush of the dangerous defects of the product, and against Tulane for failing to test the device as set forth in the FDA recall notice and for "intentionally" failing to inform Mr. Bush of the known defect. She also alleged that both defendants knowingly concealed defects from the FDA and concealed the results of an analysis of Mr. Bush's device.

Tulane filed an exception of prematurity in CDC and a motion to dismiss, alleging that the plaintiff had filed medical malpractice claims but had not complied with the medical-review-panel requirement. Thoratec then removed the case to federal court, contending that Tulane's exception showed that the plaintiff "stood no chance of recovery against Tulane and that Tulane had been improperly joined to defeat diversity jurisdiction."

Mrs. Bush filed a motion to remand on two grounds, one of which involved the timeliness of the filing of the motion to remove, an issue that the court decided in favor of Thoratec. She also moved to remand for lack of subject-matter jurisdiction because plaintiff and Tulane were Louisiana citizens, whereas Thoratec was a California citizen.

In evaluating Tulane's contention that all of Mrs. Bush's claims were governed by the Medical Malpractice Act (MMA), the court looked to the CDC petition and examined Mrs. Bush's allegations concerning its conduct. The petition alleged that Mr. Bush began "treatment" at Tulane and that Tulane failed to perform tests on the device's lead to determine whether it was damaged as set forth in the recall notice, failed to advise whether any problems were detected, and:

> intentionally refused to perform its duty to inform patients of known defects... and the need for re-operation and replacement.... Additionally, both Thoratec and Tulane knowingly concealed known defects from the FDA and the results of the analysis of the (device)... which constitutes fraudulent concealment.

The court found that those allegations "comfortably" fell within the ambit of the MMA. The statements concerning Mr. Bush's treatment clearly established that at least some of the claims must proceed to a medical-review panel, even if some of the claims "involve only failure to give notice," which, under *Rogers v. Synthes, Ltd.*, 626 So.2d 775, 777 (La. App. 2 Cir. 1993), may not be malpractice.

Mrs. Bush countered that some of her claims were not governed by the MMA, *e.g.*, the failure to notify of the warnings was a ministerial failure and was not a healthcare or treatment decision. She relied on *DeRouen v. Park Place Surgical Center, L.L.C.*, 09-1442 (La. App. 3 Cir. 5/5/10), 37 So.3d 525, 526, *writ denied*, 10-1294 (La. 9/24/10), 45 So.3d 1073, and *Garnica v. LSU Medical Center*, 99-0113 (La. App. 4 Cir. 1999), 744 So.2d 156, for support. The court distinguished *DeRouen* and *Garnica*, as in each of those cases the plaintiffs had been discharged from care and there was no ongoing relationship with the patient, nor any medical treatment rendered by any of the defendants *after* they had notice of product issues. The decedent, according to the plaintiff's own petition, was being actively treated at the time the defendant allegedly had a ministerial duty to notify of the potential defect in the product. Thus, any ministerial duty/failure to transmit any warning "arose in the context of ongoing healthcare," intertwining any breach of duty to notify with the obvious malpractice claims.

Mrs. Bush also contended that the fraudulent concealment claims were intentional torts that should not be governed by the MMA. The court opined that:

> although plaintiff has used the words "intentionally" and "knowingly," she has not asserted any facts to back up those labels or to suggest that Tulane intended the decedent's death.... To the extent she can support those allegations, they are "fair, grist for a medical review panel."

The failure to comply with the MMA's panel requirement meant that Mrs. Bush could not state a claim against Tulane, that Tulane was improperly joined, and thus its citizenship "is therefore ignored for the purposes of analyzing diversity."

Plaintiff's motion to remand was denied, and plaintiff's claims against Tulane were dismissed without prejudice.

Is Disregarding a "DNR" Order Medical Malpractice?

Jones v. Ruston Louisiana Hosp. Co., L.L.C., 46,356 (La. App. 2 Cir. 8/10/11), 71 So.3d 1154, *writ denied*, 11-1970 (La. 11/14/11), 75 So.3d 946.

Employees of a hospital resuscitated a patient despite a "Do-Not-Resuscitate" (DNR) order that was on record with the hospital. The patient survived thereafter for two months. His children filed suit to recover the medical expenses attributable to the post-resuscitation care, other elements of a survival action and for bystander damages. The children also filed a medical-review-panel request.

In response, the hospital, a qualified healthcare provider, filed an exception of prematurity in which it claimed its right to a medical-review panel. The exception was overruled and the hospital appealed. The appellate court referenced one of its earlier opinions, *Terry v. Red River Center Corp.*, 37,991 (La. App. 2 Cir. 12/10/03), 862 So.2d 1061, *writ denied*, 04-0094 (La. 3/19/04), 869 So.2d 856, in which it had discussed the six factors that determine whether a claim sounds in medical malpractice or in general negligence. In *Terry*, the decedent's heirs brought suit under the Nursing Home Residents' Bill of Rights, La. R.S. 40:2010.8, *et seq.* The *Terry* trial court sustained the defendant nursing home's exception of prematurity. The 2nd Circuit reversed but stated that it made "no determination of whether [the conduct] falls under the ambit of the MMA."

The *Jones* court noted that while *Terry* was not precisely on point, it was analogous to the instant case, and the *Jones* court concluded that the failure of nursing personnel to honor the DNR order was not covered by the MMA; thus, the lawsuit was not premature. The trial court's judgment denying the exception of prematurity was affirmed.

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Supreme Court Upholds Liability for Tobacco Tax on Smokeless Tobacco Products

McLane Southern, Inc. v. Bridges, 11-1141 (La. 1/24/12), ____ So.3d ____, *reh'g applied for*.

In a significant decision for the enforceability of the tobacco tax on smokeless tobacco products, the Louisiana Supreme Court granted the Louisiana Department of Revenue's writ application to determine whether a wholesale dealer of smokeless tobacco products was liable for an excise tax pursuant to Louisiana's Tobacco Tax Law, La. R.S. 47:841, *et seq*.

McLane Southern, Inc. is a Louisiana bonded wholesaler of all tobacco products located in Mississippi that sells and brings into Louisiana smokeless tobacco to retailers for sale. Since 2000, McLane filed monthly tax returns and paid the taxes on its smokeless tobacco distribution activities in Louisiana. However, in 2006, McLane filed a petition for refund of tobacco tax paid under protest relative to the smokeless tobacco it had sold in Louisiana in October 2006. McLane continued to pay the taxes under protest and, as of September 2011, McLane had paid $7,688.825.36 in tax under protest.

McLane asserted that no tobacco dealers, including McLane, are liable for the tax on smokeless tobacco. The Department asserted the opposite. The Department and McLane filed cross-motions for summary judgment. The district court granted the Department's motion for summary judgment. The 1st Circuit Court of Appeal reversed, finding that McLane and all other tobacco dealers were not liable for the tobacco tax on smokeless tobacco. The Louisiana Supreme Court reversed the court of appeal and reinstated the trial court's judgment, finding McLane liable for the tax on smokeless tobacco products.

La. R.S. 47:841, titled "imposition of tax," provides: "There is hereby levied a tax upon the sale, use, consumption, handling, or distribution of all cigars, cigarettes and smoking tobacco, as defined herein, within the state of Louisiana. . . ." In 2000, La. R.S. 47:841 was amended to add "smokeless tobacco" to the list of tobacco products to be taxed. However, La. R.S. 47:854, titled "declaration of intent and purpose of Chapter," was never specifically amended to add "smokeless tobacco" to the list of tobacco products despite the Legislature's "intent and purpose" to levy a tax thereon.

McLane argued the Tobacco Tax Law failed to impose liability on any taxpayer to pay the tax levied on smokeless tobacco because while La. R.S. 47:481 levies the tax on "smokeless" tobacco, that section does not specifically identify who must pay the tax. McLane also asserted La. R.S. 47:854 — as the only statute that imposes liability on a specific taxpayer, *i.e.*, the "dealer who first sells, uses, consumes, handles or distributes the same in the State of Louisiana" — does not mention "smokeless tobacco."

The Louisiana Supreme Court held it was clear and unambiguous that the Legislature intended to impose an excise tax on the "sale, use, consumption, handling, or distribution" of smokeless tobacco. In this specific case, while La. R.S. 47:854 was not amended to include smokeless tobacco, the Supreme Court disagreed with the 1st Circuit that courts cannot "correct an error in the Legislature's expression of its intent" by supplying language to a statute.

The court reasoned that after considering the Tobacco Tax Law in its entirety, it was the obvious intent of the Legislature to place an excise tax on the distribution of smokeless tobacco. The court found this much was clear by reading La. R.S. 47:841 alone. Even assuming that application of La. R.S. 47:854 was necessary, the court found it was required to give effect to the legislative intent to tax the distribution of smokeless tobacco by placing a construction on La. R.S. 47:854 that was consistent with that obvious intent. The court relied on a

cardinal rule of statutory interpretation that "it will not be presumed that the Legislature inserted, idle, meaningless or superfluous language in the statute or that it intended for any part of the statute to be meaningless, redundant, or useless." The court stated that to accept McLane's argument would render the Legislature's amendment to La. R.S. 47:841 in 2000 meaningless and would lead to absurd consequences.

In addition to holding the statutes were clear and unambiguous, the court held that, if necessary, an application of the secondary rules of statutory construction would lead to the same result. The court held La. R.S. 47:481 was the specific statute imposing a tax on smokeless tobacco, while La. R.S. 47:854 was the general statute expressing the "intent and purpose" of the Tobacco Tax Statutes. As a result, the specific statute directed to the matter at issue must prevail as an exception to the statute more general in character.

Further, the court rejected McLane's argument that where a tax is susceptible of more than one reasonable interpretation, the construction favorable to the taxpayer is to be adopted. The court found these rules are applicable only where the laws are subject to more than one reasonable interpretation and the intent of the Legislature is ambiguous. The court held the intent of the Legislature was obvious and the Tobacco Tax Law was subject to only one reasonable interpretation.

The court concluded La. R.S. 47:841 and 854 gave the Department the right to collect an excise tax on McLane and all dealers who first sell, use, consume, handle or distribute smokeless tobacco products in Louisiana.

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