Does AT&T Mobility L.L.C v. Concepcion Spell the End to Class Actions?

In AT&T Mobility L.L.C v. Concepcion, 131 S.Ct. 1740 (2011), the United States Supreme Court held that AT&T’s arbitration clause disallowing class actions was enforceable. The Concepcions were customers of AT&T who asserted that they were fraudulently charged sales tax on the retail value of phones provided for free under their service contracts. Their suit against AT&T was joined with a putative class action alleging false advertising and fraud for the same offense. AT&T moved to compel arbitration pursuant to the arbitration clause in the Concepcions’ service agreement, and the Concepcions opposed.

Both the California Federal District Court and the 9th Circuit Court of Appeals held that the bar of class actions in the arbitration clause was unenforceable as preempted. California case law held class waivers in consumer arbitration agreements to be unconscionable if the agreement was an adhesion contract, the damages claimed were small and the party with the inferior bargaining power alleged a deliberate scheme to defraud. The U.S. Supreme Court overturned on the grounds that the California court’s interpretation of its own unconscionability law to invalidate class action waivers was preempted by the Federal Arbitration Act (FAA) and that the class action waiver in AT&T’s arbitration clause was enforceable.

Justice Scalia, writing for the court, explained that complicated class action proceedings were antithetical to the speed and efficiency goals of arbitration. Moreover, class action proceedings greatly increased the stakes for defendants because of the possibility of large awards and the absence of appeals except on the limited grounds allowed by the FAA. The court speculated that defendants who were willing to absorb the risk of an erroneous individual arbitration award may not be willing to absorb the high-stakes risk of a multi-million-dollar class action award. This risk could cause the corporate defendants to settle unfounded class claims. Arbitrators in class claims may not be suitable to the process because they “are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.” Id. at 1750. The court also found that the drafters of the FAA never envisioned the arbitration of class action claims.

Justice Breyer, writing for the dissent, argued that the FAA did not preempt the California courts’ interpretation of its own unconscionability law to invalidate class actions.
In In re Stewart, 647 F.3d 553 (5 Cir. 2011), Wells Fargo filed a proof of claim in the bankruptcy case of the debtor, Dorothy Chase Stewart, who sought a full accounting from Wells Fargo. Upon receipt of the records, it became clear to the bankruptcy court that Wells Fargo’s proof of claim “was rife with errors,” which caused Wells Fargo to overstate its claim by more than $10,000. The bankruptcy court found that “Wells Fargo’s mortgage claims exhibit systematic errors arising from its highly automated, computerized loan-administration system.” The bankruptcy court also noted that because proofs of claim must be treated as prima facie evidence, courts are unable to review or correct errors except in the instances debtors dispute the proofs of claim. Considering this “threat to the integrity of the bankruptcy system, and to prevent other errors from evading review,” the bankruptcy court issued an injunction requiring Wells Fargo to audit every proof of claim it had filed since 2007, to provide a complete loan history for each account, and to amend any proofs of claim on file to comply with its instructions. The district court affirmed.

Wells Fargo appealed to the 5th Circuit, and the 5th Circuit vacated the injunction. First, the 5th Circuit found that the debtor lacked standing to support an injunction because “no immediate threat” existed such that the debtor would again suffer a similar injury in the future and, thus, no “case or controversy” existed. Second, the 5th Circuit held that the injunction did not follow from “the inherent power of the court to protect its jurisdiction and judgments and to control its docket.” The 5th Circuit found that (a) no pattern of conduct existed that required a judicial ruling in subsequent cases, (b) the injunction was not “sufficiently necessary” and (c) the injunction was not for the benefit of
the debtor but, rather, was aimed at other cases Wells Fargo had appeared or might appear in. While the 5th Circuit recognized the bankruptcy court’s frustration, it vacated the injunction, stating the “injunction lack[ed] jurisdictional legs” and “exceed[ed] the reach of the bankruptcy court . . . .”

Reserving Causes of Action Post-Confirmation

In In re Texas Wyoming Drilling, Inc., 647 F.3d 547 (5 Cir. 2011), the debtor’s confirmed plan of reorganization reserved “all rights, claims, defenses, and causes of action including, but not limited to, the Estate Actions,” and provided that the debtor “shall have sole authority to prosecute and/or settle such actions.” The debtor’s plan defined “Estate Actions” as claims under Chapter 5 of the Bankruptcy Code. The debtor’s disclosure statement provided similar provisions as the debtor’s plan regarding reserving causes of action; however, it also provided a chart which outlined the various claims and causes of action reserved by the debtor. Specifically, the chart stated that the debtor reserved causes of action against pre-petition shareholders of the debtor, who the debtor may sue for fraudulent transfers and recovery of dividends.

After confirmation of the plan, the debtor sued several of its former shareholders for fraudulent transfers. Several of the defendants filed a motion for summary judgment, arguing, among other things, that the trustee did not have standing to file the lawsuits because the plan did not retain the Avoidance Actions. The day before the hearing on the motion for summary judgment, the bankruptcy court converted the debtor’s chapter 11 case to a chapter 7 case, and the trustee succeeded the debtor as plaintiff in the lawsuits. The bankruptcy court then denied the motion, and the defendants appealed. The 5th Circuit affirmed the bankruptcy court’s ruling.

The issue before the 5th Circuit was whether the plan and the disclosure statement properly retained the causes of action against the defendants. According to the 5th Circuit in In re United Operating, L.L.C, 540 F.3d 351, 355 (5 Cir. 2008), “for a debtor to preserve a claim, the plan must expressly retain the right to pursue such actions” and such reservation shall be “specific and unequivocal.”

The purpose of this rule is to put “creditors on notice of any claims [the debtor] wishes to pursue after plan confirmation” and enable “creditors to determine whether the proposed plan resolves matters satisfactorily before they vote to approve it.” Texas Wyoming Drilling, 647 F.3d at 550.

First, the 5th Circuit addressed whether the disclosure statement may be considered with the plan to determine whether the debtor properly reserved the causes of action. Considering that the disclosure statement is the “primary notice mechanism informing a creditor’s vote,” the 5th Circuit held that the disclosure statement may be considered in addition to the plan to determine whether a post-confirmation debtor has standing to pursue certain causes of action.

Next, the 5th Circuit addressed whether the plan and disclosure statement at issue
Successful Federal Tort Claim Act Suit for Malicious Prosecution


In September 1996, the FBI, EPA and other federal and state agencies, working together, executed a search warrant on Canal Refining Co. in Church Point, La., as part of a larger multi-agency investigation of the practice of mixing hazardous waste with used oil and then brokering it as “clean” alternative feedstock, either with or without the buyer’s knowledge of the adulteration. Canal Refining was identified in documents obtained in an earlier search warrant of a facility suspected of laundering hazardous waste in this manner as a destination facility for product from that suspect facility.

After two prior investigating agents found no basis for pursuing an indictment, a third newly minted EPA CID agent, involved previously in the investigation as a technical advisor, tenaciously pursued investigation of Hubert Vidrine, Jr., resulting in his federal indictment and arrest, more than three years after execution of the search warrant, on one count of knowingly storing hazardous waste without a permit. Four years later, a month prior to the start of Vidrine’s criminal trial, the Government moved to dismiss the indictment against Vidrine, citing “developments” that warranted dismissal. After the dismissal, Vidrine and his wife filed a Federal Tort Claims Act (FTCA) suit in the Western District, alleging malicious prosecution.

Facts developed during the FTCA case indicated there was not sufficient factual evidence supporting the indictment of Vidrine for knowingly storing hazard-

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The company admitted it had no budget, which the company admitted in the plea. The company admitted it had no budget and violations of the facility’s air permit, identified unsafe operating conditions and violations of the facility’s air permit, which the company admitted in the plea. The company admitted it had no budget, which the company admitted in the plea.

A March 2006 inspection of the Lake Charles facility by LDEQ and EPA identified unsafe operating conditions and violations of the facility’s air permit, which the company admitted in the plea. The company admitted it had no budget, no environmental department and no environmental manager; admitted pollution prevention equipment was either not functioning, poorly maintained, or improperly installed, serviced or calibrated; admitted bypassing a scrubber; admitted not taking a tank out of service after its roof sank; and admitted employees took turns shooting a flare gun at the flare tower in an attempt to re-light the process flare when it went out, as the pilot light was not functioning properly.

**Plea Could Result in Largest Ever CAA Criminal Fine in Louisiana**


Pelican Refining Co., L.L.C., pleaded guilty to felony violations of the Clean Air Act and obstruction of justice on Oct. 12, 2011. The company faces $12 million in criminal penalties, which would be the largest ever criminal fine in Louisiana for violations of the Clean Air Act, and could be banned from future refinery operations unless under a compliance plan providing for independent external auditing and operations oversight by a court-appointed monitor.

In October 2009, the LDEQ issued a Louisiana Pollutant Discharge Elimination System (LPDES) general permit for discharge of pollutants from oil and gas production into the territorial seas of Louisiana. The Louisiana Environmental Action Network (LEAN) appealed the issuance of the permit. The district court affirmed the permit issuance and, on appeal, the Louisiana 1st Circuit Court of Appeal re-examined the LDEQ permitting decision.

LEAN contended LDEQ did not adequately verify that no significant environmental impacts are being caused by produced water discharges, with LDEQ pointing to its consideration of numerous studies of discharge to offshore waters for support of its decision. While Judge Guidry, writing for the three-judge panel that decided the case, agreed with LDEQ’s assertion that the permit contained requirements and restrictions to help diminish and guard against unreasonable degradation of the environment by the permitted activity, the court found that LDEQ’s reliance only on existing studies that addressed more generally the impact of produced water discharge in offshore waters was an inadequate basis for the issuance of a permit covering discharges to the territorial seas.

Without bio-monitoring requirements or direct testing or studies of the impact of produced water discharges in the territorial seas, the court found that LDEQ reached its permitting decision procedurally, without individualized consideration or a fair balancing of environmental factors. This, the court found, was an abuse of the agency’s discretion. The matter was remanded to the LDEQ with instructions to modify the permit such that the permitting decision suitably evaluates whether the existing monitoring and testing requirements adequately ensure that the environmental costs of discharging produced water directly into the territorial seas of Louisiana are being minimized or avoided as much as possible consistent with the public welfare.

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Custody

Fontenot v. Newcomer, 10-1530 (La. App. 3 Cir. 5/4/11), 63 So.3d 1149.

Ms. Fontenot obtained a protective order on her behalf and on behalf of her two children against her parents, who appealed. The court of appeal reversed, finding that their following her, attending the child’s basketball games, driving by the child’s school and parking behind her in a parking lot to prevent her from moving her car did not rise to the threshold of physical abuse or verbal threats, or demonstrate an immediate need for protection.

Silbernagel v. Silbernagel, 10-0267 (La. App. 5 Cir. 5/10/11), 65 So.3d 724.

Mr. Silbernagel argued that the provision in the trial court’s previous considered decree that the parties appear for a review of the matter in six months made the judgment provisional and not a final decree of permanent custody, so Bergeron did not apply to his rule to modify. The court of appeal disagreed, finding that their following her, attending the child’s basketball games, driving by the child’s school and parking behind her in a parking lot to prevent her from moving her car did not rise to the threshold of physical abuse or verbal threats, or demonstrate an immediate need for protection.

Gray v. Gray, 11-0548 (La. 7/1/11), 65 So.3d 1247.

Mr. Gray had originally been allowed to relocate from Louisiana to Alabama by considered decree. Mr. Gray sought to relocate again, to Kansas. In this long and detailed analysis (which merits reading in whole), the Supreme Court addressed the relocation statutes, custody statutes and Bergeron in allowing the father to move. The court essentially found that it did not need to compare all three states, as relocation out of Louisiana had already been approved. Instead, it needed only to determine whether Mr. Gray should be allowed to move from Alabama to Kansas. The trial court could not order him to return to Louisiana but had to choose between ordering him to remain in Alabama or allowing him to move to Kansas. As Kansas was better for the child than Alabama and there was little difference between the states as far as the mother was concerned, the father should have been allowed to move to Kansas.

On her rule to modify custody as a result of his move, the Supreme Court reversed the trial court’s award of domiciliary custody to her. The court held that La. R.S. 9:355.11’s provision that a move without prior court approval “may constitute a change of circumstances” did not create a statutory exception to Bergeron. Further, her rehabilitation from drug use did not meet the Bergeron threshold for a change of circumstances, distinguishing the prior analysis in Rao v. Rao, 05-1523 (La. App. 1 Cir. 11/4/05), 927 So.2d 391, writ denied, 04-1011 (La. 6/18/04), 876 So.2d 809, of the relationship between the relocation statute and Bergeron. Here, the initial move to Kansas before obtaining court approval did not materially affect the child or mother such as to rise to a need for a change under Bergeron.

Gathen v. Gathen, 10-2312 (La. 5/10/11), 66 So.3d 1.

Although La. R.S. 9:355.12 requires the court to consider all the relocation factors, it does not have to “expressly analyze each factor” in its reasons for judgment as long as it is clear that it considered the statutory factors. Failure to do so gives rise to review for abuse of discretion, not a de novo review. Further, appellate review of custody cases requires the higher “abuse of discretion” standard due to the great deference given to the trial court in such cases, rather than the “manifest error” standard. Moreover, a trial court is not even required to give oral reasons and is required to give written reasons only if requested. After review of the evidence and all 12 factors, the Supreme Court found that the trial court had not erred in denying the relocation request. Two spirited dissents would have allowed the move, considering more closely the negatives associated with the father than the trial court and majority did.
Cueva v. Gaddis, 10-0981 (La. App. 5 Cir. 5/24/11), 66 So.3d 1134.

Although the trial court stated in its reasons that it considered the present stable environment to be the primary factor in considering this request for relocation, the record showed that it considered and weighed all of the factors, and its decision not to allow relocation was not manifestly erroneous. Relocation would also disrupt the child’s close relationship to extended family who had helped raise him. Moreover, because the mother’s husband was in the military, the proposed move may have been temporary in any event, and an additional move was possible.

**Interim Spousal Support**

Robertson v. Robertson, 10-0926 (La. App. 5 Cir. 4/26/11), 64 So.3d 354.

In denying Mr. Robertson’s request for interim spousal support, the trial court stated:

The Court cannot understand how an able-bodied man who is in great physical shape and is in the prime of his life doesn’t have a job. A marriage is not a meal ticket. It seems that all of the financial responsibilities in the marriage have been on the wife. This is untenable.

Rather than give spousal support herein, the Court will give Mr. Robertson practical advice: get a job. This request will be denied.

Needless to say, the court of appeal affirmed, also finding that “he failed to submit proof of his expenses and needs,” lived at his father’s house without charge and failed to prove that he could not obtain work. It also affirmed the naming of the mother as the domiciliary parent.

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Dunning v. State, 10-2087 (La. App. 1 Cir. 9/20/11), ____ So.3d ____.

Dunning, working for the State of Louisiana as a deckhand/crew member aboard the M/V St. Francisville, was injured when a cable snapped, causing the closing gate of the ferry to strike him in the head and upper body, requiring medical treatment. He filed a petition for damages, seeking relief under the Jones Act and general maritime law. The State filed a peremptory exception of no cause of action asserting that the Louisiana Workers’ Compensation Act (LWCA), La. R.S. 23:1021 et seq., provides plaintiff’s
exclusive remedy. The court denied the State’s exception, finding that Dunning, a state employee, Pelican Refining Co is also a seaman and entitled under La. R.S. 23:1035.2 to seek recovery under the Jones Act and general maritime law.

Applying for review, the State contended that, while Article XII, Section 10 of the Louisiana Constitution limits suits against the state, providing a limited waiver of sovereign immunity for claims of personal injury, the Legislature, specifically authorized to limit suits against the state, has done so via the LWCA.

The 1st Circuit, per curiam, cited the recent holding of the Louisiana Supreme Court in Fulmer v. State, 10-2779 (La. 7/1/11), 68 So.3d 499, that “nothing in the plain language of the LWCA indicates the legislature’s intent to limit the State’s liability to suits under the Jones Act brought by a State employee,” specifically excluding from compensation coverage “any employee” who is covered by the Jones Act. La. R.S. 23:1035.2 states:

No compensation shall be payable in respect to the disability or death of any employee covered by... the Jones Act.... As such, the claims against the State under the Jones Act brought by a State employee,” specifically excluding from compensation coverage “any employee” who is covered by the Jones Act. La. R.S. 23:1035.2 states:

In the present case, the claim against the State brought by Pelican Refining Co, a state employee, is also a seaman and entitled under La. R.S. 23:1035.2 to seek recovery under the Jones Act and general maritime law.

Insurance: Bobtail Coverage

Jurey v. Kemp, 11-0142 (La. App. 1 Cir. 9/20/11), ____ So.3d ____. Jurey was driving his Lincoln sedan when he collided with a Peterbilt tractor, pulling a 50-foot flatbed trailer, owned and driven by Kemp, an independent contractor for Dallas & Mavis Specialized Carrier Co., L.L.C. (D&M). D&M had a policy issued by Liberty Mutual covering operation of the tractor while Kemp was engaged in performing transportation services for D&M. As required of an independent contractor, Kemp had a policy with Great American Insurance Co. providing non-trucking liability ("bobtail") coverage for operation of the equipment outside the scope of performing services for D&M. ("Bobtail" is industry lingo used to describe a tractor being operated without a trailer.) At the time of the accident, Kemp was retrieving his tractor from a maintenance facility where modifications had been performed to ease access to the trailer’s electrical connections.

Both insurers moved for summary judgment. Liberty Mutual alleged that Kemp was not engaged in performing transportation services for D&M, which was granted; Great American asserting, quelle surprise, that he was, which was denied. Liberty Mutual’s policy covering D&M provided, in pertinent part:

The following are insureds:

. . .

d. The lessor of a covered “auto” that is not a “trailer” or any “employee,” agent, or driver of the lessor while the “auto” is leased to you under a written agreement if the written agreement does not require the lessor to hold you harmless and then only when the leased “auto” is used in your business as a “motor carrier” for hire.

On appeal, Kemp and Great American contended that Kemp was on a mission for D&M because he was having contractorly requisite maintenance performed on his equipment. The 1st Circuit framed “the proper inquiry [a]s whether Kemp was acting within the scope of the lease agreement with D&M.” The lease required Kemp to “maintain the Equipment in proper operating condition and in full compliance with applicable government regulations.” Kemp acknowledged that the work (welding of a door providing access to electrical connections) was not required by government regulation or by D&M, and that the result provided no economic benefit to D&M. “Rather, it appears that these improvements were merely done for the convenience of the owner... Kemp’s trip [to retrieve his equipment] was not undertaken in the business of the employer.” Judgment of the district court was affirmed.

Judge McClendon’s majority opinion briefly but cogently analyzes the scope of the lessee’s liability vis-à-vis the lessor while having leased equipment serviced, a point on which she found no precedent in Louisiana jurisprudence. Judge Welch weighed in with an intelligent and spirited five-page dissent. Recommended reading.

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United States

U.S.-Korea (HR 3080), U.S.-Panama (HR 3079) and U.S.-Colombia (HR 3078) Free Trade Agreements.

After nearly five years of languishing and generating heated debate over the tenor of U.S/international trade policy, congressional lawmakers gave final approval to legislation implementing the free trade agreements President George W. Bush negotiated with Korea, Panama and Colombia. All three agreements passed with ample support from the Senate and House of Representatives. One of the final sticking points was renewal of the U.S. Trade Adjustment Assistance (TAA) program, which provides funding for retraining and temporary benefits to those who suffer job losses as a result of economic liberalization. House Republican lawmakers initially opposed renewal of TAA but it was ultimately renewed by a vote of 307-122 in the House, paving the way for passage of the three free trade agreements.

Each of these new free trade partners already receives virtually free and uninhibited access to the U.S. market under various preferential trade programs. These agreements make that relationship reciprocal insofar as U.S.-produced goods now enter those markets duty-free or at severely reduced tariff levels. Equally important as the tariff reductions are the non-tariff protections the agreements provide, including intellectual property protection and expanded access for our service providers.

The Louisiana delegation voted unanimously in favor of all three agreements, with the sole exception of one nay vote on Colombia from a Louisiana House member. Some of the key benefits to Louisiana businesses include: preferential tariff and quota treatment on soybeans, cotton, chemical, rubber and plastic goods to Columbia; incremental quota increases and tariff phase-outs on grain, beef fruits, chemicals, silicon and plastics to South Korea; and non-discriminatory access for Louisiana maritime and other service providers to the massive government procurement contracts associated with the ongoing expansion of the Panama Canal.

China Currency Legislation

Currency Exchange Rate Oversight Reform Act of 2011 (S 1619).

Sen. Sherrod Brown (D-OH) led a bipartisan group of senators in submitting legislation to reform and enhance U.S. oversight of currency exchange rates. China’s currency practices have been a constant source of debate in Washington as the U.S. trade deficit balloons and the unemployment rate climbs. The legislation (S 1619) passed the Senate by a vote...
of 63-35 but has not been taken up by the House.

The legislation creates a new objective framework that decreases the Treasury Department’s discretion when identifying countries that manipulate their currency to obtain an unfair trade advantage. U.S. countervailing duty laws are also strengthened in the bill as the Commerce Department will be required to initiate an investigation when a domestic industry provides appropriate evidence of currency undervaluation. Finally, the legislation imposes significant penalties on “priority” currencies where action is not taken to eliminate the misalignment.

Dominican Republic-Central American Free Trade Agreement


A groundbreaking investment dispute has been brought by a Canadian gold mining subsidiary against El Salvador regarding El Salvador’s refusal to issue mining concessions. Pac Rim is a Nevada-based company that is wholly owned by a Canadian parent company. Pac Rim was incorporated in the Cayman Islands at the time it received initial permission from El Salvador to explore the gold mine. El Salvador subsequently refused to issue final mining concessions in the wake of protests over potential harmful environmental consequences. Pac Rim then reincorporated in the United States before initiating arbitration at the International Center for Settlement of Investment Disputes (ICSID) in Washington, D.C.

This is the first dispute brought under the Chapter 10 Investor-State provisions of the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) and raises several critical issues that could have long-range implications for the integrity of the free trade agreement. Some of the key issues include: (1) whether a Canadian company may invoke the protections of a free trade agreement that its government is not a party to; (2) whether an American subsidiary of a Canadian company has standing to invoke the investor-state protections of DR-CAFTA, especially under the facts of the dispute where the Canadian claimant moved to the United States shortly before the dispute was launched in an apparent forum-shopping move; and (3) to what extent does the free trade agreement impact the sovereign nation of El Salvador’s authority to regulate its environment and natural resources, and protect the human, animal and plant population from cyanide-based mining operations.

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Judicial Control Doctrine


In 2008, six members of the Walker family granted mineral leases to Chesapeake Louisiana, L.P., for several tracts of land in Caddo Parish. The next year, the Walkers brought suit in state court alleging that Chesapeake had breached three specially-negotiated provisions in the leases. The sole relief sought by the Walkers was lease cancellation. Chesapeake removed the case to the United States District Court for the Western District of Louisiana.

One of the three lease clauses allegedly breached by Chesapeake was a “No Surface Use” clause. The clause prohibited Chesapeake from using the surface of the leased premises without the Walkers’ consent. TheWalkers alleged that Chesapeake violated the clause by crossing the surface of the leased premises in all-terrain vehicles without permission, and by staking the location of a future well site on the leased premises without permission. It was undisputed that this activity did not cause physical damages.

A second clause allegedly breached by Chesapeake was a “Well Information” clause. This provision required Chesapeake to share certain well data with the Walkers pursuant to a “data-license agreement” to which the parties would mutually agree. The summary judgment evidence showed that the parties had never agreed to a data-license agreement and that Chesapeake had not shared the required well data with the Walkers. But Chesapeake had contacted the Walkers in an attempt to negotiate a data-license agreement the day after the Walkers notified Chesapeake of its alleged breach of the Well Information clause.

The third clause allegedly breached by Chesapeake was a “Geophysical Information” clause. The clause states that when “Lessee acquires seismic permits...
on lands within one mile of the Leased Premises, Lessee agrees to negotiate in good faith to include both the Leased Premises and surrounding acreage so as to adequately provide fully imaged 3-D seismic coverage of the Leased Premises.” The Walkers asserted that Chesapeake breached the clause by failing to negotiate in good faith to include the leased premises in seismic shoots after having acquired seismic permits within one mile of the leased premises. Chesapeake argued that its obligations under the Geophysical Information clause did not apply unless it actually conducted seismic testing within one mile, not if it merely acquired seismic permits, and that it had not breached that lease clause.

In support of their request for lease cancellation, the Walkers relied on La. Civ.C. art. 2013, which states: “When the obligor fails to perform, the lessee has a right to the judicial cancellation of the contract....” The Walkers argued that article 2013 provided them an unconditional right to lease cancellation if they proved a breach by Chesapeake. Chesapeake argued otherwise, contending that the doctrine of “judicial control” gives courts the discretion to decide whether to terminate a contract or award a lesser remedy in the event of a breach.

Chesapeake sought summary judgment on two grounds: (1) it had substantially performed; and (2) under the doctrine of “judicial control,” the district court need not terminate the leases, even if Chesapeake had breached the leases, and under the facts of this case the court should not terminate the leases. The district court concluded that an issue of fact precluded a summary judgment based on Chesapeake’s contention that it had substantially performed its obligations. But the court granted summary judgment based on the basis of judicial control and dismissed the Walkers’ claims.

On appeal, the United States 5th Circuit Court of Appeals rejected the Walkers’ argument that article 2013 requires lease termination in the event of a breach. The court noted that Louisiana courts have sometimes declined to award lease cancellation, and that article 2013 should be interpreted as giving a party a right to seek judicial dissolution of a contract, while leaving the court with discretion whether to grant that remedy.

Turning to the standard for contract dissolution, the 5th Circuit noted that Louisiana jurisprudence does not favor lease cancellation. The court determined that, for lease dissolution to be warranted, a lessee’s “dereliction of duty must be of a substantial nature and cause injury to the lessor.” The 5th Circuit stated that the decision whether to exercise “judicial control” to avoid lease termination is a decision for the “judge alone,” that appellate review of a decision to exercise judicial control is based on an abuse of discretion standard, and that summary judgment is appropriate if the judge determines that judicial control should be exercised even under a version of “the facts most favorable to the non-moving party that could be found by a jury.” Applying these standards, the 5th Circuit affirmed the district court’s grant of summary judgment, holding that the court had not abused its discretion by declining to terminate the leases.

Uniform Cancellation Affidavit

Act 124 of the state Legislature’s 2011 Regular Session enacted La. R.S. 9:5166, which establishes the form for a uniform cancellation affidavit that may be used for the cancellation of mortgages and vendor’s lien inscriptions, except for judicial and legal mortgages. Act 124 does not prohibit the use of any other method or form of cancellation otherwise authorized by law.

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The Cap

Oliver v. Magnolia Clinic, 09-0439 (La. App. 3 Cir. 8/31/11), 71 So.3d 1170.

Oliver was on remand from the Louisiana Supreme Court, which had directed the court of appeal to render an opinion that reflected “a majority vote on each of the issues presented.” Id. at 1172. (See original report, Louisiana Bar Journal, Volume 58, No. 5.) Following the court’s edict, and after an en banc hearing, a majority of the judges voted to adopt the original opinion, but it supplied additional reasons for doing so.

The earlier opinion in Oliver held that nurse practitioners (NPs) were not covered by the MMA because the State did not meet its burden in proving that the cap, as applied to NPs, was rationally related to the objectives of the Legislature when the cap was created in 1975. To the extent that the MMA included NPs, it violated the Equal Protection Clause of the Louisiana Constitution.

The instant opinion traced the history of the case, including the trial court’s finding that the MMA was constitutional as applied to this NP.

The 3rd Circuit noted that in Arrington v. ER Physicians Group, APMC, 04-1235 (La. App. 3 Cir. 9/27/06), 940 So.2d 777, it had instructed the State to:

...do more than simply rely on prior jurisprudence upholding the constitutionality of the MMA's cap. It must present readily available evidence to show that the cap continues to serve a legitimate public purpose and that a reasonable basis still exists for maintaining the discriminatory classification affecting a plaintiff’s right to full recovery in medical malpractice cases.

The Arrington opinion cited by the Oliver court was vacated and remanded in 2007 because the constitutionality issue had been raised for the first time on appeal. Arrington was recently decided by the trial court and is soon to return to the 3rd Circuit. Arrington v. ER Physicians Group, APMC, 06-2968 (La. 2/2/07), 947 So.2d 727.

The State failed to meet its evidentiary burden in Oliver, and the cap, to the extent it included NPs within its protections, violated the Equal Protection Clause of the Louisiana Constitution. The court held that the case “presents a compelling example of the most pernicious consequence of capping the liability of tortfeasors.” Oliver, 71 So.3d at 1192.

Taylor Oliver, who was but months old when the first acts of malpractice were committed, represents a member of the two classes “most discriminated against by the cap”—one who is severely injured and one who is young. When extended over the expected lifetime of a young child, the cap “shrinks to relative insignificance and will continue to decrease as inflation erodes (it)” Id. “There simply is no rational reason why the most severely injured malpractice victim should be singled out to pay for special relief for a nurse practitioner who operated in derogation of her statutorily mandated duties.” Id.

The Oliver court pointed out that when the Legislature decided in 2009 to expand the MMA’s cap to cover NPs, it failed to “articulate any basis for their inclusion,” and the State offered little more by way of evidence in this case. Id. at 1192.

The cap, to the extent it included NPs, was held to violate the equal protection and adequate remedy guarantees of the Louisiana Constitution and La. R.S. 40:1299.41(A)(1), and is thus unconstitutional. The $6,000,000 general damage award was reinstated. And, in footnote 4,
the court said that NPs remained covered under the MMA to the extent an injured party’s damages do not exceed the cap, but any excess liability is not covered by the MMA.

There were two concurring and three dissenting votes.

“Favorability” of Motions for Summary Judgment

Sims v. Hawkins-Sheppard, 11-0678 (La. 7/1/11), 65 So.3d 154.

Sims filed a medical-review panel complaint in 2007, alleging a lack of informed consent. The panel unanimously found that the physician did obtain informed consent.

Subsequent to Sims’ filing in May 2009, interrogatories were propounded to her, asking for the identity of experts who would testify in support of her claim. She responded that she had none. The defendant then filed a motion for summary judgment.

The hearing date on the defendant’s motion was continued for two months at the request of plaintiff’s counsel. Prior to the new hearing date, plaintiff’s counsel filed an opposition to the motion for summary judgment and included as an exhibit an unsigned affidavit from a physician. Counsel advised that a signed affidavit would be substituted at the hearing, but on the hearing date, counsel was unable to produce it. The plaintiff then informed the court that she wished to discharge her attorney and hire a new one. The trial court advised Sims that her decision to obtain new counsel would not delay the proceedings, and the court then granted both the motion for summary judgment and the motion to terminate trial counsel.

The court of appeal reversed, holding that the court abused its discretion by failing to allow the plaintiff a reasonable amount of time to find new counsel and to have the affidavit signed. The court of appeal also found that the plaintiff had been “misled and deceived by her former counsel” and reversed the grant of summary judgment. Id. at 156.

In his writ application, the defendant-physician cited recent Supreme Court opinions that caused the court to recognize an apparent “justified concern” that the appellate courts were reversing district courts that had been applying the summary judgment rules set forth in the Louisiana Code of Civil Procedure article, adding, “Motions for summary judgment are favored under the law since the amendment to La. C.C.P. article 966 in 1996.” Id.

The Supreme Court found the same to be true in Sims: There was no abuse of the trial court’s discretion in granting summary judgment. No good cause was shown why additional time should have been granted to file an opposing affidavit; hence there was no genuine issue of material fact as to whether this plaintiff would be able to prove that the defendant breached any standard of care. The appellate court opinion was reversed and the case remanded.

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Coon’s land, or in the alternative, to select the shortest route from the public road to the southwest corner of its property. Coon answered that the proposed passages would be injurious to his property because they would bisect the estate and disturb the hunting lodge that leased that portion of the land. Coon proposed an alternative right of passage along the northern boundary of his westerly tract. This tract would provide access to the public road and would be least injurious to him.

The trial court noted the three possible options for the location of the right of passage: (1) the shortest route; (2) the existing logging road; and (3) the border or west side/north side route proposed by Coon. While selecting the shortest route to the public road, the trial court found that the other two options had “pros and cons of equal weight,” but that codal provisions governing rights of passage opted for the “shortest route.”

On appeal, Coon argued that the trial court erred in fixing the passage along the shortest route rather than along the boundary route, which would be least injurious to its estate. The appellate court rejected this argument, reasoning that “the law favors the shortest route, and departure from the general rule favoring the shortest route must be supported by ‘weighty considerations.’” The court rejected Coon’s argument, explaining:

“While the right of passage should be fixed at the point least injurious to the servient estate, the matter of its location is not to be left to the ‘caprice or option’ of the party who must grant the servitude. The court must also be mindful of the rights that the law affords the dominant estate owner. As such, a right of passage that is ‘extremely circuitous, impracticable, and expensive should not be selected because it is less burdensome to the servient estate owner.’”

In reaching its decision, the court looked to La. Civ.C. art. 692, which states that the owner of the enclosed estate may not demand a right of passage at the location of his choice. Rather, it “generally shall be taken along the shortest route from the enclosed estate to the public road at the location least injurious to the intervening lands.” The court recognized that the use of the term “generally” in article 692 indicates that there are exceptions to the shortest-route requirement. “While courts will normally grant a right of passage that is least injurious to the servient estate, other factors such as distance, degree of injury to the servient estate, practicability, and cost weigh in the decision of where to locate the right of passage.” Nevertheless, the court reemphasized that the location of a right of passage other than that of the shortest route to the public road must be supported by “weighty considerations.” The court reasoned that Coon had not established such factors and lacked the “weighty considerations” needed for a departure from the general rule. Accordingly, the court affirmed the decision to make the right of passage along the shortest route to the public road.

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