Limited Arbitration Provision Does Not Cover All Disputes Between Parties


This proceeding arose from a 2003 contract known as the Agreement for Consulting Services and Energy Efficiency Services and Equipment (ESA) between Bernhard and LSU in which Bernhard agreed to construct and maintain a cogeneration plant. In October 2005, Bernhard requested arbitration under Article 23 of the ESA. Although Article 23 was titled “Arbitration,” it was a very narrow provision granting a panel of three skilled engineers the authority to make decisions regarding specific instances set forth within the contract itself.

Despite LSU’s objection, an arbitration was held in December 2005. The engineering panel awarded Bernhard $790,429.18 out of the $2,277,867.09 it claimed. In March 2006, the Commissioner of Administration issued a decision pursuant to La. R.S. 39:1525 and found that the panel was not the equivalent of an arbitration panel and did not have the authority to consider the monetary claims made by Bernhard.

La. R.S. 39:1525 provides the commissioner of administration the authority to render a final and conclusive decision between the state of Louisiana and a contractor who provides professional, personal, consulting or social services to the state of Louisiana. Bernhard filed a petition with the trial court to confirm the award rendered by the engineering panel. The trial court granted Bernhard’s motion to confirm the award, reasoning that the ESA required the parties to arbitrate and the actions of the commissioner of administration were consequently without effect. LSU appealed the judgment.

The court of appeal found that Article 23 granted the panel jurisdiction to consider only certain issues that were carefully defined and circumscribed in the contract and that the single use of the word “arbitration” in the ESA was an obvious oversight because the parties had exchanged many drafts of the contract before the final version was accepted. Thus, Article 23 was not an arbitration clause governing every dispute between Bernhard and LSU. Bernhard should have filed for a decision with the commissioner of administration pursuant to La. R.S. 39:1525. The judgment of the 19th Judicial District Court was reversed.
Disputes Between Tobacco Manufacturers and Louisiana Are Arbitrable

Ieyoub v. Philip Morris, USA, 08-0033 (La. App. 3 Cir. 4/30/08), 982 So.2d 296, writ denied, 08-1152 (La. 9/19/08).

Tobacco manufacturers filed a motion to compel arbitration when an independent auditor failed to apply an adjustment possible under the settlement agreement in its calculation of the annual payment owed by the tobacco manufacturers to the state of Louisiana. The trial court denied the motion to compel arbitration. The court of appeal reversed.

In 1998, Louisiana, among other states, filed an action against tobacco manufacturers for damages arising from certain business practices of the manufacturers. That action resulted in a master settlement agreement (MSA) between four of the tobacco manufacturers (the original participating manufacturers) and the various states, including Louisiana, in which the original participating manufacturers would make annual payments to the settling states.

The MSA also foresaw that subsequent participating manufacturers would join the settlement and provide for annual payments by both sets of participating manufacturers. The MSA additionally provided for an independent auditor to calculate the annual payments due to each settling state. One of the factors to be considered in the calculation was the participating manufacturers’ loss of market share to non-participating manufacturers. The independent auditor could reduce the participating manufacturers’ payments if participation in the MSA was a significant factor in their loss of market share, but the non-participating manufacturer adjustment was inapplicable if the state diligently enforced its qualifying statute. A state’s qualifying statute is the settling state’s statute, regulation, law and/or rule that effectively neutralizes the cost disadvantages that the participating manufacturers experience vis-à-vis non-participating manufacturers within such settling state as a result of the provisions of the MSA.

In 2003, the independent auditor did not factor the non-participating manufacturer adjustment into the calculations. The participating manufacturers consequently requested that the dispute be submitted to arbitration. The trial court denied the participating manufacturers’ motion to compel arbitration.

On appeal, the participating manufacturers argued that both the questions of whether the independent auditor should have included the non-participating manufacturer adjustment and whether the state did actually diligently enforce the qualifying statute were subject to arbitration. The 3rd Circuit Court of Appeal found that the arbitration provision was a broad one that covered the arbitration of disputes, controversies or claims “arising out of or relating to” the independent auditor’s calculations and determinations. Since the independent auditor’s refusal to apply the adjustment to the calculations led to the dispute, the dispute was one that was subject to arbitration. Therefore, the issue of applying the non-participating manufacturer adjustment must be presented to the arbitration panel. Moreover, whether the state diligently enforced the qualifying statute arises from the refusal to apply the adjustment. Consequently, the issue must also be referred to the arbitration panel. Furthermore, the Federal Arbitration Act favors arbitration, and any doubt as to the scope of arbitrable issues must be resolved in favor of arbitration.

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Objection to State’s Proposed Movie and Studio Tax Credit Rules

The latest draft of the motion picture and infrastructure incentive rules proposed by the Department of Economic Development and Office of Entertainment Industry Development (the office) was published in the August 2008 issue of the Louisiana Register.

On Sept. 25, 2008, the office held a one-hour public hearing to discuss the draft rules. Filmmakers, studio infrastructure developers and members of the legal community presented their objections to the proposed rules. Many of the concerns discussed at the five prior public hearings on the draft rules in 2007 and 2008 were raised again.

A major concern voiced was the conflict between the proposed rules and existing state contracts executed pursuant to the Louisiana Motion Picture Incentive Act, La. R.S. 47:6007, effective at the time, as the rules focus primarily on the latest version of the Act (La. Acts 2007, No. 456). The rules fail to include all requirements and legal benefits for these valid contracts pursuant to the relevant version of the Act, which was previously amended in 2004 (La. Acts 2004, No. 7, 1st Ex. Sess.) and 2005 (La. Acts 2005, No. 456). The rules primarily include only the latest version of the Act.

The absence of guaranteed certification turnaround time by the office was questioned by some present at the public hearing. The draft rules require an applicant to return an executed copy of the state’s precertification letter to the office within 30 days, but the office has no accountable timeline to provide the letter to producers and developers. A fixed turnaround time for precertifications and tax-credit certifications and transfers provides consistency and eases concerns of industry professionals relying on tax credits for funding. Although the office has not included a turnaround time in the rules, it previously guaranteed turnaround times of five to seven working days on its Web site. However, at least one infrastructure project has waited substantially over a year for precertification, and productions have waited months for tax-credit approvals.

Another item of major concern is the rules’ prohibition against earning tax credit on movables purchased in state if they are used out of state. However, the office has certified millions of dollars of movables, including rolling stock and equipment, for Louisiana companies that generate tax revenues for the state even when a production company takes the movables on location out of state.

Every person present at the meeting objected to the appeals process proposed by the office. The rules state, “An applicant who is denied certification may appeal to the secretary or his designee, who will review the existing record and make a written determination.” The secretary of the Department of Economic Development is a signatory on all movie and studio tax-credit certifications. Thus, the state proposes that an appeal be made again to the same person who denied the certification. Such a rule could invite litigation for quicker resolution. At the public hearing, participants suggested alternative appeal procedures such as:

► a new appeals board of professionals experienced in the industry and knowledgeable of the Motion Picture Incentive Act, which board would review all denials and render expedited decisions; and/or

► mediation and/or arbitration, which has been incorporated into some state-tax-credit-certification contracts.

The latest version of the draft rules, as did prior drafts, makes substantive changes to the relevant legislation. After comments are reviewed by the office, the rules must be redrafted and republished in the Louisiana Register. Then another public hearing must be held before submission to and hearings before the Senate Revenue & Fiscal Affairs Committee and the House Ways & Means Committee, pursuant to the Act.

New Program for Training Film Crew

A new state program for training film crew was proposed to be administered by the Office of Entertainment Industry Development. The Louisiana Economic Development Corporation approved guidelines on Oct. 10, 2008, for a $2 million matching grant program to train new workers in the film, music, video game and theatrical performance businesses.

These guidelines constitute administrative rules subject to the Louisiana Administrative Procedure Act, La. R.S. 49:950, requiring, inter alia, advance notification, publication in the Louisiana Register, opportunity for a public hearing and other legal requirements.

Rather than hold a hearing for public comment, the Office of Entertainment Industry Development instead published the guidelines as “Emergency Rules” in the Oct. 20, 2008, Louisiana Register. This filing precludes any public hearing by declaring an imminent need to establish these rules or:

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the public welfare may be harmed as the result of the failure to enhance the growth and stability of Louisiana’s entrepreneurial entertainment businesses and/or the entertainment industrial environment by making available awards under this program to businesses creating such jobs in the entertainment industry and/or training employees holding such jobs in the entertainment industry.

The state has said the application process will be rigorous and companies will have to match the grants. Applicants to the program will be placed in four- to eight-week job-training programs to teach or enhance skills to work in the film industry.

Special thanks to Bradley Tate, section senior law clerk, for research assistance.

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Amended Federal Rule of Bankruptcy Procedure 6003

Have you read recently amended Rule 6003 of the Federal Rules of Bankruptcy Procedure? If not, you should, as your local bankruptcy judge will have read the rule and will expect you to comply with same.

FRBP 6003, which became effective Dec. 31, 2007, provides the following:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:

(a) an application under Rule 2014 [i.e. application to employ professional persons];
(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001 [e.g. motion for relief from stay]; and
(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

See FRBP 6003 (emphasis added). In other words, the rule provides that a court cannot grant relief on any application or motion of the type listed above for the first 20 days of a bankruptcy case, unless granting relief “is necessary to avoid immediate and irreparable harm.” As the Advisory Committee Notes to the rule indicate, FRBP 6003 “is intended to alleviate some of the time pressures present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.” See FRBP 6003, Advisory Committee Notes.

So how is a debtor supposed to employ an attorney (or other professional) on the first day of a filing when an application to employ cannot be approved until 20 days after a case has commenced? Pursuant to FRBP6003, the debtor will have to show the relief is necessary to avoid “immediate and irreparable harm” if the attorney or other professional is not appointed immediately. Since most individual debtors (especially those in Chapter 11) lack the knowledge or sophistication to handle a bankruptcy case themselves, and corporations generally cannot appear without counsel, it would seem that most debtors should be able to establish immediate and irreparable harm.
Without counsel and other professionals, most debtors would be unable to navigate even the early stages of bankruptcy. See, e.g., In re First NLC Financial Services, L.L.C., 382 B.R. 547 (Bankr. S.D. Fla. 2008). Factual allegations supporting these claims should be adequate to show “immediate and irreparable harm.” In other instances, involving the other motions listed in FRBP 6003, it is possible that financial figures or other documentation supporting allegations of immediate and irreparable harm also may be required to obtain the relief requested.

“Egregious” Standard for Determining Whether “Appropriate Circumstances” Exist

In In re Repine, 536 F.3d 512 (5 Cir. 2008), the 5th Circuit reviewed the propriety of a bankruptcy court’s award of punitive damages to a Chapter 13 debtor because of a creditor’s willful violation of the automatic stay. The creditor was an attorney who represented the debtor’s ex-wife in a pre-petition child-support-enforcement action against the debtor that had resulted in the debtor being incarcerated until he paid child support arrears and his ex-wife’s attorney’s fees. After the debtor filed his Chapter 13 petition from jail, he and his ex-wife reached a settlement under which he agreed to sell his home and use the proceeds to pay the child support arrears to his ex-wife, along with her attorney’s fees. In the event the proceeds were insufficient to pay the attorney’s fees, the debtor agreed to pay his ex-wife’s attorney as a priority unsecured creditor through his Chapter 13 plan. The bankruptcy court approved the settlement over the attorney’s objection.

When the debtor’s father died, the debtor and his ex-wife moved to enforce the settlement and release the debtor from jail so that he could attend the funeral. The ex-wife’s attorney objected, asserting that she would not agree to the debtor’s release until she was paid her fees. After his release from jail, the debtor filed a complaint seeking damages against the attorney for violating the automatic stay. The bankruptcy court awarded the debtor actual damages, punitive damages and attorney’s fees.

On appeal, the 5th Circuit affirmed the lower courts’ decisions in part, finding that the attorney had willfully violated the automatic stay when she continued with her efforts to collect her fees. The 5th Circuit further held that the award of punitive damages was proper under Section 362(k), which allows punitive damages “in appropriate circumstances.” Acknowledging that “appropriate circumstances” had never been defined in the 5th Circuit, the court adopted the 8th Circuit’s interpretation in In re Knaus, 889 F.2d 773, 776 (8 Cir.1989), which defined “appropriate circumstances” as requiring “egregious, intentional misconduct on the violator’s part.” Id. at 776.

The 5th Circuit found the attorney’s violation of the stay to be egregious, as the attorney, after being warned that her efforts to collect her fees would violate the automatic stay, ignored her client’s wishes that the debtor be released from jail and persisted in her efforts to collect her fees despite the bankruptcy court’s admonishment that she cease all collection efforts. See Repine, 536 F.3d at 521.

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Corporate Indemnification

Plaintiff members of a church won a declaratory judgment that an amendment to the church’s articles of incorporation was null. White v. St. Elizabeth’s B.C. Bd. of Dirs., 43,329 (La. App. 2 Cir. 6/4/08), 986 So.2d 202. Plaintiffs then asked for attorneys’ fees, citing Section 227A of the Non-Profit Corporation Law, a provision identical to Section 83A of the Business Corporation Law. The court awarded the fees, relying on Hirsch v. Cahn Elec. Co., 29,327 (La. App. 2 Cir. 5/9/97), 694 So.2d 636, writ denied, 97-1561 (La. 10/3/97), 701 So.2 200, and stating that in Hirsch shareholders who filed suit against a corporation and its directors were awarded attorneys’ fees pursuant to Section 83.

The trouble with these cases is that Sections 227 and 83 permit indemnification only to persons made parties to a lawsuit because they were directors, officers, employees or agents of the corporation. Neither the members in the White case nor the shareholders in the Hirsch case were directors, officers or employees, and while it is conceivable that the courts could have stretched a point and called them “agents,” neither the White nor the Hirsch court made any mention of the plaintiffs’ status.

This argument was raised and dismissed by the 1st Circuit in Lain v. Credit Bureau of Baton Rouge, 93-1166 (La. App. 1 Cir. 4/8/94), 637 So.2d 1080, writ denied, 94-2010 (La. 11/4/94), 644 So.2d 1049. Showing the same dearth of reasoning that characterized the White and Hirsch cases, the court simply but intentionally ignored the language of the statute and awarded attorneys’ fees to successful suing shareholders.

LLCs and Diversity Jurisdiction

One of the probably unintended consequences of switching from the corporate form to that of a limited liability company (LLC) was highlighted in Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077 (5 Cir. 2008). Plaintiffs, residents of Louisiana, sued Grey Wolf, an LLC organized in Texas, in federal court on the basis of diversity of citizenship.

While it is clear that had Grey Wolf been a Texas corporation diversity of citizenship would have been obtained, the court, following precedent in other jurisdictions, held that for diversity purposes an LLC had the citizenship of its members. Since one of the members of Grey Wolf was organized in Louisiana, diversity was defeated.

Fine Print in Assignments

Private Capital, Inc. v. J&K Engine & Rig Repair, 07-1556 (La. App. 3 Cir. 5/28/08), 984 So.2d 929, is an example of the old saying that words are not mere ornaments.

J&K assigned its receivables to Private Capital and sent its customers, including Coastal Drilling, the usual notice of the assignment prepared by Private Capital. Buried in the notice was a statement that asked Coastal to agree that it would not assert against Private Capital as assignee any claims or defenses Coastal had against J&K. The controller of Coastal signed and sent it.

Coastal refused to pay a J&K invoice because, it claimed, J&K had not performed certain work. Private Capital sued Coastal and pointed to the agreement not to assert any of Coastal’s defenses against Private Capital. Coastal assigned multiple errors in the grant of summary judgment, but the court had little trouble enforcing the agreement.

One of the more interesting claims of Coastal was that it received no consideration for its agreement. The court responded that Louisiana law doesn’t require consideration, only “cause,” and that the “facilitation of [Coastal’s] relationship with J&K . . . establishes cause.”

Sciencer and SEC Rule 10b-5

In recent years, Congress and the U.S. Supreme Court have emphasized the need to show defendants acted with scienter in suits seeking to hold them liable under the federal securities laws. The recent U.S. 5th Circuit case, Indiana Electrical Workers’ Pension Trust Fund IBEW v. Shaw Group, 537 F.3d 527 (5 Cir. 2008), contains the latest view of that court as to what the plaintiff must do to show a “strong inference that the defendant acted with the required state of mind,” in addition to stating what state of mind defendants must have to constitute scienter. Here, the plaintiffs lacked a smoking gun to show scienter, so they submitted circumstantial evidence in an attempt to create an inference that defendants must have acted with scienter. The court dismissed the complaint. The case is instructive for its recitation of plaintiffs’ efforts and the court’s denial that these efforts could lead to the required strong inference.

Non Non-Competition

Novelaire Technologies, L.L.C. v. Harrison, 08-0157 (La. App. 5 Cir. 9/19/08), 08 So.2d ___, involved a violation of an employee’s agreement that (i) designs by him while he was employed belonged to the employer and (ii) he would not use any confidential information of the employer without its consent. When the employer sued to enjoin the employee from selling a dehumidifier designed by him on employer time, the employee, among other things, argued that the agreement was an invalid non-competition agreement under La. R.S. 23:921. This is not as silly an argument as it first looks to be, since employees in other cases have convinced courts that agreements they signed were effectively non-compete agreements. In this case, though, the court said that since the agreement didn’t preclude the employee from operating a business selling dehumidifiers, R.S. 23:921 was unapplicable.

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The death of the children’s mother, after the divorce, was an “extraordinary circumstance” under La. Civ.C. art. 136 that allowed the maternal grandmother to seek visitation with the children.

Johnson v. Spurlock, 07-0949 (La. App. 5 Cir. 5/27/08), 986 So.2d 724, writ denied, 08-1400 (La. 7/25/08), 986 So.2d 670.

After Ms. Johnson evacuated to Memphis, Tenn., following Hurricane Katrina, she sought to relocate there with the child. The court of appeal found that the trial court erred in applying a best-interest test rather than the relocation factors. The court then conducted a de novo review and denied relocation, finding that, although she was in good faith, she failed to show relocation was necessary to improve her circumstances and that relocation would inhibit the quality of the child’s relationships with the father and other relatives who lived in the New Orleans area.


Mr. Woods, an attorney, filed a petition for domestic abuse assistance, alleging that Ms. Woods had physically abused the child, and obtained an order for supervised visitation, which lasted for four years. After trial, the court awarded joint custody and named Ms. Woods the domiciliary parent, finding that the evidence did not support Mr. Woods’ allegations of abuse. Ms. Woods subsequently filed a rule for sanctions under La. C.C.P. art. 863, which the trial court granted. The court of appeal affirmed, finding that Mr. Woods’ petition was ill-founded and his actions “diabolical.” The court ordered him to pay her attorney’s fees of $61,500, plus legal interest, supervised visitation fees of $9,400, and court costs of $400.

Brown v. Mock, 43,571 (La. App. 2 Cir. 7/16/08), 987 So.2d 892.

The court of appeal affirmed the trial court’s award of joint custody with the father named as domiciliary parent. Even though Ms. Mock’s motion for new trial and appeal were untimely, the court considered her appeal because the parties had acquiesced in a “review hearing” post-judgment. However, it admonished the trial court and the parties that the judgment was a final, considered decree and could not be “reviewed” unless Bergeron was met.

Child Support

Ola v. Ola, 07-0667 (La. App. 1 Cir. 4/16/08), 985 So.2d 786.

Health insurance premiums paid by Mr. Ola’s employer are income for child-
support purposes. This opinion differed from the 3rd Circuit’s decision in *Widman v. Widman*, 619 So.2d 632 (La. App. 3 Cir. 1993); the dissent would have followed *Widman*.

*Johnson v. Johnson*, 08-0060 (La. App. 4 Cir. 5/28/08), 986 So.2d 797.

Even though the consent judgment ordered him to pay school tuition, Mr. Johnson argued that because the eldest child attended a public high school, he did not have to pay for the second child to attend a private high school. The trial court found him in contempt; the court of appeal affirmed and sanctioned him $500 for a frivolous appeal.

**Interim Spousal Support**

*Loftice v. Loftice*, 07-1741 (La. App. 1 Cir. 3/26/08), 985 So.2d 204.

Ms. Loftice was awarded interim spousal support from the date of demand through the date she began living with another man, and Mr. Loftice appealed. The court found that his retirement income was properly considered as part of his “means” to pay interim spousal support because means includes any resources from which the wants of life may be supplied. The payor spouse’s entire financial condition should be evaluated, which includes not just his income but all of his resources: income from labor or services performed, physical property, income from such property, and the spouse’s earning capacity. La. R.S. 13:3881(D), which exempts pensions from liability for debts “except alimony,” includes spousal support, as the two terms are equivalent.

The trial court did not err in making the award retroactive to the date of demand because the case was filled with “procedure quagmires,” such as the parties’ inability to conduct and exchange discovery, numerous motions to compel and orders regarding discovery matters and Mr. Loftice’s numerous changes in counsel (including periods of pro se representation).

Finally, the parties’ prenuptial agreement establishing a separate property regime did not and could not waive interim spousal support because interim spousal support is based on the parties’ duty to support each other during the marriage and cannot be waived.

**Property**

*Statham v. Statham*, 43,324 (La. App. 2 Cir. 6/11/08), 986 So.2d 894.

Because both parties’ testimony as to the classification of a diamond ring Ms. Statham received around the time of her birthday — she said a birthday gift, he said not — was equally genuine, and because the trial court found that she thus failed to overcome her burden to prove that the ring was separate property, the court of appeal could not find that the trial court’s credibility determination was clearly wrong. The trial court’s credibility determination to accept Mr. Statham’s expert’s valuation of his company instead of Ms. Statham’s expert’s valuation also led the court of appeal to defer to the trial court. Post-termination distributions to Mr. Statham from the company were his separate property as salary due to his post-termination efforts.

*Ostarly v. Ostarly*, 07-1521 (La. App. 4 Cir. 6/18/08), 988 So.2d 276.

The court of appeal affirmed the trial court’s denial of Ms. Ostarly’s claim that movables allegedly belonging to her as her separate property were “unlawfully converted” by Mr. Ostarly. It also affirmed the trial court’s award to him from her of one-half of the payments made by him on a motorcycle note, after subtracting $5,000 from his claim for his exclusive use of the vehicle.

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International Court of Justice

Republic of Georgia Application Against Russia (Aug. 12, 2008).

In the first of presumably several legal actions resulting from the Russian Federation’s invasion of the Republic of Georgia, Georgia applied to the International Court of Justice (ICJ) for relief pursuant to Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 22 confers jurisdiction upon the ICJ to hear disputes between State Parties regarding interpretation of the CERD. Georgia alleged that Russia, through both its internal agents and separatist organizations in South Ossetia and Abkhazia, violated Articles 2, 3, 4, 5 and 6 of the CERD.

Georgia’s allegations against the Russian Federation, briefly summarized, are: (1) Sponsoring, defending and supporting of ethnic discrimination by the de facto South Ossetian and Abkhaz separatist authorities leading to ethnic cleansing; (2) Widespread and systematic discrimination of ethnic Georgians living in South Ossetia and Abkhazia; (3) Discriminatory denial of the right of refugees and internally displaced persons to return home; and (4) Systematic unlawful appropriation and sale of homes and other property of ethnic Georgians.

Georgia also alleged that Russia’s presence and logistical support of the separatist movements prevented Georgia from exercising jurisdiction over its sovereign territory and refused its citizens the right of self-determination. Georgia asked the ICJ to order Russia to comply with its CERD obligations and compensate it for all injuries related to the acts of aggression and discrimination.

World Trade Organization

United States — Subsidies on Upland Cotton, Recourse to Article 21.5 of the

DSU by Brazil (WT/DS267/AB/R).

In September 2006, the World Trade Organization (WTO) Dispute Settlement Body (DSB) granted Brazil’s request for a compliance panel to rule on whether the United States complied with the DSB’s prior ruling in the 2002-2005 case involving U.S. cotton subsidies. Brazil argued in the original dispute that various U.S. cotton subsidies violated the WTO Agreement on Subsidies and Countervailing Measures (SCM). At the time Brazil initiated the dispute, world cotton prices had fallen to the lowest level in decades and the U.S. support system was at its peak. Both the dispute-settlement panel and Appellate Body found that various aspects of the U.S. cotton-support system violated the SCM Agreement and ordered the United States to bring its domestic measures into conformity with its obligations under the SCM Agreement.

The U.S. Department of Agriculture initiated changes to some aspects of the U.S. cotton-support system in response to the WTO ruling. However, Brazil contended that the changes were insufficient and initiated a compliance panel to force the United States to fully comply with the findings in the original case. Brazil also sought countermeasures, including a request for cross-retaliation to suspend Brazil’s obligations under the Trade Related Intellectual Property Rights Agreement (TRIPS). The cross-retaliation request is extremely important as it would allow Brazil to break existing patents on U.S. pharmaceuticals as an equivalent countermeasure. The compliance panel ruled in December 2007 that the United States remained in noncompliance with the SCM Agreement. The United States appealed the compliance-panel report, and the Appellate Body issued its decision on June 2, 2008, finding that the United States has not fully complied with the original ruling.

Now that the Appellate Body has ruled that the United States remains in noncompliance, Brazil will likely seek recourse to arbitration under Article 22.6. The compliance arbitration will decide the amount and type of countermeasures Brazil is allowed to adopt. Brazil previously requested countermeasures equivalent to $4 billion annually.

European Court of Justice

Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, C-402/05 P & C-415/05 P (3 September 2008).

In one of the first European court cases involving the Community’s power to regulate potential terrorist activity, the European Court of Justice (ECJ) annulled EC Regulation No. 881/2002 imposing restrictive measures directed against persons associated with Usama bin Laden, the Al-Qaeda network or the Taliban. Appellants, Yassin Abdullah Kadi (resident of Saudi Arabia) and Al Barakaat International Foundation (Swedish foundation), were designated by the United Nations as having some connection or association with Usama bin Laden, Al-Qaeda or the Taliban. The U.N. Security Council previously enacted several resolutions requiring U.N. members to freeze the funds and other financial resources controlled by such persons. The European Council adopted Regulation 881/2002 to give effect to the U.N. resolutions and froze
the funds of Yassin Abdullah Kadi and Al Barakaat after their names were added to the U.N. list on Oct. 19, 2001.

Yassin Abdullah Kadi and Al Barakaat brought separate actions in the European Court of First Instance (CFI) seeking to annul the EC regulation, alleging incompetence (EC lack of authority to adopt the regulation) and infringement of fundamental rights to property and defense. The CFI rejected the claimants’ arguments and confirmed the validity of the EC regulation, ruling that the court lacked jurisdiction to review the validity of the regulation as it was adopted in conformity with U.N. Security Council resolutions. The CFI essentially found that the U.N. international treaty trumps Community law, with the lone exception being jus cogens principles of international law.

The ECJ reversed the CFI and set aside its judgments, finding first that Community courts have jurisdiction to review the lawfulness of the contested regulation. Second, the Court ruled that the appellants’ rights to a defense were not respected and, therefore, the freezing of their economic assets constituted an unjustified restriction on the right to property. Although the ECJ annulled the regulation insofar as it froze the assets, it delayed implementation of the annulment for three months to allow the EC time to remedy the infringements and to avoid the potential serious and irrevocable harm that may follow from releasing the funds.

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Notice of Dissolution of Panel

Thibodeaux v. Donnell, 07-1845 (La.App. 1 Cir. 9/12/08), So.2d So.2d.
Plaintiffs filed a medical-review-panel request on Nov. 4, 2004, alleging that Mrs. Thibodeaux sustained injuries as a result of the negligence of Dr. Donnell in the performance of surgery on Nov. 20, 2003. Plaintiffs filed a lawsuit on Oct. 26, 2006, with little or nothing happening between the time of the filing of the panel complaint and the lawsuit, other than the appointment of the attorney chairperson.

The attorney chairperson was appointed on June 16, 2005. No opinion was ever rendered, nor was any extension of the panel’s 12-month term obtained. Dr. Donnell filed an exception of prescription, contending that at the end of one year from the date of the appointment of the chairperson, the panel was automatically dissolved and that the 90-day suspension of prescription period had begun to run (on June 16, 2006), making Sept. 30, 2006 (90-day suspension, plus the 14 days remaining on the one-year original prescriptive period) the last date on which a lawsuit could have been timely filed. The defendant relied on several cases, but the court of appeal observed that in each of those cases there had been a court-ordered extension of the life of the panel. The court also observed that it was unaware of any jurisprudence interpreting the relevant statutes in a situation in which no court-ordered extension had been requested or granted.

The plaintiffs and the defendant agreed that the pertinent statute was La. R.S. 40:1299.47(B)(3), but the plaintiffs contended that their situation was covered by the first part of (B)(3), which requires notice by the attorney chairperson of the dissolution of the panel, a notice the plaintiffs never received. Thus, the 90-day suspension period never began to run, and the prescriptive period for filing suit was still suspended at the time they filed their lawsuit. La. R.S. 40:1299.47(B)(3) provides:

Ninety days after the notification to all parties by certified mail by the attorney chairman of the board of the dissolution of the medical review panel or ninety days after the expiration of any court-ordered extension as authorized by Paragraph (1) of this Subsection, the suspension of the running of prescription with respect to a qualified health care provider shall cease. (Emphasis added by the court.)

The court noted that prescriptive statutes must be strictly construed against prescription and in favor of the claim, and when presented with two possible constructions, the court should elect to maintain the action.

The court found the statute’s language clear and unambiguous in that either of the occurrences (notification to petitioners by certified mail of the panel’s dissolution or expiration of a court-ordered extension) would have triggered the running of the 90-day period, after which suspension would have ceased. But, as there was no extension or request for an extension of the life of the panel, notice of the panel’s dissolution was required before the 90-day period began to run. Any other conclusion would render the first part of (B)(3) “superfluous or meaningless.”

The defendant failed to prove that any notice of the panel’s dissolution was sent to the plaintiffs or their counsel; thus, the 90-day period had not commenced to run at the time plaintiffs filed their lawsuit, which the court held was timely.
Duty of Good Faith in Settlement Negotiations

**Patin v. Louisiana Patient’s Comp. Fund & Oversight Bd.,** 07-2394 (La. App. 1 Cir. 6/6/08), 991 So.2d 1135.

Patin sued Dr. Elliot, alleging that he failed timely to diagnose her breast cancer. Dr. Elliott and his insurer settled for $100,000, thereby admitting liability and reserving to Patin the right to proceed against the Louisiana Patient’s Compensation Fund and Oversight Board (PCF).

Patin and the PCF were unable to reach a settlement agreement. The case was tried, and a jury verdict was returned in Patin’s favor for $464,389. The PCF’s appeal was unsuccessful, and it ultimately paid the judgment and interest ($676,150).

Patin then filed a separate suit against the PCF, its adjusters and its attorney for “failing and refusing to fairly and promptly compensate her for damages she suffered” as a result of the admitted malpractice. Patin contended this constituted a violation of the obligation of good faith that is statutorily imposed upon the PCF. The PCF filed an exception of no cause of action, which the trial court sustained.

The court of appeal referenced La. R.S. 40:1299.44(C) concerning the procedures to be followed when the health care provider has settled its liability. The court cited the particular language of (C)(3), which provides that the PCF “may agree to a settlement with the claimant” (emphasis added by the court). If there is no agreement as to settlement, the trier of fact determines the amount of damages due, if any, from the PCF.

Patin alleged that the PCF rejected several settlement offers and that the PCF made several counteroffers, which she rejected. Patin felt that the PCF did not negotiate in good faith. The court disagreed:

We note that although La. R.S. 40:1299.44(C)(7) imposes upon the insurer of the health care provider, or upon the self-insured health care provider himself, a duty to exercise good faith and reasonable care in evaluating the claim and considering and acting upon settlement of the claim, no such duty is specifically imposed upon the board in the statute. Thus, we conclude that the plaintiff has no claim against the board for failing to comply with a duty it did not statutorily owe.

The court also observed that the Medical Malpractice Act’s intention was for the PCF to defend claims against it. Hence, the plaintiff cannot have a cause of action against it for its actions in defending against the claim. Finally, even assuming that Patin suffered any injuries from the delay in receiving money for her damages, the court concluded that those damages were recovered in the form of legal interest, and she can recover nothing further for the delay in receiving the money. The exception of no cause of action was affirmed.

—Robert J. David

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To assist taxpayers in understanding their options under H.R. 3221, the “American Housing Rescue and Foreclosure Prevention Act of 2008” (the Act), which provided tax relief to Louisiana Road Home recipients (among others), the Internal Revenue Service has issued Notice 2008-95, 2008-44 IRB and News Release IR 2008-115. The Act allows a taxpayer who claimed a casualty loss to a principal residence as a result of Hurricane Katrina, Rita or Wilma, but who received reimbursement for that loss in a subsequent tax year under Public Laws 109-148, 109-234 or 110-116, to elect to amend the return on which the deduction was taken or to which it was carried in the case of a net operating loss. The amendment may reduce the casualty loss claimed by the reimbursed amount (but not below zero). Under §3082(a)(2)(B) of the Act, a taxpayer may only elect to amend a return to take advantage of the election if the amended return is filed by the later of: (1) the due date for filing the tax return for the tax year in which the taxpayer receives the grant, or (2) July 30, 2009. Section 3082(a) of the Act gives taxpayers up to one year from the date of filing to repay any tax due without interest or penalties but all tax due must be paid by July 30, 2010. Those who have previously filed amended returns may still take advantage of the relief provisions but must notify the IRS by certain deadlines and provide the information requested in Notice 2008-95. All amended returns should be marked as pursuant to “Hurricane Grant Relief” and may not be filed electronically.

For its part, in Louisiana Revenue Information Bulletin 08-032 (Oct. 7, 2008), the Louisiana Department of Revenue has announced that taxpayers who file amended federal individual income tax returns solely for the purpose of making an election under the Act will not be required to file amended Louisiana income tax returns.

La. Department of Revenue Will No Longer Accept Federal Extensions for State Purposes

Effective for 2008 returns due in 2009 and thereafter, the Department of Revenue has adopted La. Admin. Code §61:III.2501 as an emergency rule, which provides that, effective Nov. 26, 2008, individuals must file a specific request with the state if seeking an extension of time in which to file an individual income tax return. Unlike the situation in prior years in which taxpayers could attach a copy of a

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timely filed federal extension to their state tax return, federal extensions will no longer be accepted for state return purposes. The Department has changed its position on accepting federal extensions because, according to the Department’s Web site, “changing technologies and processing procedures have made the recording of federal filing extensions unreliable.” As a result, a taxpayer may obtain an extension in which to file (of up to six months) only by filing an Application for Extension of Time to File Louisiana Individual Income Tax (Form R-2868). Alternatively, an extension may be requested electronically on-line at www.revenue.louisiana.gov. As always, the granting of an extension to file a return does not extend the time in which to pay the tax due so actual or estimated taxes still must be paid before the due date.

New ParishE-File System for Parish Sales and Use Tax Filing and Remittance

The Louisiana Department of Revenue has unveiled “ParishE-File.com,” a new online tool intended to facilitate secure electronic filing of multiple parish sales and use tax returns and remittances to local taxing authorities on one centralized Web site, bringing Louisiana closer to compliance with the Streamlined Sales Tax effort. The Streamlined Sales Tax effort is an ongoing effort by a number of states to avoid congressional action to prohibit the imposition of sales and use taxes on electronic commerce by voluntarily simplifying and modernizing sales and use tax collection and administration procedures among the cooperating states. In the United States Supreme Court case of Quill Corp. v. North Dakota, 504 U.S. 298 (1992), the Supreme Court discussed earlier case law that suggested that taxation of mail-order commerce was unconstitutional in light of the complexity inherent in reporting and remitting to a multiplicity of taxing jurisdictions. The Streamlined Sales Tax effort has included efforts to simplify remittance and collection by a number of states with not much success to date. Nevertheless, the new ParishE-File system appears to be a step by Louisiana in that direction.

There are no fees associated with the use of the new service. The service offers a registration feature that allows taxpayers to subscribe to its services and to maintain their own identifying and demographic information. The primary benefit of the new system is that Louisiana businesses and nonresident taxpayers may file and remit sales and use taxes in multiple parishes at one time by accessing Louisiana state forms as well as the forms in use in all 64 Louisiana parishes. To register, a taxpayer must provide an e-mail address, a bank account and routing number and tax account numbers for all returns to be filed. See https://parishe-file.revenue.louisiana.gov.

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Need some help managing your law office?

The Louisiana State Bar Association (LSBA) has established the Law Office Management Assistance Program (LOMAP, for short). This program is designed to assist lawyers in increasing the quality of the legal services they provide.

Questions or comments about LOMAP may be sent to Eric K. Barefield, ebarefield@lsba.org or call (504)619-0122 or (800)421-5722, ext. 122.

For more information on all LSBA programs, go to www.lsba.org.