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2012 Recent Developments in Legislation & Jurisprudence

**Baton Rouge
Kenner
Lafayette
Lake Charles
Monroe
New Orleans
Shreveport**

Book 1 of 2

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CLE CREDIT CALCULATION SHEET

2012 Recent Developments in Legislation & Jurisprudence Seminar

Please keep this sheet for your records.

Louisiana, Mississippi, Texas: 12.5 hours (max.)

TOPIC	CREDIT HRS.	ATTENDANCE	
Business Organizations	0.5	Yes	No
Criminal Law & Procedure	1.0	Yes	No
Employment Law	1.0	Yes	No
Ethics	1.0#	Yes	No
Family Law	1.0#	Yes	No
Federal Civil Procedure	0.5	Yes	No
Insurance Law	0.5	Yes	No
Louisiana Civil Procedure	1.0	Yes	No
Mineral Rights	1.0	Yes	No
Professionalism	1.0#	Yes	No
Property Law, Sales & Leases	1.0#	Yes	No
Security Devices	1.0#	Yes	No
Successions & Donations	1.0#	Yes	No
Torts	1.0	Yes	No

TOTAL HOURS ATTENDED = _____LA * _____MS ** _____TX ***

Louisiana, Mississippi, Texas: 12.5 hours (max.)

This topic is also approved for 1.0 CE credit hour for Title Insurance Licensees.

	Louisiana Course Number:	Texas Course Number:
Baton Rouge, Sept. 7-8	0117120907	901251594
Shreveport, Sept. 13-14	0117120913	901251594
Lafayette, Oct. 4-5	0117121004	901251594
Baton Rouge, Nov. 2-3	0117121102	901251594
Monroe, Nov. 8-9	0117121108	901251594
Lake Charles, Nov. 15-16	0117121115	901251594
Kenner, Nov. 29-30	0117121129	901251594
New Orleans, Dec. 7-8	0117121207	901251594

* To calculate your Louisiana credits, divide the total sum of minutes you attended by 60 and round off the result to the nearest .01 (hundredth) hour. NOTE: .005 hour is rounded up to the next highest .01 hour.

** To calculate your Mississippi credits, divide the total sum of minutes you attended by 60 and round off the result to the nearest .10 (tenth) hour. NOTE: .05 hour is rounded upward. Thus 6.25 credit hours is rounded up to 6.3.

*** To calculate your Texas credits, divide the total sum of minutes you attended by 60 and round off the result to the nearest .25 (quarter) hour. For example, 5.83 hours is rounded down to 5.75 credit hours, whereas, 5.90 hours is rounded up to 6.0 credit hours.

SPEAKER BIOS

H. KENT AGUILLARD is an attorney whose office is in Eunice, La. and whose areas of practice are primarily bankruptcy, commercial litigation, and bankruptcy related litigation. Kent holds national and state bankruptcy specialist certifications. He represents debtors, creditors, and trustees in different federal districts. Kent graduated from LSU Law School in 1979 and has been married to Denise Smith for 39 years. They have four children and five grandchildren. He is a member of Gideons International, enjoys the outdoors, friends, and family and considers himself an ordinary man who God has “blessed and highly favored.”

JENNIFER BORUM BECHET is a Member of Stone Pigman Walther Wittmann, LLC, in New Orleans. She has a practice concentrated in commercial and corporate litigation, compliance and ethics, as well as appellate and professional liability matters. She is admitted to practice law in Louisiana, New York, District of Columbia, Texas and Virginia. Ms. Bechet is rated AV in Martindale-Hubbell. Prior to joining Stone Pigman, she served as an Assistant United States Attorney for the Southern District of New York. During her service as a federal prosecutor, she handled a wide variety of white collar matters including corruption, embezzlement, and bank fraud investigations. She was a member of that office's Public Corruption Unit. In addition to trying cases to verdict, she argued numerous appeals before the United States Court of Appeals for the Second Circuit. Subsequently, she practiced law in Richmond, Virginia; including representing a global financial services firm in securities arbitration matters. Ms. Bechet received her J.D. from Harvard Law School in 1990 where she was an editor of the *Harvard Law Review*. She received her B.A. with Highest Honors from Hampton University in 1987, graduating first in her class. In 2007, she was recognized as that university's Outstanding Twenty-Year Alumnus. Upon graduating from law school, she served as Judicial Law Clerk to the Honorable James M. Sprouse of the United States Court of Appeals for the Fourth Circuit. Ms. Bechet is co-chair of the Ethics and Professionalism Committee of the American Bar Association Section of Litigation and immediate past co-chair of the Minority Trial Lawyer Committee. She is also a member of the ABA Litigation Section's Criminal Litigation and Appellate Practice Committees. She is a member of the Editorial Board of the Louisiana Bar Journal as well as the Louisiana State Bar Association's Ethics Advisory Service. She is also a member of the Society of Corporate Compliance and Ethics, New Orleans Bar Association, Louisiana Association of Black Women Attorneys, Federal Bar Association, Louis A. Martinet Society, Alpha Kappa Alpha Sorority, Inc., and American MENSA, Ltd. In 2004, she received state-wide recognition as "Big Sister of the Year" for her volunteer activities and legal work on behalf of Big Brothers Big Sisters Services, Inc. She has served as an officer and Master of the John Marshall Inn of Court. Ms. Bechet is the author of several nationally-published articles and has lectured on ethics and trial technique.

BERNARD E. BOUDREAUX, JR. is a Partner in the Baton Rouge law firm of Breazeale, Sachse & Wilson, L.L.P., where his principal areas of practice include corporate representation, business negotiations, joint ventures and business dispute

resolution. Mr. Boudreaux served as Executive Counsel to Governor Mike Foster from 2000-2004. During that time, he successfully mediated or negotiated settlement of disputes between Harrah's Inc. and the New Orleans Restaurant and Hotel Association, Harrah's Inc. and the State of Louisiana, the New Orleans Saints and the State of Louisiana, and the three Louisiana Indian tribes and the State of Louisiana as to renewal of gaming compacts. Mr. Boudreaux successfully mediated the end of the forty-seven year old desegregation litigation between the East Baton Rouge School Board, the United States Department of Justice, and the NAACP after having been appointed mediator by U.S. District Court Judge John Brady. Prior to his service with Governor Foster, Mr. Boudreaux served for 19 years as the District Attorney and 15 years as Assistant District Attorney for the 16th Judicial District, serving Iberia, St. Martin and St. Mary parishes. He served as President of the Louisiana District Attorneys Association and chaired its committee on the Louisiana Code of Evidence at the time of the adoption of the code. He is a former member of the LSU Board of Supervisors and its Executive Committee. He is currently a member of the Louisiana State Law Institute Council and the Institute's Code of Evidence Committee. He is a graduate of LSU Law Center where he was a member of Law Review. Mr. Boudreaux is currently a member of the adjunct faculty at LSU Law Center and teaches Administration of Criminal Law. He has been a guest lecturer at numerous seminars and conventions and is the co-author of the *Louisiana Sentencing Guidelines Manual*, published by West Publishing in 1993. He is admitted to practice in all courts in Louisiana as well as the U.S. Court of Appeals and U.S. Supreme Court. Mr. Boudreaux is a member of the American Bar Association and the Louisiana State Bar Association. In 2006, he was inducted into the Louisiana Justice Hall of Fame.

PATRICK J. BRINEY is a founding partner in Briney Foret Corry, LLP, in Lafayette. His areas of practice include: Professional Malpractice; Construction Law; Products Liability; Insurance; Fire, Auto and General Liability Litigation, Medical Malpractice, and Arbitration. He obtained his Bachelor of Arts degree from Louisiana Tech University in 1969. He then joined the U.S. Army and served until 1972. In 1976, Mr. Briney earned a Juris Doctorate degree from Louisiana State University. While attending law school, he was the chairman of the Moot Court Board. He began his legal career as an assistant attorney general for the State of Louisiana and subsequently worked as an assistant district attorney for the Parish of East Baton Rouge. Mr. Briney is one of the incorporators of the Lafayette Public Education Fund and has been a member of several advisory committees for the Lafayette Parish School Board. He was vice president and a member of the board of the Lafayette Parish Bar Association. He is frequently invited to appear and speak at seminars for members of the bar and insurance industry. He has received an AV rating from Martindale-Hubbell for legal ability and adherence to professional standards of ethics. He is a member of the Louisiana Association of Defense Counsel, Defense Research Institute, Lafayette Parish and Louisiana State Bar Associations.

BEAU JAMES BROCK practices law in Baton Rouge with the law firm of Manasseh Gill Knipe Belanger, APLC. His primary areas of expertise include criminal defense, environmental criminal law, and litigation. Beau is a 1991 graduate of LSU Law Center after which he began his legal career as an Assistant District Attorney with East Baton Rouge Parish District Attorney's office during the Doug Moreau administration. From

1991 to 1999, he handled over 2000 cases, prosecuted fifty-three (53) felony jury trials without fail with sixteen (16) of his prosecutions resulting in mandatory life imprisonment sentences and three (3) death penalty sentences. In March 1999, Beau began working for the United States Environmental Protection Agency as the Regional Criminal Enforcement Counsel for the Baton Rouge Resident office. He was also appointed Special Assistant U.S Attorney for the Middle District of Louisiana from 2000-2003. He was later appointed as a Special Assistant U.S. Attorney in the Eastern District of Texas, in October 2007 through October 2008 on an environmental criminal case. Beau was also appointed a Special Assistant District Attorney in Iberville Parish where he seated and oversaw the first grand jury in state history to hear exclusively environmental criminal matters. Beau was appointed Assistant to the Secretary of the Louisiana Department of Environmental Quality in 2008, and re-appointed in 2010. He was designated as the Hurricane Gustav and Ike Coordinator for the agency in handling non-Incident Command and control issues and hurricane debris management. On August 10, 2010, he was selected by the DEQ Secretary and appointed by Governor Jindal, to serve as Assistant Secretary for the Office of Environmental Compliance at the DEQ. In that capacity, he was responsible for managing a staff of 432 employees. He resigned this position to join Manasseh Gill Knipe Belanger in January 2011. Beau has given more than 100 presentations and lectures to community, legal and other professional organizations in seminars and classes in Louisiana and other states.

PROFESSOR ANDREA BEAUCHAMP CARROLL holds the C.E. Laborde, Jr. Professorship at LSU Law Center, where she teaches and writes about the civil law, both in the context of substantive areas such as property law, family law, and community property, and in the broader context of its interaction with common law systems. She is the editor of the Family Law Prof Blog on the Law Professor Blogs Network. Professor Carroll led Louisiana's 2009 legislative reform on reimbursement in the community property context and is currently working toward a revision of Louisiana legislation on child relocation. Before joining the LSU Law Center faculty in 2003, Professor Carroll earned a B.S. in Finance from LSU, magna cum laude, and a J.D. from LSU Law Center, where she was a member of Law Review and The Order of the Coif. Following law school, she clerked for The Honorable W. Eugene Davis of the United States Court of Appeals for the Fifth Circuit, and practiced law at the law firm of Baker Botts in Dallas, Texas. Professor Carroll has had a law review article published in 2006, 2007, 2008, 2009, and two articles in 2010. She is also the author of *Louisiana Civil Jury Instruction Companion Handbook* (Thomson West 2007-2009).

PROFESSOR JOHN M. CHURCH holds the Harry S. Redmon, Jr. Professorship at LSU Law Center, where he teaches and writes in the areas of Torts, Toxic Torts, Intellectual Property, Internet Law, Competition Law, and Law & Economics. He has also taught Wine Law at LSU's summer law program in Lyon, France in the last two summers. He has a master's degree from the University of Illinois and a law degree from the University of Colorado, where he was a Harlo Fellow, the Case Note Editor of the *University of Colorado Law Review*, and was inducted into the Order of the Coif. Prior to joining the Law Center faculty in 1991, Professor Church practiced law in Denver and clerked for Judge Robert H. McWilliams of the U.S. Tenth Circuit. He serves as the Law Center's representative to the Board of Governors of the Louisiana State Bar Association,

and is active in local and state bar activities. He is one of the founding board members of the Louisiana Center for Civil Justice, an organization dedicated to the provision of legal services to those in need.

JEFFREY M. COLE has been practicing with the law firm of Plauché Smith & Nieset, LLC, since graduating from LSU Law School in 1979. He handles all types of insurance defense litigation. Jeff is a member of the Louisiana State, and Southwest Louisiana Bar Associations (Past President 2005), Louisiana Association of Defense Counsel (Past Board Member) and Southwest Louisiana Association of Defense Counsel (President, 1985). He is admitted to practice before all of the state and federal district courts of Louisiana, all of the state appellate courts of Louisiana, and the U.S. Court of Appeals for the Fifth Circuit. By appointment of the Louisiana Supreme Court, he has served on the Judicial Campaign Oversight Committee, the Ad Hoc Committee to study the finances of the Office of Disciplinary Counsel, and currently serves on the Mandatory Continuing Legal Education Committee. He is a fellow of the Louisiana Bar Foundation. Recognized for his expertise in the workers' compensation system in Louisiana, Jeff Cole has conducted numerous seminars for claims adjusters on this subject.

PROFESSOR WILLIAM R. CORBETT holds the Frank L. Maraist Professorship at LSU Law Center where he teaches and writes primarily in the area of Labor and Employment Law, but he also teaches Torts. He taught as a Visiting Professor at William & Mary and the University of Georgia. Professor Corbett received his B.A. from Auburn University and his law degree from the University of Alabama, where he was Editor-in-Chief of the *Alabama Law Review* and a member of the Order of the Coif. He also received the M. Leigh Harrison Award presented to those graduating in the top 5 percent. He joined the law faculty at LSU in 1991, after practicing in Birmingham, Alabama with Burr & Forman. Professor Corbett served as Vice Chancellor of the Law Center from May 1997 to January 2000. He served as Executive Director of the Louisiana Judicial College from 1998-2000, and has served as Executive Director of the Louisiana Association of Defense Counsel since 2001.

THOMAS J. CORTAZZO is a Partner at Baldwin Haspel Burke & Mayer, LLC in New Orleans. Tom is a native of New Orleans. He earned his Bachelor of Public Administration Degree *summa cum laude* from Loyola University College of Business, where he attended on academic scholarship. He received his Juris Doctor from Loyola University School of Law in 1987, where he was a member and Comment/Casenote Editor of the *Loyola Law Review* and a moot court teaching assistant. Tom has been practicing law for more than 24 years. His practice consists of litigation in courts and administrative tribunals and other forms of dispute resolution such as arbitration and mediation. His experience ranges from various forms of commercial litigation to insurance matters. Tom is a member of the New Orleans, Louisiana State, American and Federal Bar Associations and various professional organizations. He has lectured on legal topics to lawyers, business groups and schools, as well as authored legal publications. He currently serves on the firm's Executive Committee. Tom also stays active in the community, serving as a Member and Secretary of the Loyola University School of Law Alumni Association Board, and member of the Brother Martin High School Parents Club

Executive Board and the St. Clement of Rome School Board. He is also very involved with the Rotary Club of Carrollton (in New Orleans), where he led the Carrollton Rally, a fundraiser and project that placed computer labs in public elementary schools and encouraged their use. He also led in the formation of the Carrollton Rotary Children's Foundation, a non-profit endowment supporting local children's charitable causes.

THE HONORABLE THOMAS F. DALEY is District Attorney for St. John the Baptist Parish. Prior to being elected as District Attorney, he served for twelve years as a judge on the Louisiana Fifth Circuit Court of Appeal from 1996-2008. In 2008, he was named Judge of the Year by the Louisiana Bar Foundation. He also served for six years as a State District Court Judge for the 40th Judicial District Court from 1990-1996. Prior to taking the bench, he was an Assistant District Attorney and Parish Attorney in St. John the Baptist Parish from 1984 to 1989 and maintained a general civil practice from 1978 through 1989. He received his Masters in Law in Judicial Process from the University of Virginia School of Law in 2004, his Juris Doctorate from Loyola University School of Law in 1978 and his Bachelor of Arts in Economics and English from Rutgers University in 1975. He is an Adjunct Professor at LSU Law Center teaching a course in pre-trial procedure. He lectures extensively about criminal and civil procedure in continuing education.

WILLIAM R. FORRESTER, JR. is a Partner in the law firm of Lemle Kelleher, L.L.P., and practices in the New Orleans office. His areas of practice include commercial litigation, business litigation, securities litigation, professional liability, and class actions & complex litigation. Mr. Forrester was admitted to the Louisiana Bar in 1968 after graduating from Tulane University Law School, where he was a member of the Board of Editors of the Tulane Law Review from 1966 to 1968. He has taught Louisiana Practice at Tulane University's Law School since 1976 and received the Monte Lemann Award as the outstanding adjunct professor in 1992. Presently, Mr. Forrester is a member of the New Orleans Bar Association (of which he has been a member of the Committee on Unauthorized Practice of Law since 1974). He has served on the Executive Committee of the New Orleans Bar Association. He has been elected to the House of Delegates of the Louisiana Bar Association since 1978. He is the Reporter of the Civil Procedure Section of the Louisiana Law Institute and has drafted numerous amendments to the Louisiana Code of Civil Procedure. He has been elected a member of the New Orleans Civil Service Commission since 1993 and is currently the Chairman. He has been President of the Louisiana Civil Service League and PATCH (People Attached to Children's Hospital). Mr. Forrester has published articles on Louisiana Civil Procedure in the Louisiana State University and Tulane Law Reviews and Louisiana Bar Journal. He is a member of the Board of Advisory Editors of the Tulane Law Review. He has served as a member of the Board of Trustees of Country Day School and President of its parents' organization. Mr. Forrester was honored by *Louisiana Super Lawyers*® 2008, 2009, 2010, 2011 and 2012 for his work in Business Litigation; Bonds/Government Finance; and Personal Injury Defense: General. He is listed in *The Best Lawyers in America*® for the areas of commercial litigation, mass tort litigation and professional malpractice law.

JUDGE JOE GIARRUSSO, JR. is a Mediator and Arbitrator with Mediation Arbitration Professional Systems, Inc. (MAPS) in Metairie. He was a Magistrate for the Orleans Parish Criminal District Court from 1992-2006, and was Of Counsel to the McGlinchey Stafford firm in New Orleans from 1988-2008, practicing in the health care arena. He has also served as Assistant District Attorney in Orleans Parish, an Assistant Attorney General for the State of Louisiana, and an Assistant United States Attorney. Mr. Giarrusso has an AV rating in the Martindale-Hubbell legal directory. He is an adjunct professor on the faculty of Loyola Law School, and has conducted numerous continuing legal education seminars for the bench and bar on the subjects of Professionalism, Ethics and Domestic Violence. He has a degree in American Government and Theology from Georgetown University (1974), a J.D. from Tulane University Law School (1977), and a Master of Pastoral Studies (With Highest Distinction) from Loyola University (1985). In 1990, Mr. Giarrusso was a co-recipient of the Capital Defense Advocacy Award of the Louisiana Association of Criminal Defense Lawyers. He was the 1992 Christian Brothers School *Alumnus of the Year*. In 1994, Mr. Giarrusso was recognized by the Louisiana State Mental Health Association for producing a ten-part video series entitled, *Mental Health Issues*, which has aired on local cable television. In 1995, he was acknowledged as the *Volunteer of the Year* by the Metropolitan Mental Health Association, and most recently served as Chair of the *Lawyers Helping Hands* project sponsored by the Louisiana State Bar Association Community Action Team helping to feed the needy. In May 2001, Mr. Giarrusso received the Order of St. Louis Medallion for service to the Archdiocese of New Orleans.

SAM N. GREGORIO has practiced law in Shreveport in his own firm since 1976. His practice is limited to plaintiff's personal injury. Mr. Gregorio graduated summa cum laude with a B.A. degree in 1973 from Loyola University in New Orleans. He received his J.D. degree in 1976 from LSU graduating Order of the Coif. Academic honors while attending LSU Law Center include Omicron Delta Kappa and LSU Law Center Hall of Fame. Mr. Gregorio is/has been a member of the following professional organizations: Former President and sustaining member of the Louisiana Association for Justice, formerly the Louisiana Trial Lawyers Association (Executive Committee, Board of Governors); Sustaining member of the American Association for Justice, formerly the Association of Trial Lawyers of America (State Delegate to the Association of Trial Lawyers of America 2003-2004); LSU Law Center Alumni Board of Trustees (2001-2006); LSU Law School Capital Campaign, Chairman Northwest Louisiana Steering Committee; Louisiana Supreme Court Attorney Advertising Committee (2006-2007). Louisiana State Bar Association (House of Delegates 2000-2008; Rules of Professional Conduct Committee 2005-present, including Subcommittee on Attorney Advertising Rule Changes and Advertising Executive Review Group; Committee on Judicial Independence 2004; Practice Assistance & Improvement Committee 2006; Committee on Professionalism 2006; Ethics Advisory Service Subcommittee 2005); Caddo Parish Indigent Defender Board of Directors (Chairman - 2005-2007, Vice-Chairman - 2004); Shreveport Bar Association (Chairman of the Grievance and Ethics Committee for 1997 and 1998); Louisiana Bar Foundation; Harry V. Booth American Inn of Court (Master); American Bar Association. He is also on the Board of Directors of the Louisiana State University-Shreveport Foundation 2007-2010 (Audit Committee 2006).

KEITH B. HALL is Assistant Professor of Law and Director of the Mineral Law Institute at LSU Law Center. Prior to joining the Law Center's faculty, he taught Introduction to Mineral Law as an Adjunct Professor at Loyola University School of Law from 2008 until Spring 2012, and practiced law for 16 years at Stone Pigman Walther Wittmann LLC in New Orleans. His primary areas of practice were in oil and gas law, environmental law, and toxic tort litigation. Professor Hall serves as Chair of the New Orleans Bar Association's Oil and Gas Committee, a member of the Advisory Council for the Louisiana Bar Association's Environment Law Section, and as Vice Chair for the Oil & Gas Committee of the American Bar Association's Environment, Energy and Resources Section. He co-authors "Recent Developments: Mineral Law" for the bimonthly *Louisiana Bar Journal*, and authors a blog called, the "Oil & Gas Law Brief." Professor Hall received his law degree, *summa cum laude*, from Loyola University School of Law, where he was chosen to Moot Court and served as Managing Editor of the *Loyola Law Review*. He graduated from Louisiana State University with an undergraduate degree in chemical engineering in 1985.

THE HONORABLE PATRICK J. HANNA was appointed to serve as a Magistrate Judge for the United States District Court, Western District of Louisiana, Lafayette Division, on December 1, 2009. Prior to his appointment, Judge Hanna practiced law in Lafayette, Louisiana for over 20 years. After his discharge from the United States Coast Guard, he attended USL where he graduated in 1984 with an undergraduate degree in political science. He received his Juris Doctor from Louisiana State University Law Center in 1987. Upon graduation, he began practicing law with the Onebane Law Firm in Lafayette. In 1992, he attended the Vermont Law School to study environmental law. In 1994, he and his partners formed the law firm of Rabalais, Hanna & Hays where he focused his practice in maritime, construction, and environmental law. The firm became Rabalais, Hanna & Hebert in 1997 and remained as such until his appointment in 2009.

THE HONORABLE KAREN L. HAYES was appointed a part-time United States Magistrate Judge for the Western District of Louisiana, Monroe Division in 1997, and a full time Magistrate Judge in 2005. She is a native of Baton Rouge, Louisiana, earned her B.A. in English Literature from LSU, her Masters in English Literature from NLU (now ULM), and her law degree from Mississippi College School of Law, where she graduated first in her class while commuting to law school each day and, along with her husband, Tom, rearing their four young children. After law school, Judge Hayes clerked for the Honorable Donald E. Walter, United States District Court for the Western District of Louisiana, before entering private practice at Hayes, Harkey, Smith & Cascio, LLP.

PROFESSOR WENDELL H. HOLMES holds The Curry Family Professorship at LSU Law Center where he has taught Business Associations, Commercial Paper, Contracts, UCC Sales, UCC Security Devices, and Obligations. Professor Holmes is the co-author of West's *Louisiana Civil Law Treatise on Business Organizations*, and has published a number of articles on contracts, agency, business associations, and commercial law. He received his law degree from Tulane Law School where he was Managing Editor of the *Tulane Law Review* and a member of the Order of the Coif. Before beginning his career as a law professor at the University of Mississippi in 1983, he was a law partner in Butler

Snow in Jackson, Mississippi. In 1986, he served on the Mississippi Secretary of State's Business Law Reform Task Force. Professor Holmes joined the LSU faculty in 1987.

THE HONORABLE MARK L. HORNSBY was appointed United States Magistrate Judge for the Western District of Louisiana, Shreveport Division on January 14, 2005. Judge Hornsby graduated Order of the Coif from LSU Law School in 1988, and served as Law Clerk for Chief Judge Tom Stagg in Shreveport from 1988 to 1990. He then practiced law with Wiener, Weiss & Madison in Shreveport from 1990 to 2004. He also serves as President of the Booth-Politz Chapter of the American Inns of Court.

GORDON L. JAMES is a Member of the law firm of Hudson, Potts & Bernstein, L.L.P. in Monroe. He was born in El Dorado, Arkansas in 1954. He received his undergraduate degree from then Northeast Louisiana University in 1976, where he graduated Summa cum Laude. While at NLU, Gordon was a member of Omicron Delta Kappa leadership honor society and Phi Eta Sigma history honor society. He earned his Juris Doctorate from Louisiana State University, Paul M. Hebert Law Center in 1979. He served on the Louisiana Law Review and was also a member of Order of Coif. Upon graduation Gordon moved to Monroe and began practicing with Hudson, Potts & Bernstein, where he has continuously practiced for over thirty years. Gordon is a fellow in the American College of Trial Lawyers. He is a member of the American College of Trial Lawyers, Louisiana State Bar Association, Louisiana Association for Defense Counsel, where he has served as a representative, Defense Research Institute, International Association of Defense Counsel, and the International Inns of Court. He has also served as the Fourth Judicial District Bar President.

PROFESSOR CHENEY C. JOSEPH, JR. holds the Joe W. Sanders – Law Alumni Association Professorship at LSU Law Center, where he teaches Criminal Law, Criminal Justice, Evidence, and Post-Conviction Procedure. He has also served as Vice Chancellor for Academic Affairs at LSU Law Center since 2000. Professor Joseph is Executive Director of the Louisiana Judicial College. He served as Executive Counsel to Governor Mike Foster during his first term of office (1996-2000). A graduate of Princeton and the LSU Law Center, he has taught law since 1972. He has also served in a number of interim positions including District Attorney for the 19th Judicial District, Judge Pro Tem for the 16th and 40th Judicial District Courts, and as United States Attorney for the Middle District of Louisiana. Professor Joseph is the coauthor of the *Louisiana Sentencing Guidelines Manual* and *Louisiana Jury Instructions* (West) among numerous other publications. He is an honors graduate of Princeton (1962), and graduated from LSU Law School in 1969 as a member of the Order of the Coif. He began teaching law at LSU in 1972.

THE HONORABLE KATHLEEN KAY was sworn in as United States Magistrate Judge for the Western District of Louisiana, Lake Charles Division, in December of 2007. In addition to her normal duties as Magistrate Judge, Judge Kay has been very active on a national level in development of a petty offense case management system. She has been the sole member of the judiciary working with the a panel of individuals from the Administrative Office of the United States Courts, Clerks of Court of various districts, and the Central Violations Bureau developing a system whereby the Central

Violations Bureau data will be integrated with the CM/ECF System. She has made presentations on this new application to other Magistrate Judges at their 2010 conferences and to other courtroom personnel that same year at the Administrative Office Operations Forum in National Harbor, Maryland. This system is currently being tested by several districts, including the Western District of Louisiana, and is expected to go live nationwide during the Fall of 2012. Judge Kay is a native of Lake Charles, Louisiana. She attended University of New Orleans and McNeese State University before being awarded her Bachelor of Arts degree in Political Science from Louisiana State University in 1982. Judge Kay was awarded her JD Degree in 1985 from Paul M. Hebert Law Center at Louisiana State University where she was a member of the *Louisiana Law Review*. Upon graduation from law school Judge Kay clerked for the Honorable Earl E. Veron, District Judge for the Western District of Louisiana. Thereafter she engaged in private practice in Lake Charles with various firms and then individually, initially specializing in admiralty and personal injury defense then gravitating toward general civil litigation and family law. She served as an Adjunct Professor for Louisiana Civil Procedure in the Paralegal Program at McNeese State University and was an occasional lecturer at various continuing legal education seminars. Judge Kay has been married since 1989 to Scott McPherson, originally of Walla Walla, Washington, and they are the parents of two children, Sally Kay McPherson and Robert "Robbie" McPherson.

JULIE H. KILBORN serves as Deputy Public Defender and Director of Training for the Louisiana Public Defender Board. She took office on April 1, 2009. Before joining the Louisiana Public Defender Board, Ms. Kilborn practiced as a staff attorney at the Louisiana Capital Assistance Center where she defended indigent men and women who were charged with serious felony and capital offenses. Prior to that, she worked as an attorney at the Baton Rouge Capital Conflict Office. In late 2005 and early 2006, Ms. Kilborn was a member of the small team of volunteer attorneys who litigated petitions for *habeas corpus* on behalf of 2,000 Hurricanes Katrina and Rita inmate evacuees who were held in jail in violation of their constitutional rights. In 2008, she researched and co-wrote an *amicus curiae* brief to the United States Supreme Court in Kennedy v. Louisiana arguing the unconstitutionality of the death penalty for a non-homicide rape (cited in majority opinion at 554 U.S. at 550 (2008)). In addition to designing and implementing a comprehensive public defender training program in Louisiana, Ms. Kilborn has served on the faculty of the National Defender Training Project's Public Defender Trial Advocacy Program, the Kentucky Department of Public Advocacy Litigation Persuasion Institute, and the Southern Public Defender Training Center's Summer Institute. She currently serves on the Board of Governors and the Criminal Justice Committee of the Louisiana State Bar Association. She also serves as co-chair of the CLE Committee of the Louisiana Association of Criminal Defense Lawyers, and was previously co-chair of the Amicus and Legislative Committees. Ms. Kilborn graduated *magna cum laude* from Louisiana College with a Bachelor of Science in Criminal Justice. She received her J.D. from the Paul M. Hebert Law Center at LSU where she was a member of the *Louisiana Law Review* and was elected into the Order of the Coif. She is admitted in Louisiana state courts and the various United States District Courts throughout Louisiana.

THOMAS L. LORENZI is a partner in the law firm of Lorenzi & Barnatt, L.L.P. in Lake Charles. His practice areas include criminal defense law, DUI/DWI, and white collar crimes defense. Tom was born in New Eagle, PA and raised in the Monongahela Valley near Pittsburgh. He graduated from Duquesne University in 1972 with a BA. He attended LSU law school, graduating in 1975. In those days, lawyers who had never tried a case were being appointed to represent indigent defendants and paid the princely sum of \$1,000, which included any expenses they may have! Tom has handled nearly 50 capital cases, with no death verdicts. In addition, he has worked tirelessly to bring about judicial and legislative reform of funding for indigent defense and was instrumental in creating public interest law firms to provide cutting edge capital defense (Louisiana Capital Assistance Center) and the closure of abusive juvenile prisons with long term reform of the juvenile justice system (Juvenile Justice Project of Louisiana). Tom's professional accomplishments have been recognized by numerous organizations. He has been a Fellow in the American College of Trial Lawyers since 2002, was named the Distinguished Louisiana Attorney in 2007 by the Louisiana State Bar Foundation, was awarded the 2007 David Hamilton Lifetime Achievement Award by the Louisiana State Bar Association, honored with the Justice Albert Tate, Jr. Award in 2003 by the Louisiana Association of Criminal Defense Lawyers and its Sam Dalton Capital Defense Advocacy Award in 2000, the 2006 Professionalism Award by the Judge Albert Tate American Inn of Court, and been named to Best Lawyers in America and *Super Lawyers*. Tom is a long time member of the LSBA House of Delegates, served on the Board of Governors and currently serves on the Legislative Committee of the Louisiana Bar Association. Tom has also served on the Louisiana State Law Institute Committees on the Code of Criminal Procedure and Bail Bond Reform since 1992. He is a member of the Louisiana Association of Criminal Defense Lawyers (President 1992, Board of Directors 1985-Present), and the National Association of Criminal Defense Lawyers. He is also a member of the Louisiana and National Cattleman's Association.

WAYNE R. MALDONADO is a Senior Partner with Ungarino & Eckert, LLC, in Metairie. He has been practicing law for 24 years and is admitted to practice in all Louisiana federal district courts and the United States Fifth Circuit Court of Appeals. Wayne's practice is concentrated in general liability, professional liability, auto/transportation, insurance, toxic tort, medical malpractice and construction litigation. He has tried numerous cases in state and federal court in Louisiana, Mississippi and Texas and has handled appeals in the Louisiana Circuit Courts of Appeal, the Louisiana Supreme Court and the United States Fifth Circuit Court of Appeals. He received his law degree in 1988 from Louisiana State University Law Center, where he was a member of the Moot Court Board.

G PAUL MARX is District Public Defender for the 15th Judicial District for the parishes of Acadia, Lafayette and Vermilion. He has worked in the public defender profession from his first file in late 1980, through and including his current post as chief public defender, known by the statutory title of District Defender, in what he calls the Acadiana District of Southwest Louisiana. He was born in Acadia Parish and completed his legal education at the LSU Law Center in 1980, leading to his admission to the bar that year. Paul has been active in reform, including work as a leader of the Louisiana Public

Defenders Association and a 17 year term as chief under the old law. In 2007 he was an active participant in the drafting of the Public Defender Act of 2007, which updated public defenders in Louisiana with near unanimous support of the Louisiana Legislature. In 1989 his office created the first public defender directed training in the 15th Judicial District and since 1989 has been active in training and change to better serve clients who need appointed counsel. His work record includes a great deal of Death Penalty Defense and Appellate work, as well as Federal Criminal Defense. Paul also serves as an adjunct instructor at University of Louisiana Lafayette in Criminal Justice. His wife, Paula, is a graduate of the same 1980 Law Center class, and they have three grown daughters: Sarah, who got her Ph.D. from LSU in Economics and teaches at the University of Arkansas, Little Rock; Lauren, who is a student at University of Louisiana Lafayette; and Rebecca, who is a Mechanical Engineer with John Deere Corporation in Thibodaux, Louisiana.

WM. SHELBY McKENZIE received his undergraduate degree from Princeton University in chemical engineering, and he is a 1964 graduate of LSU Law School, where he was a member of the Order of the Coif and served as Editor-in-Chief of the *Louisiana Law Review*. Since graduation, he has practiced with the Baton Rouge law firm of Taylor, Porter, Brooks & Phillips. He is an Adjunct Professor of Law at the LSU Law School, having taught the course in Insurance Law since 1971. He is co-author of McKenzie and Johnson, *15 Louisiana Civil Law Treatise: Insurance Law and Practice* (West 1986), Second Edition (1996), and Third Edition (2006). The manuscript for the Fourth Edition was submitted in August 2012. He was recognized as the 2005 Distinguished Alumnus of the LSU Paul M. Hebert Law Center and as the Louisiana Bar Foundation's 2011 Distinguished Louisiana Attorney. He is a Fellow and former State Chair of the American College of Trial Lawyers; and former President of the Louisiana Association of Defense Counsel, the Baton Rouge Bar Association and the LSU Paul M. Hebert Law Center Alumni Board of Trustees. He has participated in numerous seminar programs on insurance law topics.

JOSEPH W. MENGIS is a partner in the law firm of Perry, Atkinson, Balhoff, Mengis & Burns, L.L.C. in Baton Rouge where he practices in the area of successions, wills, trusts and estate planning. He is a Fellow of the American College of Trust and Estate Counsel and is board certified as an estate planning and administration specialist by the Louisiana State Bar Association. Joe is a member of and Treasurer for the Council of the Louisiana State Law Institute and is a member of the Institute's Coordinating, Semantics, Style and Publications Committee, Executive Committee, Power of Attorney for the Elderly Committee, and Successions and Donations Committee. Joe has also served on the Board of Governors of the Louisiana State Bar Association. He teaches the Successions, Donations and Trusts portions of the Barbri Bar Review course each summer.

PATRICK S. OTTINGER is a partner in the Lafayette law firm of Ottinger Hebert, L.L.C. He has been in private practice in Lafayette since December 1973. Mr. Ottinger's practice has been concentrated in the corporate and commercial area, with emphasis on oil and gas, financial transactions, real estate, eminent domain, mediation and arbitration, corporate and banking matters, as well as litigation in these areas. He graduated from the University of Southwestern Louisiana with a Bachelor of Science degree in 1971. He

received his Juris Doctorate degree in December 1973 from Louisiana State University Paul M. Hebert Law Center, where he was a member of the Moot Court Board. He is an Adjunct Professor of Law at LSU where, since 1996, he has taught the course in Mineral Rights. Also, Mr. Ottinger serves on the Advisory Council of the Mineral Law Institute. He has also served as Chair of the Section on Mineral Law of the Louisiana State Bar Association. He is the author of the course materials entitled Ottinger, A Course Book on Louisiana Mineral Rights (12th Rev. Ed., August 2011). He is a member of the Mineral Code Committee and the Tax Sales Committee of the Louisiana State Law Institute. He has been a Special Assistant Attorney General, representing the State of Louisiana in waterbottoms litigation. Mr. Ottinger served as City-Parish Attorney for the Lafayette City-Parish Consolidated Government from January 2004-February 2011. In that capacity, he was the chief legal advisor to the City-Parish President, the Consolidated Council and all of the departments and offices of government. He is admitted to practice in all Federal Courts in Louisiana, and in the United States Court of Appeal, Fifth Circuit. Since 1986, he has been admitted to practice in the State of Texas in which state he also maintains both a transactional and litigation practice. He has organized and spoken at numerous continuing legal education seminars on oil and gas, banking and real estate topics sponsored by Louisiana State Bar Association, Lafayette Association of Professional Landmen, Houston Association of Professional Landmen, Houston Bar Association and University of Southwestern Louisiana (now University of Louisiana – Lafayette) -- Continuing Education Department. He is an experienced arbitrator and mediator in oil and gas matters. Mr. Ottinger served as the President of the Louisiana State Bar Association during the years 1998-89. He is a Fellow of the Louisiana Bar Foundation and served on its Board of Directors from 2003-2007. He has served as President of the Lafayette Parish Bar Association and as a Member of the Board of Governors of the Louisiana State Bar Association. He served as Chair of the Reading Committee in connection with the publication of the Louisiana Professional Responsibility Law and Practice (Dane S. Ciolino, Editor), a project initiated during Mr. Ottinger's term as President of the Louisiana State Bar Association.

DARREL J. PAPIILLION is a trial lawyer who handles complicated wrongful death and serious personal injury cases. He has also won millions of dollars in settlements of clergy abuse cases in South Louisiana. Darrel is a partner in the Baton Rouge law firm of Walters, Papillion, Thomas, Cullens, LLC. Darrel is a graduate of Louisiana State University (B.A., 1990) and the LSU Paul M. Hebert Law Center (J.D., 1994). He is a former law clerk to Catherine D. Kimball, Chief Justice of the Louisiana Supreme Court. Before moving to Baton Rouge in 1999 to represent plaintiffs, he practiced at a large New Orleans law firm representing multinational corporations and insurers in products liability and casualty actions in state and federal court. He has served as an adjunct law professor at LSU Law Center, for nearly 10 years. Darrel has also served as an adjunct professor of law at Southern University Law Center in Baton Rouge, where he taught courses in pretrial litigation and trial advocacy. He is a widely sought after speaker, and is routinely invited to speak at seminars for other lawyers on a wide variety of issues throughout the state and country. Some of his recent seminars include wrongful death litigation, federal jurisdiction and procedure, understanding and proving psychological injuries and damages, insurance litigation issues and recent developments in civil law and

litigation. He has published articles in the Louisiana Law Review, the Louisiana Bar Journal, and other legal publications. He has an "AV" rating from Martindale Hubbell and has been recognized as a "Louisiana Super Lawyer" in the area of personal injury litigation for the past several years. Darrel has served as either President or as a board member of numerous professional and civic organizations. He is a member of the Board of Governors of the Louisiana State Bar Association, the Board of Directors of the Baton Rouge Bar Association, the Board of Directors of the Louisiana Bar Foundation, and he is a former President of the Wex Malone Chapter of the American Inns of Court, and a former member of the Louisiana State Bar Association House of Delegates, and the Board of Governors of the Louisiana Association for Justice. He was appointed by the Louisiana Supreme Court to serve on the Supreme Court Committee to study lawyer advertising in Louisiana and is a former Chairman of the Louisiana State Bar Association Ethics Advisory Service. He currently serves as Co-Chair of the Louisiana State Bar Association Continuing Legal Education Committee. In 2005, Darrel received the Louisiana State Bar Association's Michaelle Pitard Wynn Professionalism Award.

THE HONORABLE MICHAEL A. PITMAN serves as district court judge in the criminal division for the 1st Judicial District Court. He graduated from Baylor University with a Bachelor of Business Administration and holds a Juris Doctorate from Louisiana State University Law Center. Prior to his election, he served as Assistant District Attorney in Caddo and Bossier Parishes, where he prosecuted high-profile felonies, including many capital murder cases. In addition, he had a civil legal practice, was a certified family law mediator and has taught Criminal Law at LSU Shreveport for the past nine years. Judge Pitman is a first-degree black belt in Tae-Kwon Do and participates in triathlons and marathons throughout the country. He and his wife are founders of, and instructors for "Kick it Up," an after school program designed to teach children Christian principles through martial arts, and "Don't Be A Victim," a safety program for senior citizens, women and children.

THE HONORABLE J. WILSON RAMBO who serves in Division "C" of the Fourth Judicial District Court for Morehouse and Ouachita Parishes earned his Bachelor of Arts in Political Science from Louisiana State University in 1979, graduating cum laude, and his Juris Doctor from Paul M. Hebert Law Center in 1982. He served on staff with the Legislature during his undergraduate studies and throughout law school. He also served on staff with the Second Circuit Court of Appeal and as an Assistant District Attorney for the Fourth Judicial District. In private practice he served as in-house counsel for the Monroe City Marshal's Office and as local counsel in Monroe for the Southern States Police Benevolent Association. He was also a Public Defender for the Fourth Judicial District and is a past President and founding member of the Louisiana Public Defenders Association. He is also a past Master of the Fred Fudickar Chapter of the American Inns of Court.

THE HONORABLE STEPHEN C. RIEDLINGER was appointed a full time United States Magistrate Judge for the Middle District of Louisiana in 1986 and was reappointed in 2010 for a fourth eight-year term. As a United States Magistrate Judge he and the district's other Magistrate Judge are responsible for pretrial management of the civil cases pending in the district, as well as ruling on non-dispositive motions and recommending

rulings on dispositive motions referred by the District Judges, conducting evidentiary hearings, consent trials in civil cases, and trials in misdemeanor criminal cases. He received his B.A. in 1971 from Louisiana State University and his J.D. from the LSU Law Center in 1977. After receiving his law degree, he served as a judicial clerk to then magistrate, now Senior United States District Judge, Frank J. Polozola. After completing his clerkship, he spent eight years in private practice with a small Baton Rouge law firm which primarily represented plaintiffs. Magistrate Judge Riedlinger has been a speaker at continuing legal education programs and seminars sponsored by the LSU Law Center, Tulane Law School, the Louisiana State Bar Association and the Baton Rouge Bar Association.

MICHAEL H. RUBIN is a Member of the multi-state firm of McGlinchey Stafford in the firm's Baton Rouge office. Recognized for the depth of his knowledge about both business litigation and commercial financing, Mike has served as President of both the U.S. Federal Fifth Circuit Bar Association and the American College of Real Estate Lawyers, and for more than three decades has taught the course on Louisiana finance and real estate at LSU, Tulane and other law schools. His numerous law review articles and publications on real estate and finance have been cited as authoritative by state and federal courts, including the U.S. Fifth Circuit. Mike is one of only fifty attorneys in the United States elected to the Anglo-American Real Property Institute. He is active in the ABA's Real Property Section, the American Law Institute and is a member of numerous other business organizations, including the American College of Appellate Lawyers and the American College of Commercial Finance Attorneys. He has presented over 350 papers on ethics, professionalism, real estate and other topics throughout the United States, England, and Canada; his writings on ethics and professionalism have been utilized in law school courses around the country. Mr. Rubin is the author, co-author, and contributing writer of 11 books and more than 30 law review articles and periodicals. He is a National Burton Award winner, presented at the Library of Congress by the Burton Foundation, for outstanding legal writing. He was also awarded the Stephen Victory Award by the Louisiana State Bar Association for outstanding legal writing. He is a Louisiana Commissioner to the National Conference of Commissioners on Uniforms State Laws (2010-present). Mr. Rubin has served as president of the Louisiana State Bar Association and the Southern Conference of Bar Presidents. He is a member of the American Law Institute, the American College of Commercial Finance Lawyers, and the American College of Mortgage Attorneys. He currently serves as an advisory member of various committees of the Louisiana State Law Institute. He is AV rated in the Martindale-Hubbell legal directory, and has been recognized by *The Best Lawyers in America*, *Louisiana Super Lawyers*, and Chambers USA.

JAMES D. SEYMOUR, JR. is an associate in the Baton Rouge law office of McGlinchey Stafford, PLLC. He concentrates primarily on appellate practice and complex commercial and class action litigation. He assists clients with state and federal Constitutional issues dealing with subjects ranging from Fifth Amendment Takings and Due Process claims, Eighth Amendment claims, Spending Clause claims and Contract Clause claims. He also assists in the resolution of administrative issues ranging from education spending, unclaimed property and public finance. Mr. Seymour also helps resolve general environmental regulatory questions, business entity formation questions

and general commercial transaction and collections issues. He also assists clients in resolving covenant and building restriction questions. Prior to joining McGlinchey, he worked as a chemical engineer, handling safety, operations, and design issues for refiners in the Greater New Orleans area. Mr. Seymour received his law degree from Louisiana State University Law Center in 2004. He published a law review article on Deficiency Judgments in the *Louisiana Law Review* in 2009 (69 La. Law Rev. 784). He has a Master of Science in Chemical Engineering degree from Auburn University (1998), and a Bachelor of Science in Chemical Engineering *cum laude* degree from the University of South Alabama (1994) where he was a member of the Tau Beta Pi Engineering Honor Society and President of the student chapter of the American Institute of Chemical Engineers.

THE HONORABLE CARL V. SHARP currently serves on the criminal bench for the 4th Judicial District Court, Division G, for Ouachita and Morehouse Parishes. He was elected 1992. He earned a B.A. degree, in 1979, from the University of Louisiana at Monroe; and a J.D., in 1982, from Louisiana State University Law Center.

PROFESSOR GREG SMITH is Vice Chancellor for Business & Financial Affairs at the Paul M. Hebert Law Center at Louisiana State University, and holds the Professional Ethics Professorship of Law. He did his undergraduate work at Yale, where he majored in Political Science and graduated with honors. He obtained his law degree from Brigham Young University, where he was an article editor for the *BYU Law Review*, and was designated as a J. Reuben Clark Scholar. Following law school, Professor Smith served as a law clerk to Judge Monroe G. McKay of the United States Tenth Circuit Court of Appeals. He practiced law for 11 years in Phoenix, Arizona before joining the LSU law faculty in 1991. He teaches common law property, civil law property, land use planning, commercial paper, and legal profession. His recent published writings have dealt with judicial conduct, legal ethics, and property law – including a book entitled *Louisiana Judicial Conduct* (Birdfoot Delta Press 2006), and a book which he co-authored entitled *Louisiana Lawyering* (West Group 2007). Professor Smith contributes to the comprehensive, 15-volume treatise, *Thompson on Real Property* (Michie 2007), with the chapters on “Public Housing” and the “Rights and Duties of Landlords and Tenants.”

H. F. SOCKRIDER, JR. is President of the law firm of Sockrider, Bolin, Anglin & Batte, A P.L.C., in Shreveport. Mr. Sockrider is a Fellow in The American Academy of Matrimonial Lawyers, and is Board Certified as a Family Law Specialist by the LSBA. He serves as chairman of LSU’s annual Family Law Seminar and has spoken at this and other seminars in Louisiana for many years. He served as President of the Louisiana State Bar Association from 1992-93, and is a past-chairman of the Family Law Section and Young Lawyers Section of the LSBA, and the Shreveport Junior Bar Association. He is either a past or present member of numerous LSBA committees, including Bar Governance, Long Range Planning, Judicial Electoral Process, Professional Discipline, Search Committee for Executive Counsel, President’s Executive Committee and House of Delegates. He has long-standing affiliations with the Louisiana Bar Foundation, the Louisiana and American Trial Lawyers Associations, the Louisiana Law Institute, and the Harry V. Booth and Henry A. Politz Inn of Court. Early in his illustrious career, Mr.

Sockrider was chosen as Louisiana's Outstanding Young Lawyer, and was a three-time winner of Shreveport's Outstanding Young Man of the Year Award for his many accomplishments, both professionally and civically. Mr. Sockrider has been listed in *The Best Lawyers in America* since 1987, and has maintained an A-V rating in the *Martindale-Hubbell Law Directory* since 1975. He is an honor graduate of LSU Law Center where he was Managing Editor of the *Louisiana Law Review*. Considered one of Louisiana's premier Family Law practitioners, he also enjoys the reputation of an often sought speaker, teacher, attorney and consultant.

TYLER G. STORMS is a sole practitioner in Ruston, Louisiana. He is licensed in Louisiana and Texas, and having been graduated from Tulane (1993 B.A., English, *Magna Cum Laude*, departmental honors; 1996 J.D., *Cum Laude*), practices from the Ft. Worth, Texas area to Baton Rouge, Louisiana out of the centrally located office in Ruston, Louisiana. His primarily area of practice is in construction (representing heavy general contractors, utility contractors, and subcontractors), but Mr. Storms works in all areas of contract law, commercial litigation, property/real estate, and federal litigation, being a founding member of the North Louisiana Federal Bar Association. Mr. Storms is published in more than one field (health science, literature, and law). He has presented on multiple CLE topics, lectured at Tulane's summer abroad program in Rhodos Greece, clerked for the Hon. C. A. Marvin (then serving as the President of the U. S. Association of Chief Judges and the Chief Judge's representative of the Louisiana Law Institute) after having assisted Professor A. N. Yiannopoulos in editing the Louisiana Civil Code. Mr. Storms began his career with, and is an "alum" of, Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P. He currently serves on the Louisiana Law Institute, the editorial board of the Louisiana State Bar Journal, the House of Delegates, the Committee to Advise the President of the Louisiana Bar Association to speak on behalf of the association, an assistant examiner of the federal section of the Louisiana bar exam, as well as the Secretary-Treasurer of his local bar association in Lincoln Parish. He has also served as president of the Ruston Rotary Club, and served as a charter member of the Lincoln Parish Rotary Club. For more details, please visit www.stormslaw.com.

PROFESSOR J. RANDALL TRAHAN is the Louis B. Porterie Professor of Law and a civil law specialist at LSU Law Center, where he presently teaches Sales & Real Estate, Family Law of Persons & Family Law, Security Devices, Property Law, and Successions & Donations. He has also taught Obligations, Matrimonial Regimes, Legal Traditions & Systems, and Western Legal Traditions, and is co-author, along with Professor Ken Murchison, of *Western Legal Traditions & Systems: Louisiana Impact*. Professor Trahan received his B.A. in Political Science from LSU in 1982 and his law degree in 1989, with high honors, from LSU Law Center where he was Articles Editor of *Louisiana Law Review* and was inducted into The Order of the Coif. Before joining the Law Center faculty in 1995, Professor Trahan served as law clerk to the late Judge Alvin B. Rubin in the U.S. 5th Circuit Court of Appeals for one year and then practiced law with the firm of Phelps Dunbar in Baton Rouge for five years. He participates actively in law reform work as a member of the Marriage-Persons Committee, the Birth Certificate Committee and the Surrogacy Committee of the Louisiana State Law Institute.

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AGENCY

I. FORMATION, EXISTENCE AND NATURE

A. Employer is Liable for Torts Committed by Employee Only if Employee Was Acting Within Course and Scope of His Employment – Irwin v. Reubens, 75 So. 3d 952 (La. App. 4th Cir. 2011).

1. Defendant Reubens, a contractor, was living temporarily on the second floor of defendant Manning's house while repairing it and several other homes in post-Katrina New Orleans. On a Sunday afternoon, Irwin, the foreman on Reubens' construction jobs, went to see Reubens at Manning's house, and Reubens shot and killed him. Plaintiffs, representing Irwin's minor children, brought a wrongful death and survivorship action against Reubens and Manning, claiming that Reubens was in the course and scope of his employment with Manning when the shooting occurred. Manning moved for summary judgment, which the trial court granted.
2. The court of appeal affirmed. The court first noted that the plaintiffs presented no evidence that Manning had any right of control over Reubens, who was working on several houses for several homeowners during the same time period, and that the trial court therefore correctly found that there was no genuine issue of fact as to Reubens' status as an independent contractor.
3. However, the court went on to state that, even if the plaintiffs had created a genuine issue as to whether Manning was Reubens' employer, they would also have to produce evidence that the tort was within the course and scope of Reubens' employment. The court said that the relevant factors were those established by the Louisiana Supreme Court in LeBrane v. Lewis, 292 So. 2d 216 (La. 1974), i.e., that the tort (1) was primarily employment rooted, (2) was reasonably related to the employee's duties, (3) occurred on the employer's premises, and (4) occurred during the hours of employment.
 - (a) Applying those standards to the facts, the court noted that the tort occurred on a Sunday; Manning's house was then Reubens' residence, which is why Irwin went there; and that there was simply no evidence as to what transpired between Irwin and Reubens prior to the shooting. Therefore, no genuine issue of fact existed.

B. Purchaser at Auction Failed to Prove Status as Mandatary of Defendant – Dellinger v. Van Hoorebeck, 64 So. 3d 836 (La. App. 4th Cir. 2011).

1. At the November 2007 Opera Charity Ball in New Orleans, plaintiff made the successful bid of \$4000 for the one-time use of restored railway cars owned by The New Orleans Public Belt Railway. Plaintiff claimed that she did so at the request of the defendant individually who, because he was an auctioneer, could not bid himself. Defendant, however, testified that he suggested that she bid on behalf of the Krewe of Cork Mardi Gras club, of which both were members and plaintiff was an officer, so that the club could use the cars for a fundraiser. Based on the conflicting testimony, the court of appeal held that the trial court's ruling that plaintiff had failed to carry her burden of proof that she was defendant's mandatary was not manifestly erroneous nor clearly wrong.

II. AUTHORITY

A. Execution of Settlement Agreement by Agent Requires Express Written Authority – Sims v. USAgencies Casualty Ins. Co., 68 So. 3d 570 (La. App. 1st Cir. 2011), writ denied, 75 So. 3d 943 (La. 2011).

1. Plaintiff was in an automobile accident with a driver, Jackson, who was insured by defendant. The controversy centered on correspondence between plaintiff's lawyer and defendant's representatives. Defendant initially denied plaintiff's claim on the basis that plaintiff was uninsured and thus in violation of the No Pay, No Play Statute. Plaintiff's attorney responded with a letter alleging that Jackson was drunk at the time of the accident so that No Pay, No Play did not apply. Defendant then sent an offer to settle for \$10,000 and, apparently, forwarded a check for that amount. However, before any response by the plaintiff, defendant wrote again rescinding the offer and advising that it had stopped payment on the settlement check because of information that Jackson was not intoxicated.
2. Plaintiff sued to enforce the settlement, but the trial court ruled that the settlement was invalid and unenforceable, and the court of appeal agreed. The court first noted that La. Civ. Code art. 3072 requires that a compromise "be made in writing or recited in open court," and Article 2997 requires express authorization for a compromise. The court then observed that general authority of an attorney includes only authority to negotiate a settlement, not to conclude it, according to the jurisprudence. Thus, since the correspondence relied upon by the plaintiff did not contain plaintiff's

own signature, and there was no evidence that he expressly authorized his attorney to settle for him, plaintiff failed to prove a valid compromise, and defendant timely withdrew its offer.

(a) One related note: interestingly, the court made no mention of its earlier opinion in Amitech U.S.A., Ltd. v. Nottingham Construction Co., 57 So. 3d 1043 (La. App. 1st Cir. 2010), writ denied, 63 So. 3d 1043 (La. 2011), where the court also (correctly) held that Article 2993 requires that authority to execute a settlement/compromise must be in writing as well as express (“if the law prescribes a certain form for an act, a mandate authorizing the act must be in that form”).

B. Facts Failed to Establish Existence of Apparent Authority – Masanz v. Premier Nissan, L.L.C., 81 So. 3d 169 (La. App. 5th Cir. 2011), writ denied, 85 So. 3d 91 (La. 2012); Jefferson Parish Hospital Service District No. 2 v. K&W Diners, L.L.C., 65 So. 3d 662 (La. App. 5th Cir. 2011),

1. In Masanz, the plaintiff went to the defendant dealership to purchase a used vehicle. He met Zuniga, an employee of defendant, who gave him a business card to that effect and who was wearing a tee-shirt with defendant’s logo. After looking at several vehicles, plaintiff decided to purchase a 2001 GMC Sierra. Plaintiff claimed that he understood that the Sierra was owned by defendant; Zuniga testified that he advised plaintiff before the sale that it was owned by Mounis, defendant’s used car manager. Zuniga collected \$5600 in cash from plaintiff and gave it to Mounis. The next day, plaintiff and Mounis met at Casey & Casey Title to complete the transfer of title. Also present was Ms. McKay, Mounis’ wife, who had actual title to the Sierra. The records of the DMV showed that defendant sold the vehicle to McKay in January 2008, and that she sold it to plaintiff in April 2008. Zuniga testified that Mounis paid him a \$300 commission for selling the truck.

(a) Plaintiff drove the truck for one month when it caught on fire, totally destroying the cab. He sued the dealership, Zuniga and Mounis in redhibition. The trial court held all three liable in solido for the purchase price of the car. The court of appeal reversed the judgment as to the dealership. In addition to holding that it could not be a “seller” for purposes of redhibition since it was not an owner of the vehicle, the court also agreed with the dealership that the doctrine of apparent authority was not applicable. The court’s analysis was quite terse: after quoting La. Civil Code art. 3021 on “putative mandate,” the court stated

that “this article is inapplicable because the mandataries herein did not sell anything belonging to the principal.” 81 So. 3d at 174.

(b) The court also rejected plaintiff’s claims based on negligence, finding no duty owed by the dealership to plaintiff, and held that the dealership had no liability under respondeat superior, since Zuniga and Mounis were not acting in the course and scope of their employment.

2. In K&W Diners, the plaintiff hospital rendered medical services to Ms. Corpora, an employee of Fat Hen Grill in Harahan, for employment-related injuries. Pritchett, the owner of the restaurant, went with her to the hospital and told it that Fat Hen was her employer and responsible for her treatment. However, Fat Hen did not have worker’s compensation insurance and \$1828.35 of the medical bill was not paid.

(a) Plaintiff filed a claim with the OWC against “K&W Diners, L.L.C. d/b/a Fat Hen Grills.” The claim was mailed to Fat Hen’s address. No answer was made, and plaintiff took a default judgment against defendant. However, when defendant was served with a petition to make the judgment executory, it filed a petition with the OWC to annul the judgment. Defendant alleged that it sublet the property where the restaurant was operated to Royal Citruss, L.L.C., whose sole member, Pritchett, owned and operated Fat Hen. While defendant admitted that it registered the service mark “Fat Hen Grill” seventeen days after Ms. Corpora was injured, it never conducted business under that name. Rather, defendant stated that it registered the name as a favor to Royal Citruss and Pritchett. After a hearing, the court refused to annul the judgment.

(b) The court of appeal reversed the judgment. The relevant issue here is the trial court’s conclusion that an agency relationship existed between defendant and Pritchett. The court began by observing that at the time of Ms. Corpora’s treatment, Fat Hen Grill was only an assumed name that Pritchett used to operate the restaurant as a sole proprietorship. The defendant, on the other hand, was a registered L.L.C. with three members, none of whom was Pritchett. Thus, the court said, Pritchett had no actual authority to bind defendant.

(c) That, however, does not preclude liability based on apparent authority, which the court stated would require first, the principal’s manifestation to an innocent third person, and second, the third person’s reasonable reliance on the manifested authority. Applying that to the facts, the court

agreed that plaintiff was unreasonable in believing it would be paid by “Fat Hen Grill.” The problem is that plaintiff had no reason to believe that Fat Hen Grill was the defendant. It was only after Pritchett failed to pay that plaintiff learned that defendant leased the property where Fat Hen Grill operated. Moreover, defendant did not register the “Fat Hen” service mark until 17 days after Ms. Corpora’s treatment. Thus, the court concluded that OWC erred in finding that Pritchett and Royal Citrus were mandataries of the defendant.

- (d) However, as an alternative, plaintiff argued that the court should apply the putative mandate doctrine of Article 3021 should it find those persons were not mandataries of the defendant. Noting that that article applies when “one causes a third person to believe that another person is his mandatary,” the court found it inapplicable as well, since defendant did nothing to cause plaintiff to believe that Pritchett or Royal Citrus were its mandataries. The most interesting thing about the opinion is the implicit suggestion that there may be some difference between apparent authority and putative mandate, a matter of some uncertainty which, to date, has been addressed directly in only one case, Walton Construction Co. v G. M. Hornet Co., 984 So. 2d 827 (La. App. 1st Cir. 2008) (which concluded, basically, that there is no difference). See generally Morris & Holmes, Louisiana Business Organizations, §33.08. (1999 & Sapp. 2012).

CORPORATIONS

III. PIERCING THE CORPORATE VEIL

- A. **Veil-Piercing/Single Business Enterprise Theories Applied to Transfers of Mineral Interests** – Tealwood Properties L.L.C. v. Succession of Graves, 64 So. 3d 397 (La. App. 2d Cir. 2011); Coleman v. Burgundy Oaks, L.L.C., 71 So. 3d 352 (La. App. 2d Cir. 2011).

1. These two opinions from the same court illustrate a type of claim one suspects may proliferate as a consequence of the Haynesville Shale discovery. In Tealwood, the plaintiff purchased in 2003 477.99 acres of property for \$1.25 million from the Graves, vendors. The warranty deed purported to convey “any and all rights to oil, gas and other minerals” except for production from a specified well. However, the property was subject to a mineral servitude affecting all minerals, which a prior owner, Mr. Graves’ mother, had conveyed to Dale Oil Corporation in 1990, after which she conveyed the property to the Graves. Plaintiff alleged that the Graves were the sole owners of Dale, and thus sued the Graves and Dale for “the specific performance of transferring the mineral rights.” (Due to two pre-suit

transactions with third parties, plaintiff's claim was limited to one-half of the Dale servitude, subject to a mineral lease.) On motion for summary judgment, the trial court dismissed plaintiff's "alter ego" claims against Dale, but that was reversed by the court of appeal. Applying the "circumvention" theory of veil-piercing, the court held that if the trial court finds that the Graves' mutual intent with the plaintiff was to convey ownership of the property unencumbered and with the complete landowner's right for minerals (except for the specified well), the Graves "may not now shield themselves and circumvent their obligations of the Deed by asserting their corporate ownership." 64 So. 3d at 407. In so doing, the court emphasized that the policy of limited liability for shareholders would not be implicated should plaintiff prevail in its claims against Dale.

2. Similarly, in Coleman, one L.L.C., Longleaf Investments, sold property to an affiliated L.L.C., Burgundy Oaks, reserving all minerals. Burgundy developed the property as a residential subdivision. The plaintiffs purchased lots in the subdivision from 2002 to 2007 from either Burgundy or builders who acquired lots from Burgundy. The deeds involved all purported to sell, convey and deliver "with full guarantee of title, and with complete transfer and subrogation of all rights and actions of warranty against all former proprietors of the property herein conveyed." Alleging that neither the sellers, closing agent (which also handled the transfer from Longleaf to Burgundy) nor notary advised them that the mineral rights were not being transferred, the plaintiffs sued Longleaf, Burgundy, and one of the builders. Relying on Tealwood, the court reversed a summary judgment for the defendants holding that under the "circumvention" theory, there was a genuine issue of material fact as to whether Longleaf and Burgundy were a single business enterprise.

(a) For further discussion of "circumvention" veil-piercing see Morris & Holmes, Louisiana Business Organizations, §32.11 (1999 & Supp. 2012).

- B. **Alter Ego Test for Liability Applied** – Brennans, Inc. v. Colbert, 85 So. 3d 787 (La. App. 4th Cir. 2012); Interstate Battery Systems of America, Inc. v. Kountz, 78 So. 3d 200 (La. App. 3d Cir. 2011).

1. In Brennan's, the court refused to pierce the corporate veil of a client corporation to impose personal liability on its shareholders for fees owed by the corporation to a law firm.
2. Kountz involved an unusual application of veil-piercing principles. Plaintiff obtained a judgment for breach of contract against Performance

Management, Inc. (PMI), a Louisiana corporation, in California in June 2002. Thereafter, PMI went bankrupt and the judgment was not paid. In August 2005, plaintiff sued the various individual shareholders of PMI on an alter ego theory. The trial court ruled that plaintiff's claims had prescribed and dismissed them. The court of appeal reversed the dismissal of the veil-piercing claims. While plaintiff argued that the basis for piercing the veil to hold the defendants liable for the breach of contract judgment against PMI was "misrepresentations or fraudulent representations" which defendants allegedly made, the court concluded that the applicable prescriptive period was ten years under Article 3499 of the Civil Code, rather than the one-year period for delictual actions under Article 3492. Thus, the veil of PMI was pierced to impose on its shareholders the same prescriptive period which would have applied to PMI as a party to the contract.

C. **Single Business Enterprise Doctrine Applied** – Oracle 1031 Exchange, L.L.C. v. Bourque, 85 So. 3d 736 (La App. 3d Cir. 2012), writ denied, 85 So. 3d 1272 (La. 2012).

1. Three individuals apparently associated with the owners of three affiliated entities, Oracle 1031 Exchange, L.L.C. ("Exchange"), Delphi Oil, Inc. ("Delphi"), and Oracle Oil, L.L.C. ("Oracle"), leased royalty interests from royalty owners of property in Vermilion Parish. Those persons then assigned the leases to Exchange. The revenues from oil production, however, went to Delphi and Oracle, and Delphi paid royalties once to a single royalty owner. Following demands made by counsel for the royalty owners, Exchange filed a petition for concursus, and Oracle deposited \$18,897 into the court's registry. The owners answered and filed reconventional and third party demands against Exchange, Delphi and Oracle, seeking penalties and attorney's fees under the Mineral Code, L.R.S. §31:139. The trial court rendered a judgment against all three for those amounts, on the basis that they were a single business enterprise.
2. The court of appeal affirmed. Interestingly, the court did not quote the usual 17 – or 18 – factor test commonly used in the SBE jurisprudence. Instead, the court emphasized several facts which established a "reasonable basis" for the trial court's decision: Delphi and/or Oracle paid royalties, not Exchange; Delphi and/or Oracle received checks for the oil that was sold; Delphi and/or Oracle paid the taxes for the oil that was sold; Delphi and/or Oracle deposited the money for the concursus proceeding; and all three entities were "headed" by the same individual. The court also observed that Delphi and Oracle appealed suspensively, whereas Exchange appealed devolutively, suggesting that only Delphi and Oracle may be solvent.

IV. OFFICERS, DIRECTORS AND AGENTS

- A. **Corporate Officers Acting in Their Official Capacity Are Not Liable to Third Persons in Absence of a Personal Duty to Such Persons** – Terrebone Concrete, L.L.C. v. CEC Enterprises, L.L.C., 76 So. 3d 502 (La. App. 1st Cir. 2011), writ denied, 75 So. 3d 464 (La. 2011).
1. Unpaid subcontractors and suppliers of a corporate general contractor obtained a judgment against a corporate general contractor’s president and principal shareholder. The court of appeal reversed the judgment stating emphatically that “[c]orporate officers and directors cannot be held personally liable to third persons for negligence, maladministration of corporate affairs, or omission of duty for acts done on behalf of the corporation, especially in a commercial context, such as that of this case.” 76 So. 3d at 512.
- B. **Corporation is Bound by Corporate Resolution Certified by Secretary of Corporation** – Monlezun v. Lyon Interests, Inc., 76 So. 3d 628 (La. App. 3d Cir. 2011).

V. SHARES AND SHAREHOLDERS

- A. **Restrictions on Transfer of Stock Options Enforceable Against Ex-Wife of Stockholder/Employee Who Had Notice of Restrictions** – Funderburg v. Superior Energy Services, Inc., 83 So. 3d 1148 (La. App. 5th Cir. 2011), writ denied, 85 So. 3d 126 (La. 2012).
- B. **Inspection Rights of Shareholders of Louisiana Corporation Extended to Records Generated, Maintained and Possessed by Corporation Relating to All Companies in Which Corporation Had Ownership Interests or For Which Corporation Performed Accounting and Management Services, Whether or Not Located in Louisiana** – Feil v. Greater Lakeside Corp., 81 So. 3d 178 (La. App. 5th Cir. 2011), writ denied, 85 So. 3d 91 (La. 2012).
1. Further installment of a case discussed in 2010’s seminar.
- C. **Stock Transfer Agreement Entitling Brothers to Purchase Stock From Father Upon Occurrence of Certain Conditions Created No Duties Between Potential Purchasers** – Favrot v. Favrot, 68 So. 3d 1099 (La. App. 4th Cir. 2011), writ denied, 62 So. 3d 127 (La. 2011).
- D. **Stock Certificate is Only Prima Facie Evidence of Ownership** – Tedeton v. Tedeton, 87 So. 3d 914 (La. App. 2d Cir. 2012).

1. Extremely factually complicated case raising questions as to whether the secret formula for the product (soap) of a family-run business was validly transferred to a separate business entity, either a corporation incorporated in 1982 by father and son, but which issued no stock until 2005, or possibly a partnership, or whether it remained community property of now-deceased father and his wife.
- E. **“Act of Donation” of Stock Made Without Authentic Act and Without Indorsement and Delivery of Certificate Invalid** – Malone v. Malone, 77 So. 3d 1040 (La. App. 2d Cir. 2011).
1. This opinion involves the interpretation of Article 1550 of the Civil Code, part of the 2008 revision of the law of donations, which provides as follows:

The donation or the acceptance of a donation of an incorporeal movable of the kind that is evidenced by a certificate, document, instrument, or other wiring, and that is transferable by endorsement or delivery, may be made by authentic act or by compliance with the requirements otherwise applicable to the transfer of that particular kind of incorporeal movable.

In addition, an incorporeal movable that is investment property, as that term is defined in Chapter 9 of the Louisiana Commercial Laws, may also be donated by a writing signed by the donor that evidences donative intent and directs the transfer of the property to the donee or his account or for his benefit. Completion of the transfer to the donee or his account or for his benefit shall constitute acceptance of the donation.

Malone involved an alleged “Act of Donation” which was not made by authentic act and was also not accompanied by an indorsed and delivered stock certificate. The court rejected the argument of one of the donees that it was valid under the second paragraph of Article 1550. The court agreed that stock in a closely-held corporation is “investment property” under the Louisiana Commercial Laws. The court, however, cited Comment (b) to Article 1550, which states that the second paragraph refers to “situations when the transfer may not be directly to the donee’s account, but would be used to pay something for his benefit, as for example, if the transfer is made to a bank to pay off a child’s debt.” Thus, the court concluded that “the second paragraph of Article 1550 was intended to facilitate the gratuitous transfer of such property, which would generally be held in bank or brokerage accounts, by the donor directing in writing that the property be transferred to ‘the donee or his account or for his benefit’ and then by the completion of the transfer,” 77 So. 3d at 1045; it would not apply to the facts in Malone.

VI. CORPORATE LITIGATION

- A. **Shareholders of Corporation Have Only Derivative, Not Personal Claims for Alleged Damages to Corporation by Third Persons, in Absence of Direct Injury to Individual Shareholders** – Paul Piazza and Son, Inc. v. Piazza, 83 So. 3d 1066 (La. App. 5th Cir. 2011), writ denied, 85 So. 3d 123 (La. 2012).
1. Court holds that any loss of income caused by allegedly excessive attorney's fees charged by attorney who represented a corporation in connection with an insurance claim related to Hurricane Katrina was suffered by the corporation; any loss to its shareholders was indirect and could be pursued only by a derivative action on behalf of the corporation.
- B. **Action to Rescind Sale by Corporation For Self-Dealing Raises Claim of Relative Nullity** – In re Brennan's House of Printing, Inc., 65 So. 3d 165 (La. App. 5th Cir. 2011), rehearing denied, 2011 La. LEXIS 738 (La. App. 5 Cir. 5/31/11), review denied, 71 So. 3d 290 (La. 2011).
1. Minority shareholders sued to rescind a transfer of immovable property by the corporation to its majority shareholder and his wife, alleging, among other grounds, noncompliance with L.R.S. §12:84 on interested director transactions. The question of apparent first impression for the court was whether such an action involves an absolute nullity under article 2030 of the Civil Code which, under Article 2032, does not prescribe; or a relative nullity under Article 2031, which, under Article 2032, must be brought within five years of discovery. The court's conclusion was that an action under §12:84 raises a relative nullity which prescribes in five years.

VII. ORGANIC CHANGES

- A. **Former Corporate Liquidator Has Standing to Oppose Appeal of Judgment in His Favor** – Judson v. Davis, 81 So. 3d 712 (La. App. 1st Cir. 2011), review denied, 82 So. 3d 288 (La. 2012).
1. Very complicated case involving involuntary dissolution of corporation.
- B. **Successor Liability Inapplicable to Corporation Which Did Not Acquire Liable Corporation But Merely Had Similar Name** – Rome v. Asbestos Defendants, 70 So. 3d 121 (La App. 4th Cir. 2011), writ denied, 73 So. 3d 368 (La. 2011).

LIMITED LIABILITY COMPANIES

VIII. MEMBERS

- A. **Member's Interest in Promoting Business of L.L.C. is Sufficient Consideration for His Guaranty of L.L.C.'s Debt** – Regions Bank v. Louisiana Pipe & Steel Fabricators, L.L.C., 80 So. 3d 1209 (La. App. 3d Cir. 2011).
- B. **Statutory Period Under L.R.S. §12:1502 For Bringing Action For Breach of Fiduciary Duty Against Member of L.L.C. is Prescriptive, not Peremptive** – Robert v. Robert Management Company, L.L.C., 82 So. 2d 396 (La. App. 4th Cir. 2011), application denied, 85 So. 3d 1274 (La. 2012).

IX. LEGISLATION

- A. **See Appendix attached.**

Regular Session, 2012
HOUSE BILL NO. 1178
BY REPRESENTATIVES LEGER AND ORTEGO

ACT No. 442

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AN ACT

To enact Chapter 27 of Title 12 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 12:1801 through 1832, relative to benefit corporations; to enact the "Benefit Corporations Law"; to provide for applicability; to provide for definitions; to provide for formation of benefit corporations; to provide for election and termination of benefit corporation status; to provide for corporate purposes; to provide for a standard of conduct for directors and officers; to provide for a benefit director; to provide for a benefit officer; to provide for a right of action; to require an annual benefits report; to provide for stock certificates; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 27 of Title 12 of the Louisiana Revised Statutes of 1950, comprised of R.S. 12:1801 through 1832, is hereby enacted to read as follows:

CHAPTER 27. BENEFIT CORPORATIONS

PART I. PRELIMINARY PROVISIONS

§1801. Short title

This Chapter shall be known and may be cited as the "Benefit Corporations Law".

§1802. Application and effect of Chapter

A. This Chapter shall apply to all benefit corporations.

B. The existence of a provision of this Chapter shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation. This Chapter shall not affect a statute

1 or rule of law that is applicable to a business corporation that is not a benefit
2 corporation.

3 C. Except as otherwise provided in this Chapter, the Business Corporation
4 Law, R.S. 12:1 et seq., shall be generally applicable to all benefit corporations. The
5 specific provisions of this Chapter shall control over the general provisions of the
6 Business Corporation Law. A benefit corporation may be simultaneously subject to
7 this Chapter and one or more other Chapters within this Title.

8 D. A provision of the articles or bylaws of a benefit corporation shall not
9 relax, be inconsistent with, or supersede a provision of this Chapter.

10 §1803. Definitions

11 A. As used in this Chapter, the following terms and phrases shall have the
12 meaning ascribed to them in this Section, unless the context clearly indicates
13 otherwise:

14 (1) "Affiliate" means, in relation to a person, a subsidiary of the person or
15 an entity which owns beneficially or of record a majority of the outstanding equity
16 interests of the person.

17 (2) "Benefit corporation" means a business corporation which has elected
18 to become subject to this Chapter and whose status as a benefit corporation has not
19 been terminated.

20 (3) "Benefit director" means the director designated as the benefit director
21 of a benefit corporation pursuant to R.S. 12:1822.

22 (4) "Benefit enforcement proceeding" means any claim or action for one or
23 both of the following:

24 (a) Failure of a benefit corporation to pursue or create general public benefit
25 or a specific public benefit set forth in its articles.

26 (b) Violation of any obligation, duty, or standard of conduct pursuant to this
27 Chapter.

28 (5) "Benefit officer" means the individual designated as the benefit officer
29 of a benefit corporation pursuant to R.S. 12:1824.

1 (6) "General public benefit" means a material positive impact on society and
2 the environment, taken as a whole, assessed against a third-party standard, from the
3 business and operations of a benefit corporation.

4 (7) "Independent" means having no material relationship with a benefit
5 corporation or a subsidiary of the benefit corporation.

6 (8) "Material relationship" means the relationship between a person and a
7 benefit corporation or any of its subsidiaries if any of the following apply:

8 (a) The person is, or has been within the last three years, an employee, other
9 than a benefit officer, of the benefit corporation, or an affiliate of the benefit
10 corporation.

11 (b) An immediate family member of the person is, or has been within the last
12 three years, an employee, officer, or director of the benefit corporation, or an affiliate
13 of the benefit corporation.

14 (c) There is beneficial or record ownership of five percent or more of the
15 outstanding shares of the benefit corporation by either the person or an entity of
16 which the person is a director, an officer, or a manager, or in which the person owns
17 beneficially or of record five percent or more of the outstanding equity interests.

18 (9) "Minimum vote" means:

19 (a) In the case of a business corporation, the approval by holders of
20 two-thirds of the shares present and voting of each class or series and any other
21 approval or vote required under the Business Corporation Law or the articles.

22 (b) In the case of a domestic entity other than a business corporation, the
23 approval by holders of two-thirds of each class or series of equity interests entitled
24 to vote on any issue and any other approval or vote required under the law governing
25 the internal affairs of the entity or its constituent documents.

26 (10) "Specific public benefit" means any of the following:

27 (a) Serving low-income or underserved individuals or communities.

28 (b) Promoting economic opportunity for low-income or underserved
29 individuals or communities.

- 1 (c) Preserving the environment, promoting positive impacts on the
2 environment, or reducing negative impacts on the environment.
- 3 (d) Improving human health.
- 4 (e) Promoting the arts, sciences, or advancement of knowledge.
- 5 (f) Increasing the flow of capital to entities with a purpose listed in this
6 Paragraph.
- 7 (g) Historic preservation.
- 8 (h) Urban beautification.
- 9 (11) "Subsidiary" means, in relation to a person, an entity in which the
10 person owns beneficially or of record fifty percent or more of the outstanding equity
11 interests.
- 12 (12) "Third-party standard" means a recognized standard for defining,
13 reporting, and assessing the performance of corporations in producing general public
14 benefit and specific public benefits which is all of the following:
- 15 (a) Comprehensive in that it assesses the effect of the corporation and its
16 operations in producing general public benefit and any specific public benefit
17 specified in the articles.
- 18 (b) Transparent because the following information about the standard is
19 publicly available:
- 20 (i) The criteria considered when measuring the overall social and
21 environmental performance of a business.
- 22 (ii) The relative weightings, if any, of those criteria.
- 23 (iii) The identity of the directors, officers, material owners, and the
24 governing body of the organization that developed and controls revisions to the
25 standard.
- 26 (iv) The process by which revisions to the standard and changes to the
27 membership of the governing body are made.
- 28 (v) An accounting of the sources of financial support for the organization,
29 with sufficient detail to disclose any relationships that could reasonably be
30 considered to present a potential conflict of interest.

1 B. Terms not otherwise defined in Subsection A of this Section shall have
2 the meanings given to them in the Business Corporation Law.

3 C. For purposes of the definitions in this Section, a percentage of ownership
4 in an entity shall be calculated as if all outstanding rights to acquire equity interests
5 in the association have been exercised.

6 §1804. Election of status; corporate name

7 A. A business corporation incorporated in accordance with R.S. 12:21 et seq.
8 may elect to be a benefit corporation under this Chapter by stating in its articles that
9 it is a benefit corporation subject to this Chapter.

10 B. Any amendment to the articles of an existing business corporation to add
11 a statement that it is a benefit corporation subject to this Chapter shall be adopted by
12 at least the minimum vote. The notice of the meeting of shareholders to approve the
13 amendment shall state the specific public benefits, if any, to be included in the
14 purposes of the benefit corporation and shall explain the anticipated impact on
15 shareholders of becoming a benefit corporation.

16 C. If an entity that is not a benefit corporation is a party to a merger or
17 consolidation, and the surviving or new entity in the merger or consolidation is to be
18 a benefit corporation, then the plan of merger or consolidation shall be adopted by
19 at least the minimum vote.

20 D. The corporate name of a benefit corporation shall end with the following
21 phrase, which may be in parentheses, "A Benefit Corporation".

22 §1805. Termination of status

23 A. A benefit corporation may terminate its status as such and cease to be
24 subject to this Chapter by amending its articles to delete the provision required by
25 R.S. 12:1804 to be stated in the articles of a benefit corporation. In order to be
26 effective, the amendment shall be adopted by at least the minimum vote.

27 B. If a merger or consolidation of a benefit corporation would have the effect
28 of terminating the status of a business corporation as a benefit corporation, in order
29 to be effective, the plan of merger or consolidation shall be adopted by at least the
30 minimum vote of the benefit corporation. Any sale, lease, exchange, or other

1 disposition of all or substantially all of the assets of a benefit corporation, unless the
2 transaction is in the usual and regular course of business, shall not be effective unless
3 the transaction is approved by at least the minimum vote.

4 §§1806-1810. [Reserved.]

5 PART II. CORPORATE PURPOSES

6 §1811. Corporate purposes

7 A. A benefit corporation shall have a purpose of creating a general public
8 benefit. This purpose is in addition to its purpose under R.S. 12:21 et seq.

9 B. The articles of a benefit corporation may identify one or more specific
10 public benefits that it is the purpose of the benefit corporation to create in addition
11 to its purposes under R.S. 12:21 et seq. and Subsection A of this Section. The
12 identification of a specific public benefit under this Subsection shall not limit the
13 obligation of a benefit corporation under Subsection A of this Section.

14 C. The creation of a general public benefit and specific public benefit under
15 Subsections A and B of this Section is in the best interests of the benefit corporation.

16 D. A benefit corporation may amend its articles to add, amend, or delete the
17 identification of a specific public benefit that it is the purpose of the benefit
18 corporation to create. In order to be effective, the amendment shall be adopted by
19 at least the minimum vote.

20 E. A professional corporation that is a benefit corporation shall not be
21 deemed in violation of R.S. 12:804, 904, 984, 1054, 1074, 1089, 1113, 1133, 1154,
22 1193, or 1403 by having the purpose to create general public benefit or a specific
23 public benefit.

24 §§1812-1820. [Reserved.]

25 PART III. ACCOUNTABILITY

26 §1821. Standard of conduct for directors

27 A. In discharging the duties of their respective positions and in considering
28 the best interests of the benefit corporation, the board of directors, committees of the
29 board, and individual directors of a benefit corporation:

- 1 (1) Shall consider the effects of any action or inaction upon all of the
- 2 following:
- 3 (a) The shareholders of the benefit corporation.
- 4 (b) The employees and work force of the benefit corporation, its subsidiaries,
- 5 and its suppliers.
- 6 (c) The interests of customers as beneficiaries of the general public benefit
- 7 or specific public benefit purposes of the benefit corporation.
- 8 (d) Community and societal factors, including those of each community in
- 9 which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers
- 10 are located.
- 11 (e) The local and global environment.
- 12 (f) The short-term and long-term interests of the benefit corporation,
- 13 including benefits that may accrue to the benefit corporation from its long-term plans
- 14 and the possibility that these interests may be best served by the continued
- 15 independence of the benefit corporation.
- 16 (g) The ability of the benefit corporation to accomplish its general public
- 17 benefit purpose and any specific public benefit purpose.
- 18 (2) May consider other pertinent factors or the interests of any other group
- 19 that they deem appropriate.
- 20 (3) Shall not be required to give priority to the interests of a particular person
- 21 or group referred to in Paragraph (1) or (2) of this Subsection over the interests of
- 22 any other person or group unless the benefit corporation has stated in its articles the
- 23 intention to give priority to certain interests related to the accomplishment of its
- 24 general public benefit purpose or of a specific public benefit purpose identified in the
- 25 articles.
- 26 B. The consideration of interests and factors in the manner required by
- 27 Subsection A of this Section shall not constitute a violation of R.S. 12:91.
- 28 C. A director shall not be personally liable for monetary damages for any of
- 29 the following:

1 (1) Any act or omission covered by a provision in the articles of
2 incorporation that eliminates or limits the liability of the director as authorized in
3 R.S. 12:24(C)(4).

4 (2) Any act or omission as a director if the director performed the duties of
5 office pursuant to R.S. 12:91.

6 (3) Failure of the benefit corporation to pursue or create a general public
7 benefit or specific public benefit.

8 D. A director shall not have a duty to a person that is a beneficiary of the
9 general public benefit purpose or a specific public benefit purpose of a benefit
10 corporation arising from the status of the person as a beneficiary.

11 §1822. Benefit director

12 A. The board of directors of a benefit corporation shall include a director
13 who shall be designated the benefit director and who shall have, in addition to the
14 powers, duties, rights, and immunities of the other directors of the benefit
15 corporation, the powers, duties, rights, and immunities provided for in this Part.

16 B. The benefit director shall be elected, and may be removed, pursuant to
17 R.S. 12:81, and shall be an individual who is independent. The benefit director may
18 serve as the benefit officer at the same time as serving as the benefit director. The
19 articles or bylaws of a benefit corporation may prescribe additional qualifications or
20 duties of the benefit director not inconsistent with this Subsection.

21 C. The benefit director shall be responsible for the preparation of an annual
22 benefit report submitted to shareholders as required by R.S. 12:1831. The benefit
23 director may retain an independent third party to audit the annual benefit report or
24 conduct any other assessment of the corporation's pursuit of its general public benefit
25 purpose and any specific public benefit purpose. The annual benefit report shall
26 include a statement of the benefit director, in the opinion of the benefit director, on
27 all of the following:

28 (1) Whether the benefit corporation acted in accordance with its general
29 public benefit purpose and any specific public benefit purpose in all material respects
30 during the period covered by the report.

1 (2) Whether the directors and officers complied with R.S. 12:1821(A) and
2 1823(A), respectively.

3 (3) If, in the opinion of the benefit director, the benefit corporation or its
4 directors or officers failed to comply with R.S. 12:1821(A) and 1823(A), a
5 description of the ways in which the benefit corporation or its directors or officers
6 failed to comply.

7 D. The act or inaction of an individual in the capacity of a benefit director
8 shall constitute for all purposes an act or inaction of that individual in the capacity
9 of a director of the benefit corporation.

10 E. Regardless of whether the bylaws of a benefit corporation include a
11 provision eliminating or limiting the personal liability of directors authorized by R.S.
12 12:24(C)(4), a benefit director shall not be personally liable for an act or omission
13 in the capacity of a benefit director unless the act or omission constitutes
14 self-dealing, willful misconduct, or a knowing violation of law.

15 F. The benefit director of a professional corporation shall not be required to
16 be independent.

17 §1823. Standard of conduct for officers

18 A. Each officer of a benefit corporation shall consider the interests and
19 factors described in R.S. 12:1821 in the manner provided in that Section if all of the
20 following applies:

21 (1) The officer has discretion to act with respect to the matter.

22 (2) It reasonably appears to the officer that the matter may have a material
23 effect on the creation by the benefit corporation of a general public benefit or a
24 specific public benefit identified in the articles of the benefit corporation.

25 B. The consideration of interests and factors pursuant to Subsection A of this
26 Section shall not constitute a violation of R.S. 12:91.

27 C. An officer shall not be personally liable for monetary damages for either
28 of the following:

29 (1) An action or omission as an officer if the officer performed the duties of
30 the position pursuant to R.S. 12:91.

1 (2) Failure of the benefit corporation to pursue or create general public
2 benefit or specific public benefit.

3 D. An officer shall not have a duty to a person that is a beneficiary of the
4 general public benefit purpose or a specific public benefit purpose of a benefit
5 corporation arising from the status of the person as a beneficiary.

6 §1824. Benefit officer

7 A. A benefit corporation may have an officer designated as the benefit
8 officer.

9 B. A benefit officer shall have all of the following:

10 (1) The powers and duties relating to the purpose of the corporation to create
11 a general public benefit or specific public benefit provided by the bylaws or, absent
12 controlling provisions in the bylaws, by resolutions or orders of the board of
13 directors.

14 (2) The duty to prepare the benefit report required by R.S. 12:1831.

15 C. An officer shall not be personally liable for monetary damages for any of
16 the following:

17 (1) Any act or omission covered by a provision in the articles of
18 incorporation that eliminates or limits the liability of the officer as authorized in R.S.
19 12:24(C)(4).

20 (2) Any act or omission as an officer if the officer performed the duties of
21 office pursuant to R.S. 12:91.

22 (3) Failure of the benefit corporation to pursue or create general public
23 benefit or a specific public benefit.

24 §1825. Right of action

25 A. The duties of directors and officers under this Chapter and the general
26 public benefit purpose and any specific public benefit purpose of a benefit
27 corporation may be enforced only in accordance with this Section in a benefit
28 enforcement proceeding, and no person shall bring an action or assert a claim against
29 a benefit corporation.

1 (3) The name of the benefit director and the benefit officer, if any, and the
2 address to which correspondence to each of them may be directed.

3 (4) The compensation paid by the benefit corporation during the year to each
4 director in the capacity of a director.

5 (5) The name of each person that owns five percent or more of the
6 outstanding shares of the benefit corporation.

7 (6) The statement of the benefit director pursuant to R.S. 12:1822(C).

8 (7) A statement of any connection between the organization that established
9 the third-party standard, or its directors, officers, or any holder of five percent or
10 more of the governance interests in the organization, and the benefit corporation or
11 its directors, officers, or any holder of five percent or more of the outstanding shares
12 of the benefit corporation, including any financial or governance relationship which
13 might materially affect the credibility of the use of the third-party standard.

14 B. A benefit corporation shall annually send a benefit report to each
15 shareholder either:

16 (1) Within one hundred twenty days following the end of the fiscal year of
17 the benefit corporation.

18 (2) At the same time that the benefit corporation delivers any other annual
19 report to its shareholders.

20 C. A benefit corporation shall post all of its benefit reports on the public
21 portion of its Internet website, if any. The compensation paid to directors and
22 financial or proprietary information included in the benefit reports may be omitted
23 from the benefit reports as posted.

24 D. If a benefit corporation does not have an Internet website, the benefit
25 corporation shall provide a copy of its most recent benefit report, without charge, to
26 any person that requests a copy, but the compensation paid to directors and financial
27 or proprietary information included in the benefit report may be omitted from the
28 copy of the benefit report provided.

29 §1832. Stock certificates

1 All certificates representing shares in a benefit corporation shall contain, in
2 addition to any other statements required by the Business Corporation Law, the
3 following conspicuous language on the face of the certificate: "This corporation is
4 a benefit corporation subject to the Benefit Corporations Law, R.S. 12:1801 et seq."

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

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AN ACT

To enact R.S. 12:1308.3, relative to limited liability companies; to provide for the manner of converting the state of organization of domestic and foreign limited liability companies; to provide certain terms, conditions, procedures, requirements, and effects; to provide for the content and requirements for certain certificates; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 12:1308.3 is hereby enacted to read as follows:

§1308.3. Conversion of state of organization

A. Unless prohibited by the laws of the other state, a domestic limited liability company may convert its state of organization from this state to any other state, and a foreign limited liability company may convert its state of organization from any other state to this state.

B. Such conversion may be made by a limited liability company only pursuant to this Section and only after authorization by a majority of the members, or by such larger vote as the articles of organization or an operating agreement may require.

C. The domestic or foreign limited liability company seeking conversion shall file with the Louisiana Secretary of State a written request for conversion of the state of organization. Such request shall contain all of the following:

(1) The name of the limited liability company, which shall comply with the provisions of R.S. 12:1306.

(2) The full name and municipal address of either each current manager of the limited liability company, if management of the limited liability company is vested in one or more managers, or of each of the current members, if management of the limited liability company is reserved to the members.

1 (3) A statement, as appropriate, that the limited liability company is
2 converting its state of organization from another named state to this state and
3 is continuing its existence in and under the laws of this state, or is converting its
4 state of organization from this state to another named state and is continuing
5 its existence in and under the laws of such other named state.

6 (4) A statement that a majority of the members, or such larger vote as
7 the articles of organization or the operating agreement may require, has
8 approved the conversion of the state of organization.

9 (5) The manner and basis of converting the interests of the members of
10 the limited liability company into the interests of the members in the converted
11 limited liability company.

12 (6) A statement that the limited liability company, in changing its state
13 of organization, has complied with the laws and requirements of both the prior
14 and new state of organization.

15 (7) Any other provision, attachment, or exhibit, not inconsistent with
16 law, that the members elect to set forth or include in the certificate of
17 conversion.

18 (8) If the limited liability company is converting its state of organization
19 from another state to this state:

20 (a) the location and municipal street address, if any, of the limited
21 liability company's registered office. An address consisting of a post office box
22 alone is insufficient.

23 (b) the location and municipal street address, if any, of each of the
24 limited liability company's registered agents, together with a notarized affidavit
25 of acknowledgment and acceptance signed by each such agent. An address
26 consisting of a post office box alone is insufficient.

27 D. The request for conversion may be delivered to the secretary of state
28 for filing as of any specified date, and, if specified upon such delivery, as of any
29 given time on such date, within thirty days after the date of delivery.

30 E. If the secretary of state finds that the request for conversion is in

1 compliance with the provisions of this Section, and after all fees have been paid
2 as required by law, the secretary of state shall record in his office the request
3 for conversion and any attachments or exhibits thereto, after endorsing thereon
4 the date and, if requested, the hour of filing. Thereafter, the secretary of state
5 shall either issue to the limited liability company a certificate of conversion,
6 reciting that such limited liability company has complied with the requirements
7 of this state for converting its state of organization, or advise the limited liability
8 company with reasons why it has denied the request for conversion.

9 F. Upon receipt of the certificate of conversion from the secretary of
10 state, and after compliance as applicable with the laws of the other state:

11 (1) A domestic limited liability company converting its state of
12 organization from this state to another state shall be deemed to be organized
13 solely under the laws of such other state and no longer under the laws of this
14 state. The limited liability company shall continue to exist without interruption
15 in its organizational form. All rights, title, interests, obligations, and liabilities
16 of the limited liability company shall continue in the limited liability company
17 without impairment, diminution, or termination. Any proceeding pending by
18 or against the limited liability company or its members or managers, in their
19 capacities as such, may be continued by or against the limited liability company
20 without the need for substituting a new party to such proceeding as a result of
21 any conversion of the state of organization as authorized in this Section. The
22 limited liability company shall be deemed to have appointed the secretary of
23 state in this state as its agent for service of process in any proceeding to enforce
24 any liability or obligation against the limited liability company arising or
25 existing prior to the effective time of the conversion of the state of organization.

26 (2) A foreign limited liability company converting its state of
27 organization from another state to this state shall be deemed to be organized
28 solely under the laws of this state and no longer under the laws of such other
29 state. The limited liability company shall continue to exist without interruption
30 in its organizational form. All rights, title, interests, obligations, and liabilities

1 of the limited liability company shall continue in the limited liability company
 2 without impairment, diminution, or termination. Any proceeding pending by
 3 or against the limited liability company or its members or managers, in their
 4 capacities as such, may be continued by or against the limited liability company
 5 without the need for substituting a new party to such proceeding as a result of
 6 a change of the state of organization authorized under this Section. The
 7 certificate of conversion issued by the Louisiana Secretary of State shall be
 8 conclusive evidence of the fact that the limited liability company has been duly
 9 organized under the laws of this state, except that in any proceeding brought by
 10 the state to annul, forfeit, or vacate a company's franchise, the certificate of
 11 conversion shall be only prima facie evidence of due organization.

12 G. In addition to the other requirements of this Section, a domestic
 13 limited liability company converting its state of organization from this state to
 14 another state shall also file with the Louisiana Secretary of State a certified copy
 15 of the certificate of organization or other official certificate obtained by it from
 16 the other state evidencing the company's organization under the laws of such
 17 state. Such certified copy shall be filed with the Louisiana Secretary of State
 18 not later than thirty days after issuance of the official certificate evidencing the
 19 company's organization under the laws of the other state.

20 Section 2. The provisions of this Act shall become effective on January 1, 2013.

 PRESIDENT OF THE SENATE

 SPEAKER OF THE HOUSE OF REPRESENTATIVES

 GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

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AN ACT

To enact Chapter 26 of Title 12 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 12:1701, relative to commercial regulations; to provide relative to the removal of officers, members, managers, or partners of certain business organizations; to provide for judicial review; to provide for the duties of a certain court; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 26 of Title 12 of the Louisiana Revised Statutes of 1950, comprised of R.S. 12:1701 is hereby enacted to read as follows:

CHAPTER 26. PROVISIONS APPLICABLE TO MORE THAN

ONE KIND OF BUSINESS ORGANIZATION

§1701. Judicial review; removal of officers, members, managers, and partners

A. Should any officer, member, manager, or partner of any corporation, limited liability company, or partnership have his name removed from any document or record filed with the secretary of state in violation of state law or in contravention of any document of creation, organization or management of such business entity, the aggrieved party may file suit against the party who caused the aggrieved party's name to be removed from such document or record.

B. Such suit shall be filed in the judicial district court where the business entity is domiciled.

C. The secretary of state shall be made a party to the suit.

D. The court shall conduct a hearing within ten days after service of process of the suit on all parties.

E. Should the court find that the name of the aggrieved party was improperly or fraudulently removed from the documents and records of the secretary of state, the court shall order the secretary of state to replace the

1 name of the aggrieved party on to all appropriate documents and records of the
2 secretary of state.

3 F. Nothing in this Section shall be construed to supercede or conflict
4 with the provisions of R.S. 12:208.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

GOVERNOR OF THE STATE OF LOUISIANA

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AN ACT

To enact R.S. 12:2.1 and 2.2 and R.S. 44:4.1(B)(37), relative to access of certain public records; to provide for the "Business Identity Theft Prevention Act"; to make confidential certain electronic mail addresses and short message service numbers; to provide for notifications; to provide relative to the duties of the secretary of state; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. This Act shall be known and may be cited as "The Business Identity Theft Prevention Act".

Section 2. R.S. 12:2.1 and 2.2 are hereby enacted to read as follows:

§2.1. Electronic mail addresses and short message service numbers; confidentiality

Any electronic mail address or short message service number submitted to or captured by the secretary of state pursuant to the provisions of this Title shall be confidential and shall not be disclosed by the secretary of state or any employee or official of the Department of State.

§2.2. Electronic notification of status changes

The secretary of state shall notify any person who subscribes to the secretary of state's electronic mail or short message notification service and who is an officer of a corporation, member or manager of a limited liability company, or partner in a partnership, or any agent thereof, when a filing has occurred that may have removed that person's name from documents and records of that entity held by the secretary of state.

Section 3. R.S. 44:4.1(B)(37) is hereby enacted to read as follows:

§4.1. Exceptions

* * *

**RECENT DEVELOPMENTS IN
LOUISIANA CIVIL PROCEDURE
2011-2012**

William R. Corbett*

* © 2012 Frank L. Maraist Professor of Law, LSU Law Center. I thank my friend and mentor Professor Frank Maraist for his newsletters, which I consulted as I prepared this paper. This paper was last updated on August 20, 2012.

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I. LEGISLATION AND RULES

A. Consolidation

Act 194 amends CCP Art. 1561: Before the amendment, the article provided that where two or more separate actions are pending in the same court, the section or division of the first filed action could order their consolidation if, after contradictory hearing, the court determined that common issues predominate. There was an exception: if a trial date had been set in a subsequently filed action. Then consolidation could be ordered only upon written consent of each section or division of the court. The amendment changed the exception to the following: “in the event a trial date has been set in a subsequently filed action, upon a finding that consolidation is in the interest of justice.” Additionally, the amendment provides that the contradictory hearing may be waived “upon the certification by the mover that all parties in all cases to be consolidated consent to the consolidation.”

B. Filing

Act 826 amends La. R.S. 13:850: The time within which a party who has fax filed a document must file the original with the clerk has been increased from five to seven days, exclusive of legal holidays.

C. Judgments; Notice

Act 290 amends CCP Arts. 2166 and 2167 provisions of the Children's Code Art. 1143: Provides that transmission of electronic notices starts the running of the period for application for rehearing and application for writ of certiorari. The amendment replaced “mailing of notice” with “transmission of notice,” and defined it as follows: “‘transmission of the notice’ means the sending of the notice via the United States Postal Service, electronic mail, or facsimile.”

D. Judgment; Offer of Judgment

Act 557 amends CCP Art. 970 to change to more than 20 days before trial as the time within which to serve an offer of judgment. Before the amendment, an offer of judgment had to be served more than 30 days before trial.

E. Service

Act 741 amends CCP Art. 1313 to allow service by “commercial courier” of a pleading or order setting a court date. Prior to the amendment, service was authorized by only registered or

certified mail or as provided by Art. 1314. The amendment also defines “commercial courier.”

Act 242 amends CCP Art. 1314 (B) to permit service on a counsel of record upon his secretary, receptionist, legal staff, administrative staff or paralegal. Before the amendment, the article provided for personal service on only a partner or office associate of a counsel of record.

Act 521 amends CCP Art. 1293, enacting paragraph C:

C. In addition to those natural persons who the court may appoint to make service of process pursuant to Paragraph A or B of this Article, the court may also appoint a juridical person which may then select an employee or agent of that juridical person to make service of process, provided the employee or agent perfecting service of process is a natural person who qualifies as an agent for service of process pursuant to Paragraph A or B of this Article.

F. Venue

Act 126 amends CCP Art. 42:

(4) A foreign corporation or foreign limited liability company licensed to do business in this state shall be brought in the parish where its ~~primary business office~~ principal business establishment is located as designated in its application to do business in the state, or, if no such designation is made, then in the parish where its primary place of business in the state is located.

Act 713 amends CCP Art. 123: regulates venue for class actions and provides that if forum non conveniens applies, domicile shall be at the location pursuant to CCP Art. 42 where plaintiff would have been subject to suit had he been a defendant. Art. 123(A)(2).

G. Summary Judgment

Acts 257 and 741 amend CCP Art. 966: (1) only evidence admitted for purposes of the motion for summary judgment may be considered by the court in ruling on the motion (Art. 966(E)(2)); (2) allocation of fault to a party dismissed on summary judgment cannot be placed in the jury verdict form (Art. 966(F)(1)), and if Paragraph F applies to a summary judgment, the court must so specify in the summary judgment and if the court does not, the paragraph does not apply; (3) if the court denies summary judgment, the court should provide reasons for the denial on the record, either orally at the time of rendition or in writing, sua sponte or upon request of a party within ten (10) days of rendition (amending 966(B)).

Note that some of the 2012 amendments to Art. 966 follow up on the 2010 amendment which provided that if a party is determined not to be at fault or not to be a cause of the harm, then that party cannot be further considered for allocation of fault, evidence on that issue is not to be admitted, and the issue is not to be submitted to the jury (current ¶ F):

F. When the court determines, in accordance with the provisions of this Article,

that a party or nonparty is not negligent, not at fault, or did not cause, whether in whole or in part, the injury or harm alleged, that party or nonparty may not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or nonparty nor shall the issue be submitted to the jury. This Paragraph shall not apply when a summary judgment is granted solely on the basis of the successful assertion of an affirmative defense in accordance with Article 1005.

H. Evidence; Class Actions

Act 115 amends CCP Art. 592: Expert testimony or evidence may be introduced at a class certification hearing, and the discovery rules under CCP Art. 1425(F) apply, although the court has the discretion to change the deadlines for filing or hearing a motion if the deadlines are prior to or contemporaneous with the class certification hearing. Art. 592(3)(a)(ii).

I. Supreme Court Rules

A new Supreme Court rule requires certain lawyers and clerks to notify the judicial administrator about commencement and completion of certain lawsuits filed in district court for damages arising from offense or quasi-offense. Part G, Section 13 of the Court's General Administrative Rules and Louisiana Civil Case Reporting Form (available at <http://www.lasc.org/rules/supreme/PartGSection13.asp>):

Section 13. Reporting on Actions for Offenses and Quasi-Offenses.

(a) When a lawsuit has been filed in any Louisiana judicial district court for damages arising from an offense or quasi-offense, the Clerk of Court shall submit information pertaining to the nature of the case and the final judgment of the district court following the commencement of a bench or jury trial to the Office of the Judicial Administrator, Supreme Court of Louisiana.

(b) At the commencement of every litigation involving an action for an offense or quasi-offense, counsel for the petitioner, counsel's representative, or the self-represented litigant, shall complete a Civil Case Cover Sheet Form authorized by the Supreme Court of Louisiana. The Clerk of Court shall submit completed Civil Case Cover Sheets no later than the tenth day of each month, for cases filed in the preceding month, to the Office of the Judicial Administrator.

(c) At the conclusion of each case in which damages are sought for an offense or quasi-offense, and in which a bench or jury trial is commenced, the Clerk of Court shall forward the final judgment to the Office of the Judicial Administrator, Supreme Court of Louisiana. Final judgments shall be forwarded no later than the tenth day of each month, for judgments that become final in the district court during the preceding month.

[Effective January 1, 2012]

J. Rules for Louisiana District Courts

1. Rule 6.1 General Courtroom Conduct:

New ¶ (f): “A judge may prohibit the use of electronic devices, including cellular telephones and recording devices, in a courtroom.”

Old ¶ (f): “A judge may prohibit the use of electronic transmitters, receivers, and entertainment devices such as cellular telephones, beepers, computer disc players, etc., in a courtroom.”

2. Rule 9.5 Court's Signature; Circulation of Proposed Judgment: If a proposed judgment, order, or ruling is not presented to the judge for signature when rendered, the subsequent presentation is changed. The amendment increases the period for circulation for comment on a proposed judgment, order, or ruling to counsel or parties from 3 working days to 5 working days before presentation to the judge. This time does not apply if the judgment, order, or ruling is presented to the judge when rendered. Effective Jan. 1, 2012.

3. Rule 10.1 Motions to Compel Discovery:

a) Before filing any motion to compel discovery, the moving party or attorney shall confer in person or by telephone with the opposing party or counsel for the purpose of amicably resolving the discovery dispute. The moving party or attorney shall attempt to arrange a suitable conference date with the opposing party or counsel and confirm the date by written notice sent at least five (5) days before the conference date, unless an earlier date is agreed upon or good cause exists for a shorter time period. If by telephone, the conference shall be initiated by the person seeking the discovery responses.

(b) No counsel for a party shall file, nor shall any clerk set for hearing, any motion to compel discovery unless accompanied by a "Rule 10.1 Certificate of Conference" as set forth below . . . [Certificate is provided in rule.] Effective Jan. 1, 2012.

What's new?

--Requires that a motion to compel be accompanied by a “Rule 10.1 Certificate of Conference,” the form of which is now provided.

--New rule also expressly states that attorney fees and costs are appropriate sanctions for a party's willfully failing to confer.

--Requires a party to “confirm the date by written notice sent at least five (5) days before the conference date, unless an earlier date is agreed upon or good cause exists for a shorter time period.”

--Also provides that “If by telephone, the conference shall be initiated by the person seeking the discovery responses.”

II. Court Decisions

A. Louisiana Supreme Court Decisions

1. Summary Judgment

Sims v. Hawkins-Sheppard, No. 2011-0678, 65 So. 3d 154 (La. 2011).

Facts: Doctor was sued for medical malpractice. In interrogatories and requests for production of documents, defendant asked for the identity of medical experts consulted. Plaintiff responded that no such expert had been consulted. Based on that response and the unanimous conclusion of the medical review panel finding informed consent and no breach by the doctor, defendant moved for summary judgment. A hearing date was set for the motion. At the request of plaintiff's counsel, the hearing date was continued for two months. Before the hearing, plaintiff opposed the summary judgment with an unsigned affidavit from a doctor. Plaintiff's counsel said a signed affidavit would be substituted at the hearing, but it was not. Plaintiff informed the court that she wanted to terminate counsel and obtain new representation. The court responded that it would not further delay the proceedings, which already had been continued once at plaintiff's request. The court granted the summary judgment. On appeal, the court of appeal reversed, holding that the trial court had abused its discretion under CCP Art. 966(B) and the case law. The court held that the trial court should have granted plaintiff a reasonable amount of time to obtain new counsel and obtain the signature of a medical expert on an opposing affidavit. Issue: Whether the trial court abused its discretion in granting a summary judgment when the party opposing summary judgment did not comply with the time requirements of CCP Art. 966(B) and Uniform District Court Rule 9.9(b).

Holding and Rationale: No. Plaintiff's counsel's explanation for not obtaining the doctor's signature was that the doctor was on vacation and then there was a three-day holiday. However, plaintiff's counsel did not send medical records and a copy of the affidavit to the doctor until two weeks before the rescheduled hearing on the motion for summary judgment. Under these facts, plaintiff could not establish good cause for failing to comply with the time limits in Art. 966(B) and Rule 9.9(b), both of which require service of opposing affidavits at least eight calendar days before the scheduled hearing. The Court cited its upholding of the trial court's decision to enforce the time limits in *Guillory v. Chapman*, 44 So. 3d 272 (La. 2010). The Court stated as follows:

The defendants established their entitlement to summary judgment under the provisions of La. C.C.P. art. 966, and the uniform rules approved by this court. The plaintiff failed to show "good cause" under La. C.C.P. art. 966(B) why she should have been given additional time to file an opposing affidavit. Consequently, there is no genuine issue to the material fact that the plaintiff, upon the present record, is unable to prove the doctor defendant breached an applicable standard of care and the defendants are entitled to judgment on this issue as a matter of law.

Sims, 65 So. 3d at 157.

2. Discovery and Evidence

Trascher v. Territo, No. 2011-2093, 89 So. 3d 357 (La. 2012).

Facts: Man's video deposition was being taken to perpetuate testimony after his diagnosis with asbestosis. After fifteen minutes, the deposition was recessed due to deponent's failing health and fatigue. Plaintiff died before the deposition could be completed and deponent could be cross-examined. Thereafter plaintiffs filed wrongful death and survival claims. Plaintiffs moved for summary judgment. They relied in part on the video deposition of the decedent. Defendant filed a motion to strike the deposition from consideration on the summary judgment and for an *in limine* order against the admission of the video deposition into evidence for any purpose because the deposition never had been completed and the deponent had not been cross-examined. The trial court denied the motion to strike and ruled that the deposition could be read at the trial. The Fourth Circuit denied writs.

Issue: Whether video deposition was admissible at trial when deposition was not completed and deponent had not been subject to cross-examination.

Holding and Rationale:

1) Not as a deposition. CCP Art. 1432 provides that the deposition to perpetuate testimony may be used in accordance with the provisions of CCP Art. 1450. "The thrust of La. C.C.P. Art. 1450 . . . seems to be that the party against whom a deposition is sought to be used must have been afforded a meaningful opportunity to cross-examine the deponent." *Trascher*, 89 So. 3d at 363. Thus, the testimony was not admissible as a deposition under CCP Art. 1450.

2) Some statements were admissible under an exception to hearsay, but most were not. The Court began by noting that as out-of-court statements, they are governed by the hearsay rule. Plaintiffs argued that the deposition was admissible under three hearsay exceptions: 1) "statement under belief of impending death," CE Art. 804(A)(4); 2) then-existing mental, emotional, or physical condition, CE Art. 803(3); and 3) residual hearsay exception, CE Art. 804(B)(6). The Court rejected the argument regarding the dying declaration because, at the time of the deposition, the decedent did not believe his death was "imminent" as defined for the exception. All who attended the deposition contemplated that the deposition would be resumed at a later date, as indicated on the record. Regarding the second exception, the Court held that the decedent's answer to the question about how he felt was admissible under the exiting condition exception because that was exactly what the statement was offered to prove. For the rest of the statements in the deposition--about his employment duties, his exposure to asbestos at work, and the lack of safety precautions taken by his employer--the plaintiffs urged that they came under the residual exception. This exception is intended to apply under only "extraordinary circumstances" when the statement is made under sufficient assurances of trustworthiness, the evidence in the statement is otherwise unavailable, and the opponent is given a fair opportunity to meet the evidence. *Trascher*, 89 So. 3d at 366. It is narrower than its federal counterpart. The Court held that the statements did not satisfy the indicia of trustworthiness requirement. Although the testimony was under oath, there was no opportunity for cross-examination, the testimony concerned events that occurred 50 years earlier, and there were inconsistencies and errors evident in the testimony. The Court also noted that there is an argument that the residual exception should not apply to statements that fall under another specific exception but fail to satisfy its requirements. According to the Official Comments to the article, to apply the residual exception in that way would "emasculate the hearsay rule." *Id.* at 368.

In an interesting observation in his concurrence, Justice Weimer expressed concern that the comment that the residual exception should not apply to statements covered by other exceptions could have the effect of emasculating the residual exception. *Id.* at 372 (Weimer, J., concurring with reasons).

McGlothlin v. Christus St. Patrick Hosp., No. 2010-2775, 65 So. 3d 1218 (La. 2011).

Facts: In the medical review opinion in a med/mal case, the panel rendered a unanimous decision that the evidence did not support the conclusion that the defendant breached the standard of care. The written reasons included the following statement: “but we feel that the versions of both of the incidents, by the patient and her family, appear to have numerous inconsistencies.”

Issue: Whether a “medical review panel opinion is admissible under the statute when the panel exceeds its statutory duty and renders an opinion based on its decision to credit the evidence presented by one party over another.”

Holding and Rationale: No. La. R.S. 40:1299.47(H) provides that “[a]ny report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law.” However, what constitutes the expert opinion is defined in 40:1299.47(G). Under that statute, when there is “a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court,” the panel is to acknowledge the issue and defer to the factfinder’s consideration. “[T]he panel is not permitted to render an opinion on any disputed issue of material fact that does not require their medical expertise.” *Id.* at 1229. Thus, the medical review panel’s opinion in this matter did not fit the statutory definition of an “expert opinion,” and is not subject to the mandatory admission of 40:1299.47(H). The Court went beyond that to say that to the extent the panel exceeded its statutory authority by trying to resolve an issue of material fact it was inadmissible. *Id.* at 1230. However, any error was rendered harmless by redaction of the violative language on the credibility determination.

3. Prescription

Jenkins v. Starns, No. 2011–C–1170, 85 So. 3d 612 (La. 2012).

Facts: Plaintiff in a legal malpractice case had lost the underlying case on default judgment when her attorney did not file an answer timely because he believed there was an informal agreement to extend the time. Plaintiff’s counsel filed a petition to annul the judgment, but the attorney did not appear at a hearing on a declinatory exception, which resulted in the dismissal of the action to annul. Plaintiff’s bank account was then garnished for the amount of the judgment, interest and costs. Plaintiff sued her attorney for legal malpractice for not filing a timely response to the petition. The attorney filed an exception alleging that plaintiff had not filed the legal malpractice action within the one-year preemptive period of La. R.S. 9:5605. He argued that any acts of malpractice occurred when the default judgment was confirmed, and plaintiff filed her malpractice claim more than a year after being served with a copy of the confirmation of default. The trial court denied the exception, applying the continuous representation rule (an application of *contra non valentem*). Under the continuous representation rule, prescription of a legal malpractice claim does not begin to run while the attorney continues to represent the client and attempts to remedy the act of malpractice. The trial court held that plaintiff did not discover the malpractice until her bank account was garnished, and that was when the one-year period began to run, so plaintiff’s suit was timely. The court of appeal affirmed.

Issue: Whether the continuous representation rule applies to suspend commencement of the one-year preemptive period provided in La. R.S. 9:5605.

Holding and Rationale: No. The court of appeals was incorrect in stating that the Supreme Court never had addressed the issue of the discovery rule in the context of legal malpractice. The Court held that peremption begins to run from the “date on which a reasonable man in the position of plaintiff has, or should have, either actual or constructive knowledge of the damage, the delict, and the relationship between them sufficient to indicate to a reasonable person he is the victim of a tort and to state a cause of action against the defendant.” *Jenkins*, 85 So. 3d at 620-21 (quoting *Teague v. St. Paul Fire and Marine Ins. Co.*, 974 So. 2d 1266, 1275 (La. 2007)). Applying that rule, the Court held that plaintiff was put on notice of the malpractice when she received the notice of default judgment. At that point, she called her attorney, who told her he had made a mistake and he would try to fix it. This was sufficient to constitute constructive notice. Thus, the one-year preemptive period began to run at that time. The Court then turned its attention to the argument that the continuous representation rule suspended the commencement of the preemptive period. The Court held that “the continuous representation rule cannot apply to suspend the one-year preemptive [sic] period found in La. R.S. 9:5605.” *Jenkins*, 85 So. 3d at 624. The Court relied on the clear and unambiguous statement in the statute that the preemptive periods “may not be renounced, interrupted, or suspended.” La. R.S. 9:5605(B). The Court reasserted that there are three preemptive periods in the statute: 1) one year from the date of the act, neglect or omission; 2) one year from the date of discovery of the act, neglect, or omission; and 3) three years from the date of the act, neglect, or omission regardless of discovery. The Court found its decision in *Reeder v. North*, 701 So. 2d 1291 (1997) to control the issue of the continuous representation rule. Because the continuous representation rule is a suspension principle based on *contra non valentem*, it cannot apply to preemptive periods.

Glasgow v. PAR Minerals Corp., No. 2010-C-2011, 70 So. 3d 765 (La. 2011), *reh’g denied* (La. July 14, 2011).

Facts: In a tort lawsuit, a defendant was dismissed on summary judgment as immune because it was the plaintiff’s statutory employer. After that, a defendant that had been added in a supplemental and amended petition filed an exception of prescription. The defendant argued that because the suit against the statutory employer was dismissed, there was no timely lawsuit against a joint tortfeasor to interrupt prescription. The district court agreed and ruled that the suit against the defendant had prescribed. The Third Circuit affirmed.

Issue: Whether a timely lawsuit against a defendant later dismissed as a statutory employer interrupts prescription against a third-party alleged tortfeasor.

Holding and Rationale: The court began by stating that the case law recognizes three theories to establish that prescription has not run: suspension, interruption, and renunciation. This case addressed interruption. The Court looked to the statutory language of CC Art. 3462, which provides in pertinent part as follows:

. . . . If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period.

The Court framed the issue as whether the threshold language of “an incompetent court” is satisfied when suit is filed against an immune statutory employer. The Court reasoned that the court would not have been competent to render a tort judgment against an immune party. Therefore, the court held that prescription was interrupted against the statutory employer. The next piece in the argument was based on CC Art. 1799, which provides that interrupting prescription against one solidary obligor interrupts against all solidary obligors. The Supreme Court has held that a party sued under workers compensation and a party later sued in tort are solidary obligors. See *Williams v. Sewerage & Water Bd. of New Orleans*, 611 So. 2d 1383 (La. 1993). In *Williams*, the Court explained that is not the source of the liability but the coextensiveness of obligations for the same debt that determines solidary liability. The defendant attempted to distinguish *Williams* because in this case, although the dismissed defendant was a statutory employer, it had paid no workers comp benefits, which had been paid by the direct employer. The Court rejected the putative distinction, emphasizing that it is the coextensiveness of the obligations, not the source of liability, that determines solidary liability. The distinction between plaintiff’s pleading tort damages rather than workers’ comp benefits was of no moment because Louisiana has fact pleading, which does not require pleading the theory of the case in the petition. “The rulings of...courts impos...(ing) pleading requirements which are inconsistent with Louisiana rules of pleading, or otherwise failed to recognize a solidary relationship by drawing a distinction between liability derived from workers’ compensation and liability derived from tort...” are overruled and...“we...affirm the principle that for purposes of prescription parties ‘are solidarily liable to the extent that they share coextensive liability to repair certain elements of the same damage.’” *Glasgow*, 70 So. 3d at 772 (quoting *Williams*, 611 So. 2d at 1389).

4. Class Actions

Price v. Martin, No. 2011-C-0853, 79 So. 3d 960 (La. 2011).

Facts: Class action where the class was some 4,600 property owners for damage caused from 1944 to the present by the emission of toxic chemicals from operations at a wood treating facility which was operated successively and independently by more than one owner. The plaintiffs alleged environmentally unsound practices that caused release of toxic and hazardous substances into air, soil, and water of communities in which plaintiffs resided. The district court certified a class of property owners in the area from 1944 through the present.

Issue: Whether court erred in certifying class.

Holding and Rationale: Yes. The Court noted that the 1997 amendment of CCP Art. 591 essentially adopted the federal law regarding class actions under FRCP Rule 23. The tone of the opinion was set with the Court’s noting that the class action is a “nontraditional litigation procedure” and an exception to the rule that litigation is conducted by individual named parties. *Price*, 79 So. 3d at 966 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011)). In citing *Wal-Mart v. Dukes*, the Court explained that “to the extent La. C.C.P. art. 591 parallels Rule 23 regarding class actions, Louisiana’s class certification analysis is appropriately informed by federal jurisprudence interpreting Rule 23.” *Id.* at 967 n.6. The Court also clarified that one of its prior decisions should not be read as relaxing the plaintiff’s burden is satisfying the requirements for a class action:

To the extent that language in *McCastle [v. Rollins Environmental Servcs. of La., Inc.]*, 456 So. 2d 612 (La. 1984)], particularly the statement that “[i]f there is to be

an error made, it should be in favor and not against the maintenance of the class action” *McCastle*, 456 So.2d at 620, has been interpreted by courts as relaxing the plaintiffs' burden in establishing the appropriateness of the class action for a particular case or the court's role in evaluating whether the required statutory showing has been met, it has been misinterpreted. This general rule does not obviate the requirement that courts employ a “rigorous analysis” and take a “close look” at a case to determine if, in fact, the statutory requirements have been satisfied before accepting it as a class action.

Price, 79 So. 3d at 867 n.8.

CCP Art. 591(A) provides five “threshold prerequisites” for class certification: 1) class is so numerous that joinder of all is impracticable; 2) questions of law or fact common to class; 3) claims or defenses of representatives are typical; 4) representatives will fairly and adequately protect interests of class; and 5) class may be defined objectively in terms of ascertainable criteria. Beyond those basic requirements Art. 591(B) establishes additional requirements, depending on the type of class action. Under 591(B)(3), applicable to this class action, plaintiff must prove 1) that questions of law or fact predominate over individual issues, and 2) that the class action is the superior device for resolving the matter fairly and efficiently. Having covered the general principles regarding restrictions on class actions, the Court turned to analysis of certification in the case before it. The Court held that the trial court had erred in certifying the class because plaintiffs did not establish commonality under 591(A) and did not establish predominance and superiority under 591(B)(3). Regarding commonality, the Court explained that in mass tort actions, “each member of the class must be able to prove individual causation based on the same set of operative facts and law that would be used by any other class member to prove causation.” *Price*, 79 So. 3d at 969 (quoting *Brooks v. Union Pacific RR. Co.*, 08–2035 at 17, 13 So. 3d 546, 559 (La. 2009)). The Court relied on its precedent (*Ford* and *Brooks*) for the narrow range of commonality in mass torts: “only mass torts arising from a common cause or disaster are appropriate for class certification.” *Id.* at 975. The plaintiffs argued that the commonality requirement was satisfied by the common issue: “whether defendants' off-site emissions caused property damage to the residences in the area surrounding the plant.” The Court explained that establishing commonality on this issue required proving not just that emissions occurred, but also that defendants had a duty to avoid the releases, that the duty was breached, and that the breaches caused damage to the property owners. Those issues must be resolved based on common evidence for all class members. The Court then demonstrated why the commonality requirement could not be satisfied by detailing the individualized questions that must be addressed. Summarizing the failure to satisfy the commonality requirement, the Court stated, “[F]ar from offering the same facts, each member of the proposed class in this case will necessarily have to offer different facts to establish that each defendant's emissions caused them specific damages on yet unspecified dates (which dates may run into the hundreds or even thousands, considering the 66–year period in question).” *Id.* at 975. Moreover, the causation issue was complicated by the many other sources of the hazardous substances.

Beyond the failure to satisfy the 921(A) prerequisite of commonality, the Court held that plaintiffs failed to establish predominance and superiority under 921(B)(3). Regarding superiority, the Court concluded that “the claims are so highly individualized that class certification likely will be unfair to members who have claims stronger than the named representatives.” *Id.* at 976. Moreover, 500 putative class members already had commenced

individual claims.

Alexander v. Norfolk Southern Corporation, No. 2011-2793, 82 So. 3d 1234 (La. 2012) (per curiam), *reh'g denied*, 85 So. 3d 1277 (La. 2012)

Facts: The case arose out of a chemical spill from a railroad tank car in New Orleans. There was no evacuation, and about twenty people were treated and released at the scene for exposure to the chemical. Plaintiffs filed a class action against several railroad and chemical companies. The district court certified the class, and the appellate court affirmed.

Issue: Whether the court erred in certifying a class in such a chemical spill case.

Holding and Rationale: Yes. The Court recited the requirements that must be satisfied for a class action under CCP Art. 591(A): commonality, typicality, adequacy of the representative, and objectively identifiable class. If all the 591(A) requirements are satisfied, then, under Art. 591(B)(3) the court must find that questions of law or fact common to members of the class predominate over questions affecting individual members of the class. The court repeated its statement from other decisions that “the predominance requirement is more demanding than the commonality requirement, because it ‘entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class,’ a process that ultimately ‘prevents the class from degenerating into a series of individual trials.’” *Alexander*, 82 So. 3d at 1235 (quoting *Dupree v. Lafayette Ins. Co.*, 09–2602 (La.11/30/10), 51 So.3d 673 (quoting *Brooks v. Union Pacific R. Co.*, 08–2035, p. 19 (La.5/22/09), 13 So.3d 546, 560)). The Court also stated that this inquiry involves identifying a common question, the determination of which will resolve an issue central to all claims “‘in one stroke.’” *Id.* at 1236 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). With those basic principles in mind, the Court turned to the district court’s analysis. The district court had found the requisite common and predominant issues in whether the chemicals released could and did cause the alleged damages to the plaintiffs. Reviewing the testimony of toxicologists, the Court found that it established instead that “determination of damages will be dependent upon proof of facts individual to each putative class member.” *Alexander*, 82 So. 3d at 1236. To determine each person suffered the alleged damages would involve assessment of each person’s susceptibility to the chemicals, health, medical history, and other factors. The Court explained that this was precisely the danger it had warned of in earlier cases—“the class would degenerate into a series of individual trials.” *Id.* (citing *Brooks v. Union Pacific R. Co.*, 08–2035, (La.5/22/09), 13 So. 3d 546). Thus, the Supreme Court reversed, finding that the district court had erred in finding under Art. 591(B)(3) that common questions of law and fact predominated.

5. Conflict of Laws

Arabie v. CITGO Petroleum Corp., No. 2010–C–2605, 89 So. 3d 307 (La. 2012).

Overturing an award of punitive damages against a Texas-based corporation for an oil spill at its Louisiana plant where Louisiana residents were injured, the Supreme Court concludes that under CC Art 3546(1) punitive damages in Louisiana may be awarded if authorized by the law of the state where the injurious conduct occurred and by either the law of the place where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled. An alternative is under Art. 3546(2)—law of the state where the injury occurred and the law of the state where person whose conduct caused the injury is domiciled. The Court noted that paragraph 2 was inapplicable because it was undisputed that the injuries occurred in Louisiana. Turning to paragraph 1, the Court addressed where CITGO is domiciled.

Whether a corporation is a domiciliary of a state pursuant to Article 3548 is determined by a multi-factor test under Article 3542. Applying those factors, the Court determined that it is appropriate to treat CITGO as a domiciliary of Louisiana. Because CITGO's domicile and the place of the injurious conduct would have to be Texas or Oklahoma for their punitive damages law to apply under Art. 3546(1), the defendant was not liable for punitive damages under that article. Next, the Court held that CC Art. 3543 did not provide for imposition of another state's punitive damages law. Art. 3543 does not apply to situations in which the conduct causing the injury occurred in Louisiana and the injury was caused by one domiciled in or having a significant connection with Louisiana. Finally, CC Art. 3547 did not authorize application of the Texas or Oklahoma punitive damage laws. Art. 3547 applies to exceptional cases in which, even if Arts. 3543-3546 do not apply, it is "clearly evident" that the policies of another state would be more seriously impaired if its law were not applied. Thus, Arts. 3546 and 3543 did not authorize application of Texas or Oklahoma punitive damages law, and the case did not fall under Art. 3547 exceptional cases.

6. Appellate Procedure

Wooley v. Lucksinger, No. 2009-0571, 61 So. 3d 507 (La. 2011) *reh'g denied* (La. Apr. 29, 2011) -- an appellate court has the authority to raise an issue sua sponte on appeal, including an issue on appeal where there has not been an assignment of error. The question becomes whether a re-examination of the district court's ruling is required in the interests of justice. In the case before it, the Supreme Court found that the court of appeal failed to articulate why it addressed an uncontested choice of law issue.

Merrill v. Greyhound Lines, Inc., No. 2010-2827, 60 So. 3d 600 (La. 2011), *on remand to 70 So 3d 991* (La. App. 4th Cir.), *writ denied*, 74 So 3d 214 (La. 2011).

Applying *Wooley, supra*, the Court found no error in the court of appeal reaching issues not raised by the parties. However, "having made the determination to review these issues, the court of appeal should have invited additional briefing from the parties prior to rendering judgment." *Merrill*, 60 So. 3d at 602. Because the court did not do that, the Court vacated the judgment and remanded to give the parties an opportunity to brief the issue.

7. Trial Practice

Arshad v. City of Kenner, No. 2011-1579, ___ So. 3d ___, 2011 WL 7111322 (La. Jan. 24, 2012).

Under La. R.S. 13:5105(D), a political subdivision may only waive its right to a non-jury trial through an ordinance or resolution waiving the right in all cases, not in a specific suit. A political subdivision's insurer is not entitled to a trial by jury where the political subdivision has not waived the prohibition and the insurer's liability is vicarious, not independent.

8. Abandonment

Louisiana Department of Transportation and Development v. Oilfield Heavy Hauler, LLC, No. 2011-C-0912, 79 So. 3d 978 (La. 2011) – Overruling the Third Circuit, the Supreme Court holds that sending a letter to all parties to schedule a discovery conference in accordance with Louisiana District Court Rule 10.1 is a "step" in the prosecution or defense of an action, within the meaning of CCP Art. 561 sufficient to interrupt the abandonment period. Rule 10.1 requires

a discovery conference prior to filing any discovery motion, and discovery motions move the action toward judgment. “Thus, scheduling a Rule 10.1 conference is a necessary part of the discovery motion process, and a necessary step to hasten a matter toward judgment when a party has failed to comply with discovery requests.” *Id.* at 986.

9. Service of Process

Igbinoghene v. St. Paul Travelers Ins. Co., No. 2011-0124, 58 So. 3d 452 (La. 2011).

A plaintiff does not show good cause for failure to request service within 90 days as required by CCP Art. 1201 and avoid dismissal by contending that the parties were engaging in ongoing settlement negotiations and plaintiff had agreed to defendant’s request for an extension of time to file responsive pleadings. Defendant did not expressly and in writing waive service under 1201(C). Moreover, defendant’s actual knowledge of plaintiff’s filing the action did not obviate the need for service.

Hunter v. Louisiana State University, No. 2011–C–2841, 82 So. 3d 268 (La. 2012).

Where the plaintiff timely requests service on the attorney general pursuant to R.S. 13:5107, but the petition misidentifies the defendant but provides sufficient information to identify the defendant, the lower court should not dismiss the action, but instead permit the plaintiff the opportunity to cure the defect by making service upon the proper agency.

10. Recusal

Tolmas v. Parish of Jefferson, No. 2012-C-0555, 87 So. 3d 855 (La. 2012).

The Supreme Court transfers the case from one appellate court to another where the author of the first appellate opinion had a substantial economic interest in the controversy--an interest in a corporation which was in direct commercial competition with the plaintiff. The Court justified its actions both on recusal (CCP Art. 151(A)(4)) and avoiding the appearance of impropriety grounds.

11. Arbitration

Interdiction of Wright, No. 2010–CC–1826, 75 So. 3d 893 (La. 2011).

Issue: Whether an unconfirmed arbitration award has res judicata effect.

Holding and Rationale: No. Res judicata does not apply to an unconfirmed arbitration award. “[I]f the legislature intended unconfirmed awards to have preclusive effects, there would be no reason to include a procedure for confirming awards. By enacting La. R.S. 9:4209, et seq., the legislature intended for parties to seek judicial confirmation before an arbitration award would become a legally enforceable judgment.” *Id.* at 897. The Court further explained that the applicability of the res judicata statute presupposes a judgment rendered by a court with constitutional authority.

Hodges v. Reasonover, No. 2012-0043, ___ So. 3d ___, 2012 WL 2529403 (La. July 2, 2012).

Issue: “[W]hether a binding arbitration clause in an attorney-client retainer agreement is enforceable where the client has filed suit for legal malpractice.” *Hodges*, 2012 WL 2529403, at *1.

Holding: There is no per se rule against such a clause if it is fair and reasonable to the client.

“However, an attorney must make full and complete disclosure of the potential effects of an arbitration clause, including the waiver of a jury trial, the waiver of the right to appeal, the waiver of broad discovery rights, and the possible high upfront costs of arbitration. The contract must explicitly list the types of disputes covered by the arbitration clause, e.g., legal malpractice, and make clear that the client retains the right to lodge a disciplinary complaint.” *Id.* at *8. The arbitration agreement at issue in the case did not satisfy the requirements and was unenforceable.

B. Courts of Appeal Decisions

1. Arbitration

Wilson v. Allums, No. 47,147-CA, ___ So. 3d ___, 2012 WL 2052131 (La. App. 2d Cir. June 8, 2012).

Facts: Contract to build log house contained a mandatory arbitration provision. A supplier filed suit, and the owners filed an answer and cross-claim against the contractor without reserving rights as to arbitration. The district court eventually dismissed the cross-claim with prejudice. The owners later filed a demand for arbitration against the contractor. The contractor filed a petition for injunctive relief in court, arguing among other things, that the owners had waived the right to arbitrate by filing a cross-claim. The owners filed an exception asserting lack of subject matter jurisdiction (because they had initiated arbitration) and no cause of action. The trial court granted a preliminary injunction.

Issue:

- 1) Whether a party waived its right to arbitrate under the terms of a contract should be decided by a court or an arbitrator.
- 2) Whether res judicata is an issue of procedural arbitrability that should be decided by an arbitrator.

Holding and Rationale:

1) An arbitrator. La. R.S. 9:4203 requires a Louisiana court, at the request of an aggrieved party, to order the parties to arbitration in accordance with the terms of their arbitration agreement if the court finds 1) that an arbitration agreement was made and 2) that the opponent failed or refused to comply. Those are the only two issues in a suit to enforce an arbitration agreement. “[W]hether a party waived its right to arbitrate under the terms of a contract is an issue of procedural arbitrability that should not be decided by the courts, but rather by the arbitrator.” *Wilson*, ___ So. 3d at ___.

2) No. “The trial court was in a better position than an arbitrator to decide whether the earlier judgment, issued by another . . . judge, had res judicata effect. Under the circumstances of this case, we conclude that the trial court had subject matter jurisdiction to determine whether res judicata was a ground upon which to grant the preliminary injunction.” *Id.* at ___.

Greer v. Town Const. Co., Inc., No. 2011 CA 1360, ___ So. 3d ___, 2012 WL 982414 (La. App. 1st Cir. Mar. 23, 2012).

Issue: Whether an unconfirmed arbitration award has res judicata effect.

Holding and Rationale: “[A] district court errs in giving preclusive effect to an unconfirmed arbitration award, even though the parties do not dispute the existence of or the finality of the unconfirmed award.” *Greer*, ___ So. 3d at ___. The court noted that the parties had “consented to the arbitration, that neither party objected to or questioned the merits of the arbitration award or the finality of the award, and that the parties apparently honored the arbitrator's decision.” *Id.* at ___. Therefore, the First Circuit expressed doubt about the need to confirm such an arbitration

award, but the court said it was bound by the Louisiana Supreme Court's decision in *Interdiction of Wright, supra*.

Jasper Contractors Inc. v. E-Claim.com, LLC, No. 2011 CW 0798, ___ So 3d ___, 2012 WL 2847636 (La. App. 1st Cir. May 4, 2012).

Facts: Plaintiff signed a contract with defendant to provide electronic storage of plaintiff's business records. The contract included a mandatory arbitration provision. When a number of documents were deleted or lost, affecting over 900 of plaintiff's clients and damaging plaintiff's business, defendant disclosed that it had outsourced the web hosting of plaintiff's files to an out-of-state business. Plaintiff filed suit in state district court seeking damages and a declaratory judgment that the contract was null and void for a vice of consent. Defendant filed an exception of prematurity, contending that the claim was subject to the mandatory arbitration provision in the contract. The district court overruled the exception on the ground that the allegations of fraud required that the court first determine the validity of the contract before deciding whether the matter should be referred to arbitration. The court of appeal denied a writ application, but the Louisiana Supreme Court granted writs and remanded to the First Circuit for briefing, argument, and opinion.

Issue: Whether the court should decide the issue of the validity of the contract.

Holding and Rationale: No. The U.S. Supreme Court established the general rules in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006): a challenge to the validity of a contract as a whole goes to the arbitrator, while a challenge to the validity of an arbitration clause goes to the court. But those rules do not apply where the parties agree in the contract, as in this case, that Rules of the American Arbitration Association prevail over the FAA. Rule 7-A provides that an arbitrator has power to rule on the arbitrator's own jurisdiction, including questions of existence, scope, or validity of the arbitration agreement. "Although general jurisprudential law, based on the FAA, allows a district court to decide a challenge directed only to a contractual arbitration clause, when, as here, the parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Jasper Contractors*, 2012 WL 2847636 at *6.

Sturdy Built Homes, L.L.C. v. Carl E. Woodward L.L.C., No. 2011-0881, 82 So. 3d 473 (La. App. 4th Cir. 201), writ denied, 85 So. 3d 94 (La. 2012).

Facts: Subcontractor on apartment construction project filed suit against general contractor and other defendants seeking damages for breach of the subcontract, unjust enrichment, tortious interference with the contract, and bad faith breach of contract.

Issue: Whether "a non-signatory to a contract with an arbitration clause can be compelled to arbitrate under an equitable estoppel theory, including when the action is intertwined with, and dependent upon, that contract."

Holding and Rationale: Yes. The court followed the decision of the federal Fifth Circuit in *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (5th Cir. 2000).

2. Sanctions and Fees

Acosta v. B & B Oilfield Services, Inc., No. 2012-122, 91 So. 3d 1263 (La. App. 3 Cir. June 6, 2012).

Facts: Plaintiff argued that sanctions should not have been imposed under CCP Art. 863 because

defendant did not supply him with needed information, and he filed suit to avoid prescription. Court awarded attorney fees of \$7,500 and expenses of \$65.40.

Issue: Whether trial court abused its discretion in awarding sanctions when suit may have been filed in good faith to avoid prescription.

Holding and Rationale: No. When a trial court awards sanctions under Art. 863, the type and amount are reviewed on appeal under the abuse of discretion standard. The Third Circuit observed that under CCP Art. 863 sanctions may be imposed upon a plaintiff for “the continued pursuit of the litigation” after he brought an action and then subsequently obtained information that indicated the lawsuit was without reasonable basis. The sanction was affirmed, and the court awarded \$2,500 for the filing of a frivolous appeal, pursuant to CCP Art. 2164:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

Regarding sanctions for frivolous appeal, the court explained that they are awarded if the appellant is trying to delay the action, the appealing attorney does not believe the law the attorney is advocating, or the appeal does not present a “substantial legal question.” The court found that the appeal of sanctions did not present a substantial legal question.

Mother of Eden, LLC v Thomas, No. 2011-1303, 86 So. 3d 760 (La. App. 3d Cir. 2012), *reh’g denied* (Apr. 18, 2012).

Under CCP Art. 863 as interpreted by the case law, sanctions can only be imposed on motion by a party or the court and after a hearing. A trial court must hold a hearing and provide counsel with an opportunity to respond to a proposed award of sanctions. This also applies to attorney’s fees awarded under Art. 863.

Slaughter v. Board of Supervisors, No. 2010 CA 1114, 76 So. 3d 465 (La. App. 1st Cir. 2011), *writ denied*, 77 So. 3d 970 (La. 2012).

Article 863 imposes an obligation on litigants and their attorneys to make an objectively reasonable inquiry into the facts and law; subjective good faith will not satisfy this duty of reasonable inquiry. . . . The article does not empower a trial court to impose sanctions simply because a particular argument or ground for relief is subsequently found to be unjustified; failure to prevail does not trigger an award of sanctions. Article 863 is intended to be used only in exceptional circumstances; where there is even the slightest justification for the assertion of a legal right, sanctions are not warranted.

Id. at 470.

Bandaries v. Cassidy, No. 2011-1267, 86 So. 3d 125 (La. App. 3d Cir. 2012), *writ denied*, 90 So. 3d 412 (La. 2012).

Facts: Plaintiff had assisted defendant as both a friend and a lawyer, providing advice and

advancing money to maintain her property. Plaintiff filed three separate actions against his former client based on the same transaction or occurrence. After one was dismissed, he filed another, and when that was dismissed on grounds of *lis pendens* with the trial court imposing sanctions of \$2,500, he appealed. Plaintiff had already filed one appeal of a dismissal of his action, which the Third Circuit had affirmed. In this case, the plaintiff again appealed the dismissal on grounds of *lis pendens*, which the Third Circuit affirmed. Turning to the issue of sanctions, the Third Circuit affirmed sanctions of \$2,500 (CCP Art. 863). The Third Circuit rejected plaintiff's argument that he engaged in no sanctionable conduct because he was not procedurally barred from filing the action since his prior suit was dismissed without prejudice. The Third Circuit explained that the trial court had not relied upon the dismissal of the action as the basis for imposing sanctions; rather, the trial court explained that an examination of the pleadings revealed something personal was going on and that the second lawsuit was filed for purposes of harassment and increasing the other party's legal costs. The Third Circuit found no abuse of discretion in the trial court's imposition of sanctions. The Third Circuit also awarded \$2,500 for the frivolous appeal pursuant to CCP Art. 2164. The court observed that the attorney's act in filing the last appeal was "delusive and disingenuous," and his motive for filing the second appeal was to harass defendant and cause her needless incurrence of additional legal expenses.

Alexander v. Centanni, No. 2011-0783, 80 So. 3d 590 (La. App. 4th Cir. 2011).

Facts: Defendant in an unfair trade practices action filed a special motion to strike under CCP Art. 971. The trial court granted the motion dismissing the claims, and then defendant filed a motion for attorney's fees and costs under Art. 971. The court granted the motion. The court conducted an *in camera* inspection of the billing records of the defense attorneys but did not permit plaintiff's counsel to review the records.

Holding: The Fourth Circuit began with the principle that statutes granting penalties and attorney's fees are penal and must be strictly construed. The appellate court found the imposition of attorney's fees without an opportunity to review the records to constitute a "lack of meaningful due process." *Id.* at 593. The court explained, "There is no reason why the plaintiff should not have been able to have reviewed a redacted copy (anything privileged could have been removed by the trial court) of the billing records after the trial court's *in camera* inspection." *Id.*

Daigle v. City of Shreveport, No. 46,429, 78 So. 3d 753 (2d Cir. 2011), *writ denied*, 79 So. 3d 1027 (La. Feb. 3, 2012).

Facts: Plaintiff sued the city after slipping on a freshly painted sidewalk. At some point early in the case, each side listed the trial judge on its witness list. At a status conference, the trial judge told the parties that he did not see the accident occur and did not know anything about it. He instructed the parties that if anyone was going to file a motion to recuse, they should do it at that time. No motion to recuse was filed. Later, the attorney for the city moved for a second continuance which was denied and writs were denied. Then he filed a motion to recuse the judge because he was on the witness list. Another judge heard the recusal motion, denied it, and set a hearing on sanctions. At that hearing, the court found that the city's attorney did not file the recusal motion in good faith, but filed it to receive an extension of time. The court imposed sanctions on the attorney personally for the costs of the recusal and sanctions hearings--\$3,000.

Issue: Whether the court abused its discretion in imposing sanctions when the motion to recuse

was procedurally proper and in ordering the city's attorney to pay the sanctions in his personal capacity.

Holdings and Rationale: No, the court did not abuse its discretion on either point. The court determined that the attorney "failed to perform his duties as an officer of the court." *Daigle*, 78 So. 3d at 773. The attorney knew that if the judge were called as a witness, he would testify that he did not witness the accident and did not have any helpful information. Therefore, the attorney knew that the motion was not supported by the facts. The Second Circuit also rejected his argument that the sanctions should not be imposed on him personally because he was an attorney for the city, and his superior had ordered him to file the motion to recuse. "A personal, nondelegable duty is imposed on the signing attorney to satisfy himself, by application of his own judgment, that the pleading is factually and legally responsible. Because the duty belongs to the individual attorney, only he, and not his law firm, may be sanctioned for violating the duty." *Id.* at 772-73. The court analogized the attorney's position with the city to that of an attorney in a law firm, who may not delegate his duty under Art. 863.

Sicard v. Sicard, No. 11-CA-423, 82 So. 3d 565 (La. App. 5th Cir. 2011).

Facts: Court awarded \$5,500 in attorney's fees in an action to annul a judgment under CCP Art. 2004.

Issue: Whether court abused its discretion in awarding attorney's fees as adjunct to granting summary judgment without considering factors relevant to award of attorney's fees.

Holding and Rationale: Yes. The court explained the requisite considerations in awarding attorney's fees:

[R]egardless of the statutory authorization for an award of attorney's fees, courts should examine certain factors to determine the reasonableness of attorney's fees. *Rivet v. State, Dep't. of Transp. and Dev.*, 96-145, p. 11 (La.9/5/96), 680 So.2d 1154, 1161. Factors to be considered include the ultimate result obtained; the responsibility incurred; the importance of the litigation; the amount of money involved; the extent and character of the work performed; the legal knowledge, attainment, and skill of the attorneys; the number of appearances involved; the intricacies of the facts involved; the diligence and skill of counsel; and the court's own knowledge.

Sicard, 82 So. 3d at 569. The record was void of any evidence that the court considered these factors in making the award of attorney's fees.

3. Motion to Dismiss

Succession of Carroll, No. 46,327, 72 So. 3d 384 (La. App. 2 Cir. 2011), writ not considered (untimely), 75 So. 3d 912 (La. 2011).

Facts: Children of a decedent who received nothing under her will sued attorney who prepared the will, asserting tort claims against him. The plaintiff children made allegations that the attorney participated in a scheme to defraud them and to conceal their property and succession rights. The defendant attorney filed, among other things, a special motion to strike the allegations in the petition. The trial court granted the motion to strike.

Issue: Whether the motion provided for in CCP Art. 971 is restricted to defamation claims and actions involving free speech.

Holding and Rationale: No. The express language of Art. 971 does not restrict its applicability:

“any act of that person in furtherance of the person's right of petition or free speech.” CCP Art. 971 applies to any cause of action arising from any act of the person in furtherance of the person’s right to petition or free speech. An action against an attorney arising from actions undertaken and pleadings filed in court on behalf of the attorney’s clients constitute written statements made before a judicial proceeding. The attorney met his burden under Art. 971 of proving that his actions were undertaken in his exercise of his right of free speech or petition. The burden then shifted to plaintiffs to demonstrate a probability of success on their claims. Because plaintiffs failed to satisfy their burden, the trial court properly dismissed their claims and awarded the defendant attorney’s fees under Art. 971.

4. Evidence

Benjamin v. Zeichner, No. CA 11-1524, ___ So. 3d ___, 2012 WL 2400630 (La. App. 3d Cir. June 27, 2012).

Issue: Whether doctor who was not licensed to practice medicine at time of trial but was licensed when he began working for plaintiff as an expert met the mandatory requirements for expert medical testimony in La. R.S. 9:2794(D)(1).

Holding: Yes. Paragraph D does not require that expert be licensed at the time she gives testimony at trial. Comparing that paragraph with other paragraphs, the court interpreted it as requiring that the physician be licensed at the time the claim arose. Because the doctor began his expert work for plaintiff when he was still licensed in the state, the trial court erred in disqualifying him from testifying in the case.

Robertson v. Lafayette Ins. Co., No. 2011-0975, 85 So. 3d 186 (La. App. 4th Cir. 2012).

Facts: Plaintiff did not file a witness list by the deadline set by the court. The defendant filed a motion to strike all of plaintiff’s witnesses after the deadline passed. The court set a hearing, and plaintiff’s counsel did not attend. The court granted the motion to strike the witnesses.

Issue: Whether the trial court abused its discretion by striking plaintiff’s witnesses for failure to file a witness list.

Holding and Rationale: No, the court did not abuse its discretion. Pursuant to CCP Art. 1551, the court had broad discretion to implement and enforce a pretrial order. Although the striking of witnesses is a harsh remedy, the plaintiff did not avail himself of multiple opportunities to correct this deficiency. However, plaintiff himself was still entitled to testify at trial. The appellate court distinguished between a party’s witnesses and a party, observing in a footnote that “the plaintiff is not a witness but a party to the lawsuit. We find nothing in the law or jurisprudence that would prevent a party from testifying at trial.” *Roberston*, 85 So. 3d at 188 n.3.

Scheuermann v. Cadillac of Metairie, Inc., No 11-CA-1149, ___ So. 3d ___, 2012 WL 1957702 (La. App. 5th Cir. May 31, 2012).

Facts: On motion to dismiss and enforce settlement agreement, the parties attached various documents to the motion and memoranda, but neither party introduced any of the documents into evidence.

Issue: Whether court could consider documents that were not introduced into evidence.

Holding and Rationale: No.

Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. . . . Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. . . . Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence.

Scheuermann, 2012 WL 1957702, at *3. Thus, court erred in granting motion because there was no evidence properly before it on which to base such a ruling.

Horacek v. Watson, No. CA 11-1345, 86 So. 3d 766 (La. App. 3d Cir. 2012).

Application of the uncalled witness rule, giving rise to an adverse presumption when a party having control of a favorable witness fails to call him or her to testify, is discretionary with the trial court. Therefore, the court’s reference to uncalled witness rule in its reasons for judgment was not error.

5. Judgments

Acker v. Bailiff, No. 47,160-CA, ___ So. 3d ___, 2012 WL 2401006 (La. App. 2d Cir. June 27, 2012).

Facts: Judge who signed the judgment had not heard the matter, and the record showed no ruling by the hearing judge. Plaintiff brought action to annul the succession judgment. The court held that the claim to annul had prescribed.

Issue: Whether judgment signed by a judge other than the judge who heard the case was valid.

Holding and Rationale: No. CCP Art. 1911 states that “every final judgment shall be signed by the judge.” That language has been interpreted as meaning the judge before whom the case was tried. A judgment signed by another judge is invalid. There are exceptions to that rule. Under CCP Art. 253.3, a duty judge can hear and sign specified orders and judgments. The judgment signed in this case did not come within those exceptions. Thus, no final judgment was rendered in this matter.

Gaten v. Tangipahoa Parish School System, No. 2011-CA-1133, 91 So. 3d 1073 (La. App. 1st Cir. 2012).

Facts: A summary judgment which simply stated that the “Motion for Summary Judgment is GRANTED” was appealed.

Issue: Whether there was a valid judgment.

Holding and Rationale: No. The First Circuit dismissed the appeal because there was no final judgment, and thus the appellate court lacked subject matter jurisdiction. The court stated a number of principles regarding judgments:

Under Louisiana law, a final judgment is one that determines the merits of a controversy in whole or in part. La.Code Civ. Proc. Ann. art. 1841. A final judgment must be identified as such by appropriate language. La.Code Civ. Proc. Ann. art. 1918. A valid judgment must be precise, definite, and certain. *Laird v. St. Tammany Parish Safe Harbor*, 02–0045 (La.App. 1 Cir. 12/20/02), 836 So.2d 364, 365. A final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the

ruling is ordered, and the relief that is granted or denied. See *Carter v. Williamson Eye Center*, 01–2016 (La.App. 1 Cir. 11/27/02), 837 So.2d 43, 44. These determinations should be evident from the language of a judgment without reference to other documents in the record.

Gaten, 91 So. 3d at ____.

Leonard v. Reeves, No. 2011 CA 1009, 82 So. 3d 1250 (La. App. 1st Cir. 2012).

Facts: Attorney filed a “Motion to Annul Judgment,” seeking annulment of a default judgment based on lack of proper service and notice of hearing and misrepresentations regarding the amounts actually billed and the amounts actually paid or otherwise credited. Attorney’s client sued him for legal malpractice.

Issue: Whether a null judgment can be attacked other than by a petition for nullity.

Holding and Rationale: Yes. “It seems only reasonable, then, that an absolutely null judgment may also be collaterally attacked by procedural means short of a petition for nullity, such as a contradictory motion or rule.” *Id.* at 1260. “Absolute nullity of a judgment is thus ‘[a]n issue which may be raised properly by an exception, contradictory motion, or rule to show cause’ and therefore appropriate for summary proceeding. See La. C.C.P. art. 2592(3).” *Id.* n.3 Thus, the attorney’s filing of a motion to annul was not malpractice.

6. Summary Judgment

Sheffie v. Wal-Mart Louisiana LLC, No. 11-CA-1038, ____ So. 3d ____, 2012 WL 1957591 (La. App. 5th Cir. May 31, 2012), *reh’g denied* (July 19, 2012).

Facts: Lawsuit was based on a slip and fall in Wal-Mart. Defendant Wal-Mart filed a motion for summary judgment, and plaintiff filed an opposition attaching exhibits, including a video surveillance recording of the accident. At the hearing on the motion for summary judgment, oral argument was conducted, but no evidence was officially offered or introduced. The trial judge reviewed the video, found that it did not show whether liquid was on the floor, and granted the summary judgment in favor of the defendant.

Issue: Whether the trial court erroneously considered video surveillance, which was not introduced into evidence at hearing on motion.

Holding and Rationale: Yes. CCP Art. 966 lists documents that need not be formally introduced into evidence at the hearing if they already are “on file” or physically placed into the record before the hearing: “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.” CC Art. 966(B). “[A]lthough La. C.C.P. art. 966(B) provides an exception for specific documents a court may consider on a motion for summary judgment without the need to formally introduce such documents into evidence at hearing, generally all other documents or things not enumerated in the article but relied upon by the parties must be verified or authenticated and officially offered and introduced into evidence.” *Sheffie*, 2012 WL 195759, at *3. The video surveillance tape is not among the documents listed in 966(B), and it was never officially offered or introduced into evidence.

Ultra Pure Water Technologies, Inc. v. Standex International Corp., No. CA 11-1531, 89 So. 3d 1282 (La. App. 3d Cir. 2012).

Facts: Defendant filed a motion for summary judgment. At a hearing on the motion defendant filed into evidence discovery documents and deposition excerpts which defendant argued showed plaintiff had sold the equipment in question before any claim for redhibition arose. Plaintiff objected to the documents as untimely in violation of the requirement for fifteen days' notice under La. CCP Art. 966(B). Defendant argued, however, that plaintiff should have been familiar with the documents and that its counsel was present at the depositions from which the excerpts were taken. Plaintiff argued that most of the materials had neither been provided with the summary judgment motion nor timely identified and served as supplemental support for the motion, thus, the fifteen day notice requirement of Art. 966(B) should have been enforced. The trial court gave plaintiff only a short recess to familiarize itself with the documents and deposition excerpts in question. The court then granted the summary judgment, relying in large part on the documents.

Issue: Whether the court committed error in admitting the late-filed documents and granting summary judgment based on them.

Holding and Rationale: Yes.

The Louisiana Supreme Court in *Buggage v. Volks Constructors*, 06–0175 (La.5/5/06), 928 So.2d 536, noted that the time limitation established by La.Code Civ.P. art. 966(B) was mandatory. Nevertheless, the Buggage court did also indicate a trial court has some discretion in this matter. Rather than holding that untimely affidavits must be excluded by the trial court, the supreme court specifically stated that such affidavits “can” be excluded by the trial court, and noted that the trial court “acted within its discretion” in excluding the opposition. *Buggage*, 928 So.2d at 536. Other courts of this state have also indicated that district courts have discretion, absent prejudice, in application of this otherwise mandatory time period.

Ultra Pure, 89 So. 3d at 1288.

The Third Circuit held that the plaintiff was prejudiced by the court’s not requiring compliance with the procedural rules for serving documents on a motion for summary judgment. “The late introduction by [defendant] of the evidence in question prevented [plaintiff] from meeting this evidence with their own arguments and submissions in opposition. Thus, we find the trial court abused its discretion in ruling on the motion for summary judgment at the point this evidence was offered for introduction.” *Id.* at 1289.

Welch v. East Baton Rouge Parish Metropolitan Council, No. 2010-1532, 64 So. 3d 249 (La. App. 1st Cir. 2011).

Facts: Trial court granted defendant’s motion for summary judgment after denying plaintiff’s motion to continue the motion and compel discovery. Plaintiffs, despite noticing a deposition and obtaining a subpoena had not been able to depose a particular person.

Issue: Whether the trial court abused its discretion in denying the continuance and granting the summary judgment.

Holding and Rationale: Yes. “When a trial court cannot positively determine the diligence of a party in securing evidence through discovery, it should grant a requested continuance. The

continuance produces delay, but the denial of the continuance may cause irreparable injury.” *Welch*, 64 So. 3d at 254. “The mere contention of an opponent that he lacks sufficient information to defend a motion for summary judgment because of movant's failure to comply with discovery is insufficient to defeat the motion. . . . However, when the plaintiff alleges sufficient reasons why additional evidence to oppose the summary judgment motion could not be produced, it is an abuse of discretion for the trial court to deny the plaintiffs request for a continuance. *Id.*

Drury v. Allstate Insurance Co., No.11-CA-509, 86 So.3d 634 (La. App. 5th Cir. 2011).

A police report does not comply with the requirement that supporting affidavits shall be made on personal knowledge on summary judgment. There must be an affidavit or deposition by the police officer who authored the report or other witnesses in support of a summary judgment motion.

7. Exceptions

Succession of Carroll, No. 46,327-CA, 72 So. 3d 384 (La. App. 2d Cir. 2011), *writ not considered by* 75 So. 3d 912 (La. 2011).

Facts: Two children who were excluded from mother’s will brought action against several, including attorney who drafted will. Attorney filed peremptory exception of no cause of action. The trial granted the exception because the plaintiffs were not defendant’s clients, there were no allegations of intent or intent to injure, and defendant had “no legal duty to a person intentionally left out of a testament by a testator.” *Id.* at 387.

Issue: Whether the court erred in granting the exception of no cause of action.

Holding and Rationale: No. The court stated the limited circumstances under which the exception can be granted:

An exception of no cause of action is likely to be granted only in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insurmountable bar to relief. Thus, dismissal is justified only when the allegations of the petition itself clearly show that the plaintiff does not have a cause of action, or when its allegations show the existence of an affirmative defense that appears clearly on the face of the pleading. . . . A court appropriately sustains the peremptory exception of no cause of action only when, conceding the correctness of the well-pleaded facts, the plaintiff has not stated a claim for which he can receive legal remedy under the applicable substantive law.

Id. at 389. The petition failed to state an intentional tort claim. The attorney owed a duty to his clients, not to plaintiffs.

8. Prescription/Peremption

Bates v. City of Shreveport, No. 46,432-CA, 69 So. 3d 1205 (La. App. 2d Cir. 2011).

Facts: Plaintiffs sued city for a taking. Eight years after filing, they filed an amended petition, adding as a plaintiff the person who owned the property at the time of the taking. The city opposed the amendment, arguing prescription. The trial court granted the exception of

prescription.

Issue: Whether an amendment to a petition filed eight years after the original petition related back.

Holding and Rationale: No. *Giroir v. South Louisiana Medical Center*, 475 So. 2d 1040 (La. 1985), did not place any time limits on the relating back of an amended pleading. The passage of time, however, generally weighs against relation back.

Stewart v. Continental Casualty Co., No. 2011 CA 0505, 79 So. 3d 1047 (La. App. 1st Cir. 2011), *writ denied*, 82 So. 3d 28 (La. 2012).

Facts: Plaintiffs sued attorney's legal malpractice carrier but did not name attorney. Insurer filed exceptions of no right of action and no cause of action, contending that the direct action statute does not authorize the suit against the insurer without naming the insured under the facts of the case. Plaintiffs amended their petition to name the attorney as a defendant. Attorney and insurer argued preemption, contending that because attorney was not sued within three years, claim had prescribed under La. R.S. 9:5605.

Issue: Whether relation back applies to legal malpractice action.

Holding and Rationale: No. CCP Art. 1153 does not avoid the operation of the period by allowing a "relating back" to the filing of an original and timely filed petition.

Allowing the application of LSA–C.C.P. art 1153 to the instant case would avoid the operation of the preemptive time period by allowing a pleading filed after the expiration of the period to relate back to the filing of an original and timely filed petition. Because the avoidance of the time period interferes with the running of that time period, relation back of a petition adding a new defendant is not permitted where the time period involved is preemptive. Further, because the expiration of a preemptive time period destroys the cause of action, there is nothing for an amended or supplemental petition to relate back to under LSA–C.C.P. art. 1153.

Stewart, 79 So. 3d at 1053.

9. Abandonment

Miles v. Suzanne's Café & Catering Inc., No. 11-907, 91 So. 3d 1107 (La. App. 5th Cir. 2012). A letter that clearly establishes an agreement that the plaintiff would take no action adverse to the interests of any party without first allowing them the opportunity to protect their interests is sufficient to interrupt abandonment under CCP Art. 561.

Hunter v. R. J. Reynolds Tobacco Co., No. 2011-CA-1433, 89 So. 3d 1256 (La. App. 4th Cir. 2012).

Where the plaintiff is a putative member of a class action but has maintained a separate action, steps taken in the class action do not interrupt abandonment under CCP Art. 561 on the separate action.

10. Venue

Thompson Tree & Spraying Service, Inc. v. White-Spinner Construction, Inc., No. 2010-

1187, 68 So. 3d 1142 (3d Cir.), *writ denied*, 71 So. 3d 290 (La. 2011).

CCP Art. 44(A) clearly and unambiguously prohibits waiver of the Code's venue provisions in advance of litigation. The court rejects prior jurisprudence indicating that forum selection clauses in Louisiana are binding unless such a clause is found to be unreasonable and unjust, or arise from fraud or overreaching, or would otherwise contravene a strong state public policy:

La.Code Civ.P. art. 44(A) clearly and unambiguously prohibits waiver of the Code's venue provisions prior to the institution of the action. The contract at issue here purported to waive the venue provisions of Louisiana Code of Civil Procedure in advance of the litigation. Therefore, the waiver is not enforceable.

We decline to accept the holdings from our sister-jurisdictions that make forum selection clauses enforceable in this state. None of those decisions examined the primary source of law of this state, i.e., La.Code Civ. P. art. 44(A), and relied, instead, on the Supreme Court's pronouncements. Yet, it is the Supreme Court which declared that forum selection clauses are unenforceable when the "enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision."

Thompson Tree & Spraying Service, 68 So. 3d at 1155-56.

Aquatic Lodging, LLC v. Bayou Boys Boat Rental, LLC, No. 11-CA-382, 82 So. 3d 562 (2011). Forum selection clauses are legal and binding in Louisiana, except as specifically prohibited by law. These clauses are prima facie valid and should be enforced unless the resisting party clearly proves that enforcement would be unreasonable and unjust, or that enforcement would contravene a strong public policy of the forum where the suit is brought. A party seeking to set aside such a clause has a heavy burden.

We find that enforcement of this forum selection clause against Aquatic would be unreasonable and unjust, and enforcement would contravene a strong public policy of protecting the rights of small Louisiana companies to bring contractual disputes to Louisiana courts. Accordingly, we find the forum selection clause requiring Aquatic to file suit for payment in Texas to be invalid and unenforceable.

Aquatic Lodging, 82 So. 3d at 564.

See also ***Rising Resources Control, Inc. v. KIE Commodities & Finance***, No. 2011 CA 1026, 80 So. 3d 1217 (La. App. 1st Cir. 2011), *writ denied*, 86 So. 3d 632 (La. 2012) (applying same standard, but finding that party attacking forum selection clause did not satisfy heavy burden of proving that enforcing the clause would contravene a strong public policy).

11. Med/Mal Procedure

Alexander v. Shaw-Halder, No. 11-CA-1136, ___ So. 3d ___, 2012 WL 1605702 (La. App. 5th Cir. May 8, 2012).

Pursuant to La. R.S. 40:1299.47(A)(2)(c), if neither party takes a step to appoint an attorney chairman of the medical review panel within the prescribed time frame, both parties waive the

use of the medical review panel. The statute provides as follows: “If the board has not received notice of the appointment of an attorney chairman within one year from the date the request for review of the claim was filed, then the board shall promptly send notice to the parties by certified or registered mail that the claim has been dismissed for failure to appoint an attorney chairman and the parties shall be deemed to have waived the use of the medical review panel.”

FEDERAL LAW AND LITIGATION UPDATES
Louisiana State University
Continuing Legal Education

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Federal Statutory and Rule Changes

A. Federal Courts Jurisdiction and Venue Clarification Act of 2011

President Obama signed the Federal Courts Jurisdiction and Venue Clarification Act of 2011 on December 7, 2011, creating several changes to the statutes governing removal and venue in federal courts. The changes apply to any action commenced on or after the effective date of the Act, January 6, 2012. For any action commenced in state court and removed to federal court, that action “shall be deemed to commence on the date the action or prosecution was commenced, within the meaning of state law, in state court.”

1. Amendments to 28. U.S.C. §1441

28. U.S.C. §1441(c) was amended so that when a case includes claims based on federal law as well as a claim over which the federal court does not have original or supplemental jurisdiction, or when the claim is a statutorily nonremovable claim, the entire case may be removed if it could have been removed, had the other claim, or the nonremovable claim, not been included. While this is not a change in the law, the amended version of 28. U.S.C. §1441(c) now requires that the district court sever and remand the non-federal claim. Previously, the court could either “determine all issues,” or “in its discretion,” remand all matters in which state law predominated. Moreover, under the

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amended version of §1441(c)(2) when a case of this type is removed, only the defendants against whom federal claims are brought are required to join in or consent to the removal.

2. Amendments to 28. U.S.C. §1446

When a case is removed, “all defendants who have been properly joined and served must join in or consent to removal.” §1441(b)(2)(a). While this language is new, this is not a change in the law. This requirement applies only to removals under §1441(a), and not to removals provided for in other statutes. Very importantly, however, there is now a 30 day time limit for removal afforded to each defendant because 28 U.S.C. §1446(b)(2)(B) has been amended such that “each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons” to file the notice of removal. Moreover, §1446(b)(2)(C) has been amended to state that “if defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant, may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.”

These changes are a clear change in the law of removal in the Fifth Circuit because, until this statutory change, the Fifth Circuit required the notice of removal be filed within 30 days after the first served defendant was served, and

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all defendants served when the notice of removal was filed had to join in or consent to the removal.

3. Changes to the One Year Limit on Removal

Under the prior version of 28 U.S.C. §1446, a case could not be removed to federal court more than one year after it was commenced in state court. Some circuits, including the U.S. Fifth Circuit, allowed “equitable tolling” of this time limit. *See Tedford v. Warner Lambert Co.*, 327 F.3d 423 (5th Cir. 2003).

The 2011 Clarification Act creates a statutory confirmation of this principle. Under the revised version of §1446, the one year time limit is applicable “unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.” §1446(c)(1). A defendant can successfully remove an action more than a year after it was commenced in state court if the defendant can show the plaintiff acted in a manner that was designed to prevent a defendant who had an interest in removing the action from timely filing a notice of removal. §1446(c)(1).

4. Clarification regarding the jurisdictional amount for federal diversity jurisdiction.

While the jurisdictional amount in 28 U.S.C. §1332 is still \$75,000.00, exclusive of interest and costs, the Clarification Act of 2011 allows the removing defendant to allege the amount in controversy when the plaintiff has demanded no particular sum, or the plaintiff can recover more than a sum alleged.

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Moreover, in the case of a notice of removal filed more than a year after the action was commenced in state court, if a district court finds that the plaintiff “deliberately failed to disclose the actual amount in controversy to prevent removal, that action shall be deemed “bad faith.” §1446(c)(3)(B).

5. Voluntary Transfer of Venue

A change to 28 U.S.C. §1404 now permits the parties to agree to transfer venue to “any district or division to which the parties have consented.” Prior to this change, a case could only be transferred to a district or division “where it might have been brought.” The court must still make a determination that the transfer is for the convenience of the parties and witnesses and is also in the interest of justice. Transfers are not permitted, however, from district courts to the district courts in Guam, the Northern Mariana Islands, or the Virgin Islands.

B. 2011 Changes to the Federal Rules of Evidence

The Federal Rules of Evidence underwent a restyling as part of the Federal Rules Amendment effective December 1, 2011, but the changes are intended to be stylistic only and are not designed to be substantive changes in the law.

C. Review of 2010 Federal Rules Changes

While these changes have been in effect since December 1, 2010, they include significant changes and are still not yet well known to many members of the practicing bar.

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1. Important changes to the rules governing communications between experts and attorneys.

Witnesses who serve as testifying experts in federal court are, in addition to the Federal Rules of Evidence, subject to Federal Rule of Civil Procedure 26. Effective December 1, 2010, Rule 26 was updated in several important respects.

The pre-2010 version of Rule 26 was established in 1993. The pre-1993 version had provided work product protection to testifying experts, but since 1993, interpretation of Rule 26 has evolved to such an extent there has been nearly total discovery of communications between testifying experts and retaining counsel, including draft reports, emails, notes from meetings, and discussions with counsel. The December 1, 2010 amendments were intended to strike a balance by protecting some communications between experts and counsel, and allowing discovery of other communications.

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This table summarizes the changes.

BEFORE AND AFTER COMPARISON OF RULE 26			
Amendment	Pre December 2010 Rule	December 2010 Amendments	Intent to Change
Drafts of Expert Reports	Basically all drafts shared with counsel are discoverable.	Drafts are generally no longer subject to discovery	More refined and persuasive reports, plus reduction of elimination of time spent examining an expert about the development of opinions
Communication with Counsel	Virtually all communication discoverable	Communications protected regardless of form with three exceptions: compensation received; data considered that was provided by counsel; and assumptions relied upon that were provided by counsel	Elimination or reduction of the need for retention of records of communications between counsel and experts, thus avoiding discovery on communications
Information considered by an expert	Experts required to disclose “data or other information” considered	Experts required to disclose only “facts or data considered.”	Elimination of broad “other information” category.

The changes to the Federal Rules of Civil Procedure effective December 1, 2010 include changes to Federal Civil Rule 8 (deletes “discharge in bankruptcy” as an affirmative defense); Rule 26 (changes discovery of expert

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witnesses); Rule 56 (summary judgment changes); Illustrative Civil Form 52 (technical and conforming amendment).

The amendments to Rule 26 appear to be intended to eliminate expansive discovery so that only the “facts or data considered by the witness” in forming expert opinions must be disclosed. This should extend work product protection to communications between experts and counsel who retained them, including drafts of expert reports, with three exceptions noted above: (1) compensation for the expert’s study or testimony, (2) facts or data provided by the retaining lawyer that the expert considered in forming the expert’s opinions, and (3) assumptions provided to the expert by the retaining lawyer that an expert relied upon in forming opinions.

The December 1, 2010 amendments to Rule 26 should eliminate a conflict among the federal circuits concerning the scope of discovery for retained experts, but the amendments also clarify that experts not specifically retained to testify at trial – treating physicians, for example - are not obligated to submit Rule 26 reports. The December 1, 2010 version of Rule 26 requires, however, an attorney statement regarding the anticipated testimony of the expert not specifically retained for litigation.

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2. Summary Judgment Changes

Federal Rule of Civil Procedure related to summary judgment has been extensively revised. The amendments to Rule 56 are strictly procedural and do not change the summary judgment standard or burdens, but federal court practitioners should be mindful the procedural changes contain stricter requirements for record evidence citations in support or in opposition of summary judgment motions.

D. Proposed 2013 Amendments

The judicial conference committee on Rules of Practice and Procedure has approved amendments to Federal Rules of Civil Procedure 37 and 45, as well as Federal Rule of Evidence 803.¹

Proposed Federal Rule of Civil Procedure 45 would be amended to simplify provisions governing where compliance with a subpoena can be required and to reject the line of cases that have compelled parties or party officers to travel more than 100 miles from outside the state to testify at trial. Federal Rule of Civil Procedure 37 would be amended to conform with the proposed amendments to F.R.C.P. 45.

Federal Rule of Evidence 803 would be amended to align F.R.E. 803(10) with the United States Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009), by adopting a "notice and demand" procedure that would require

¹ The committee has also recommended changes to Federal Rules of Appellate Procedure, but these will not be discussed within these materials.

production of the person who prepared a certificate stating the absence of a public record only if the defendant, after receiving notice from the government, made a timely pretrial demand for production of the witness.

Update on Recent Federal Jurisprudence

A. U.S. Supreme Court

1. Arbitration

Marmet Health Care Center v Brown, __ US ___, 132 S. Ct. 1201 (2012) (per curiam).

Facts: Three wrongful death actions based on negligence were filed against nursing homes in West Virginia. In each case, there was a signed contract requiring arbitration of all disputes with the exception of collection of late payments by the patient. The state supreme court held that such an arbitration clause violated the public policy of West Virginia.

Issue: Whether the state law was pre-empted by the Federal Arbitration Act (FAA), as interpreted by the U.S. Supreme Court.

Holding and Rationale: Yes. The Court found that the issue was resolved by *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011): When a state law prohibits arbitration of a particular type of claim, the FAA pre-empts the state law.

KPMG LLP v Cocchi, 132 S. Ct. 23 (2011).

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Facts: Court denied motion to compel arbitration because it determined that complaint contained both arbitrable and non-arbitrable claims.

Issue: Whether a court must compel arbitration when a complaint contains both arbitrable and nonarbitrable claims.

Holding and Rationale: Yes. The FAA has been interpreted by the Court as requiring, when some claims are arbitrable and others are not, that the arbitrable claims must be sent to arbitration. *Id.* at 24 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). In *Dean Witter*, the Court explained that the FAA leaves no room for the exercise of discretion by the court. Even though it may result in inefficiency with separate proceedings in different forums, “courts must examine a complaint with care to assess whether any individual claim must be arbitrated.” *Id.* at 26.

2. Class Actions

Wal-Mart Stores v Dukes, ___ U.S. ___, 131 S. Ct. 2541 (2011).

Facts: The Supreme Court described the case as “one of the most expansive class actions ever” against the largest private employer in the United States. *Dukes*, 131 S. Ct. at 2547. A class of perhaps a million and a half current and former employees of Wal-Mart sued for sex discrimination in pay and promotion practices and decisions. Pay and promotion decisions regarding hourly wage employees at Wal-Mart stores generally are committed to the broad discretion of local store

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managers, although there are some general criteria for admission to the management training program. Three Wal-Mart employees were the named plaintiffs representing the class. plaintiffs asserted a pattern or practice (systemic disparate treatment) claim. The Ninth Circuit en banc had affirmed the district court's certification of the class under FRCP Rule 23(a)(2), a class action in which there are questions of law or fact common to the class.

Issue: Whether the class could be certified under Rule 23(a)(2).

Holding and Rationale: No. First, the commonality requirement of 23(a) was not satisfied. The Court recited the four requirements under Rule 23(a): numerosity, commonality, typicality, and adequate representation. The majority declared that commonality is the crux of the case, and the requirement means that all class members must have suffered the same injury. In addition to its holding and rationale that the class could not be certified under Rule 23(a)(2) because of its failure to satisfy the commonality requirement, the Court held that claims for monetary relief, at least where it is not incidental to injunctive or declaratory relief, cannot be certified under Rule 23(b)(2). Just as 23(b)(2) does not permit class actions when individual class members would be entitled to different injunctions or declaratory judgments, it does not permit class certification when each class member would recover an individualized monetary judgment award.

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Rather, class actions for individualized monetary claims must be asserted under Rule 23(b)(3).

B. Federal Courts of Appeal and Federal District Courts

1. Judgments

Barber v Shinseki, 660 F.3d 877 (5th Cir. 2011).

Facts: Order that purportedly dismissed plaintiff’s action was electronically entered by magistrate judge.

Issue: Whether there was a judgment dismissing the action.

Holding and rationale: No, because the electronic order of the magistrate judge did not comply with FRCP Rule 58, which requires that “every judgment shall be set forth on a separate document.” The electronic order was a separate entry on the docket sheet, but not a separate document—electronic or otherwise. “[T]he district court has an obligation to issue an order as a separate, freestanding document, and not just as a docket entry, when it disposes of a case.” *Id.* at 879.

2. Jurisdiction

Cuevas v. BAC Home Loans Servicing, LP, 648 F. 3d 242 (5th Cir. 2011).

Facts: Plaintiffs sued defendants in Texas state court for wrongful foreclosure, asserting various state law claims. Plaintiffs later amended to add a claim under the federal Truth in Lending Act. Defendants removed the case to federal district court under federal question and diversity jurisdiction. Defendants argued that a

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nondiverse defendant named in the complaint did not destroy diversity because that defendant was fraudulently joined. Defendants did not remove the case within 30 days based on diversity, even though they had notice of the defendant that they believed to be fraudulently joined. The court granted a motion to dismiss the federal claim, and plaintiffs moved to remand to state court, arguing that the defendants had not carried their burden of proving improper joinder of the nondiverse defendant. Having dismissed the federal claim, the federal court declined to exercise supplemental jurisdiction over the state law claims and remanded the case to state court.

Issue: “[W]hether a party’s previous failure to argue fraudulent joinder and timely remove the case on the basis of diversity jurisdiction affects the district court’s authority to remand state law claims after the case has been properly removed to district court.”

Holding and Rationale: The court noted that the issue was a matter of first impression in the federal courts of appeal. First, once a federal district court has assumed jurisdiction over a properly removed case, the issue of whether a party previously waived its right to be in federal court is irrelevant to the issue of whether the federal district court can or should remand the case to state court. The authority to remand depends on the nature of the federal district court’s jurisdiction “*at the time of the remand.*” *Id.* at 248 (emphasis in original). The

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Fifth Circuit stated that when a federal court has original subject matter jurisdiction over a claim, the exercise of jurisdiction is mandatory, not discretionary. On the other hand, when a court may exercise only supplemental jurisdiction, the court has discretion to exercise the jurisdiction or remand. The Fifth Circuit examined the facts and determined that the defendants had satisfied the burden of proving improper joinder—that plaintiffs had no possibility of recovering against the in-state defendant. Accordingly, the federal district court had original diversity subject matter jurisdiction over the state law claims, and the exercise of jurisdiction was mandatory. *Id.* at 250.

Williams v Homeland Insurance Co. of New York, 657 F.3d 287 (5th Cir. 2011).

Facts: A class of Louisiana medical providers filed a class action in state court against three Louisiana defendants operating a preferred provider organization network. One year later, the petition was amended to add three non-Louisiana defendants. One of the added non-Louisiana defendants removed the case to federal court, claiming federal jurisdiction under the Class Action Fairness Act (CAFA). Plaintiffs moved to remand, arguing that the CAFA’s local controversy exception, 28 U.S.C. 1332(d)(4) applied. The district court determined that two-thirds of the plaintiffs were Louisiana citizens, a significant defendant was a Louisiana citizen, the principal injuries occurred in Louisiana, and no other class

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actions had been filed within three years (the requirements for application of the local controversy exception). Thus, the court remanded the case to state court.

Issue: Whether the CAFA's local controversy exception applied to a case with significant Louisiana contacts.

Holding and Rationale: Of the four requirements, the Fifth Circuit agreed with the district court on all, but it considered that a class arbitration had been initiated within three years. The Fifth Circuit held that a class arbitration is not a class action. Therefore, the local controversy exception applied to the case.

3. Arbitration

In Re American Express Merchants' Litigation, 667 F.3d 204 (2d Cir. 2012), *petition for cert. filed* (Jul 30, 2012) (No. 12-133).

Facts: The Second Circuit considered the enforcement of a mandatory arbitration clause in a commercial contract also containing a class action waiver, which prohibited the parties to the contract from pursuing anything other than individual claims in the arbitral forum. The plaintiffs asserted claims under the Sherman and Clayton Acts, alleging anticompetitive behavior.

Issue: In light of recent Supreme Court decisions, whether the Second Circuit could sustain its holding that the mandatory arbitration clause in a commercial contract prohibiting class claims was unenforceable.

Holding and Rationale: The Second Circuit had maintained its ruling even after the Supreme Court had vacated and remanded for reconsideration in light of *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). The Second Circuit’s latest decision came after the Supreme Court’s decision in *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, the Court held that the Federal Arbitration Act preempted a California law barring the enforcement of class action waivers in consumer contracts. The Court reaffirmed its prior holding, distinguishing the Supreme Court decisions: “It is tempting to give both *Concepcion* and *Stolt–Nielsen* such a facile reading, and find that the cases render class action arbitration waivers per se enforceable. But a careful reading of the cases demonstrates that neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.” *American Express*, 667 F.3d at 212. “What *Stolt–Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed per se enforceable. That leaves open the question presented on this appeal: whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims.” *Id.* at 214. The Second Circuit thus found the controlling

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precedent to be *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), and the issue to be whether the plaintiffs, as the party seeking to invalidate the arbitration agreement could prove that arbitration would be prohibitively expensive. Applying that standard, the court held that “[t]he evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.” *American Express*, 637 F.3d at 217.

Discovery

For a federal court's punishment of a litigant's “callous and careless” attitude toward its ediscovery obligations, see *PIC Group Inc. v LandCoast Insulation, Inc.*, ___ F Supp 2d_____, 2011 WL 3476538 (SD Miss 2011)

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RECENT DEVELOPMENTS

**CRIMINAL LAW
AND
CRIMINAL PROCEDURE**

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Fall, 2012

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Missouri v. Frye, 132 S.Ct. 1399, 2012 WL 932020 (U.S. Supreme Court, 21 March 2012)

The defendant was charged with Fourth Offense Driving with a revoked license, a felony with a maximum penalty of four year imprisonment.

On two occasions, the prosecutor informed defense counsel of a “plea bargain.” The first was that the state would recommend a three year sentence with no recommendation of probation but would recommend a 10 day “shock” term in jail if defendant agree to enter a plea of guilty. The state later offered to reduce the offense to a misdemeanor and to recommend a 90 day jail sentence if defendant entered a plea of guilty. Both offers had an expiration term and both offers expired. Defense counsel did not advise the defendant of either offer.

Following a preliminary hearing, defendant entered a plea of guilty and was sentenced to 3 years in prison. The prosecutor recommended a 3 year sentence with no recommendation regarding probation, but did recommend a 10 day “shock” term in jail. The trial court nevertheless imposed the 3 year sentence of imprisonment.

Defendant challenged his guilty plea in a post-conviction application on the basis that defense counsel’s failure to inform him of the state’s guilty plea offers denied him effective assistance of counsel.

“The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel’s deficient performance.”

“This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising [defendant] to consider it, defense counsel did not render the effective assistance the Constitution requires.”

“Here counsel did not communicate the formal offer to the defendant. As a result of that deficient performance, the offer lapsed. Under Strickland, the question then becomes what, if any, prejudice resulted from the breach of duty.”

“To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it, if [the trial court] had that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of the plea to a lesser charge or sentence of less prison time.”

“In order to complete a showing of Strickland prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.”

In remanding the case with instructions, the Court noted the “question of proper remedies” would be addressed in the companion case of *Lafler v. Cooper*.

The same remedial scheme described in *Lafler* applies when the deficient performance and prejudice result from the failure to communicate the prosecution’s plea offer to the defendant.

***Lafler v. Cooper*, 132 S. Ct. 1376, 2012 WL 932019 (U.S. Supreme Court, 21 March 2012)**

The defendant was charged with a series of offenses arising from his shooting of the victim. Prior to trial, the state offered to dismiss two of the several charges and to recommend a sentence of 51 – 85 months if defendant would enter a guilty plea. On the advice of defense counsel, defendant rejected the plea bargain and was convicted by a jury of the offenses charged. The defendant was sentenced to the minimum mandatory term of 185 to 360 months in prison.

In an application for post-conviction relief, the defendant contended that his counsel’s advice to reject the state’s plea offer “constituted ineffective assistance.” The state courts rejected his application and he filed a post-conviction application in federal district court. The federal district court granted relief in the form of ordering “specific performance of the original plea agreement, for a minimum sentence in the range of 51 to 85 months. The Sixth Circuit Court of Appeals affirmed. The Supreme Court granted writs and remanded the matter for disposition in accordance with the holding of the Court. The Court said:

“In contrast to [cases involving misadvice regarding the consequences of a guilty plea which was entered by the defendant], here the ineffective advice led not to an offer’s acceptance but to its rejection. Having to stand trial, not choosing to waive it is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.”

“Even if a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy. That question must be addressed.”

“The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that are admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel’s errors, he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.”

Justice Kennedy, in endeavoring to give added guidance to trial courts regarding the appropriate disposition when such a situation requiring a remedy is found, said:

“In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge’s sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. In these circumstances, the proper exercise of discretion to remedy the constitutional injury may require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. “

“In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge’s discretion. At this point, however, it suffices to note considerations that are of relevance. First, a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.”

The same remedial scheme applies to situations in which the deficient performance and prejudice resulted for the failure to communicate a plea bargain offer.

See also **Chaidez v. United States**, 655 F. 3d 684 (7th Cir. 23 August 2011), **Cert. Granted to resolve a split in the circuits regarding whether Padilla v. Kentucky announced a new rule inapplicable on collateral attack**. Chaidez held that Padilla was not applicable on collateral attack. The Fifth Circuit in *United States v. Amer*, 681 F.3d 211, 2012 WL 1621005 (5th Cir. 9 May 2012) also held that Padilla announced a new rule and was not applicable on collateral review. In *United States v. Figuereo-Sanchez*, ___F.3d___, 2012 WL 1499871 (11th Cir. 1 May 2012), the Eleventh Circuit found that Padillo did not alter any bedrock elements of criminal proceedings: “In Padilla, the Supreme Court applied Strickland to hold that, based on prevailing professional norms, a defense counsel’s failure to advise a defendant of the risk of deportation following a guilty plea in a criminal case constituted constitutionally deficient representation. Thus we cannot say that Padilla has altered our understanding of bedrock procedural elements, given that the Court merely defined the contours of deficient and effective representation under Strickland.” The court of appeals nevertheless rejected the petitioner’s application for post-conviction relief on the basis that his petition was untimely. See also *United States v. Orocio*, 645 F.3d 630 (3rd Cir. 2011) in accord with *Figuero-Sanchez*.

See also **United States v. Akinsade**, #09-7554, **USCA 4th Cir.**, 7/25/2012, in which the court of appeals found that the attorney’s erroneous advice to the defendant that he could not be deported was not cured by the judge’s warning that defendant could be deported as a consequence of his guilty plea.

See also **Titlow v. Burt**, 680 F.3d 577 (6th Cir. 22 May 2012) in which the Court of Appeals found that defense counsel provide ineffective assistance at the plea bargaining stage by virtue of counsel's failure conduct a reasonable investigation of the facts of the case. In Titlow, defense counsel failed to conduct a reasonable investigation prior to advising defendant, charged with first degree murder, to reject a state plea offer of manslaughter with a 7 to 15 year sentence range. "Counsel cannot responsibly advise a client about the merits of different courses of action, and the client cannot make informed decisions unless counsel has first conducted a thorough investigation." The defendant was tried for first degree murder and convicted of second degree murder – and sentenced to 20 – 40 years in prison. The Court of Appeal reversed the conviction and ordered that the the original plea offer to the lesser offense be resubmitted to the defendant.

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)

"The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless the analyst is unavailable for trial, and the accused had an opportunity, pretrial, to cross examine that particular scientist.

Williams v. Illinois, #10-8505, 18 June 2012, 2012 WL 2202981, 132 S. Ct. 2221

In Williams, the Illinois Supreme Court held that the trial court did not err in allowing a state police crime lab expert to rely on the "DNA profile" developed b a scientist at a DNA lab in formulating and testifying regarding the state's expert's opinion that the DNA sample taken from the defendant Williams, accused of rape, matched the DNA profile developed by the other lab's study of a DNA sample of the DNA material secured from the rape victim. The Illinois Supreme Court relied on the provisions of Code of Evidence article 703 which provides that the "facts and data in the particular case upon which an expert bases an opinion or inference may be those ...made known to the expert prior to the hearing." The Code article, like the Louisiana Code of Evidence article, provides that "if of a type reasonably relied on by experts in the particular field in formulating opinions in the subject, the facts or data need not be admissible in evidence." The Supreme Court of the United States granted writs and affirmed.

Writing for a plurality, Justice Alito said:

“For more than 200 years, the law of evidence has permitted the sort of testimony that was given by the expert in this case. Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who call the expert to introduce other evidence establishing the facts assumed by the expert. While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an answer to a hypothetical question, modern practice does not demand this formality and, in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts. That is precisely what occurred in this case and we should not lightly ‘sweep away an acceptable rule governing the admission of scientific evidence.’”

“We now conclude that this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.”

“As a second independent basis for our decision, we also conclude that even if the report produced ... had been admitted into evidence, there would have been no Confrontation Clause violation. The report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. the report was sought not for the purpose of obtaining evidence to be used against [defendant], who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that was provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. “

Justice Breyer, concurring, noted:

“This case raises a question that I believe neither the plurality nor the dissent answers adequately: How does the Confrontation Clause apply to the panoply of laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the

testimonial statements rule set forth in Crawford?..... Once one abandons the traditional rule, there would seem to be no logical stopping place between requiring the prosecutor to call as witness one of the laboratory experts who worked on the matter and requiring the prosecutor to call all of the laboratory experts who did so.”

Justice Breyer felt that rehearing should have been granted to resolve this issue – but because the Court did not do so, he “join[ed] the plurality’s opinion.” “In the absence of reargument, I adhere to the dissenting view set forth in *Melendez – Diaz and Bullcoming*, under which the [laboratory] report would not be considered ‘testimonial’ and barred by the Confrontation Clause.”

Justice Thomas also concurred, expressing his belief that the statements in the laboratory report “lacked the requisite formality and solemnity to be considered testimonial for purposes of the Confrontation Clause.”

See also *Sanders v. Commonwealth*, ___S.E. 2d___, 2011 WL 2278156 (Va.9 June 2011) in which a medical examiner was permitted to refer to a laboratory report from an independent lab in testifying that the victim of sexual abuse was infected with a sexually transmitted disease. The court found that the primary purpose of the laboratory in conducting the test was for medical purposes, and not in anticipation of or for use in an investigation or prosecution of crime. Citing *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009), the court noted that *Crawford* “in no way prevents experts from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence.”

See also *United States v. Deleon*, ___F. 3d ___, 2012 WL 1680839 (4th Cir. 15 May 2012) in which the court of appeal found that statements made by a crime victim to a social worker were non-testimonial in nature because the statement (which related to prior abuse) was made when no criminal investigation was in progress and “the primary purpose was to establish a treatment plan” rather than for the preservation of evidence for a criminal prosecution. The social worker was not acting in concert with law enforcement officers.

State v. Simmons, 2011-1280 (La. 1/20/12), ___So.3d___

Prior to the defendant’s trial for possession of cocaine with intent to distribute, the state provided defendant with notice under the then applicable provisions of R.S 15:501 of the state’s intent to introduce a crime lab certificate of analysis as prima facie evidence that the substance possessed by the defendant was cocaine.

On the morning of trial, defense counsel filed a written objection to the introduction of the certificate. The trial court ultimately denied the defendant's objection and the case proceeded to trial, and the state offered the certificate in evidence.

On appeal, the court of appeal found the procedure denied defendant's right to confrontation.

Reversing the court of appeal and reinstating the conviction, the Supreme Court noted the amendment to R.S. 15:500 which was effective following the trial of defendant's case. The Court nevertheless found that the provisions of the former statute, on which the state relied in defendant's case, was a constitutionally acceptable "Notice and Demand" statute – as the Court had earlier held in *State v. Cunningham*, 903 So.2d 1110 (La. 2005).

"The majority in *Melendez-Diaz* sharply distinguished the Massachusetts procedure at issue from so-called notice and demand statutes prevalent in other jurisdictions which do not, as least as a general matter, pose Sixth Amendment confrontation problems because they do not shift the burden of producing the analyst to the defense....In the present case, [defendant] waived his Sixth Amendment right of confrontation by failing to timely request a subpoena for the analyst who performed the test on the rocks of cocaine. As *Melendez-Diaz* observed, states remain free to impose reasonable restrictions on a defendant's assertion of his confrontation rights and the trial court therefore did not abuse its discretion in failing to issue an instanter subpoena for the out of parish criminalist at the risk of delaying the one-day trial after defendant failed to timely request that a subpoena issue for the witness. Given the circumstances, the trial court properly admitted the analyst's certificate in lieu of the analyst's live testimony."

Ryburn v. Huff, 132 S. Ct. 987 (2012)

Officers responding to a "rumor" that a high school student may have been planning to bring a weapon to "shoot up the school" went to the student's home to inquire. When his parents did not answer their telephone call or initially respond to their knock on the door, officers became concerned. When the student's mother came to the door and officers questioned her and her son about the threats, they were uncooperative. When the mother was asked about guns in the house, the mother turned and ran into the house with the officers following her. The student's father appeared and ordered them to leave, which they did, being satisfied that the "rumor" was false.

The Huff's sued the officers for violation of their Fourth Amendment rights by entering the home without proper justification.

The Supreme Court, reversing the Court of Appeals for the Ninth Circuit, ordered the suit dismissed.

"...[T]he fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence... In this case the district court concluded that [the officers] has such an objectively reasonable basis for reaching such conclusion."

"Confronted by the facts found by the district court, reasonable officers in the position of the officers could have come to the conclusion that there was an imminent threat to their safety and to the safety of others."

"It should go without saying that there are many circumstances in which lawful conduct may portend imminent violence."

"...Judges should be cautious about second guessing a police officer's assessment made on the scene of the danger presented by a particular situation...[R]easonableness must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight and ... the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances which are tense, uncertain, and rapidly evolving."

Smith v. Cain, 132 S.Ct. 627, 10-8145, United States Supreme Court, 10 January 2012

The defendant, Smith, was convicted of first degree murder in the Criminal Court for Orleans Parish. The state's evidence was based primarily on the testimony of an eye witness who survived an armed invasion of a home which left five people dead.

In a post- conviction proceeding the defendant established that a police officer's notes of interview with the eye witness taken on the night of the murders conflicted with the in court testimony of the witness. The notes from the interview stated that the witness could not "supply a description of the perpetrators other than that they were black males." Notes taken during an interview several days later state that the witness said he could not identify anyone because he could not see faces and would not be able to identify the perpetrators if he saw them.

The state courts denied relief and the Court granted review and reversed, finding that the state's failure to disclose the detective's notes violated the state's duty to disclose evidence favorable to the defense and material to the determination of guilt.

"...Evidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result would have been different. A reasonable probability does not mean that the defendant would more likely than not received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial."

State v. Seiler, 2012 – 0389 (La. 5/25/ 2012), 89 So.3d 1159

Police learned from a burglary suspect that contraband was located in the residence of the defendant. Police officers returned to the defendant's home and knocked on the door. Upon being admitted by the defendant, the officers immediately became aware of a strong odor of marijuana. An officer observed marijuana in a can on a table. After detaining defendant and seeking his consent to a further search, which the defendant refused to grant, the officers secured a search warrant based on their observations. Other evidence was found.

The trial court suppressed the evidence based on its theory that the officers' initial entry was gained as a "pretext."

Reversing, the Supreme Court noted that the officers had " an objective right to knock on defendant's door and ask to be admitted." Further, the Court said it was of "no moment the reason they were admitted may not have been the full reason they were in the defendant's home..." "Louisiana jurisprudence has long recognized the legitimacy of the knock and talk approach by police."

See also the decision of the United States Supreme Court in *Kentucky v. King*, 131 S. Ct. 1849 (16 May 2011) in which the Court said:

"It is well established that 'exigent circumstances', including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. In this case, we consider whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Kentucky Supreme Court held that the "exigent circumstance rule does not apply in the case at hand

because the police should have foreseen that their conduct would prompt the occupants to destroy evidence. We reject this inter-pretation of the exigent circumstances rule. The conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies.”

“When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or speak. And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time. Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.”

The Court did not decide whether exigent circumstances existed, but remanded to the Kentucky Supreme Court to resolve that issue.

Florence v. Board of Freeholders of Burlington, 132 S.Ct. 1510, 2012 WL 1069092 (2 April 2012)

The Court granted review to determine whether a person subjected to a full custody arrest on a warrant could be subjected to an extensive “strip-type” search prior to being placed in the general population of a jail or prison. Although the term “strip search” may include various types of searches, in Florence the Court was dealing with a “close visual inspection” of an undressed person – which included directing the detainee to “move or spread the buttocks or genital areas, to cough in a squatting position.” “In the instant case, the term does not include any touching of unclothed areas by the inspecting officer.”

Because the Court was concerned about studies showing introduction of contraband and dangerous items into general prison populations, the Court approved the search procedure in Florence’s case and affirmed the dismissal of his Section 1983 action.

Florence had been subjected to such a search after being arrested on a warrant which had, if fact, been recalled. He was “strip searched” prior to being placed in the general prison population, where he remained for several days prior to being released. He was never prose-cuted on the offense and filed suit.

In noting the limited scope of the Court's holding, Justice Kennedy, writing for a plurality of the Court, said:

"This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees..... The circumstances before the Court ...do not present the opportunity to consider the narrow excep-tion of the sort Justice Alito describes which might restrict whether the arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subjected to the types of searches at issue....."

Justice Thomas did not concur in the above aspect of the opinion of Justice Kennedy. Four members of the Court dissented.

Chief Justice Roberts, in his concurring opinion, noted that the decision of the Court did not foreclose the "possibility of an exception to the rule it announces" when an arrestee has been detained for a minor traffic offense without a warrant and when there is apparently an alternative to placing the detainee in the general prison population.

Justice Alito, in his concurring opinion, said:

"The Court holds that jail administrators my require all arrestees who are committed to the general population of a jail to undergo visual strip searches not involving physical contact by correction officers. To perform the searches, officers may direct the arrestees to disrobe, shower, and submit to visual inspection. As part of the inspection, the arrestees may be required to manipulate their bodies. ... It is important to note, however, that the Court does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate...For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible. ...The Court does not address whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an arrestee before the arrestee's detention has been reviewed by a judicial officer."

Justice Breyer, dissenting joined by Justices Ginsberg, Sotomayor, and Kagan, noted that “lesser measures” will suffice to protect against the dangers outlined in Justice Kennedy’s majority opinion. Justice Breyer also said:

“...This case does not address, and reserves judgment on whether it is always reason-able to strip search an arrestee before the arrestee’s detention has been reviewed by a judicial officer. In my view, it is highly questionable that officials would be justified, for instance, in admitting to the dangerous world of the general jail population and subject-ing to a strip search someone with no criminal background arrested for jaywalking or some other similarly minor crime...Therefore, it remains open for the Court to consider whether it would be reasonable to admit an arrestee for a minor offense to the general jail population, and to subject her to the humiliation of a strip search prior to any review by a judicial officer.”

United States v. Jones, 132 S. Ct. 945, 2012 WL 171117 (23 January 2012)

The government installed an electronic tracking [“GPS” monitoring] device on a vehicle. The government suspected defendant was engaged in illegal drug activity and attached the device to a vehicle which the defendant was using. The device was installed on the under-carriage while the vehicle was parked on a public parking lot. Although a warrant had been issued authorizing the installation of the device, the time period specified in the warrant had expired.

The government introduced evidence derived from the device at defendant’s trial and defendant was convicted.

On appeal, in *United States v. Maynard*, ___ F.3d ___, 2010 WL 3063788 (USCA D.C. Cir. 6 August 2010) the D.C. Circuit held that the government violated the Fourth Amendment when the police tracked a defendant’s movements 24 hours a day for four weeks by use of a GPS device installed on defendant’s jeep with an invalid warrant. The court of appeals noted that “[t]wo circuits...have held that the use of a GPS device to monitor an individual’s movements in his vehicle over a prolonged period is not a search.” *United States v. Pineda-Moreno*, 591 F.3d 1212(9th Cir. 2010) and *United States v. Garcia*, 474 F. 3d 994 (7th Cir. 2007) Rejecting the views of the other circuits, the court of appeals said:

“[W]e hold the whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood that a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing

for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again and then the next day and the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine....When it comes to privacy,... precedent suggests that the whole may be more revealing than the part....We hold the information the police discovered using the GPS device was not constructively exposed... The whole of one's movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more."

The court of appeals noted that "this case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment."

The Supreme Court granted writs and affirmed the decision reversing the conviction. Writing for the Court, Justice Scalia said:

"We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements constitutes a search...The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a search within the meaning of the Fourth Amendment when it was adopted."

"..[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon areas ('persons, houses, papers, and effects') it enumerates. Katz did not repudiate that understanding."

"By attaching the device to the Jeep, officers encroached on a protected area... Situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis...It may be that achieving the same result through electronic means without an accompanying trespass is an unconstitutional invasion of privacy, but the present case does not require us to answer that question. And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence [by Justice Alito] posits that relatively short - term monitoring of a person's movements on public streets is

okay, but that the use of longer term GPS monitoring in investigations of most offenses is no good.”

Justice Alito, writing for four members concurring in the result, said:

“..[I]f long term monitoring can be accomplished without committing a technical trespass – suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car – the Court’s theory would provide no protection..If the police attach a GPS device to a car and use the device for even a brief time, under the Court’s theory, the Fourth Amendment applies. But if the police follow the same car for a much longer time using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.”

“The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated. Under this approach relatively short term monitoring of a person’s movements on public streets accords with expectations of privacy. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”

Concurring, Justice Sotomayor noted that she agreed to resolve the case on the basis of the opinion of Justice Scalia. However, she noted that the Fourth Amendment is not concerned only with trespassory intrusions on property. In a footnote, she observed the “owners of GPS – equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements.”

Davis v. United States, 131 S.Ct. 2419 (2011).

Relying on the “Belton rule,” an officer searched the passenger compartment of an automobile incident to the lawful arrest of the driver and the passenger. On the back seat of the auto, the officer found a revolver in the pocket of a coat the officer had previously observed being worn by the defendant.

At the time of the search, both the driver and defendant (the passenger) were handcuffed and placed in the rear seat of police vehicles.

The defendant was found to be a felon and was convicted of being a felon in possession of a firearm under 18 USC 922(g)(1).

During the pendency of the defendant's appeal the Court decided *Gant*, modifying *Belton* as noted above.

Although the court of appeals found that *Gant* applied to the defendant's case, since the decision in *Gant* applied to all cases pending on appeal at the time of the *Gant* decision, the court nevertheless upheld the admissibility of the pistol.

"Our conclusion that the search violated Davis's constitutional rights does not, however, dictate the outcome of this case. Whether the exclusionary sanction is appropriately imposed in a particular case is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."

The court of appeals noted that the Court in *Gant* addressed only the question of whether the search violated *Gant*'s Fourth Amendment rights – not whether the exclusionary rule must apply when the officer acted in good faith reliance on settled case law. The Court in *Gant* merely upheld the decision of the Supreme Court of Arizona.

The Supreme Court granted writs and affirmed the decision of the court of appeals. The Court noted that when *Gant* was decided the conviction of Davis has not become final on direct review and therefore *Gant* applied to the Davis case and "*Gant* therefore applies retroactively to this case." Nevertheless, "the question, then, becomes one of remedy, and on that issue Davis seeks application of the exclusionary rule"

"At most, Davis's argument might suggest that – to prevent Fourth Amendment law from becoming ossified – the petitioner in a case that results in the overturning of one of this Court's Fourth Amendment precedents should be given the benefit of the victory by ermitting the suppression of evidence in that one case. Such a result would undoubt-ly be a windfall to this one random litigant. But the exclusionary rule is not a personal constitutional right. It is a judicially created sanction, specifically designed as a 'windfall' remedy to deter future Fourth Amendment violations. The good faith exception is a judi-cially created exception to the judicially created rule. Therefore, in a future case, we could recognize a limited exception to the good faith exception for a defendant who obtains a judgment over-ruling one of our Fourth Amendment precedents."

"But this is not such a case. Davis did not secure a decision overturning a Supreme Court precedent; the police in his case reasonably relied on binding circuit precedent. That sort of blameless police conduct we hold, comes within the good – faith exception and is not properly subject to the exclusionary rule."

“It is one thing for the criminal to go free because the constable has blundered. It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial societal costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.”

Justice Sotomayor, concurring, noted “[t]his case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled. As we previously recognized in deciding whether to apply a Fourth Amendment holding retroactively, when police decide to conduct a search or seizure in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations.”

“Whether exclusion would deter Fourth Amendment violations where appellate precedent does not specifically authorize a certain practice and, if so, whether the benefits of exclusion would outweigh its costs are questions unanswered by our previous decisions.”

Justices Breyer and Ginsberg dissented.

J. D. B v. North Carolina, 131 S.Ct. 2394 (2011).

“This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.”

“In some circumstances, a child’s age would have affected how a reasonable person in the suspect’s position would perceive his or her freedom to leave. That is a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis. “

“Reviewing the question *de novo* today, we hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is

consistent with the objective nature of that test. That is not to say that a child's age will be a determinative, or even significant, factor in every case."

Because the North Carolina Supreme Court had not considered the age of the 13 year old in the custody analysis, the matter was remanded for further consideration.

JDB was questioned at school by a police detective investigating house burglaries. JDB was questioned for at least a half hour in a conference room at the school having been taken there from his social studies class by a uniformed officer. The school principal and an administrative intern were also present during the questioning. At the end of the session, JDB was allowed to leave to ride home at the usual time on the bus.

Justice Alito, joined by the Chief Justice and Justices Scalia and Thomas, dissented." Today's decision shifts the Miranda custody determination from a one size fits all reasonable person test into an inquiry that must account for at least one individualized characteristic – age – that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics – such as intelligence, education, occupation, or prior experience with law enforcement – that may also correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the Miranda custody test – from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the Miranda Court found to be unsatisfactory."

State v. Chinn, 2011-2043 (La. 2/1/12)

The defendant was charged with multiple felony offenses in a single bill of information. Following a series of pretrial proceedings, the state requested that the case be set for trial only 43 days from the date of the state's request. The state objected when the defendant sought to waive trial by jury. The assistant district attorney candidly stated that the date was selected to prevent the defendant from waiving his right to trial by jury. The state was relying on La. Constitution article 1, Section 17 as amended.

The amendment requires the defendant to exercise his right to waive trial by jury prior to 45 days before the trial date – and provides that that the waiver is irrevocable.

In this case, the trial court nevertheless granted the defendant's waiver of trial by jury and the state sought writs of review.

Reversing and remanding, the Court said that the legislative history of the constitutional amendment did not support the state's argument that the state could defeat the defendant's right to waive trial by jury by setting a case for trial within the 45 day period. The amendment as introduced would have required the approval of the court and consent of the state for the defendant to waive trial by jury. That language was rejected in favor of establishing a time limit within which defense waivers must be executed – and provided that the waiver be deemed irrevocable.

The Court held that “[w]here, as here, the State did not agree to allow a waiver within the forty-five day period, the sole course of action available to the district court that did not cause the defendant's right to waive the jury trial to conflict with the forty-five day period of La. Const. art.1, Section 17 (A) was to consider the waiver, and if the waiver was accepted, to set a trial date beyond the forty-five day period.”

“To protect the defendant's constitutional right to waive a jury trial in this matter, the trial date could not be set within forty-five days such that the right to waive trial by jury would be lost. Under the unique facts of this case, the district court erred, not in allowing the waiver, ...but in setting the initial trial date less than forty – five days away.”

Southern Union v. United States, 132 S. Ct. 2344 (6/21/2012)

“The Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence. We have applied this principle in numerous cases where the sentence was imprisonment or death. The question here is whether the same rule applies to sentences of criminal fines. We hold that it does.”

Blueford v. Arkansas, 132 S.Ct. 2044 (6/24/2012)

The Court held that the circumstances surrounding the granting of a mistrial in Blueford's case did not preclude the state from retrying him for capital murder. Following the presentation of evidence and deliberations the foreman of the jury reported to the judge that the jurors were “unanimously against capital murder and first degree murder but were deadlocked on manslaughter and could not reach a verdict. After continued deliberations, the jury remained unable to reach a verdict and the judge declared a mistrial. When the state endeavored to try defendant again for

capital and first degree murder, the defendant moved to dismiss the capital and first degree murder counts on the basis of double jeopardy. The Arkansas courts denied relief and the United State Supreme Court granted writs – and affirmed the decision of the Arkansas courts.

“The foreperson’s report was not a final resolution of anything. When the foreperson told the court how the jury had voted on each offense, the jury’s deliberations had not yet concluded.The fact that deliberation continued after the report derives that report of the finality necessary to constitute an acquittal of the murder offenses.....The jury in this case did not convict [defendant] of any offense, but it did not acquit him of any either. “

State v. Karen Hall, 2012-0601 (La. 6.28/12), 91 So. 3d 302

“When a double jeopardy claim arises in the context of multiple offenses allegedly committed in a single criminal episode involving a single evidentiary nexus and charged in the same bill of information or indictment, and the state has thus made no effort to prosecute the charges seriatim, and a question arises as to whether the same evidence required to convict a defendant of one offense is also the same evidence required to convict him of the other crime, the court should defer ruling on a motion to quash until trial has fully developed the factual context of a claim that prosecution has implicated the double jeopardy prohibition of multiple punishments for the same offense. In the event that the evidence at trial supports a claim that defendant has been punished in a single proceeding twice for the same offense, the court may then take appropriate action by granting the motion to quash and vacating the conviction of the less seriously punishable offense. To say that a defendant may be prosecuted simultaneously for violation of separate offenses ...is not to say that he may be convicted and punished for two offenses. The only remedy consistent with the legislative intent is for the district court ... to vacate one of the underlying convictions ... which alone is unauthorized punishment for a separate offense. “

State v. Nelson, 85 So.3d 21 2010-1726 (La. 3/13/12), 2012 WL 798767

The Court reversed the conviction of the defendants because the trial court failed to apply the proper standard when reviewing the state’s “reverse Batson” objections to the defendants’ use of preemptory challenges.

After the defense counsel (who had collaborated on preemptory challenges) collectively excused a large number of white prospective jurors, the trial court found that a prima facie case had been established. Defense counsel gave a “race neutral”

reason for each challenge of a prospective juror. The trial court did not find that the reasons were untrue or pretextual – but rather found that the reasons given by defense counsel did not persuade that trial court that the defense had rebutted the state’s prima facie case of discrimination.

The Court reversed the convictions because the trial court used an improper standard in rejecting the race neutral reasons. Following the articulation of race neutral reasons, the burden remains on the party challenging the peremptory challenges - in this case the state. The trial court erroneously shifted the burden of persuasion to the party exercising the peremptory challenge – in this case the defense.

The Court also noted that the trial court erred in finding that none of the reseated jurors who were improperly struck could be peremptorily challenged by either defendant on any ground. The Court stated that the peremptory challenges were exercised by each defendant individually despite the collaboration in the exercise of the challenges. The Court said “we hold the trial court erred in refusing to allow each defendant to use his remaining peremptory strikes on jurors who were reseated to remedy discriminatory acts by his co-defendant’s attorney.”

The Court found that the trial court did not err in forfeiting the peremptory challenges which were used in a discriminatory fashion. “We hold that forfeiture of peremptory challenges is an acceptable remedy in some cases. The purpose of the Batson rule is to eliminate discrimination. To forbid forfeiture as a remedy offers no deterrent effect for using discriminatory challenges.”

State v. Bazile, 2011-2201 (La. 1/24/12), 85 So.3d 1

The trial court on its own motion declared the jury trial waiver provisions of La. Constitution article 1, Section 17 (A) unconstitutional for “depriving [defendant] of his due process guaranteed under the 5th and 14th Amendments.”

The issue arose in the context of the defense moving for a continuance of the trial date due to the state’s failure to comply with some discovery requirements. When the trial court granted the continuance to a date less than 45 days away, the state objected to the defense waiver of trial by jury. Rather than continuing the trial date to a later date, the district judge “sua sponte” declared the jury waiver provision unconstitutional.

The Supreme Court reversed and remanded because the district court erred in refusing to enforce the provisions of the Louisiana Constitution on the basis of the district court’s determination, without the issue being raised by the defendant, that the jury waiver provision was unconstitutional.

Remanding, the Court said "...the constitutionality of La. Const. art.1, Section 17 (A) was not raised by the parties in the district court. As such, the procedural posture of this case precludes a decision being made regarding the constitutionality of this provision of the Louisiana Constitution."

State v. Martin, 2011-0082(La. 10/25/11), ___ So.3d ___

The defendant and an officer encountered one another on the parking lot of a convenience store. They knew one another from casual encounters at football games and civic functions. The officer was aware that the defendant had been in some sort of difficulty in another city and asked the defendant for his identification so he could check for outstanding warrants. As they were talking the officer noticed that the defendant was "nervous and sweating." The officer asked whether the defendant had any illegal substances on his person. The defendant replied that he had some Soma pills in his pocket which the officer retrieved.

The defendant was arrested for possession of a schedule IV controlled dangerous substance. The defendant filed a motion to suppress which was denied by the trial court and defendant entered a guilty plea reserving his right to appeal the denial of the motion to suppress. The court of appeal reversed the conviction, finding merit in the motion to suppress.

The Supreme Court granted review and reversed the court of appeal, reinstating the conviction. The Court said:

"Police remain free to approach an individual on the street to engage him in conversation, which may include questions which invite an incriminating response, and may also ask for some identification without implicating the Fourth Amendment."

"What we must ...determine is whether the officer's decision to retain the defendant's identification, after inspecting it briefly, for however long it takes to conduct a warrant check, transforms his consensual encounter with a pedestrian into a Fourth Amendment event requiring at least reasonable suspicion for a forcible detention."

"We are aware that some jurisdictions subscribe to a per se rule in the context of pedestrian stops. In other words, those courts have held that an officer's retention of an individual's identification in the course of continued questioning, or to check for outstanding warrants, creates an atmosphere in which an individual, as a general rule, will not reasonably feel free to terminate the

encounter. Thus, these courts have held that a detention or seizure has occurred, necessitating at least reasonable suspicion in order to justify a restraint on the individual's liberty."

"Courts relying on [Florida v. Royer,, 103 S. Ct. 1319(1983)] for the per se rule have noted the impractical and unrealistic option of a reasonable person in modern society to abandon one's identification, as an individual is practically immobilized without adequate identification."

"After due consideration, we reject a per se rule under these facts. Instead, we believe the determination of whether a seizure has occurred is a fact intensive process in which a reviewing court must consider the totality of the circumstances....We note police –citizen encounters do not become seizures simply because citizens may feel an inherent social pressure to cooperate with police."

"In examining the totality of circumstances, a court must look to numerous factors, including the time, place, and purpose of the encounter, the words used by the officer, the officer's tone of voice and general demeanor, the officer's statements to others present during the encounter, the threatening presence of several officers, the potential display of a weapon by an officer, and the physical touching by the police of the citizen."

See **State v. Thompson, 2011-0915 (La. 5/8/12), ___ So. 3d ___** in which the Court found that the detention of the defendant was lawful, reversing the judgment of the court of appeal. The Court noted that defendant and others were detained by police executing two search warrants for rooms at a motel which was considered a "high crime area", known for drug activities. The Court found that "it was reasonable for the police officers to briefly detain those persons in and immediately around the target rooms of the search warrants to ascertain their identities, maintain the status quo over a large physical area, and seek an explanation of their presence near or at the scene of the suspected narcotics distribution operation." The Court also approved the "brief use of handcuffs" until defendant was frisked and officers were assured that he was unarmed. Thus, defendant's consent, given during the detention, was not the product of an unconstitutional seizure of defendant.

State v. Rochon, 2011 – 0009 (La. 10/25/11), 75 So.3d 876

The defendant was charged by bill of information with the felony offense of theft of over \$500.00. He had not previously been arrested for the offense. When the

defendant failed to appear for arraignment, the district attorney requested that the district court issue an arrest warrant pursuant to C.Cr.P. article 496. That article provided that the court shall issue a warrant for the arrest of an individual who has been indicted or charged in a bill of information and who is not in custody or free on bond – unless the court may issue a summons under C.Cr.P. article 497. The court issued the warrant and set bond at \$25,000.00.

Counsel for the Office of the Indigent Defender objected to the issuance of a warrant and challenged the constitutionality of C.Cr.P. article 496. On the public defender’s motion, the district court recalled the warrant and declared the article unconstitutional.

After a thorough and scholarly discussion of “ripeness” and “mootness,” the Court addressed the issue of the validity of the code article.

The Supreme Court noted that article 496 was modeled on F.R. Cr. Proc. 9. The Court also noted that Rule 9 was amended in 1979 to require the government to submit an affidavit establishing probable cause to support the arrest of the defendant when the government requests issuance of an arrest warrant based on the filing of a bill of information.

Upholding the constitutionality of the code article as construed by the Court to preserve its constitutionality, the Court said:

“To the extent article 496 can be construed as directing a district court to issue an arrest warrant without first determining whether probable cause exists, it runs afoul of federal and Louisiana jurisprudence and the plain language of the United States and Louisiana Constitutions.”

“Although article 496 does not expressly require a judicial determination of probable cause before a warrant is issued based on a bill of information, we find the general requirements for issuing an arrest warrant must apply to article 496. Louisiana Code of Criminal Procedure article 202 provides that an arrest warrant may only be issued if two requirements are met: (1) the complainant executes an affidavit under oath specifying, to his best knowledge and belief, the nature, date, and place of the offense, the name of the offender if known, and of the person injured if there be any; and (2) the magistrate has probable cause to believe an offense was committed and that the person against whom the complaint was made committed it. As both articles govern the issuance of arrest warrants, we conclude articles 202 and 496 must be read in *pari materia*, such

that the requirements set forth in article 202 must be met before an arrest warrant can be issued based upon a bill of information under article 496.”

“We further find support for this narrow construction from the fact that article 496 was modeled after Fed. R. Crim. P. 9(a), which now expressly required the information of an accompanying affidavit show probable cause for an arrest premised upon a bill of information. Just as the Advisory Committee notes to F.R.Cr.P. 9(a) mention that this had generally been assumed to be the state of the law even though not specifically set out in rule 9, we conclude the same must be true here. Although article 496 does not expressly require a probable cause determination before a warrant is issued, article 202 governs the issuance of arrest warrants and states that all of the requirements therein, including the filing of an affidavit and a judicial determination of probable cause, must be met before an arrest warrant can issue. Reading the two articles in pari material, we find the requirements set forth in article 202 must apply with equal force to an arrest warrant issued pursuant to article 496 based upon and information.”

See Acts 2012, No 216 amending C. Cr. P. article 496 in response to Rochon to provide that an arrest warrant can issue on the basis of a grand jury indictment – but that an arrest warrant can issue on the basis of the filing of a bill of information only “if the information is accompanied by one or more affidavits which establish probable cause to believe that an offense has been committed and that the defendant named in the information committed it....”

State v. Carter, 2012 WL 206430, 2010 – 0614 (La. 1/24/12), ___ So3d ____.

The defendant was convicted of first degree murder and sentenced to death.

On appeal, the defendant contended that one of his two lawyers “labored under a potential conflict of interest in that counsel...was facing possible criminal charges in an unre-lated criminal offense at the time of defendant’s trial....” Noting that the charges were not being prosecuted by the same district attorney prosecuting defendant’s case, and that the unrelated charges were not based upon the lawyer’s being charged with an offense in any way related to defendant’s charges, the Court found no basis for a conflict of interest. The lawyer’s case was being prosecuted by the Attorney General.

Affirming the conviction and sentence, the Court said:

“Although we agree that a potential conflict of interest could arise where the district attorney’s office prosecuting counsel’s client is simultaneously

investigation or prose-cutting counsel [for the defendant], this is not such a situation.”

Bobby v. Dixon, 2011 WL 5299458 (U.S. Supreme Court, 7 November 2011)

The defendant, Dixon, was a suspect in a murder – robbery because he used the victim’s identification to cash a check and to sell the victim’s automobile. The victim’s body had not been discovered at the time Dixon was arrested for forgery. Police questioned Dixon without giving Miranda warnings because the police were concerned that if the warnings were given Dixon would refuse to speak with them. Dixon had, prior to his forgery arrest, been given a Miranda warning and refused to answer questions without his lawyer being present. He was not arrested on that occasion and left the police station.

Dixon on this occasion responded to questions by admitting that he signed the victim’s name on the check and that he sold the auto but claimed the victim gave him permission to sell the auto. Dixon denied any knowledge of the victim’s disappearance. The officers told Dixon that another individual, a man named Hoffner, had given “more useful information” and suggested that “now was the time to say” whether he was involved in Hammer’s disappearance: “If Tim [Hoffner] starts cutting a deal...this is kinda like a bus leaving. The first one that gets on it is the only one that’s gonna get on it.” Dixon again denied any involvement in Hammer’s disappearance.

After Hoffner confessed his involvement and led police to Hammer’s grave, Dixon was again brought to the police station for questioning. Prior to questioning, Dixon told an officer he heard police found a body and asked if Hoffner was in custody. When told Hoffner was not in custody, Dixon said “I talked to my attorney, and I want to tell you what happened.” Dixon was then advised of his Miranda rights, waived his rights and confessed that he was involved in the murder of Hammer, placing the “lion’s share of the blame on Hoffner.”

After Dixon’s conviction for murder and death sentence was affirmed by the Ohio courts, Dixon filed an application for post-conviction relief in the federal district court. Although the district court denied relief, the Court of Appeals for the Sixth Circuit granted relief finding that the Ohio Supreme Court unreasonably applied the Supreme Court’s decision in *Missouri v. Seibert* because the confession was “the product of a deliberate question-first, warn-later strategy.”

The Supreme Court granted writs and reversed. The Court said:

“In this case, no two-step interrogation technique of the type that concerned the Court in *Seibert* undermined the Miranda warnings Dixon received. In *Seibert*, the suspect’s first unwarned interrogation left little if anything of incriminating potential left unsaid, making it unnatural not to repeat at the second stage what had been said before. But in this case, Dixon steadfastly maintained during his first unwarned interrogation that he had nothing to do with [the victim’s] disappearance. Thus, unlike *Seibert*, there is no concern here that police gave Dixon Miranda warnings and then led him to repeat an earlier murder confession because there was no earlier confession to repeat. Indeed, Dixon contradicted his prior unwarned statements when he confessed.....”

Noting Justice Kennedy’s concurring statement that he “would apply a narrower test applicable only in the infrequent case ... in which the two-step interrogation technique was used in a calculated way to undermine the Miranda warning”, the Court noted several factors which distinguished *Seibert*:

“...[I]n *Seibert*, the Court was concerned that the Miranda warnings did not effectively advise the suspect that he had a real choice about giving an admissible statement because the unwarned and warned interrogations blended into one continuum. Given all the circumstances of this case, that is not so here. Four hours passed between Dixon’s unwarned interrogation and his warning of Miranda rights, during which time he traveled from the police station to a separate jail and back again; claimed to have spoken to his lawyer; and learned that police were taking to his accomplice and had found [victim’s] body. Things had changed. Under *Seibert*, this significant break in time and dramatic change in circumstances created a new and distinct experience, ensuring that Dixon’s prior, unwarned interrogation did not undermine the effectiveness of the Miranda warnings he received before confessing to [victim’s] murder.”

The Court reversed the Sixth Circuit in a per curiam decision with no dissents.

See also ***State v. Kowalski***, ___ N. W. 2d ___, 2012 WL 3078584 in which the Michigan Supreme Court held that the trial court did not abuse its discretion in refusing to allow the defendant to present the testimony of a law professor who had done extensive research “regarding interrogation techniques and psychological factors claimed to generate false confessions.” The court was satisfied that the trial court did not abuse its discretion in determining that the “expert testimony” proffered by the defendant did not meet the Daubert test for reliability - and was thus properly excluded. The opinion of the court and of the concurring and dissenting justices provides a fascinating and thorough discuss of the various aspects of the issues involved.

Howes v. Fields, 132 S. Ct. 1181, 2012 WL 538280 (U.S. Supreme Court, 21 February 2012)

The defendant was serving a jail sentence when a corrections officer escorted him to a conference room where two sheriff's deputies wished to question him about a sexual offense committed prior to defendant's entry into prison to serve his sentence for disorderly conduct. Although defendant was not given Miranda warnings, he was told that he was free to leave and return to his cell "whenever he wanted." He was not advised of his right to refuse to speak with the deputies or a right to counsel. The defendant was not physically restrained and the conference room was "well lit" and "average sized." The door to the room was sometimes left open and defendant was "not uncomfortable" and was offered food and water. After questioning for five to seven hours in the evening, defendant made incriminating statements regarding his engagement in sexual acts with the boy victim.

After the Michigan Court of Appeals affirmed his conviction, the defendant sought post-conviction relief in the United States District Court. The District Court granted relief and the Sixth Circuit Court of Appeals affirmed. The United States Supreme Court granted writs and reversed.

The Court first held that the Court's "precedents did not clearly establish the categorical rule ...that the questioning of a prisoner is always custodial when a prisoner is removed from the general prison population and questioned about events that occurred outside the prison." The Court noted that it had "repeatedly declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial."

Thus, under the AEDPA standard for granting relief under Section 2254, the district court and the court of appeals erred in finding a permissible basis for granting relief.

Nevertheless, the Court determined that the court of appeal also erred in finding that Miranda governed the questioning conducted in defendant's situation. The Court said:

"Determining whether a person's freedom of movement was curtailed ...is the simply the first step in the [Miranda] analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of Miranda. We have declined to accord talismanic power to the freedom-of-movement inquiry... and have instead asked the additional question whether the relevant environment

presents the same inherently coercive pressures as the type of station house questioning in Miranda.”

“...[Q]uestioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest.”

“...[A] prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release....[W]hen a prisoner is questioned, he knows that when the questioning ceases, he will remain under confinement.”

“...[A] prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence.”

“...[Q]uestioning a prisoner in private does not generally remove the prisoner from a supportive atmosphere. Fellow inmates are by no means necessarily friends.”

“In short, standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial interrogation. Thus, the service of a term of imprisonment, without more, is not enough to constitute Miranda custody.”

See also **State v. Butt**, ___P.3d___, 2012 WL 2149782 (Utah, 6/8/12) in which the Utah Supreme Court applied *Howes* to find that a deputy’s questioning of defendant in his jail cell was not a custodial interrogation for purposes of Miranda. “Defendant’s liberty was not restrained beyond his usual status as a jail inmate, nor was he coerced in any way. We therefore conclude that he was not ‘in custody’ and Miranda warnings were not required.”

Perry v. New Hampshire, 132 S. Ct. 716 (11 January 2012)

The Court held that “the Due Process Clause does not require a preliminary judicial inquiry into the reliability of eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.”

“An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for

reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstance, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.”

“We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. [Defendant] requests we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions...turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at post-indictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.”

See also **State v. Nolan, 807 N. W. 520 (Nebraska Supreme Court, 20 January 2012)** applying Perry in an interesting context in which a lay witness made comments identifying the defendant to a prosecutor in the presence of another lay witness. The prosecutor was unaware of the ability of the lay witness to identify the defendant and no evidence suggested that the prosecutor or police “deliberately arranged circumstances of the meeting in order to influence” the identifications. “In the absence of such evidence, due process did not require a pretrial inquiry into the reliability of [the testimony of the lay witness] or suppression of that evidence.”

See also **State v. Cabagbag, ___ P. 3d ___, 2012 WL 1764064 (Hawai’I, 5/17/2012)** in which the Supreme Court of Hawai’I held that on request a cautionary instruction must be given regarding eye witness identification in cases in which identification is a central issue.

“The new rule is applied prospectively and the instruction is given at the request of the defendant. This court’s holding that in criminal cases the circuit courts must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue and it is requested by the defendant marks a departure from the prior approach in this jurisdiction. Previously, the decision to give a special instruction on eyewitness identification rested within the sound discretion of the trial court. However, there is substantial scholarship and empirical research indicating that there are a number of factors that can affect the reliability of eyewitness identification. Moreover, misidentification is one of the leading causes of wrongful convictions.

Accordingly, we are exercising our supervisory powers in order to ensure that, upon request of the defendant when identification is a central issue, the jury will be specifically instructed as to the potential factors which can affect the reliability of eyewitness testimony.”

The court provides an excellent and thorough discussion of the national jurisprudence regarding this issue and notes the discussion in *Perry* in both the majority and dissenting opinions of the various means courts have adopted to ensure that juries are able to best assess the reliability of identification testimony.

State v. Jones, 2010-0762 (La. 9/7/11), ___ So3d ___

The defendant was convicted of attempted indecent behavior with a juvenile based on a “graphic sexual request” defendant, a police officer, made of a teen age boy. On review, the Supreme Court found that the request was “an act committed for the purpose of and tending directly toward accomplishing [defendant’s] object,” i.e., engaging in the sexual act with the teenage boy.

The state’s evidence showed that the teenage boy asked the officer for a ride to a store, and in response, the officer replied “you can’t get something for nothing” and told the boy that he should put the boy’s penis in the officer’s mouth.

Affirming the conviction, the Court said:

“The specific question is whether defendant’s conduct of asking the victim to put his penis in the defendant’s mouth constitutes an attempt to commit a lewd and lascivious act upon the victim or in the presence of the victim.”

“The overt act need not be the ultimate step toward or the last possible act in the consummation of the crime attempted, and it is the intent to commit the crime, not the possibility of success that determines whether the act or omission constitutes the crime of attempt. Further, a person may be found guilty of attempt as a responsive verdict even though the evidence shows he committed the actual crime charged.”

“Significantly, the completed crime of indecent behavior with a juvenile is accomplished by the mere transmission of any electronic textual communication or an electronic visual communication depicting lewd or lascivious conduct, text, or images to any person reasonably believed to be under seventeen and at least two years younger than the offender. So, if defendant had texted his request to the juvenile in this case rather than stated his request right in front of him, he

would have been guilty of the completed crime of indecent behavior with a juvenile. It would be an absurd construction of this statute to find that a defendant could be guilty of the completed crime if done over the internet or electronically, but would not even be guilty of attempt if he committed the same act in the physical presence of the victim, where the juvenile is actually more vulnerable.”

“...[A]ttempt in the context of La. R.S. 14:81 must be viewed in light of the legislative intent of protecting children from sexual exploitation as a special class of persons needing extra protection. By making it a crime to electronically transmit a lewd or lascivious message to a person reasonably believed to be a juvenile with the intent of arousing or gratifying the sexual desires of the perpetrator or the juvenile, the legislature has expressed its intent to punish conduct that involves no more than communication. Punishing a request for oral sex with a juvenile in this case as an attempt to commit a lewd or lascivious act, is consistent with the legislature’s protectionist goal with regard to juveniles.”

See also **United States v. Winckelmann**, 70 M.J. 403 (U.S. Court of Appeals for the Armed Forces, 12 December 2011) finding that sending a text message “U free tonite” in the context of a sexually explicit text exchange in a “on line chat” by the defendant with a person believed to be a minor was not sufficient to establish a “substantial step” necessary to support a conviction for attempted enticement of a minor to engage in sexual activity.” The court of appeals noted that the Seventh Circuit Court of Appeals “cautioned against treating speech (even obscene speech) as the substantial step because it would abolish any requirement of a substantial step.” The court agreed that “online dialogue must be analyzed to distinguish ‘hot air and nebulous comments’ from more concrete conversation that might include making arrangements for meeting the supposed minor, agreeing on a time and place for a meeting, making a hotel reservation, purchasing a gift, or traveling to a rendezvous point.”

See also **State v. Kendrick Williams**, 47,242 (La. App. 2nd Cir. 7/18/12), ___ So.3d ___ in which the court of appeal reversed a conviction of attempted failure to register as a sex offender. La. R.S.14:542.1.4. The court of appeal said:

“In this case, the law compels a person to do something – register as a sex offender. An attempt requires a specific intent to commit a crime and an overt act in furtherance of the crime. Mere preparation is not sufficient. [T]he failure to register was an act of omission. Thus, an attempt was a legal impossibility. ...There is no such crime as an attempt to not register. The crime of failure to register is not a

specific intent crime. One either fails to register or not. One cannot plead guilty to an nonexistent crime.”

Judge Stewart, dissenting, noted that the litigants did not raise the issue. He noted that a defendant can plead guilty to attempt “even when it appears that [the defendant] actually perpetrated the crime.”

State v. Wright, 2011-0141 (La. 12/6/11), ____So.3d____

The defendant was convicted of aggravated incest. At the trial the state introduced evidence proving that the defendant had oral and anal sexual intercourse with his biological son, who was seventeen years old. The victim testified that he submitted due to fear of physical violence.

At trial, the state also introduced evidence to prove that the defendant also became sexually involved with a fourteen year old female, whom he ultimately married. The state offered evidence establishing physical abuse by the defendant of the female.

Although the trial court initially ruled that the state should not introduce evidence of the female’s age, on several occasions the state introduced such evidence, prompting mistrial motions which were denied. Eventually, the trial court changed its ruling and found that the age of the female was properly admissible.

The defendant denied that he ever has sexual acts with the biological son and contended that the allegations were fabrications based on hostility of the son toward his father.

The court of appeal reversed the conviction finding that the trial court improperly allowed the state to introduce unduly prejudicial evidence regarding the female’s age.

The Supreme Court granted writs and reversed, reinstating the conviction. The Court said that the evidence of the defendant’s conduct with the fourteen year old female, whom he married, was admissible under La. Code of Evidence article 412.2. The Court found that the court of appeal erred in determining that the evidence of defendant’s sexually assaultive behavior was significantly dissimilar to the sexually assaultive behavior with the victim, the biological son due to the difference in the gender of the victims.

“...[W]e reject the defendant’s argument that Article 412.2 only applies when the victim is under the age of seventeen. The statute applies in two situations: 1) when an accused is charged with a crime involving sexually assaultive conduct or 2) when an accused is charged with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense. Here, the defendant is charged with aggravated incest, a crime involving sexually assaultive behavior. Thus, the evidence of defendant’s other acts which involve sexually assaultive behavior or acts which indicate his lustful disposition toward children may be admissible.”

“In looking at admissibility of Article 412.2 evidence where victims are of different genders, existing Louisiana jurisprudence involves victims of the same general age and same gender. Similarly, there is a dearth of federal jurisprudence regarding the issue of different genders of victims when analyzing the similar Federal of Evidence 413. How-ever, after considering this issue, especially in light of the purpose behind Article 412.2, we find no reason to prohibit the admission of such evidence simply because the other acts involve a victim of a different gender. While this Court has not previously addressed the issue directly, we have implied that such evidence would not be inadmissible strictly on the basis of a difference in the victims’ gender.”

“Further, in enacting Article 412.2, the Legislature did not see fit to impose a restriction requiring such evidence to meet a stringent similarity requirement for admissibility. We have previously examined the legislative history behind the Article in *State v. Williams*, 830 So.3d 984 (La. 2002). In *Williams*, this Court noted the enactment of the Article was prompted by two decisions of this Court. Both cases involved prosecutions for aggra-vated rape in which the State sought to introduce evidence of other sexual offenses committed by the defendants pursuant to what the State labeled a lustful disposition exception to other crimes evidence. In both cases, this Court refused to recognize the so-called ‘lustful disposition’ exception to Article 404’s other crimes prohibition, but, in doing so, noted that the evidence sought to be introduced would be admissible if Louisiana had a rule similar to Federal Rule of Evidence 413. This Court stated the enactment of Article 412.2 was apparently the legislature’s response to this Court’s statements in [those cases] as the language of Article 412.2 closely follows that of Federal Rule of Evidence 413. Thus, Article 412.2 was enacted to loosen the restrictions on other crimes evidence and to allow evidence of lustful disposition in cases involving sexual offenses.”

State v. Brown, 2011-1044 (La. 3/13/12), ___ So.3d ___

The defendant was tried before a 12 member jury on a bill of information charging defendant with simple burglary of a religious building and simple burglary. The jury returned a non-unanimous (10-2) verdict convicting the defendant.

On appeal, the court of appeal found that the conviction must be reversed despite the failure of the defendant to raise an objection based on the fact that the offenses were triable by a six, not a twelve member jury – and that the six member jury must return a unanimous verdict.

The Supreme Court granted writs of review and reversed, reinstating the conviction. The Court noted that the Jones case involved the same issue of a 12 member jury being impaneled to try a case which should have been tried before a 6 member jury – but in Jones the verdict was unanimous.

Affirming the conviction, the Court said:

“...Because Jones made clear that the error of trying a six-person jury offense before a 12 person jury falls within the vast number of trial errors subject to harmless error analysis, as opposed to errors interjecting a structural or jurisdictional defect in the proceedings, a necessary corollary of the decision is that the error also falls within the scope of Louisiana’s procedural default rules which generally require a defendant to timely preserve trial errors in the trial for later appellate review. Grounds for arresting judgment as a matter of La. C.Cr.P. article 859 including jury composition errors under La. C.Cr.P. art. 782, may provide narrow exceptions to Louisiana’s contemporaneous objection rule. However, in the present case, defendant neither objected at the time of jury selection, nor moved in arrest of judgment, on grounds that the composition of his jury violated the terms of La. C.Cr.P. art. 782. In the present case, to the extent that defendant failed altogether to employ the procedural vehicles provided by law for preserving the error for review, he waived any entitlement to reversal on appeal on grounds that he was tried by a jury panel which did not conform to the requirements of La. Const. art. 1, Section 17 and La.C.Cr.P. article 782 because it included a greater number of jurors than required by law, although the error is patent on the face of the record.”

In a footnote, the Court said “we have no occasion to consider here whether trial before a panel composed of fewer jurors than required by law, i.e. trial of a twelve person jury offense in a six – person forum, constitutes more than trial error and retains its jurisdictional character as a structural defect in the proceedings. We also have no

occasion to consider whether, in a post-conviction claim for ineffective assistance of counsel, the failure of counsel to object to the error in jury composition, which may constitute counsel error for purposes of the two - part test of ineffective assistance claims set forth in Strickland, may also satisfy Strickland's second prong, that the error prejudiced the defendant, i.e., so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

State v. Shaffer, 2011 WL 6757417, 2011-1756 (La. 11/23/11), 77 So.3d 947

The defendant, Shaffer, and others similarly situated, challenged their sentences of life imprisonment without parole based on their conviction of a non-homicide crime such as aggravated rape committed prior to their becoming 18 years old.

Implementing the Court's decision in Graham, the Louisiana Supreme Court held that Shaffer and other defendants similarly situated were eligible to be considered for parole after serving twenty years in prison and reaching the age of 45. The Louisiana Supreme Court noted that under the provisions of R.S.15:574.4 a defendant sentenced to life imprisonment would become eligible for parole consideration if the Pardon Board commuted his sentence to a term of years and the defendant served 20 years and reached the age of 45. The court, in determining the appropriate response to Graham, followed the direction of Section 574.4, with the deletion of the requirement of action by the Pardon Board.

"We hold, as we must under Graham, that the Eighth Amendment precludes the state from interposing the Governor's ad hoc exercise of executive clemency as a gateway to accessing procedures the state has established for ameliorating long terms of imprisonment as part of the rehabilitative process to which inmates serving life terms for non-homicide crimes committed when they were under the age of 18 years would otherwise have access, once they reach the age of 45 years and have served 20 years of their sentences in actual custody."

In implementing a remedy to comply with Graham, the court noted in Footnote 6 that "the decision ... is an interim measure based on the legislature's own criteria pending the legislature's response to Graham. The court noted the failure of an earlier "Graham" bill and the Law Institute's study of a solution to Graham.

Senate Bill 317 of 2012 by Senator Martiny was enacted as Acts 2012, No. 466. In essence, Act 466 provides for parole eligibility of "Graham lifers" who have served 30 years and have been successful in completing various named programs and have no disciplinary offenses during the twelve months prior to parole consideration. The

parole board is to be provided with and consider a written evaluation of the offender by a person with expertise in adolescent brain development and behavior. The board may consider any other relevant evidence. Act 466 does not apply if the offender was convicted of first or second degree murder.

Miller v. Alabama c/w Jackson v. Hobbs, Director, Arkansas Department of Correction, 132 S. Ct. 2455 (10-9646 and 10-9647, 25 June 2012)

In **Miller v. State, 63 So.3d 676 (Alabama Court of Criminal Appeals, 2010)** the Alabama Supreme Court held that a life without parole sentence was not constitutionally disproportionate and barred by the Eighth Amendment for a defendant who was convicted of a homicide committed when Miller was fourteen years old. In a similar case, the Supreme Court of Arkansas in **Jackson v. Norris, ___ S.W. 3d ___, 2011 WL 478600 (Supreme Court of Arkansas, 9 February 2011)** held:

“... Roper and Graham are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile. We decline to extend the Court’s bans to homicide cases involving a juvenile where the death penalty is not at issue.”

The United States Supreme Court granted certiorari in both cases and reversed. The Court held :

“...[M]andatory life without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishments.”

“Such mandatory penalties [on juvenile homicide offenders], by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.”

“Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.”

“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate

punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.....Although we don not forclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

" Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents : specifically, the principle of Roper, Graham, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. "

"Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment 's ban on cruel and unusual punishment."

In both cases, the defendants were convicted of murder and the mandatory life without parole sentence was imposed in accordance with state law.

See also **Conley v. State, # 58S00-1011-CR-634, Supreme Court of Indiana, 31 July 2012** in which the Indiana Supreme Court upheld under Miller a sentence of Life without Parole on a defendant who, at age 17 brutally murdered his 10 year old younger brother. The Court noted that the life sentence was not mandatory, but rather was imposed after the sentencing court found aggravating factors in the age of the victim and the cruel and heinous manner of the murder – and found that those aggravating factors "outweighed" the mitigating evidence offered by the defendant.

State v. Trosclair, 89 So.3d 340 2011-2302 (La. 5/8/12)

The Court upheld the application to the defendant of the “life time supervision” amend-ment to the provisions of La. R.S. 15: 561.2 to the defendant- although the defendant had been convicted and sentenced prior to the amendment. The Court found that the requirements of life time supervision with electronic monitoring for offenders convicted of sex offenses with victims under the age of 13 were not punitive and could therefore be applied to offenders whose offense and conviction occurred prior to the enactment of the provision. The Court noted that courts are divided on the question of “statutes requiring electronic monitoring.” The majority of courts have “found the application of state statutes requiring electronic location monitoring of sex offenders whose crimes were committed before the statute’s effective dates does not violate the ex post facto prohibitions.” The Court also held that the Legislature “rationally concluded that sex offenders present an unusually high risk of recidivism and that registration, notification, and supervision requirements can reduce that risk and thereby pro-tect the public without further punishing the offender.” The Court found significant the fact that the “supervision at issue is ... subject to judicial review and potential termination by the sentencing court upon petition of the offender.”

See also **State v. Cole, ___ N. W. ___, 2012 WL 1918920 (Michigan, 25 May 2012)** in which the Supreme Court of Michigan held that “constitutional due process” requires a trial court to inform a defendant pleading guilty or not contest to an offense requiring a mandatory lifetime monitoring as part of the sentence to advise the defendant of the “direct and automatic consequence” of his plea.

State v. Golston, et al, 2010-2804 (La. 7/1/11), 67 So.3d 452

The Court upheld the constitutionality of the SOAP statute, reversing a district court judgment declaring the statute unconstitutional on several grounds. The Court found “R.S. 15:560 et seq. to be a regulatory, rather than a criminal statutory scheme, and thus not subject to a void for vagueness analysis.” “Further, even applying a due process analysis,” the Court found no due process violations. The SOAP statutory scheme provides offenders with notice and a meaningful opportunity to be heard at a court hearing to determine SVP (sexually violent predator) or CSP (child sexual predator) status.” The Court noted that the statutory definitions associated with SVP and CSP are “constitutionally sufficient” to allow the panel to make its recommendations and the court to make a determination of SVP or CSP status.

The Court found the statute requires the state to carry burden of proof by a “clear and convincing evidence” standard. That standard comports with constitutional

requirements and was found by the United States Supreme Court in *Hendricks and Crane* to be sufficient even in statutory schemes which provide for involuntary commitment for an indeterminate period of time.

Under the SOAP (Sexual Offender Assessment Panel) procedure, every sex offender committed to the DOC (Corrections) must be evaluated by a three member panel six months before their scheduled release from custody. The panel consists of a physician or clinical psychologist, the Secretary (of designee) and the warden of the prison in which the offender is held. The panel is to review various psychological evaluations and reports, presentence reports, information provided by the offender and any other helpful data in formulating a recommendation to the district court which imposed sentence.

If the panel determines that the offender meets the criteria set forth in the statute for an SVP or a CSP, the panel must submit a recommendation to the court. The recommendation must include the factual basis for the recommendation and a copy of all information available to the panel.

The district court must give notice to the offender, the attorney of record, the district attorney who prosecuted the offender, and the victim of the offense. The offender must be notified that he has the right to be present at the district court hearing and to present evidence at the hearing. The offender is entitled to be represented by counsel at the hearing and to have court appointed counsel if indigent.

In finding the statutory scheme to comport with due process, the Court noted that the district court, not the initial panel, makes the final determination. "The SOAP panel serves a screening function by reviewing the available evidence and formulating a recommendation to the sentencing court. The lack of formal notice of the panel meeting does not result in a violation of the offenders' constitutional rights. Under the SOAP statutes, an offender received notice of the court hearing and appraisal of his right to be present and to present evidence and his right to counsel, including the right to appointed counsel if he is indigent. Thus, even if the offender does not provide the panel with any information, he may still present information to the sentencing court – the ultimate decision maker.... The court is required to accept the panel recommendation as evidence, like any other evidence. Although courts will likely rely on the findings of the panel when reaching its ultimate conclusion,... an offender has the opportunity to present his own rebuttal evidence, which could include his own independent psychological evaluation."

If declared an SVP or a CSP, the offender is subjected to a regime of "extensive reporting and monitoring requirements...for the duration of his natural life." The

offender may petition for review of the finding once every three years if the offender is currently receiving treatment and good cause for such reconsideration is shown.

See also **United States v. Comstock**, 627 F.3d 513 (4th Cir. 6 December 2010) in which the court of appeals, for reasons similar to the reasoning of the Louisiana Supreme Court in *Golston*, upheld the constitutionality of the civil commitment procedures of the Adam Walsh Child Protection and Safety Act. “The Act authorizes civil commitment only if a court finds by clear and convincing evidence that a person has engaged or attempted to engage in sexual violence or child molestation and is sexually dangerous to others.... To establish [that a person is sexually dangerous to others], the Government must prove that a person suffers from a serious mental illness, abnormality, or disorder and as a result would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”

Like the Louisiana Supreme Court, the court of appeals relied heavily on the Supreme Court’s decisions in *Kansas v. Hendrick*, 117 S.Ct. 2072 (1997) upholding the Kansas civil commitment procedures.

The court of appeals, like the Louisiana Supreme Court, noted the “non-criminal, regulatory nature” of the statutory scheme.

See also Acts 2011, No. 26 prohibiting persons required to register as sex offenders convicted of indecent behavior with a juvenile, pornography involving juveniles, computer aided solicitation of a minor, video voyeurism or any other sex offense defined in R.S.15:541 if the victim was a minor (defined as a person under 18) from “using or accessing” various forms of “social media.” Social networking websites, chat rooms, and peer-to-peer networks are specifically enumerated and defined in the statute.

See also **United States v Williams**, ___ F.3d ___ (9th Cir. 7 March 2011), 2011 WL 768082 in which the court of appeals found “[w]e must decide whether sentencing a sex offender to a life term of supervised release constitutes cruel and unusual punishment under the Eighth Amendment.” In evaluating the circumstances of the defendant and the facts of the offense, the court of appeals held “a life term of supervised release is not unconstitutionally disproportionate given the circumstances of this case.” Noting that “although supervised release limits a criminal’s liberty and privacy, it is a punishment far less severe than prison”- and not “inappropriate for much less grossly disproportionate to the grave offenses which Williams committed.”

The court of appeals also rejected the defendant’s argument that the life time supervision was “categorically disproportionate.” “When considering categorical

challenges to classes of sentences, courts look to ' objective indicia of society's standards to determine whether there is a national consensus against the sentencing practice at issue' and to the court's' own independent judgment'. Here the objective indicia suggest that society is comfortable with lifetime sentences of supervised release for sex offenders, as such sentences are common."

Subsequently, in **In Re C.P., ___N.E. 2d ___, 2012 WL 1138035 (3 April 2012)**, the Supreme Court of Ohio declared unconstitutional the Ohio statute requiring automatic life time registration and notification procedures on juvenile offenders adjudicated in the juvenile court of a "Tier 3" sexual offense. The Court noted that the trial court had no discretion in such cases and that the Supreme Court's decisions in *Roper* and *Graham* held unconstitutional on Eighth Amendment grounds categorical punishments imposed on juvenile offenders. The Ohio Supreme Court found that the life time registration requirements constituted "punishment." The Court said:

"Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in his community. ... It will define his adult life before it has a chance to truly begin."

See also **State v. Dykes, ___S.E. 2d ___, 2012 WL 1609451 (Supreme Court of South Carolina, 9 May 2012)** in which the Court found unconstitutional a statutory provision mandating lifetime "GPS-type" monitoring of defendants convicted of a lewd sexual act with a juvenile under the age of 16. Dykes, a 26 year old female, was convicted of engaging in a sexual relationship with a 14 year old female. At the time of her conviction, satellite monitoring was not required. The monitoring statute was later enacted and was applied to Dykes after she was released from parole supervision after her release from incarceration. She challenged the satellite monitoring following her release from supervision "for the rest of her life absent a demonstration that she is likely to reoffend." In his concurring opinion, which was supported by a majority of the Court, Justice Kittredge said that "satellite monitoring is predominately civil." However, "mandated satellite monitoring and absence of any judicial review related to an assessment of an individual's likelihood of reoffending renders the challenged provision arbitrary..." The lack of risk assessment renders the provision "not rationally related" to the purpose of protecting the public from sex offenders who are likely to reoffend.

See also **State v. Franklin, 11-1909 (La. 12/16/11), ___ So.3d___**, in which the Court said that “[t]he collection of DNA from persons arrested and charged with a crime but not convicted is now a matter of comprehensive federal and state regulation, which authorize the taking of a DNA sample from arrestees and pre-trial detainees in the same routing manner as the taking of fingerprints and photographs, to identify the person by means of an accurate, unique, identifying marker – in other words, as fingerprints for the twenty-first century”, citing *United States v. Mitchell*, 625 F. 3d 387 (3rd Cir. 2011). In reversing the court of appeal, which vacated a trial court order directing the defendant to submit to taking of a buccal sample, the Court noted that the defendant had been indicted by a grand jury and further that a district court determined that probable cause existed to believe defendant participated in the charged crimes.

See also **Maryland v. King, In Chambers Opinion by Chief Justice Roberts acting as Circuit Justice, 30 July 2012** in which the Chief Justice stayed the judgment and mandate of the Maryland Court of Appeals pending application for certiorari. The Maryland Court of Appeal held that the Maryland statute which authorized the taking of DNA from the defendant in connection with his arrest for the violent crime of first degree assault violated the Fourth Amendment – and thus the DNA sample could not be used to convict defendant of an earlier rape. The Chief Justice noted that the Maryland court’s decision conflicted with decisions of the Third and Ninth Circuit Courts of Appeal and of the Virginia Supreme Court, upholding statutes of a very similar nature. Due to the split of authority and the importance of the issue to state and federal law enforcement, the Chief Justice felt it was “reasonably probable that the Court will grant certiorari to resolve the split on the question presented” and further that “there is a fair prospect that this Court will reverse the decision below.” 91 Criminal Law Reporter at page 633.

United States v. Ludwig, 641 F.3d 1243, 2011 WL 1533520 (C.A. 10th Cir. 22 April 2011).

The Court of Appeals addressed the question of determining probable cause to believe controlled dangerous substance are located in an auto (or other location) based on a “dog’s alert.” In Ludwig’s case, following a traffic stop, a drug dog alerted on his vehicle, resulting in a search and discovery of 11.3 pounds of a controlled dangerous substance, ecstasy, in a hidden compartment in Ludwig’s vehicle.

The Court said:

“.It surely goes without saying that a drug dog’s alert establishes probable cause only if that dog is reliable. But none of this means we must mount a full-scale statistical inquisition into each dog’s history. Instead, courts typically rely on the dog’s certification as proof of its reliability. After all, it is safe to assume that canine professionals are better equipped than judges to say whether an individual dog is up to snuff. And beyond this, a dog’s credentials provide a bright line rule for when officers may rely on the dog’s alerts – a far improvement over requiring them to guess whether the dog’s performance will survive judicial scrutiny after the fact. Of course, if a credentialing organization proved to be a sham, its certification would no longer serve as proof of reliability. But the judicial task, we hold is limited to assessing the reliability of the credentialing organization, not individual dogs. And in this case, there is no suggestion that the California Narcotics Canine Association, the organization that credentialed the drug dog in this case, is all smoke and mirrors.”

But see **Harris v. State, 71 So.3d 756, 2011 WL 1496470 (Florida, 21 April 2011)(Writs Granted, 26 March 2012)** in which the Florida Supreme Court adopted a contrary view:

“We adopt a totality of circumstances approach and hold that the State, which bears the burden of establishing probable cause, must present all records and evidence that are necessary to allow the trial court to evaluate the reliability of the dog. The State’s presentation of evidence that the dog is properly trained and certified is the beginning of the analysis. Because there is no uniform standard for training and certification of drug-detection dogs, the State must explain the training and certification so that the trial court can evaluate how well the dog is trained (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog’s performance in the field, including the dog’s successes (alerts where contraband was found) and failures (unverified alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of the unverified alerts, as well as the dog’s ability to detect or distinguish residual odors. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog’s reliability.”

United States v. Scott, ___F.3d ___, 2010 WL 2650709 (8th Cir. 6 July 2010)

The court of appeals held that a dog's "sniff of [an] apartment door frame from a common hallway did not constitute a search subject to the Fourth Amendment."

For a contrary view, see **Jardines v. State, ___So.3d___, 2011 WL 1405080 (Florida, 14 April 2011)(Writs Granted by the United States Supreme Court)** in which the Supreme Court of Florida held that "[g]iven the special status accorded a citizen's home in Anglo-American jurisprudence..., the warrantless sniff test that was conducted at the front door of the residence... was an unreasonable intrusion into the sanctity of the home and violated the Fourth Amendment."

"In sum, a sniff test by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal sui generis dog sniff cases...but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation, and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded to a citizen's home under the Fourth Amendment, we conclude that a sniff test, such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a search within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment – specifically, the search must be preceded by an evidentiary showing of wrongdoing. We note that the rulings of other state and federal courts with respect to a dog sniff test conducted at a private residence are generally mixed, as are the rulings of other state and federal courts with respect to a dog sniff test conducted at an apartment or other temporary dwelling."

State v. Mathieu, 2010-2421 La. 7/1/11, 68 So. 3d 1015

The trial court permitted the defendant to engage in "hybrid representation," actually conducting cross-examination of several important state witnesses and making the closing argument. Although the trial court did not provide a formal "Faretta Warning," the Court found that the trial court made defendant aware of the risks he was taking in not allowing his court appointed counsel to conduct the entire trial. Further, the Court noted that the record reflected that the defendant "had more than a passing knowledge of the criminal law." "Legal knowledge or skill is not strictly relevant to the determination of whether a defendant is competent to waive counsel, but it underscored what the record overwhelmingly demonstrated about defendant's capacity to make decisions with regard to his defense of his the case."

In affirming defendant's conviction, even in the absence of a formal "Faretta warning," which the Court noted should be given when a court elects to permit "hybrid representation," the Court said while Faretta does not entitle a defendant to permit such representation " a trial court has the discretion to allow a defendant to act as his own co-counsel." " A trial court may require a defendant acting as co-counsel to conduct portions of the trial entirely in his own right, or may permit the defendant to act in tandem with counsel during cross-examination of witnesses and closing argument to the jury"

Noting the substantial advantage afforded the defendant in this situation, the Court found that the court of appeal erred in reversing the defendant's conviction due to the trial court's failure to conduct a formal "Faretta Warning" prior to approving 'hybrid representa-tion', but acknowledging that such a formal procedure is preferable and avoids the post conviction hearings conducted in Mathieu's case.

United States v. Masciandro, 638 F.3d 458 (4th Cir., 24 March 2011), 2011 WL 1053618

The court of appeals upheld a Park Service regulation prohibiting possession of a loaded handgun in a motor vehicle in a national park. At the time of the offense, the regulation was in effect, but by the time of defendant's trial the regulation had been superceded eliminating the prohibition – and making applicable state law govern – which would, in this case, not rendered defendant's conduct culpable. The court of appeal nevertheless affirmed the defendant's conviction and fine, citing 1 USC 109 which provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so provide....." The statute, the court noted "reversed the common law rule under which repeal of a criminal law precluded punishment for acts antedating the repeal."

The court of appeal, using an intermediate scrutiny analysis, upheld the regulation. In two interesting opinions by judges of the court of appeal, the court in Masciandro discussed the appropriate approach to take in cases involving statutory restrictions on possession of firearms outside the home, noting that both Heller and McDonald involved possession in the home. Judge Wilkinson, writing for a divided court in part of the opinion, noted " it is unneces-sary to explore in this case the question of whether and to what extent the Second Amendment right recognized in Heller applies outside the home.... On the question of Heller's applicability outside the home environment, we think it prudent to await direction from the Court itself."

See also **United States v. Yancey**, 621 F. 3d 681 (7th Cir. 2010) in which the court of appeals applied an intermediate scrutiny standard to uphold the provisions of 18 USC 922(g)(3) prohibiting possession of a firearm by an “unlawful user of a controlled dangerous substance.” In Yancey’s case, he, an 18 year old, was found in possession of a firearm while in possession of marijuana and admitted he had been smoking marijuana since age 16. An unlawful user is “someone who regularly ingests controlled substances in a manner except as prescribed by a physician.” The court of appeals noted the correlation between drug use and violent crime, citing several statistical surveys. See also in accord **United States v. Carter**, ___F.3d ___, 2012 WL 207067 (4th Cir. 23 January 2012)

See Senate Bill 303 providing for an Amendment to La. Constitution Article I, Section 11 to provide that the right of “each citizen” to possess arms for legitimate purposes and for defense of life or liberty shall not be denied. and that “any restrictions on this right shall be subject to strict scrutiny.” The amendment will be submitted to the electors of Louisiana for approval at the statewide election to be held on 6 November 2012.

For an interesting discussion of the standards to be used by courts in determining whether a particular statute infringes on Second Amendment rights of weapons possessors, see **Wilson v. County of Cook**, ___N.E.2d___, 2012 WL 1136642 (**Supreme Court of Illinois**, 5 April 2012). In remanding for further proceedings in a case challenging an Ordinance banning possession of “assault weapons” (semiautomatic weapons capable of holding a large capacity magazine), the Court said:

“Since *Heller* and *McDonald*, courts have begun to develop a general framework for analyzing the newly enunciated second amendment right. The courts have endeavored to (1) outline the appropriate scope of the individual second amendment guarantee as defined in *Heller*, and (2) determine the appropriate standard of scrutiny for laws that burden these rights.

“These courts have generally followed a two-pronged approach. The threshold question we must consider is whether the challenged law imposes a burden on conduct falling within the scope of the second amendment guarantee. That inquiry involves a textual and historical inquiry to determine whether the conduct was understood to be within the scope of the right at the time of ratification. If the government can establish that the challenged law regulates activity falling outside the scope of the second amendment right, then the regulated activity is categorically unprotected. However, if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected – then there must be a second inquiry into the strength

of the government's justification for restricting or regulating the exercise of Second Amendment rights. What form that takes has been articulated in various ways, but courts generally recognize that *Heller* rejected rational-basis review and requires some form of heightened scrutiny."

For other cases, see **United States v. Huitron-Guizar**, ___F.3d ___, 2012 WL 1573565 (10th Cir., 7 May 2012) holding the illegal aliens are not entitled to second amendment right to bear arms. Accord *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) and *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) ("Verdugo-Urquidez teaches that 'People' is a word of broader content than 'citizens', and of narrower content than 'persons'.")

State v. Thornton, 12-0095 (La. 3/30/12), 83 So. 3d 1024

The Court found that the trial court erred in granting the defendant's motion to suppress his confession.

The Court noted that "our current jurisprudence subscribes as a matter of state law to the rule of *Connelly v. Colorado*, 107 S. Ct. 515 (1986) that coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. ... *Connelly* has therefore also modified our former jurisprudential rule that intoxication may negate the voluntariness of a statement if it is of such a degree that it renders the defendant unconscious of the consequences of what he is saying. After *Connelly*, diminished mental capacity, which may result from intoxication, remains relevant to the voluntariness of a statement only to the extent that it made mental or physical coercion by the police more effective. Intoxication remains relevant to the question of whether a *Miranda* waiver is not only voluntary but also knowing and intelligent."

Arizona v. United States, 183 L. Ed. 2d 351, 132 S.Ct. 2492 (25 June 2012)

The Court granted certiorari to determine whether several Arizona statute were preempted by federal legislation regulating immigration issues. The Attorney General sued the State of Arizona seeking to enjoin application of the state statutes. The district court granted the injunction – which was affirmed by the court of appeals.

The Arizona statutes in question enact misdemeanor criminal offenses for (1) failure to comply with federal alien registration requirements (2) an unauthorized alien to seek or engage in work in the state of Arizona. Two other provisions of Arizona law granted specific arrest authority and investigative duties with respect to certain aliens –

one authorizing the arrest without a warrant of a person the officer has probable cause to believe has committed “any public offense that makes the person removable from the United States” – and another providing that officers who make stops and arrests in some instances make efforts to verify the person’s immigration status.

The Court noted the importance of the exclusive authority of Congress to determine the policy of the United States with respect to foreign relations.

The Arizona statute which created the misdemeanor offense of “willful failure to complete or carry an alien registration document” was preempted:

“Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. Federal law makes a single sovereign responsible for maintaining a comprehensive system to keep track of aliens within the Nation’s borders. Were [the Arizona statute] to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.”

The Court found the prohibition against unauthorized aliens seeking work to be preempted because that statute “enacts a state prohibition where no federal counterpart exists.” Congress made a “deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.” The federal scheme does not impose penalties on the employee side, but rather imposes the penalty on the employer.

The Court found preempted the state statute authorizing warrantless arrest of persons committing public offenses which make a person removable. “Congress has put in place a system in which state officials may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officials to engage in these enforcement activities as a general matter, [the state law creates an obstacle to the full purposes and objectives of Congress.”

The Court however was not prepared to determine the question of preemption on the record established regarding the provisions of state law requiring state officers to make a “reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”

“Even if the law is read as an instruction to complete a check while the person is in custody ..., it is not clear at this stage and on this record that the verification would result in a prolonged detention. If the [provision in question] only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provisions likely would survive preemption - at least absent some showing that it has other consequences that are adverse to federal law and its objectives. There is not need to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention or whether this too would be preempted by federal law..... This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.”

Legal Ethics: Scary Stories

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I. Introduction

Collections of materials on legal ethics, especially collections that include stories about lawyers who have been disciplined, can make for scary reading. There are so many ways to get into trouble. However, there are some lessons that can be learned from the stories, lessons that might come in handy at opportune moments.

The lessons in these materials come from a variety of sources. The law of lawyering is generated by court orders, court decisions, legislative enactments, and the work of bar associations and their constituent groups. The most important developments, for most lawyers, are those that result from actions by the state supreme court. But actions by other courts, and other groups, can also have significant impact on the practice. Local law practice can also be affected by developments outside of the state. Among other things, local law practice can be influenced by congressional enactments, by actions of the American Bar Association, and by decisions of courts and ethics committees in other jurisdictions. Because of this, these materials are not limited to developments within Louisiana.

II. Permanent Disbarment Stories

In re Smith

75 So. 3d 902 (La. 2011) (per curiam)

Smith was declared ineligible to practice law for failure to pay bar dues and the disciplinary assessment. He continued to practice law anyway. He took on representation of Christine Sims, who was struck by an uninsured motorist in a Wal-Mart parking lot. He contacted Sims' insurance company and said that he was authorized to settle her claims for \$30,000. The insurer later issued a check for \$10,000 payable to Sims and Smith. Smith endorsed and cashed the check. He did not communicate with Sims about this, and he did not give her any of the money.

In the eventual disciplinary case, the Louisiana Supreme Court concluded that the evidence supported findings that Smith had "practiced law while ineligible to do so,

settled his client's claim without her knowledge or consent, converted the settlement funds to his own use, and failed to cooperate with the ODC in its investigation.” 75 So. 3d at 906.

The court noted that Smith had been previously disciplined, and it stated:

We note that he has victimized both clients and third parties in the past, and it is highly likely he will continue to do so in the future if given an opportunity. His conduct demonstrates a lack of regard for his clients and for his duties as an attorney. In order to protect the public and maintain the high standards of the legal profession in this state, we conclude respondent should not be allowed the opportunity to return to the practice of law in the future.

Id. at 906-07. It ordered permanent disbarment.

In re Bradley

62 So. 3d 52 (La. 2011) (per curiam)

Bradley pled guilty to one count of conspiracy to bribe a state official in connection with a program receiving federal funds. He admitted that he had represented a client, Malcolm Petal, whose film production company had been seeking Louisiana film tax credits. Mr. Petal paid Bradley \$135,000, and Bradley paid \$67,500 to Mark Smith, the director of the Louisiana Film Commission. Mr. Smith then certified approximately \$1,350,000 in tax credits for Petal's company. Bradley was sentenced to serve ten months in federal prison. He was also permanently disbarred. In this connection, the Louisiana Supreme Court stated:

While respondent's misconduct may not definitively fit any of the specific permanent disbarment guidelines, his conviction of conspiracy to commit bribery nevertheless demonstrates a clear lack of moral fitness In light of respondent's misconduct, we can conceive of no circumstances under which we would allow him to be readmitted to the practice of law.”

62 So. 3d at 54-55.

In re Bell

72 So. 3d 825 (La. 2011) (per curiam)

Attorney Bell had been a senior prosecutor at Baton Rouge City Court. In October of 2009, he pleaded guilty to federal charges that he had accepted bribes in exchange for “fixing” criminal and traffic matters that were pending before the court. He was permanently disbarred.

In re Abdallah

72 So. 3d 836 (La. 2011) (per curiam)

Attorney Abdallah was convicted of conspiracy to defraud and falsely bill Medicare and Medicaid, arising from his operation of a health care provider that transported dialysis patients to and from their treatments. He fraudulently represented the medical conditions of these patients in order to bill Medicare and Medicaid for ambulance transportation to regularly-scheduled non-emergency treatment. According to the reported opinion, the provider service operated by Abdallah “falsely billed Medicare and Medicaid more than \$20 million and was paid more than \$7 million for regularly scheduled non-emergency ambulance transports to dialysis treatments.” 72 So. 3d at 838. He engaged in other misconduct as well.

The Louisiana Supreme Court concluded that Abdallah had been engaged in insurance fraud. It ordered permanent disbarment.

In re Bark

72 So. 3d 853 (La. 2011) (per curiam)

Attorney Bark induced persons to forward money to him for investment. In one instance he reported that the investments were making between 17% and 19%. In another instance, he told an investor that he could expect returns between 15% and 20%. When the investors asked for their money back, he did not return it. When investors reported him to the ODC, he did not cooperate with the investigation.

Summarizing the misconduct, the Louisiana Supreme Court stated:

The record in this deemed admitted matter supports a finding that respondent was involved in an investment scheme wherein he fraudulently induced several parties to invest a total of \$373,000. He also issued two checks, totaling \$1,463,200, which were returned due to insufficient funds in his trust account. Finally, he failed to cooperate with the ODC in its investigations.

72 So. 3d at 859. He was permanently disbarred.

In re Calahan

55 So. 3d 782 (La. 2011) (per curiam)

Attorney Calahan was disbarred in 2006 for

misconduct that included defrauding a legally blind woman into signing a contingent fee agreement, forging an endorsement on a settlement check, forging a signature on an affidavit, making a false accusation in a pretrial memorandum that a police sergeant may have

had a sexually intimate relationship with a convicted felon, and blatantly violating the confidentiality rule regarding complaints filed with the Judiciary Commission.

55 So. 3d at 783.

He was later found to have continued to practice law after being disbarred. He pleaded no contest to eight counts of unlawful practice of law, four counts of filing false public records, and one count of public intimidation.

The ODC subsequently charged him with violating Rules 5.5 (engaging in the unauthorized practice of law), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice).

He was permanently disbarred.

In re Callahan

64 So. 3d 766 (La. 2011) (per curiam)

Callahan repeatedly neglected his clients' legal matters, failed to communicate with his clients, failed to refund unearned legal fees, and failed to cooperate with the ODC. Concluding that Callahan had converted client funds totaling \$23,700, in eleven separate matters, the Louisiana Supreme Court ordered permanent disbarment.

In re Williams

85 So. 3d 583 (La. 2012) (per curiam)

Williams shot and killed his friend Larry Broome on Thanksgiving Day in 2004. He was arrested following the shooting and charged with manslaughter. He pleaded guilty as charged. Pursuant to the terms of a plea agreement, he was sentenced to serve ten years at hard labor, suspended, and placed on active probation for three years with special conditions. However, it turned out that the trial judge had lacked the authority to suspend the sentence and place him on probation.

Following further proceedings, the Louisiana Supreme Court vacated the sentence and remanded the matter to allow Williams to withdraw his guilty plea. Upon remand, he pleaded not guilty, and the district attorney's office declined to prosecute the matter further.

The ODC filed charges, claiming that Williams had committed a criminal act in violation of Rule 8.4(b). Williams contended that he had acted in self-defense and

that the charges should be dismissed.

Williams had been employed by Broome to work at Broome's bar. He was paid \$700 a week and permitted to live with Broome in a house located behind the bar. On Thanksgiving Day in 2004, Broome became angry at Williams for not being present to open the bar when a customer came by. When Williams arrived at the parking lot of the establishment, Broome told Williams to get off his property. There was an altercation. According to Williams:

And you know he was telling me you know get off my property, such and such and so and so. And one thing led to another. And he pushed me all the way from behind the truck and all that. I don't know if Vernon and them saw everything. But then he punched me on the left side of my jaw. And when he got to the truck door he told me to go for it. You know like he was gonna shoot me. And I went for it. And you know I was trying to hit him in the arm, but it happened so fast. And when I realized I hit him that's when I threw the pistol away and called Vernon and tried to get him to the hospital as soon as possible.

85 So. 3d at 588. Williams also claimed that, before the shooting, Broome had thrown him to the ground and had started beating him.

The Louisiana Supreme Court stated that the ODC was "required to establish that respondent did not act in self-defense when he shot Mr. Broome, and that the shooting was unjustified." *Id.* at 591. But the hearing committee made a factual finding that Williams had not acted in self-defense.

In reaching this conclusion, the committee made the following factual determinations: (1) respondent's version of the altercation with Mr. Broome was not corroborated by the testimony of the witnesses; (2) the witnesses heard Mr. Broome tell respondent that he should collect his belongings and leave the premises, which suggests Mr. Broome was not the aggressor; and (3) the police officer who investigated the shooting did not observe any injuries to respondent's face or hands, and respondent did not seek medical treatment after the incident. Based upon these facts, the committee concluded that respondent was not acting in self-defense when he shot Mr. Broome.

Id. The court found no manifest error in the factual determinations. And it ordered permanent disbarment.

In re Dillon

66 So. 3d 434 (La. 2011) (per curiam)

Attorney Dillon was convicted of sexually assaulting two women while acting under

color of law as a Deputy City Attorney for the City of New Orleans. His conviction was affirmed by the United States Fifth Circuit Court of Appeals. Disciplinary proceedings were initiated. Dillon claimed that they were premature, because he was seeking post-conviction relief. The Louisiana Supreme Court rejected the contention, concluding that “once the time for filing a petition for writ of *certiorari* expired, respondent's conviction became final for purposes of discipline under Supreme Court Rule XIX.” 66 So. 3d at 437. It also ordered permanent disbarment.

In re Beauchamp

70 So. 3d 781 (La. 2011) (per curiam)

Beauchamp, in representing a number of clients, failed to communicate with clients, to hold disputed fees in trust, to refund unearned fees, to timely remit funds to a client or a third person, to make reasonable efforts to expedite litigation, and to cooperate with disciplinary investigations. She also engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Louisiana Supreme Court noted, in the disciplinary case, that the baseline sanction for her misconduct was disbarment. However, because her conduct amounted to “repeated or multiple instances of intentional conversion of client funds with substantial harm,” she was permanently disbarred. 70 So. 3d at 794.

III. Other Stories

A. Bar Admission

In re Jordan

85 So. 3d 683 (La. 2012) (per curiam)

Jordan sought admission to the bar in 1997 after graduation from law school. But the day before the admissions ceremony, her law school rescinded her Dean’s Certificate in consideration of allegations that she had embezzled student funds while serving as SBA president. In subsequent proceedings, the Louisiana Supreme Court determined that she had misappropriated or converted SBA funds and had destroyed financial records relating to her tenure as president. The court denied her application for admission.

Thereafter, in 2000 and in 2004, she petitioned the court for admission. Both petitions were rejected. In response to the 2000 petition, the court said she could reapply only “upon a showing of changed circumstances or evidence not previously submitted to this court.” 85 So. 3d at 684. In 2009, the court rejected her 2004 petition because evidence had shown that she had engaged in the unauthorized practice of law and had participated in a fee-sharing arrangement prohibited by the Rules of Professional Conduct.

In 2012, she reapplied for admission. The court stated:

Three years ago, we rendered our most recent judgment denying petitioner admission to the bar. At that time, we were confronted with evidence demonstrating that petitioner had repeatedly engaged in the unauthorized practice of law and had entered into an improper agreement to share the legal fees paid to her then-employer, Richard Garrett. This conduct began in 1999 and did not cease until 2006, when the ODC filed formal charges against Mr. Garrett. In addition, it is undisputed that petitioner committed serious misconduct when she was the president of her law school's SBA and during the investigation of her conduct conducted by the first commissioner this court appointed to take character and fitness evidence. Standing alone, the unauthorized practice of law conclusively demonstrates that petitioner lacks the moral fitness to be admitted to the bar. The improper fee-sharing and the conduct arising out of the incident in law school simply serve to underscore the conclusion that petitioner possesses serious and fundamental character flaws.

Given the egregious nature of petitioner's wrongdoing, as well as her pattern of conduct occurring over many years, we can conceive of no circumstance under which we would ever grant her admission to the practice of law in this state. Accordingly, we will deny her application for admission. Furthermore, no applications for admission will be accepted from petitioner in the future.

Id. at 685-86.

B. Advertising

South Carolina Bar Ethics Advisory Committee Op. 11-05

The South Carolina ethics committee was asked whether it would violate ethics standards for a lawyer to use "daily deal" websites that offer products and services at discounted rates, in order to offer legal services. The idea was to have a user purchase a voucher to be redeemed for discounted products or services. The proceeds of the purchase would be split between the website operator and the business (in this case, a law firm) where the voucher is redeemed. In this instance, the lawyer wanted to use the website to offer will preparation and other legal services.

One of the issues was whether such an arrangement would violate the rule that prohibits splitting fees with non-lawyers. Some members of the committee concluded that the arrangement would not violate the rule, because it involved

payment for permissible forms of advertising. Other members of the committee thought that the arrangement would involve fee splitting, but that it would be all right if the lawyer would still be able to exercise independent professional judgment, that is, if the website would not exercise control over the performance of the legal services.

See *also* New York State Bar Association Committee on Professional Ethics, Opinion 897 (Attorneys may offer discounted legal services through “deal of the day” or “group coupon” websites, provided that the advertising is not misleading or deceptive).

C. Formation of Lawyer-Client Relationship

Wisconsin State Bar Commission on Professional Ethics Opinion EF-11-03 (2011)

The Wisconsin ethics committee considered whether unilateral email messages to a lawyer from people seeking representation triggered a duty of confidentiality or created conflicts of interest. The committee said no, unless the lawyer, through a website or through advertisements has published a statement that would lead reasonable people to believe that they could share private information with the lawyer with meeting with the lawyer and establishing a professional relationship.

The committee reasoned that if merely sending an uninvited email message could trigger duties of loyalty and confidentiality, people seeking counsel could disrupt existing lawyer-client relationships by creating conflicts.

On the other hand, when a person contacts a lawyer in response to an advertisement that encourages such contact, the contact is not necessarily unsolicited and is not unilateral. Here, the committee found guidance in an ABA ethics committee opinion (Op. 10-457), which indicated that a “discussion” for purposes of Model Rule 1.18 – the prospective client rule – takes place when a lawyer’s website specifically invites potential clients to submit information about their matters and a potential client responds by doing so. In this instance, a disclaimer could be helpful to the lawyer.

D. Confidentiality

1. Email & Employer Computers

ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 11-459 (2011)

In this opinion, the ABA ethics committee considered problems associated with

client emailing of confidential information through computers that may be accessed by employers or other third parties.

The hypothetical considered by the committee was one in which a client retained a lawyer for advice about a potential claim against her employer, the client uses a computer assigned to her for use at work, but the company's internal policy gives the employer the right to access the computer and its email files.

In this situation, the committee was of the view that the employee's lawyer had a duty, arising under Rule 1.6 – the confidentiality rule – to warn the employee about the risks of using the company computer, or other company-owned electronic devices, to exchange messages with her attorney. The warning would be about the risk that the employer could access the information or that the information could be accessed by third parties who subpoena the employer. The committee thought that such a warning should occur even if it is unclear whether the employer has a policy allowing access to the employee emails.

The duty to warn could also apply to client use of other computers, such as those owned by libraries and hotels. It could even arise with respect to a home computer if the client is involved in a matrimonial dispute and if other family members can access the computer.

2. Receipt of Email Messages By Employer's Lawyer

ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 11-460 (2011)

In a separate opinion, the ABA ethics committee said that an employer's lawyer who receives email messages that an employee has exchanged with her lawyer through a company computer or other device is not required to notify the employee's attorney of the receipt of those messages. At least not under the ethics rules. The committee acknowledged, however, that court decisions or procedural rules could be relevant to this situation.

Stating this another way, the committee said that Rule 4.4(b), which generally requires an attorney to disclose inadvertent receipt of confidential information, did not apply. The committee said that a message is not inadvertently sent when it is retrieved by a person from a public or private location where it was stored or left.

E. Administration of Justice

In re Miniclier 74 So. 3d 687 (La. 2011) (per curiam)

Attorneys for some plaintiffs in litigation arising out of a chemical plant explosion in Bogalusa declined to pay CTG for medical testing and other services it had contracted to provide. The attorneys claimed that CTG had failed to perform. Attorney Miniclier represented CTG in a federal court lawsuit against the lawyers who refused to pay.

Miniclier filed motions and appeals in the litigation. He also filed a new lawsuit in federal court, based on causes of action not timely presented in the initial litigation. Following consolidation of the two matters, the federal district court dismissed the causes of action set forth in the second lawsuit, and stated that “this appears to be just another end run around the findings of the [earlier] litigation.” 74 So. 3d at 689. The district judge also said:

[F]or all who may have missed the point, that not one more frivolous filing or harassing tactic will be permitted or allowed to go on without the imposition of the strictest of sanctions against the offending party or counsel.

Id. Following additional proceedings, the court granted a motion to strike filed against CTG, stating:

While mindful that a motion to strike is an extraordinary remedy, the Court finds that it is warranted in this extraordinary case. Several of the defenses asserted in the reply and all of the counterclaim and third party demand constitute more of the patently duplicative litigation that has run rampant throughout this litigation. CTG has a right to reply to the defendants' counterclaim and to bring its own counterclaim. It does not have a right to use its reply and counterclaim to circumvent or blatantly ignore the Court's prior rulings. Counsel's conduct is either contemptuous, or his learning capacity is grievously challenged.

Id. at 690.

Although a judgment was rendered that was largely favorable to CTG, the defendants lawyers filed a motion to recoup unnecessary fees and costs they claimed that they had incurred because of repetitive and redundant pleadings filed by Miniclier. After an evidentiary hearing, the district judge ruled that Miniclier had “unreasonably and vexatiously multiplied this litigation within the injunction of § 1927,” and it awarded over \$27,000 in fees and costs. This result was upheld on appeal.

The ODC initiated disciplinary proceedings initiated against Miniclier, claiming that his conduct in the federal litigation had violated several of the Rules of Professional Conduct. In the portion of the opinion discussing the findings of the Disciplinary

Board, the Louisiana Supreme Court stated, in part:

[T]he board found that respondent violated Rule 3.4 by continuing in his attempts to advance the fraud and civil RICO claims after the court repeatedly warned him that it was not going to allow those claims. Respondent also violated Rule 8.4(d) because his conduct forced the defendants to expend additional time and money defending his repeated attempts to circumvent the court's rulings and frustrated the legal system by prolonging the underlying legal matter.

Id. at 693. The Louisiana Supreme Court said that the record supported these findings. It ordered suspension for a year and a day, fully deferred, subject to two years of unsupervised probation.

F. Threats

In re Ruffin

54 So. 3d 645 (La. 2011) (per curiam)

Dwayne Anthony hired Philip Jenkins to paint a residence he occupied with his fiancée, Dandre James. Mr. Anthony and Ms. James paid for Mr. Jenkins' services with a check in the amount of \$375, but it was returned unpaid because it was drawn upon a closed account. Ruffin, who was a friend of Mr. Jenkins, agreed to approach Mr. Anthony and ask him to make the check good or otherwise resolve the dispute. While employed as an assistant district attorney in Orleans Parish, Ruffin visited the Anthony residence and returned the dishonored check to Ms. James. Ms. James said that she would honor the check and gave Ruffin \$200 towards the balance due. Ruffin stated:

Girl, don't you know that you shouldn't be writing bad checks ... Well you know, I'm an assistant district attorney and you can't be doing those kinds of things.

54 So. 3d at 646. Ruffin also conveyed her status as an assistant district attorney by wearing a badge on the outside of her suit.

Two weeks later, Ruffin returned to the residence. At this time, she threatened Mr. Anthony with arrest and prosecution if he failed to pay the balance due.

Ruffin self-reported her conduct to her employer. She was terminated from her position with the district attorney's office. The ODC charged her with violating several of the Rules of Professional Conduct, including 8.4(a) (violation of the Rules of Professional Conduct), 8.4(d) (engaging in conduct prejudicial to the administration of justice), and 8.4(g) (threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter). The parties stipulated that Ruffin had used her position as an assistant district attorney to threaten criminal

prosecution and gain an advantage in a civil matter. They also stipulated that she had violated the three rules mentioned above.

On account of the “coercive nature” of Ruffin’s threat to arrest and prosecute Mr. Anthony, the Louisiana Supreme Court determined that a period of actual suspension was warranted. It ordered a six-month suspension. However, because of mitigating circumstances, it also deferred all but 30 days of the suspension.

G. The No-Contact Rule

1. Contact Initiated by Opposing Client

Engstrom v. Goodman 271 P.3d 959 (Wash. Ct. App. 2012)

Attorney Williams represented Denise Engstrom in a personal injury case against Rebecca Hardesten. After Engstrom prevailed in an arbitration proceeding, Hardesten’s lawyer filed a request for a trial de novo. Shortly thereafter, Hardesten sent an email to Williams in which Hardesten said she did not agree to a new trial and did not desire to be represented by her lawyer. She invited Williams to contact her.

Williams thereafter prepared a declaration, which Hardesten signed, stating that Hardesten did not authorize her lawyer to request a trial de novo. It also stated that Hardesten was seeking independent counsel. A second declaration from Williams described receiving the email from Hardesten. Based on the declarations, Engstrom moved to strike the new trial request.

Hardesten’s original lawyer withdrew. Represented by a new lawyer, she moved to strike the declarations, claiming that they had been obtained in violation of the no contact rule.¹ The trial court struck the declarations. The case went up on appeal.

The appellate court said that the purpose of the no contact rule is to “prevent situations in which a represented party is taken advantage of by adverse counsel.”

¹ The relevant rule states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

271 P. 3d at 964. Engstrom argued that there was no violation of the rule because it was Hardesten who had initiated the communication with Williams by sending him the e-mail message. The court said that that did not matter:

The fact that Hardesten first approached Williams is irrelevant. As the official comments make clear, the rule applies “even though the represented person initiates or consents to the communication;” in such a case, the lawyer “must immediately terminate communication” with the represented person.... Williams did not immediately terminate communication with Hardesten. Instead, he obtained from her a signed declaration repeating the substance of her email message.

Id.

Engstrom argued that Williams should be excused for soliciting Hardesten's declaration because her e-mail message had given him a reasonable basis to believe she was unrepresented. The court said: “Engstrom is mistaken. The question is whether there is a reasonable basis for an attorney to believe a party may be represented. If so, the attorney's duty is to determine whether the party is in fact represented.” *Id.* Williams had not done so. Even if the message would have given reasonable grounds for Williams to inquire into the authority of Hardesten's counsel, the court said that the proper recourse was to bring the matter to the court, not to communicate directly with Hardesten.

The court concluded that the two declarations had been properly rejected by the trial court, and there was no basis to support the claim that Hardesten had not consented to a trial de novo.

The trial court had sanctioned Williams \$3000 for bringing a frivolous motion and for submitting declarations that were secured in violation of the no contact rule. The appellate court affirmed the sanction.

2. Attorney's Advice to Client to Contact Opponent.

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 11-461 (2011)

In this opinion, the ABA Ethics Committee concluded that attorneys who believe that a client could benefit from communicating directly with a represented opponent may suggest doing so, and provide the client with talking points or a proposed settlement, so long as the lawyer's assistance does not result in overreaching. Examples of overreaching would include helping the client obtain, from a person represented by counsel, an enforceable obligation, disclosure of confidences, or admissions against interest without the opportunity of that person to consult with

counsel.

The committee said that the lawyer who uses this tactic should tell the client to encourage the other party to consult with counsel before taking on obligations, making admissions, or disclosing secrets. The committee agreed with Comment k to Section 99 of the *Restatement (Third) of the Law Governing Lawyers* (2000), that prohibiting lawyers from giving advice to clients who intend to communicate with represented opponents would unduly restrict the client's interest in obtaining legal advice and the client's ability to communicate fully with the lawyer.²

3. Settlement Orchestrated by Lawyer

Board of Professional Responsibility v. Melchior 269 P.3d 1088 (Wyo. 2012)

Melchior filed a divorce complaint on behalf of a wife. The husband hired attorney Mincer to represent him. While the case was pending, the wife got the husband to sign a settlement agreement that Melchior had edited. Melchior did not inform Mincer that the parties were meeting to consider settlement. Mincer complained to Bar Counsel.

The case describes what happened:

In the course of the divorce case, Respondent made revisions to said settlement documents at his client's request, including to the property settlement agreement and a confidential financial affidavit in the husband's name. Respondent did not initially inform Ms. Mincer of these facts, nor did he initially provide Ms. Mincer with copies of the documents.

... On or about February 7, 2011, the husband signed a stipulated property settlement, child custody and child support agreement (both redacted and unredacted versions), and a confidential financial affidavit, all of which were prepared by Respondent. The husband's lawyer, Deborah Ford Mincer, was not informed by Respondent that he had been making revisions to the parties' said settlement documents at his client's direction or that Respondent knew, based upon his client's representations to him, that the parties were meeting

² Comment 4 to Model Rule 4.2 states, in part:

Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

together on their own for the purpose of trying to reach agreement relative to the terms of their divorce.

269 P.3d at 1089-1090.

Melchior acknowledged that his conduct had violation Rule 4.2, the no contact rule:

Respondent has acknowledged that his conduct violated Rule 4.2 of the Rules of Professional Conduct for Attorneys at Law, which provides, "In representing a client, a lawyer shall not communicate [either directly or indirectly] about the subject of the representation with a person or entity the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 3 to the Rule states, "The Rule applies even though the represented person initiates or consents to the communication. Regardless of who commences the communication, a lawyer must immediately terminate communication with a person if the lawyer learns that the person is one with whom communication is not permitted by this Rule." Comment 4 to the Rule states, "A lawyer may not make a communication prohibited by this Rule through the acts of another." Respondent has acknowledged that he violated this Rule when he created and gave to his client a divorce settlement agreement and a confidential financial statement at a time when Respondent knew or reasonably should have known that there was a substantial risk that she would deliver them to the husband, whom Respondent knew was being represented by counsel.

269 P. 3d at 1090-1091.

He was reprimanded.

4. "Friends"

San Diego County Bar Legal Ethics Committee Op. 2011-2 (2011)

The San Diego ethics committee was asked to consider whether it was appropriate for plaintiff's counsel in a wrongful discharge case to send a "friend" request to two high-ranking company employees whom the client had identified as being dissatisfied with the employer.

The committee concluded that if the friend request was intended to elicit information from a represented party about the subject matter of the representation it amounted to an improper ex parte contact. It also said that the practice was

deceitful and improper for that reason alone, whether or not the recipient is represented by counsel.

The situation is different, said the committee, when the lawyer merely accesses a public website for an opponent. When a “friend” request is accepted, the “friend” will have access to more restricted information about the target.

H. Deceit

1. Relationships

In re Strouse

34 A.3d 329 (Vt. 2011) (per curiam)

Attorney Strouse was hired to work for a Vermont law firm in 2006. The next year, a client hired the firm to represent her in a divorce action. Unaware that the firm was representing that client, Strouse began to date the client’s husband. When she later became aware of the conflict caused by the dating, Strouse told the firm about her relationship with the client’s husband. She suggested that the firm create a “conflict wall,” to prevent her from participating in any representation of the client and allow her to continue dating the husband.

The firm told Strouse that she needed to end the relationship or she would be fired. The next day, she told the firm that she had done so. However, the relationship was later resumed. When she was confronted about this by a senior attorney at the firm, Strouse admitted that the relationship had resumed. Strouse was fired.

Disciplinary proceedings were also initiated. A hearing panel found that Strouse had violated the provision in Rule 8.4 against engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation. The Vermont Supreme Court agreed, and stated:

We conclude that respondent's failure to inform the senior attorney about her renewed relationship with the husband can be characterized as deceitful; she was aware that her relationship with the husband put the firm into a conflict of interest with its representation of its client. Respondent had a duty to disclose the continuing relationship so that the firm could take the action necessary to cure the potential ethical violation.

Respondent urges us to view her conduct in relation to the common law of fraud and deceit, arguing that her conduct did not meet that standard. We conclude otherwise. When there exists a duty to speak, “Vermont has long recognized the doctrine of negative deceit.” ...

Respondent argues that there was no scienter—that is, an intent to mislead—because she was not required to cease all contact with the husband. This argument ignores the fact that she did not disclose the renewal of her romantic relationship with the husband. The evidence strongly supports the conclusion that she intended to mislead the senior attorney through nondisclosure.

...

In the current case, respondent put the firm in danger of an ethics violation. She knew the firm sought to prevent a problem by requiring her to end the relationship with the husband. She acted deceitfully when she concealed her renewed relationship. Respondent's actions were motivated by a self-serving desire to keep both her employment and her relationship. We hold that respondent's choices and actions reflect adversely on her fitness to practice law, and we affirm the Panel's decision that respondent violated Rule 8.4(c).

34 A.3d at 332-34 (citations omitted).

She was reprimanded. Two of the justices thought that Strouse should have been suspended.

2. Client Information

In re Lightfoot

85 So. 3d 56 (La. 2012) (per curiam)

Lightfoot, a bankruptcy lawyer, was contacted by United States District Judge G. Thomas Porteous, Jr. to discuss financial difficulties that he and his wife, Carmella, were having. Lightfoot recommended they attempt a non-bankruptcy “workout”, but this was not successful. He then recommended that they file for bankruptcy. However, in order to avoid embarrassment, he recommended that his clients allow him to purposely misspell their names on the bankruptcy petition. He further recommended that they obtain a temporary post office box, the address of which could be used on the bankruptcy petition instead of their home address. He told them that once the information regarding the inaccurate bankruptcy filing was reported in *The Times–Picayune*, he would amend the petition to provide their proper names and address. Judge and Mrs. Porteous agreed to this. The bankruptcy petition that Lightfoot filed listed the debtors as “G.T. Ortous” and “C.A. Ortous,” and gave their address as a post office box in Harvey, Louisiana. The clients signed the petition, attesting that “the information provided in this petition is true and correct.” 85 So. 3d at 57-58. Lightfoot also signed. After the newspaper published the information regarding the filing, Lightfoot filed an amended petition with the correct information.

Several years after Lightfoot had filed the incorrect petition, the ODC charged him with violating several of the Rules of Professional Conduct:

Rules 1.2(d) (a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent), 3.3(a)(1) (a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer), 3.3(a)(3) (a lawyer shall not offer evidence that the lawyer knows to be false), 3.3(b) (a lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in fraudulent conduct related to the proceeding shall take reasonable remedial measures, including disclosure to the tribunal), 8.4(a) (violation of the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Id. at 58

The Louisiana Supreme Court ordered a six-month suspension, with all but 30 days deferred.

3. Guarantees

In re Cucci

85 So. 3d 62 (La. 2012) (per curiam)

Cucci was charged with a number of violations of the Rules of Professional Conduct, including Rule 8.4(c), which prohibits conduct “involving dishonesty, fraud, deceit, or misrepresentation.” In particular, he was found to have made dishonest or misleading statements to clients by “guaranteeing a particular outcome in their cases.” 85 So. 3d at 72. For example, in one matter, involving an application for post-conviction relief, after meeting with his client for only a few minutes at the jail, and even though an earlier attempt at such relief had failed, Cucci said, “I am going to get you out.” 85 So. 3d at 68. The client’s parents said that, during an initial consultation, Cucci had told them that he could get their son “out” and that he had used the word “guarantee.” *Id.* The effort failed.

The Hearing Committee found, among other things, that:

Respondent had written agreements with clients that were unclear, confusing, and misleading to the clients. If the clients are to be believed, respondent made promises that were far beyond reasonable for an experienced practicing attorney.

... Respondent engaged in the practice of criminal law and had

repeated encounters with clients and their relatives whose consistent statements were that respondent claimed he could deliver positive results that were, in truth, beyond reasonable expectations.

Id. at 67.

The Louisiana Supreme Court said: “The record supports a finding that respondent made dishonest or misleading statements to his clients by guaranteeing a particular outcome in their cases.” *Id.* at 72.

For this, and for other misconduct, Cucci was suspended for three years.

4. Court Schedule

In re Kelly

54 So. 3d 1096 (La. 2011) (per curiam)

Attorney Kelly represented a client in a worker's compensation matter that was set for trial on March 11, 2005. Two days before trial, Kelly contacted opposing counsel and said that he needed a continuance because he was unprepared. Opposing counsel agreed to consult with his client about whether they would agree to a continuance. On the day before trial, Kelly again contacted opposing counsel, stating again that he was not prepared for trial and also stating that he was scheduled to be in court in St. Martinville the next day.

Opposing counsel informed Kelly that his client would not permit him to agree to a continuance, Kelly filed a written motion for a continuance with the worker's compensation hearing officer, in which he stated: “Mover shows that he is scheduled to attend court in St. Martinville Parish in the matter captioned State of Louisiana v. Billy Williams, Jr.”

The hearing officer held a status conference to discuss the request for continuance. During the conference, Kelly indicated the Billy Williams matter had been set for trial in December 2004, but had been continued and given a setting for March 11, 2005, the date of the worker's compensation trial. When Kelly indicated that the conflict could not be resolved, the hearing officer granted a continuance.

The representations by Kelly were later determined to be false. Although Kelly was a friend of the family of Billy Williams, he was not counsel of record for Mr. Williams, and there was no court matter scheduled in St. Martinville on March 11, 2005.

The ODC charged Kelly with violations of several rules dealing with candor and truth (Rule 3.3(a)(1), Rule 8.4(a), and Rule 8.4(c)). Kelly ultimately admitted that he had misrepresented facts to the hearing officer in order to obtain a continuance.

The Louisiana Supreme Court ordered an 18-month suspension, with all but one year deferred, and a year-long period of probation to follow the active period of suspension.

5. Lexis & Westlaw

Utah State Bar Ethics Advisory Opinion Committee Opinion 11-3 (2011)

The Utah ethics committee said that practicing lawyers run afoul of their duties of honesty and supervision if they pressure their law student clerks to do electronic research through their free law school accounts. The students have to agree, as a condition to getting the free access, that they will not use the access for commercial purposes. The committee noted that many students have reported that practitioners condition employment upon the students' willingness to engage in research that violates their agreements with the vendors. The committee also said that it was unethical for the law firms to use the fruits of the students' access with knowledge of its improper source.

6. Traffic Stop

In re Dear 934 N.Y.S.2d 141 (App. Div. 2011) (per curiam)

Attorney Dear was cited for driving at 84 mph in a 55 mph zone. Six days after receiving the ticket, he wrote this letter to the traffic court:

"Ladies and Gentlemen:

This ticket shall be dismissed immediately since—

- a. there was no speeding and the officer refused to show me evidence that there was: (i.e.—"not guilty")
- b. even if there was speeding (which there wasn't)—I was in a 65-mph zone NOT a 55 mph zone; and
- c. The officer called me a "jew kike"—and this prejudice obviously was the cause for the ticket.

I am a licensed attorney in N.Y. State and will be representing myself in this matter (contact details enclosed).

Eliot Dear

934 N.Y.S.2d at 142. In a subsequent phone call with an Internal Affairs officer, Dear

added that the trooper dismissed respondent's proffered explanation for speeding, namely, that his pregnant wife needed a bathroom, as more baloney from "you guys," which respondent stated referred to orthodox Jews. Respondent further recounted that the trooper displayed a demeaning attitude toward respondent and his wife.

Id. at 142-43.

Unfortunately for Dear, the traffic stop had been recorded and videotaped, and the recordings did not support his version of events. Internal Affairs exonerated the police officer. And the police department filed a complaint against Dear with the Disciplinary Committee. After this had occurred, Dear paid the speeding ticket. He also admitted that he had lied about the incident.

There were some mitigating circumstances, but the reviewing court said:

Here, respondent cavalierly attributed anti-Semitic slurs to an innocent person in a manner which could have had devastating consequences to that person's career. This act alone warrants a harsh sanction, not to mention that it was done to gain an advantage in an administrative proceeding. Notwithstanding the mitigating evidence and respondent's apparently sincere remorse, his behavior was reckless and reflects poorly on the bar.

Id. at 145.

Dear was suspended for six months.

7. Notary Public

In re Brown

68 So 3d 1023 (La. 2011) (per curiam)

In 1998, Wiley Williams executed a will leaving his property to his children. Thereafter, he married Althrial Nelson. In 2005, attorney Brown was asked to draft a will leaving most of Williams' property to Althrial. In June of that year, Williams purportedly executed the new will, and Brown notarized it. Williams died that same month.

After Williams died, both wills were submitted for probate. Brown submitted the 2005 will on behalf of Althrial. A handwriting expert examined the 2005 will. He concluded that Williams signature on that will was a forgery. One of Williams' children filed a disciplinary complaint against Brown, claiming that he had known

that the 2005 will was a forgery when he submitted it to probate.

In the disciplinary proceedings, Brown admitted that he did not know if Williams had actually executed the 2005 will. According to Brown, “Williams came into his office with two witnesses and appeared to sign the will in his presence, but he could not actually see Mr. Williams sign because cataracts in both eyes impaired his vision.”

The ODC charged Brown with violating Rule 3.3(a)(3) (a lawyer shall not knowingly offer evidence that the lawyer knows to be false) and Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The hearing committee decided that there was no evidence of a conspiracy between Brown and Althrial to present false evidence to a court. And it decided that the ODC had not demonstrated that Brown’s acts had been intentional. But it did conclude that he had falsely attested that he had witnessed the signatures of Williams and the witnesses, and that, with that knowledge, had submitted the will to probate.

The Louisiana Supreme Court concluded that the charges were supported by the evidence, and that, in improperly notarizing the will, Brown had violated Rules 3.3(a)(3) and 8.4(c). It also said:

By knowingly submitting an improperly notarized will for probate, respondent violated duties owed to the legal system and the legal profession. His conduct caused harm by unnecessarily delaying the resolution of Mr. Williams' succession. Mr. Williams' children were required to obtain the services of a handwriting expert to challenge the 2005 will, which was determined to be a forgery.

The court imposed a one-year suspension, with all but three months deferred, and it ordered that, after the period of active suspension, Brown be placed on unsupervised probation for a period of two years, subject to the condition that he successfully complete the Louisiana State Bar Association's Ethics School program.

8. License to Sell

In re Lee

85 So. 3d 74 (La. 2012) (per curiam)

Attorney Kimuel Lee was married to Janet Lee, who owned Foreign Car Sales, LLC. In 2005, John Nell purchased a Dodge truck from Foreign Car Sales for \$7500. According to an affidavit provided by Nell, it was attorney Lee who showed him the truck and who negotiated the sales price. Lee was not a licensed salesperson at the time. The affidavit also indicated that Lee had signed his wife’s name to the bill of sale and had then notarized the signature.

The Louisiana Supreme Court said, about this transaction, “In the Nell matter, respondent engaged in dishonest conduct by notarizing his wife's forged signature on the bill of sale when he was the actual salesperson for the transaction.” 85 So. 3d at 82.

For this, and for other misconduct, Lee was suspended for two years.

I. Crimes

1. Gunplay

State ex rel. Oklahoma Bar Association v. Conrady 275 P.3d 133 (Okla. 2012)

On January 30, 2009, attorney Conrady returned to Oklahoma following a three-week trip to the Middle East. He was met at the airport by his longtime girlfriend, Janice Pierce. During the drive home, Pierce told Conrady that she no longer wanted to continue their relationship. She also told him that she had begun dating a fellow Sunday School teacher at her church, Steve McCroskey. Conrady became despondent. He consumed vodka and took pain medication. On the evening of February 1, while intoxicated, Conrady armed himself and drove to McCroskey's residence. No one was home. Conrady forcibly entered the house. He fired rounds throughout the house. One round penetrated the outside wall of the house and lodged in a neighbor's storm door. After exiting the house, Conrady discharged his firearm multiple times into Pierce and McCroskey's unoccupied vehicles. He later plead guilty to several criminal charges.

In disciplinary proceedings, Conrady was charged with violating Rule 8.4(b), which defines professional misconduct to include, any criminal act that reflects adversely on an attorney's “honesty, trustworthiness, or fitness as a lawyer.”

The Oklahoma Supreme Court said that

we must examine whether criminal conduct may serve as the basis for disciplinary measures, when it does not (1) call into doubt the honesty or trustworthiness of a lawyer, or (2) directly involve his/her practice of law, or a client relationship.

275 P. 2d at 136.

Conrady had stipulated that his conduct had run afoul of Rule 8.4, but he characterized his conduct as amounting to “property crimes.”

The court saw things differently:

Conrady denied any intent to do harm to Pierce or McCroskey, yet his actions were inconsistent with that statement. Although no one was physically injured as a result of the shooting, Conrady's reckless behavior could have easily resulted in death or serious bodily injury. Conrady's attempt to minimize his behavior ignores the emotional impact of his crimes and is an affront to his victims.

Id. at 137. It suspended him for two years and a day.

2. Domestic Abuse

In re Cardenas

60 So. 3d 609 (La. 2011) (per curiam)

Attorney Cardenas was convicted of a misdemeanor count of domestic abuse battery (child endangerment). He was incarcerated for a short time and fined \$500. The ODC later charged him with a violation of Rule 8.4, which states that it is professional misconduct for an attorney to “[c]ommit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.”

In discussing the behavior of Cardenas, the Louisiana Supreme Court said: “By its very nature, respondent's criminal conduct was intentional. He violated duties owed to the public, the legal system, and the legal profession, causing actual harm.” 60 So. 3d at 613.

The court observed that “[s]anctions in cases dealing with attorneys who have engaged in violent conduct range from a year and a day suspension to disbarment.” *Id.* at 614. In this instance, the court thought that the conduct was similar to the earlier case of *In re Sterling*, 2 So. 3d 408 (La. 2009) (per curiam), in which a lawyer was suspended after kicking in the door of his girlfriend's apartment and shoving her around the apartment. The court ordered Cardenas to be suspended for a year, with six months deferred, following by a two-year period of supervised probation.

3. Hit Man

In re Walker

713 S.E.2d 264 (S.C. 2011) (per curiam)

Attorney Walker engaged in several acts of misconduct. In one of those, he attempted to hire a “hit man” to murder another member of the South Carolina Bar. He also paid the “hit man” in part with a post-dated check because he did not have sufficient funds in his account to pay the check's face value. Walker was sentenced to imprisonment and probation. He was also disbarred.

J. Conflicts of Interest

1. A News Item

According to some survey results reported by attorney Ronald Mallen on February 29, at the 11th Annual Legal Malpractice & Risk Management Conference, the frequency with which legal malpractice claims are being made against law firms is “flattening or even decreasing a bit.” However, the severity of those claims is increasing. And the largest source of those claims is conflicts of interest.

Elizabeth J. Cohen, *Number of Claims May Be Decreasing But Their Severity is Heading Upward*, 28 ABA/BNA Lawyers’ Manual on Professional Conduct 161 (2012).

2. Children

In re Formal Advisory Opinion NO. 10-2 720 S.E.2d 647 (Ga. 2012)

The Georgia Supreme Court approved an ethics committee opinion dealing with conflicts of interest in representation of a child. The ethics opinion considered whether a lawyer who was appointed to serve as both counsel and guardian ad litem for a child could advocate the termination of parental rights when the child objects. It said no. It also said that when an irreconcilable conflict develops between the child’s wishes and the lawyer’s notion of the child’s best interests, the lawyer must petition the court to be removed as guardian ad litem or make see to withdraw altogether.

3. Migratory Paralegal

Mississippi Bar Ethics Committee Opinion 258 (2011)

The Mississippi ethics committee was asked to give an opinion on a situation in which a paralegal changed jobs. In her previous employment, the employer represented a corporation that was one of the defendants in a lawsuit. She worked on the case for 15 hours. The corporation ended up settling with the plaintiff. Her new employer represents the plaintiff in the same lawsuit against the remaining defendants.

The committee determined that the paralegal’s conflict would not be imputed to the new employer so long as she is screened from involvement, in order to protect the former client’s confidential information. The committee noted that the Rules of Professional Conduct do not explicitly apply to paralegals, but they do provide that

lawyers “are responsible for assuring that their non-lawyer staff acts in accordance with the lawyer’s ethical obligations.” This includes the obligation to safeguard confidential information. It also noted that a comment to Model Rule 1.10 provides that nonlawyer conflicts will not ordinarily impute to firm lawyers if the nonlawyer is properly screened.

4. Settling a Malpractice Case

In re Newman

83 So. 3d 1018 (La. 2012) (per curiam)

Attorney Newman was charged, among other things, with settling a malpractice case against him without complying with Rule 1.8(h), which provides that

a lawyer shall not settle a claim or potential claim for malpractice liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

The circumstances were that Newman had filed a lawsuit on behalf of two clients, Vital and Patterson, for claims arising out of an automobile accident. Although Vital was the driver, and Patterson was a passenger, Newman did not discuss the possibility of conflict of interest between them. He then proceeded to settle Patterson’s claims, and closed his file, without pursuing Vital’s claim, which was eventually dismissed as abandoned. Vital filed a complaint against Newman with the ODC. According to the Louisiana Supreme Court’s opinion in the case,

After respondent was notified of Mr. Vital's disciplinary complaint, he arranged to meet with Mr. Vital at his office. Mr. Vital brought his friend, Mary Sam, to the meeting. During the meeting, respondent informed Mr. Vital that he wanted to pay Mr. Vital the value of his claim and gave Mr. Vital a \$3,000 check to that end. However, respondent did so without advising Mr. Vital in writing that he should seek the advice of independent counsel.

83 So. 3d at 1020.

For this, and for other misconduct, Newman was suspended for 90 days, with all but 30 days deferred, and was placed on probation for a year.

5. Personal Interest

In re Gerdes

74 So. 3d 650 (La. 2011) (per curiam)

Attorney Louis Gerdes was found to have engaged in several violations of the Rules of Professional Conduct. One of these involved a conflict of interest.

Gerdes represented Robert Bates in a personal injury lawsuit on a contingency fee basis. While the lawsuit was pending, Bates died. Gerdes was appointed administrator of the succession. He also filed a petition claiming that he, as the succession's administrator, be substituted as the plaintiff in the lawsuit. State Farm, the insurer, objected, and Gerdes filed a pleading requesting that Bates' daughter (Ms. Anderson) be substituted as plaintiff.

The opinion of the Louisiana Supreme Court discussed this as follows:

When respondent had himself substituted as the plaintiff in Mr. Bates' lawsuit, his representation of Mr. Bates became materially limited by his personal interest. Respondent became a party to the lawsuit, the outcome of which had a direct bearing on his contingency fee interest. In fact, he admitted at the hearing that he proceeded in this matter "to recover whatever fee I had to recover in the process." The fact that he had a professional relationship with Ms. Anderson but claimed he was unable to reach her before substituting himself as the plaintiff supports the conclusion that he was only pursuing his personal interest in his contingency fee when he substituted himself as plaintiff. Therefore, a conflict existed

74 So. 3d at 657.

For this and other misconduct, the Louisiana Supreme Court ordered a suspension for nine months, all but three of which were deferred.

6. Multiple Clients

In re Newell

60 So. 3d 1194 (La. 2011) (per curiam)

Newell agreed to represent two persons in a survival and wrongful death action arising out of the death of Willie Crew, Sr. One of the clients, Vivian Jones, was a grandchild of the decedent. The other, Willie Crew, Jr., was a son. Newell also filed a petition representing the estate of the decedent. Through another lawyer, Betty Draper, the decedent's other child, also brought a wrongful death and survival action.

State Farm, the insurer for the defendant, wrote to both attorneys stating that it would like to settle the claims by tendering the policy limits of \$25,000. It also filed an answer showing that Vivian Jones, as granddaughter of the decedent, did not have a cause of action under applicable provisions of the Louisiana Civil Code. It

advised the lawyers that only the children of the decedent could recover.

Newell informed his clients that State Farm had delayed settlement until it could be assured that Ms. Jones' status as a proper plaintiff was not an issue. He asked his clients to share the settlement funds equally. Client Crew responded by instructing Newell to omit Ms. Jones from the recovery. For her part, Ms. Jones wrote to Newell, objecting to Ms. Draper's participation in the settlement. Despite the conflict between his two clients, Newell continued to represent them both. Eventually, Ms. Jones was dismissed from the lawsuit, and settlement funds were distributed to Crew and to Draper.

The ODC claimed that the conflict of interest violated Rule 1.7. The Louisiana Supreme Court concluded that the record supported a finding that Newell had engaged in a conflict of interest. For that, and for other misconduct, he was suspended for a year and a day, all but six months deferred, and was placed on supervised probation for a two-year period.

K. Ghostwriting

In re Liu

664 F.3d 367 (2d Cir. 2011) (per curiam)

Attorney Liu had been recommended for public reprimand by the Committee on Attorney Admissions and Grievances. The recommendation was reviewed by the United States Second Circuit Court of Appeals.

One of the issues was whether Liu should be disciplined for ghostwriting pleadings. In this connection, the committee had concluded that Liu had "violated her duty of candor by helping pro se petitioners draft and file petitions for review in this Court without disclosing her involvement to the Court." 664 F.3d at 368. The court adopted the committee's findings regarding other violations, but did not adopt those regarding ghostwriting.

The court noted that there were differences of opinion on whether ghostwriting is unethical:

In *Duran v. Carris*, for example, the Tenth Circuit admonished an attorney for ghostwriting a pro se brief for his former client without acknowledging his participation by signing the brief. 238 F.3d 1268, 1271–73 (10th Cir.2001) (per curiam). The court stated that the attorney's conduct had inappropriately afforded the former client the benefit of the liberal construction rule for pro se pleadings, had shielded the attorney from accountability for his actions, and conflicted with the requirement of Federal Rule of Civil Procedure 11(a) that all pleadings, motions, and papers be signed by the party's attorney.

...

On the other hand, a number of bar association ethics committees have been more accepting of ghostwriting.

664 F.3d at 369-70

The court referred, among other things, to an ABA ethics committee opinion:

[A] more recent opinion of the ABA's Standing Committee on Ethics and Professional Responsibility concluded that “[a] lawyer may provide legal assistance to litigants appearing before tribunals ‘pro se’ and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.” ABA Standing Comm. on Ethics & Prof’l Resp., Formal Op. 07–446, Undisclosed Legal Assistance to Pro Se Litigants (2007)(superseding ABA Comm. on Ethics & Prof’l Resp., Inf. Op. 1414). The ABA committee found that providing undisclosed legal assistance to pro se litigants constituted a form of limited representation, pursuant to ABA Model Rule of Professional Conduct 1.2(c), which states that “[a] lawyer may limit the scope of the representation [of a client] if the limitation is reasonable under the circumstances and the client gives informed consent.”

Regarding the benefit of liberal construction afforded to pro se pleadings, the ABA opinion stated that, “if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal” and, in any event, when a pleading is of higher quality, there will be no reason to apply liberal construction. *Id.* at 3. On the other hand, according to the ABA opinion, “[i]f the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage.” *Id.* The opinion concluded that, “[b]ecause there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.”

Id. at 370-71 (citations omitted).

As to Liu, the court said:

In light of this Court's lack of any rule or precedent governing attorney ghostwriting, and the various authorities that permit that practice, we conclude that Liu could not have been aware of any general obligation to disclose her participation to this Court. We also conclude that there

is no evidence suggesting that Liu knew, or should have known, that she was withholding material information from the Court or that she otherwise acted in bad faith.

Id. at 372.

So Liu was not disciplined for the ghostwriting.

See *also* Philadelphia Bar Association Professional Guidance Committee, Joint Formal Opinion 2011-100 (2011) (Lawyers who give limited drafting assistance to pro se litigants are not required to disclose their involvement to opponents or the court).

L. Supervision

Board of Overseers of Bar v. Warren 34 A.3d 1103 (Me. 2011)

John Duncan was found to have stolen money from clients and from his law firm. The full extent of his misdeeds was not uncovered at first. Initially, the firm's executive committee deferred action on Duncan's offer to resign. The managing partner notified the head of the firm's private clients group so that practices could be implemented to prevent such problems in the future. Eventually, when other evidence of misdeeds was discovered by the firm, Duncan was fired. The firm's in-house general counsel resigned, but notified bar counsel that he had learned about misconduct during the investigation.

Bar counsel subpoenaed the former general counsel, but the firm attempted to quash, claiming attorney-client privilege protections. Ultimately the Maine Supreme Court concluded that the crime-fraud exception to the privilege (which would defeat the privilege) did not apply, because the firm had not been planning or engaging in fraudulent activity at the time it had engaged the general counsel's assistance in the matter.

Disciplinary charges were filed against several firm lawyers (the members of the firm's executive committee) over the incident. One of the claims was that the lawyers had delayed the reporting on Duncan's misdeeds in violation of Rule 8.3. That claim ultimately failed. But the Maine Supreme Court determined that the lawyers had violated the rule requiring partners in a firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Code of Professional Responsibility." It said:

We recognize that these six attorneys, comprising Verrill Dana's executive committee, were caught completely "off guard" by Duncan's conduct. We also recognize that they dealt with Duncan with

compassion, and there is no suggestion of bad faith in their failure to refer his conduct to Bar Counsel or to individuals in the firm who were more capable of assessing the need for action, such as the firm's own counsel. However, we cannot ignore that, when faced with the significant malfeasance of a self-destructing partner, none of the attorneys even recognized that the Maine Code of Professional Responsibility required them to contemplate reporting that partner's conduct and subsequent breakdown. Notwithstanding the single justice's factual findings, when a firm's practices and policies do not require the firm's leadership to at least consider whether it has an ethical obligation to report a colleague in the circumstances presented by this case, we are compelled to find, as a matter of law, that the firm failed to have in effect "measures giving reasonable assurance that all lawyers in the firm conform to the Code of Professional Responsibility."

34 A.3d at 1113.

The court remanded for an appropriate sanction.

M. Fees

1. Earned and Unearned

In re Jones

85 So. 3d 15 (La. 2012) (per curiam)

Attorney Jones was hired to complete a succession, but he was discharged before doing so. Indeed, at the time of his discharge, he had not yet filed the pleadings to open the succession. Nevertheless, Jones refused to refund any portion of the \$10,000 the client had paid him, claiming that he had earned the entire amount.

The Louisiana Supreme Court concluded that Jones' conduct had been in violation of Rule 1.5(f)(5), which states:

When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do

so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

Jones and his client disagreed about the nature of the fee agreement. But this disagreement did not prevent a conclusion that Jones had acted improperly.

Whether the fee was an advanced fee (as respondent described it) or a fixed fee (as Ms. Childs described it), respondent would be responsible for returning any unearned portion pursuant to the provisions of Rule 1.5(f)(5). The record contains only a few letters prepared by respondent, respondent's testimony that he attended one or two mineral conservation hearings, Ms. Childs' notes of several telephone conversations with respondent, and a title abstract requested by respondent. Respondent did not file any pleadings to open the succession, which was the purpose of the representation. Therefore, the board determined respondent did not earn the entire \$10,000 fee. Because he did not refund the unearned portion or place the disputed portion in a trust account, respondent violated Rule 1.5(f)(5).

85 So. 3d at 19.

Jones was suspended for three years, all but one year deferred, and placed on supervised probation for two years.

2. Proof

Regel L. Bisso, L.L.C. v. Stortz 77 So. 3d 1033 (La. App. 5 Cir. 2011)

The Bisso firm represented the Stortzes in an arbitration proceeding with a home builder. At the conclusion of the proceeding, the Stortzes were awarded \$49,876.50, which included an award of attorney's fees of \$11,212.00. The firm claimed that the Stortzes owed it a larger fee. The Stortzes saw things differently, so the firm filed a suit on an open account claiming that the firm had entered into an oral agreement with the Stortzes for representation at a rate of \$200 per hour, and seeking recovery of \$24,650.00.

The trial court concluded that the firm was entitled to \$11,212.00 in legal fees for representation of the Stortzes in the arbitration proceeding. It also awarded the firm \$1,500.00 in fees for its representation in the suit on open account.

On appeal, the Third Circuit said:

Rules of Professional Conduct, Art. 16, Rule 1.5(b) provides, “[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation ...”

LSA–C.C. art. 1846 provides that a contract not reduced to writing and the price or value is in excess of \$500.00 must be “proved by at least one witness and other corroborating circumstances.” A plaintiff may offer his own testimony in support of his claim; however, the other circumstances which corroborate the claim must come from a source other than the plaintiff.

In the present case, all of the extrinsic evidence presented to establish the oral contract with the Stortzes for legal representation came from Mr. Bisso, a member of Bisso, L.L.C., through his testimony and the submission of billing statements and demand letters attested to by him. However, this evidence is insufficient to prove that Bisso, L.L.C. was owed \$24,650.00 from the Stortzes pursuant an oral contract because no independent corroboration was presented on its behalf.

77 So. 3d at 1035-36 (citations omitted).

The court affirmed the a \$11,212.00 award.

N. Malpractice

1. Environmental Due Diligence

SCB Diversified Mun. Portfolio v. Crews & Associates 2012 WL 13708 (E.D. La. 2012)

After buying 324 acres of land, MGD Partners LLC decided to sell some bonds to finance development. It elected to form a community development district – the Coves of the Highland Community Development District – in order to issue the bonds. The District hired the McGlinchey Stafford firm to act as special counsel in connection with its organization and as bond counsel in connection with the issuance of the bonds. Crews and Associates underwrote the bonds, and purchased them from the District. The bonds were offered for repurchase to SCB Diversified Municipal Portfolio, and others, through a Preliminary Limited Offering Memorandum (“PLOM”) and a final Limited Offering Memorandum (“LOM”).

McGlinchey Stafford issued opinion letters in connection with the bond transaction. The court discussed this as follows:

The first addressed the validity and binding effect of the Bonds, the source of payment and security for the Bonds, and the excludability of interest on the Bonds from federal and Louisiana income taxes. The second ... stated that McGlinchey reviewed certain portions of the LOM and that those sections contained a fair and accurate summary of certain legal provisions and instruments. This opinion expressly excluded the section of the LOM labeled "The Development." In the third, ... McGlinchey opined as to the formation of Plaintiff, the validity of the Bonds, Plaintiff's ability to enter into the indenture, the source of payment and security for the Bonds, and the excludability of interest on the Bonds from federal and Louisiana income taxes.

After the development had commenced, the Army Corps of Engineers issued a public notice stating

that the Corps used portions of the Property from 1942 until September 1945 to provide gunnery, rocket and bombing practice for pilots. The Corps' inspection report noted the potential for unexploded ordnance ("UXO") and munitions and explosives of concern ("MEC").

Thereafter, the Parish Engineer notified MGD that no further building permits or approvals would be issued until the risk of contamination had been investigated and remediated. This stopped the project. The District defaulted on the bonds. It then filed suit against McGlinchey Stafford for legal malpractice for, among other things, failing to conduct environmental due diligence. It also claimed that the firm had violated its duty to obtain informed consent before limiting the scope of the representation.

The district court granted McGlinchey Stafford's motion for summary judgment, stating that the District could not establish that the law firm, as bond counsel, had a duty to investigate the environmental aspects of the real estate venture.

The court based part of its conclusion on the engagement letter between the District and the law firm:

The engagement letter clearly defines the scope of the representation contemplated between Plaintiff and McGlinchey. McGlinchey's role in the venture consisted of assisting Plaintiff in its formation under Louisiana law and in issuing bonds. As expressly stated, McGlinchey's review of the PLOM did not include the section regarding the development, which is where the mention of a Phase I Environmental Site Assessment is located. McGlinchey's limited role in this transaction is further elucidated by the number of other parties employed by Plaintiff or otherwise involved in the Bond transaction....

On the question whether the law firm had failed to obtain informed consent of the District with respect to the limitations on the scope of its representation, that court said that

Plaintiff cites several rules of conduct from various sources which state that a lawyer must consult with client when narrowing his representation from what his traditional role as counsel would be. In order to demonstrate a violation of these rules, Plaintiff must show that McGlinchey failed to perform some duty which is traditionally included in the role of bond counsel.

The court then turned to expert testimony:

In an attempt to establish the scope of McGlinchey's duties, Plaintiff submits the expert report of Sean Rafferty, a title attorney based in New Orleans, Louisiana. In his report, Mr. Rafferty opines that "an attorney representing a client intending to conduct a Louisiana commercial real estate development project has a professional duty to advise his client of the acute need to obtain appropriate environmental reviews of the project property." ... However, Mr. Rafferty does not address McGlinchey's duties to Plaintiff specifically or the role of bond counsel generally. Rather, Mr. Rafferty asserts that any attorney representing, in *any* capacity, a client who is engaged in developing real estate must advise a client about the need for environmental reviews. Based on the Court's familiarity with the standard of practice in this community, this broad contention cannot be sustained. For instance, a tax attorney who works only on tax issues surrounding a real estate development would certainly have no obligation to advise the client of the need for environmental studies of the property. Mr. Rafferty states that he has experience representing clients in real property acquisitions and that he works as a title attorney. In these roles, such an attorney would most likely have a duty to advise a client regarding environmental issues, but this duty does not extend to every attorney who comes into contact with a client developing real estate.

...

On the other hand, McGlinchey submits the expert report of M. Jane Dickey, an attorney with experience in municipal finance who served as President of the National Association of Bond Lawyers, stating that environmental issues are outside the scope of bond counsel's traditional role in municipal finance transactions such as the one at issue herein. Based on Ms. Dickey's testimony and the Court's knowledge of standards of practice observed in this community, the

Court finds that Plaintiff has failed to show that environmental issues were within the scope of McGlinchey's duty as bond counsel.

(Footnotes omitted).

Since environmental due diligence had not been shown to be within the scope of the law firm's duty to the District, the court concluded that McGlinchey Stafford had not committed malpractice.

2. Continuous Representation

Jenkins v. Starns 85 So. 3d 612 (La. 2012)

Laurie Jenkins had a contract with Chet Medlock to buy a metal building from him. After delivery of the building, there were issues about its quality, and Jenkins withheld payment of the last installment under the contract. She also consulted with attorney Starns, who wrote a letter to Medlock. Medlock subsequently sued Jenkins for breach of contract. Starns was in contact with Medlock's lawyer, and believed that there was an informal agreement for an extension of time to file responsive pleadings. But Medlock ultimately obtained a default judgment against Jenkins that was confirmed on January 16, 2007. An attempt to set the default aside failed. A writ of garnishment was served on Jenkins' bank on October 1, 2008. After the loss of funds from her bank account, Jenkins, through another attorney, filed a legal malpractice action against Starns on November 5, 2008. The trial court entered a partial judgment on the pleadings, concluding that a claim for legal malpractice had been established. Starns filed an exception, claiming that the malpractice suit was not filed within the one-year preemptive period of R.S. 9:5605.³ Starns claimed that because Jenkins had been served with a copy of the

³ It provides:

A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three

default judgment on or about January 12, 2007, any damages resulting from the alleged malpractice began to run in January of 2007. He further claimed that Jenkins' petition filed on November 5, 2008, was untimely and should be dismissed.

The trial court denied the exception, and it rendered judgment against Starns. It said that Louisiana courts had adopted the "continuous representation rule" as an application of *contra non valentem*. The concept is that prescription of an act of legal malpractice does not begin to run while the attorney continues to represent the client and attempts to remedy the act of malpractice. In this instance, Starns had attempted to have the default judgment set aside. And Jenkins had testified that she had first realized that things had gone "seriously wrong" when she had discovered a deficit in her bank account after the garnishment.

The court of appeal affirmed, and the case came before the Louisiana Supreme Court. It focused on the one-year peremptive period set forth in the legal malpractice statute, and said:

years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional law corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, the prescriptive and peremptive period shall be governed exclusively by this Section.

D. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

In this case, the peremptive period began to run when the plaintiff knew or should have known of the existence of facts that would have enabled her to state a cause of action for legal malpractice. The “act, omission, or neglect” complained of in Jenkins' petition is Starns' failure to file a responsive pleading in the Medlock case and Starns' failure to appear and defend her at the April 16, 2007, hearing on the declinatory exceptions filed in response to her petition to annul judgment. Thus, the question before the Court is the date upon which Jenkins could reasonably discover the malpractice which triggered the running of the peremptive period. We find Jenkins had constructive knowledge of facts sufficient to state a cause of action against Starns when she received notice of the default judgment against her and Starns advised her a mistake had been made in January of 2007.

85 So. 3d at 621.

What about the continuous representation rule? The court said that

the main issue before this court is whether the continuous representation rule can apply to suspend the commencement of the one-year peremptive period under La. R.S. 9:5605. Starns contends the malpractice suit is perempted because Jenkins failed to file suit within one year of January 16, 2007, the date she was served a copy of the confirmed judgment. Starns argues this is when Jenkins discovered the act of malpractice, namely his failure to file a responsive pleading which led to the entry and confirmation of a default judgment against her. Starns asserts the time periods in La. R.S. 9:5605 are peremptive and therefore, cannot be renounced, interrupted, or suspended by the continuous representation rule. In contrast, Jenkins asserts, and the court of appeal found, the continuous representation rule suspended the commencement of the one-year peremptive period until July 28, 2008, when her suit to annul was dismissed for the second time. We agree with Starns and find this malpractice suit is untimely because the continuous representation rule cannot apply to suspend the one-year peremptive period under La. R.S. 9:5605.

Id. at 622.

The court noted that, in an appropriate case, the continuous representation rule, as an application of the jurisprudential doctrine of *contra non valentem*, could suspend the running of prescription. But it concluded that suspension was not appropriate here:

Reaffirming this Court's decision in *Reeder*, *Teague*, and *Naghi*, we

find La. R.S. 9:5605 clearly provides three preemptive periods: (1) a one-year preemptive period from the date of the act, neglect, or omission; (2) a one-year preemptive period from the date of discovering the act, neglect, or omission; (3) and a three-year preemptive period from the date of the act, neglect, or omission when the malpractice is discovered after the date of the act, neglect, or omission. We further find the continuous representation rule cannot apply to suspend the commencement of these preemptive periods, as it would render La. R.S. 9:5605(B) meaningless.

Id. at 626 (citations omitted).

It went on to say:

The statute clearly states the one-year and three-year periods therein are preemptive and consequently cannot be renounced, interrupted, or suspended. La. R.S. 9:5605(B). In the present case, Jenkins had constructive knowledge and therefore, “discovered” Starns' acts of malpractice in January of 2007. Jenkins filed her malpractice suit in November of 2008, within three years of the acts of malpractice but more than one year after discovery. The lower courts, relying principally upon *Lima* and *Hendrick*, found her claim timely by applying the continuous representation rule to suspend commencement of the preemptive period. Just as the Court in *Reeder* found the court of appeal's reliance upon *Lima* misplaced, we also find the lower courts in this case erred in relying upon *Lima* to apply the continuous representation rule. Neither *Hendrick* nor *Lima* involved the application of La. R.S. 9:5605 to a legal malpractice claim. Instead, both cases applied the one year prescriptive period under La. C.C. art. 3492, which can be suspended or interrupted. As discussed at length above, in *Reeder* this Court held the continuous representation rule is a suspension principle based on *contra non valentem* and therefore cannot apply to preemptive periods.... This Court also stated, “nothing may interfere with the running of a preemptive period.... And exceptions such as *contra non valentem* are not applicable.... prescription ... may be renounced, interrupted, or suspended; and *contra non valentem* applies an exception to the statutory prescription period....” ... Applying *Reeder* to this case, it is clear the trial court and court of appeal erred in applying the continuous representation rule to suspend the commencement of the preemptive period on Jenkins' malpractice suit.

Id. at 627-28.

The court reversed. Two justices dissented. They were of the view that failure to apply the continuous representation rule leads to absurd results. They noted that an “attorney need only litigate a claim past the three (3) year preemptive period to avoid all consequences of his malpractice.” *Id.* at 629.

3. Waiver & Expert Testimony

MB Industries, LLC v. CNA Ins. Co. 74 So.3d 1173 (La. 2011)

MB Industries (“MBI”) brought a legal malpractice action against attorneys Durio and Weinstein. The lawyers had represented MBI in an unsuccessful lawsuit against two former employees. MBI had claimed that the employees had violated non-compete agreements and had misappropriated confidential trade secrets. Rather than appeal the unfavorable judgement, MBI sued the lawyers for malpractice.

In the malpractice action, MBI claimed, among other things, both Durio and Weinstein had failed to meet trial court cutoff dates to amend the petition, add additional defendants, and request a jury trial. As to Durio, MBI alleged that he had negligently lost a box of documents, some of which were privileged or proprietary, and had failed to seek a protective order with respect to those documents. As to Weinstein, MBI alleged that he had mishandled the case by failing to pursue certain claims in bankruptcy court, by withdrawing from the case while a trial date was looming, and by falsely representing to the court that no trial date had been set when he filed a motion to withdraw. The trial court granted Durio’s motion for summary judgment, the Third Circuit reversed, and the case came before the Louisiana Supreme Court.

One of the issues on appeal was whether MBI had waived its right to bring a legal malpractice suit by not timely appealing the unfavorable judgment against it. The defendant lawyers contended “under the principles of equitable estoppel,” a claimant who fails to perfect an appeal effectively waives his right to seek a remedy in malpractice. 74 So. 3d at 1179. The Louisiana Supreme Court said that the issue was *res nova* for the court. It rejected the lawyers’ contention.

The court stated:

A claim of waiver by failure to appeal is thus not “equitable estoppel” as the doctrine has been defined by this Court. Strictly speaking, equitable estoppel applies only where a party has made false or misleading representations of fact and the other party justifiably relied on the representation.... Because MBI’s decision not to pursue an appeal was not a representation of fact which Durio or Weinstein justifiably relied on to their detriment, equitable estoppel does not

apply.

The issue is more properly framed as a failure to mitigate damages under Civil Code article 2002, which states: "An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts, the obligor may demand that the damages be accordingly reduced." ... If an aggrieved party could have cured the effects of an unfavorable judgment by appeal, its decision not to appeal may be a failure to mitigate under article 2002. The failure to mitigate damages is an affirmative defense, and the burden of proof is on the party asserting the defense.

The scope of a party's duty to mitigate depends on the particular facts of the individual case, and a party is not required to take actions which would likely prove unduly costly or futile....

Defendants urge this Court to adopt a per se rule requiring an appeal in all cases before a legal malpractice action may be pursued. However, the defendants do not cite, and this Court has not found, any reported decision imposing such a per se rule....

We agree with plaintiff that a per se rule would be untenable, as there are many types of malpractice which would effectively preclude any possibility of a successful appeal. For instance, if an attorney neglects to file a petition before the expiration of a prescriptive period, the client would have no remedy on appeal. In this case, MBI argues that Durio failed to elicit necessary testimony at trial, therefore creating an inadequate factual record. If MBI is correct, an appeal would have been pointless because the record on appeal is necessarily limited to facts properly before the trial court

74 So. 3d at 1180-82.

The court announced the following rule:

We therefore hold a party does not waive its right to file a legal malpractice suit by not filing an appeal of an underlying judgment unless it is determined a reasonably prudent party would have filed an appeal, given the facts known at the time and avoiding the temptation to view the case through hindsight. This analysis is heavily dependent on the specific facts of the case.

Id. at 1182-83.

A second issue before the Louisiana Supreme Court was whether summary judgment was proper in light of MBI's failure to introduce expert testimony to establish the standard of care for the attorneys' conduct. On this point, the court said:

[W]e find a party alleging legal malpractice must introduce expert testimony to establish the standard of care except in those rare cases involving malpractice so egregious that a lay jury could infer the defendant's actions fell below any reasonable standard of care.

Id. at 1176.

In this instance, the court was of the view that

because MBI did not introduce any competent expert witness testimony or affidavit, summary judgment for the defendants is proper unless the undisputed facts establish malpractice which was so obvious that a lay person would recognize it as falling beneath the necessary standard of care.

Id. at 1185. The court concluded that MBI had not met that standard in this case, so the defendant lawyers were entitled to summary judgment.

O. Money

1. Advanced Payment

In re Williams

62 So. 3d 751 (La. 2011) (per curiam)

Jo Ann Smith hired Williams to handle a succession matter. She paid him \$1,959. Williams claimed that this consisted of a flat fee of \$1,500 plus court costs of \$459. He placed the amount into his operating account. Thereafter the balance in that account was regularly less than \$1,959. Ms. Smith filed a complaint with the ODC.

The ODC claimed that Williams had violated the following provisions of the Rules of Professional Conduct: Rules 1.5(f)(3) (advance deposit against fees that are to accrue must be placed in the lawyer's trust account), 1.5(f)(4) (advance deposit for costs and expenses must be placed in the lawyer's trust account), 1.15(a) (safekeeping property of clients or third persons), 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation)

The Louisiana Supreme Court concluded that Williams had acted improperly. It said:

In this matter, there is no dispute that respondent deposited \$459 in advanced costs into his operating account rather than a client trust account, converted those funds to his own use by allowing the balance of the operating account to drop below \$459, and failed to reduce a contingency fee agreement to writing. The only issue to be determined is the proper characterization of the \$1,500 fee paid by Ms. Smith. Respondent apparently intended the \$1,500 to be a fixed fee or a minimum fee, which would become his property when paid by Ms. Smith. On the other hand, the ODC contends the \$1,500 was an advance deposit against fees for future work, which, when paid, still belonged to Ms. Smith and should have been placed in respondent's trust account.

While respondent's intentions may have been good, the fee agreement he drafted and which was signed by Ms. Smith clearly refers to an advance fee. Therefore, pursuant to Rule 1.5(f)(3), respondent was required to deposit the \$1,500 paid by Ms. Smith into his client trust account.

62 So. 3d at 755-56.

The court ordered a one year suspension, all but four months deferred, subject to successful completion of a two year supervised probation.

2. Bad Trust Account Practices and Other Bad Things

In re Dixon

55 So. 3d 758 (La. 2011) (per curiam)

Attorney Dixon was found to have intentionally mishandled his client trust accounts, which resulted in commingling and conversion of funds; he was caught by a policeman in the act of committing a criminal act of prostitution; and he failed to promptly refund a \$100 unearned fee after he was ordered to do so by a bankruptcy judge.

An audit of Dixon's trust accounts showed more than 200 unexplained entries, because he had failed to keep complete records. It also showed that Dixon had left approximately \$91,000 of his fees in the trust accounts, and that he had paid personal and/or office expenses from the trust accounts.

The prostitution incident took place while Dixon was undergoing one of his substance abuse treatment efforts. Dixon plead no contest to a misdemeanor charge of prostitution.

He also had a prior history of discipline, alcohol and drug abuse, recovery, and

relapse.

The Louisiana Supreme Court said that the “heartland” misconduct was Dixon’s mishandling of his trust accounts. It ordered a three year suspension. Justice Clark would have disbarred the lawyer.

3. Negligent Practices

In re Spears

72 So. 3d 819 (La. 2011) (per curiam)

Attorney Spears ran into trouble with respect to his handling of funds. On January 20, 2009, his trust account did not have a sufficient balance to cover a \$470 check. The bank returned the check unpaid. On February 4, 2009, the check was presented a second time and was paid, but this resulted in an overdraft in the trust account of \$444.75. The ODC subsequently opened an investigation and audited the trust account. It learned the following:

On fifty-seven occasions, respondent wire transferred funds between his trust account and his operating account or personal account without proper documentation. He also had no documentation to explain the \$9,941.43 balance in his trust account on August 1, 2008 or various deposits into the trust account during this time period. Between November 5, 2008 and February 5, 2009, respondent transferred a total of \$3,117 from his operating or personal account to his trust account. On several occasions, respondent also left his personal funds and/or his attorney's fees from various settlements in his trust account. The non-client funds in respondent's trust account exceeded the amount necessary to pay bank service charges, and respondent occasionally used these funds to pay his office's operating expenses directly from the trust account. Additionally, in November 2008, respondent's trust account had insufficient funds to cover \$1,176.35 due to a third-party medical provider; thus, the processing of two checks made payable to the third-party medical provider created a \$1,160.62 deficit in the account. On November 19, 2008, respondent transferred funds from his operating and personal accounts into his trust account to eliminate the deficit.

72 So. 3d at 820.

Spears did not dispute the findings from the audit, but he did claim that Hurricane Gustav had damaged his office and that most of his financial records had been destroyed. He also claimed that he had believed that electronic banking would help, but it did not provide that much help.

The Louisiana Supreme Court concluded that Spears had failed to maintain adequate records of his trust account, that he had commingled his funds with those of his clients by leaving his attorney's fees in his trust account for extended periods of time and by transferring funds to his trust account from his personal and operating accounts, and that he had converted client and/or third-party funds when he had allowed his trust account to become overdrawn.

The court concluded that Spears had “negligently violated duties owed to his clients, the public, and the legal profession.” *Id.* at 824. It ordered suspension for a year and a day, fully deferred, subject to two years of supervised probation.

P. Substance Abuse

In re Guidry

71 So. 3d 256 (La. 2011) (per curiam)

Attorney Guidry was arrested in Lafayette and charged with first offense DWI, possession of marijuana, and possession of cocaine. He thereafter completed a pre-trial diversion program. The following year, he was arrested in Illinois, and charged with driving under the influence of alcohol, speeding, and improper lane usage.

The ODC filed charges, claiming that he had violated Rule 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer). Guidry responded by claiming that he no longer practiced law, that he had completed a recovery program, and that he had been clean for three years.

The Louisiana Supreme Court questioned the evidence concerning Guidry's rehabilitation. It stated:

Although the hearing committee found respondent has not used alcohol or illegal drugs since he entered the 90-day treatment program at Home of Grace, we agree with the board that respondent has provided no evidence, other than his own testimony, that this is, in fact, true. He is not active in Alcoholics Anonymous or a similar support group and does not participate in the Lawyers Assistance Program. Furthermore, he is not currently being tested for alcohol and drug use.

71 So. 3d at 260.

The court also referred to a portion of Rule 19:

Suspending respondent from the practice of law for more than one

year will require him to show his compliance with the reinstatement criteria set forth in Supreme Court Rule XIX, § 24(E) before being reinstated to the practice of law. Particularly relevant to respondent's situation is Rule XIX, § 24(E)(3), which states:

If the lawyer was suffering under a physical or mental disability or infirmity at the time of suspension or disbarment, including alcohol or other drug abuse, the disability or infirmity has been removed. Where alcohol or other drug abuse was a causative factor in the lawyer's misconduct, the lawyer shall not be reinstated or readmitted unless:

- (a) the lawyer has pursued appropriate rehabilitative treatment;
- (b) the lawyer has abstained from the use of alcohol or other drugs for at least one year; and
- (c) the lawyer is likely to continue to abstain from alcohol or other drugs.

Id.

The court ordered suspension for a year and a day.

Q. Gifts

California Bar Standing Committee on Professional Responsibility and Conduct

Formal Op. 2011-180

The committee was asked whether it was improper for a lawyer to induce a client to give the lawyer a free stay at the client's luxury vacation home by hinting to the client that the lawyer could work more effectively on the client's case if the lawyer could spend a week relaxing there.

The committee was of the view that this would violate the rule against inducing a client to make a substantial gift to a lawyer.

On the question whether the gift was "substantial", the committee consulted a comment to the *Restatement (Third) of the Law Governing Lawyers* (2000), which indicates that the means of both the lawyer and the client should be considered, as well as other factors. In this case, the vacation home had a rental value of \$5000 per week. The committee thought that this was enough to make the gift substantial.

Recent Developments in Louisiana Jurisprudence

Family Law

2011-2012

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I. Husband and Wife

A. Marriage

1. Validity

Ghassemi v. Ghassemi

11-1771 (La. App. 1 Cir. 6/8/12); 2012 WL 2060826

FACTS: Mr. and Mrs. Ghassemi were born and raised in Iran and were first cousins. In May 2006, Mrs. Ghassemi filed a petition for divorce, spousal support, partition of community property, and injunctive relief—she averred that Mr. Ghassemi purported to marry another woman such that she was entitled to a divorce based on adultery. Mr. Ghassemi argued that the Baton Rouge family court was under no obligation to give legal effect to the Iranian marriage under the principles of comity and/or conflict of laws. The family court agreed and dismissed the petition for divorce. The First Circuit reversed finding that, under Louisiana Law, if the marriage was valid in the place where it was contracted, it was to be recognized in Louisiana, absent violation of a strong public policy. Thus, the court remanded to the lower court to accomplish the divorce and incidental matters. After the remand and before the court issued its judgment on the merits, Mr. Ghassemi filed a rule to show cause as to why the relief sought should not be limited to the marital portion—the “mahr” which is a sum of money negotiated between the husband and his in-laws and also continued to deny that the parties were validly married in Iran. Mr. Ghassemi did not appear at the final hearing. The trial court entered judgment decreeing that the parties were married in Iran in 1976. Mr. Ghassemi appealed.

HOLDING: AFFIRMED

REASONING: Appellant argued that the trial court erroneously applied an adverse presumption against him for not being present at the hearing. The record reflected that he did not request a continuance but also contained sufficient evidence to support the lower court’s conclusion that the parties were married without applying an adverse presumption. The trial court knew that Mr. Ghassemi vehemently denied the validity of the marriage. Nonetheless, the record reflected testimony from both parties and an Iranian law expert—all of which conflicted as to the validity of the Iranian marriage. In the face of conflicting facts, the lower court’s decision was not manifestly erroneous. The court also noted that Mr. Ghassemi’s Motion and Order for Divorce during the pendency of his appeal requested a divorce from Mrs. Ghassemi. Thus he was judicially estopped from denying the fact that he was married to Mrs. Ghassemi. Thus, the lower court’s judgment was correct on this alternative basis as well.

2. Covenant Marriage

Short v. Short

11-3 (La. App. 5 Cir. 10/12/11); 77 So. 3d 405

FACTS: The parties were married in 1997 and wife filed for separation in 2006; she asserted that the couple had contracted a covenant marriage. Divorce was granted in 2008 based on wife’s

adulterous affair. On March 18, 2008, the trial judge ruled that the couple had not entered into a covenant marriage. Wife appealed from that judgment and a subsequent ruling that husband was not liable for his pro rata share of school tuition for the minor children of the marriage.

RULING: AFFIRMED

REASONING: To perfect a valid covenant marriage, the parties must comply with the statutory mandates found in La. R.S. 9:273. Specifically, the parties must sign the declaration of intent to enter into a covenant marriage and must also participate in pre-marital counseling. Wife introduced into evidence the affidavit of a religious figure that attested he had performed the required counseling and had signed the attestation clause of the declaration of intent. The trial judge recognized that because of Hurricane Katrina, the supporting documents were no longer available. However, when the religious figure testified at trial, he could not specifically remember meeting with this couple, nor could he recall the nature of the document(s) signed. Husband testified that he did not participate in premarital counseling and had not signed a declaration of intent. The trial court held that a covenant marriage was not perfected; wife appealed. She argued that the supporting documents were unnecessary after she submitted a certified copy of the certificate of marriage, which contained a signed statement of intent on its face. The Fifth Circuit disagreed that such a statement, standing alone, met the statutory requirements for a covenant marriage. Without supporting documents or agreement by both parties, wife failed to meet her burden of proof.

Wife also appealed the judgment that rejected wife's request to force husband to pay a pro rata share of the children's school tuition. Prior to divorce, the children had been homeschooled. After divorce, wife was named as domiciliary parent and enrolled the children in a private school that cost approximately \$18,000 per year. The presumption that that a domiciliary parent's decisions are in the best interests of the children is not absolute and the trial court found that wife had failed to show that her decision was in the best interest of the child. The Fifth Circuit agreed. The children had been homeschooled and their enrollment in a new private school would not ensure stability and continuity in education. There was not any evidence this school met the children's needs, and wife and rushed into the enrollment without investigating other options. La. R.S. 9:315.6 provides that costs such as private school tuition may be added to the basic child support obligation, but that is permissive and not mandatory. Wife argued that the trial court's decision was inconsistent with applicable law concerning the domiciliary parent's determinations. This court found that because the children did not have a history of attending this private school, wife failed to show that the children's attendance there would fulfill their needs in a different manner than another school. The trial court's judgment was not an abuse of discretion and was affirmed.

B. Divorce

1. Procedure

a. Jurisdiction

Cannatella v. Cannatella

11-618 (La. App. 5th Cir. 3/13/12); 91 So. 3d 393

FACTS: Cynthia and Anthony Cannatella were married in February 1981. In May 2010, Cynthia filed for divorce based on adultery. Alternatively, she sought a divorce based on living separate and apart for 180 days from service of the petition. Anthony filed an Answer and Reconventional Demand denying the allegations of adultery and seeking a divorce in the alternative. In November 2010, the merits of the divorce came before the court and the parties agreed to continue other pending issues to another date. At a trial on the merits on adultery, Anthony admitted to allegations of adultery, stating he started in 2007 and continued since that time. His mistress was called to the stand and admitted to the same. A licensed investigator stated that she observed the mistress and Anthony in his truck, under a carport, and then the two entered the residence. Neither left the house overnight, but the next morning the mistress left briefly, then returned. Both exited the house shortly thereafter, embraced, and kissed three times. The trial judge indicated that he was not finding that Anthony committed adultery because the fault issues were reserved for another date. Cynthia argued that the issue for later determination was whether she was free from fault for the purposes of support.

The trial judge then granted a divorce for having lived apart for six months per CC art. 103(1), not on grounds of adultery. A judgment was issued stating that the court heard testimony on adultery but was granting a divorce based on the six months apart. The court indicated that it was premitting the issues of Anthony's fault for the fault trial in February 2011. In December 2010, Cynthia moved for a new trial, asserting that there was insufficient evidence for a divorce based on the six months apart. A new trial was set for January 2011. In December 2010, Anthony died and trial was reset to February 2011. Anthony's executor filed a Motion to Dismiss and Motion for Summary Judgment, including a dismissal of Cynthia's claim for a partition of community property, her motion for new trial, her spousal support claims, and other pending issues. The trial judge granted the Motion to Dismiss without prejudice, ruling that Cynthia could re-urge her motions in the succession proceedings. Cynthia appealed the divorce judgment and the judgment granting the Motion to Dismiss.

HOLDING: AFFIRMED in PART; REVERSED in PART

REASONING: The trial court stated that Cynthia's petition was filed on May 12, 2010 and that the two separated physically on March 29, 2010. The trial court was thus without authority to render a divorce pursuant to CC art. 103(1). However, the evidence on record, including the direct statements of Anthony and his paramour as well as the investigator's testimony, sufficed for a finding of adultery. The Fifth Circuit therefore affirmed the judgment of divorce because adultery was proven. As for the appeal of the Motion to Dismiss, Cynthia argued that a divorce action involving property rights is not extinguished on the death of one of the spouses, so the

community property claims and reimbursement claims did not die with Anthony. The court noted that an action does not abate upon the death of a party unless the obligation or right is strictly personal (citing CC art. 428). The appellate court agreed that, although a divorce action is strictly personal, the ancillary claims of property interests are not strictly personal. Therefore, the court reversed the grant of the Motion to Dismiss.

b. Applicable law

Burns v. Burns

12-128 (La. App. 3 Cir. 6/20/12); 2012 WL 2327718

FACTS: James and Victoria Burns were divorced in Massachusetts family court in 2010. There were four children of the marriage, including three minor children. A notarized agreement was appended to the judgment of divorce, which provided for child custody, child support, and spousal support. Victoria and the children moved to Louisiana; James moved to Florida. In December 2010, the Agreement was registered in Louisiana. Thereafter, Victoria filed a Rule for Sole Custody as well as a Motion for Contempt against James for underpayment of spousal support. The parties stipulated in the spring of 2011 that Victoria had begun living with her fiancé. James therefore filed a Motion to Terminate Spousal Support on April 13, 2011 pursuant to CC art. 115. Victoria countered that the Agreement provides for modification of spousal support only upon death or remarriage, neither of which have occurred (her fiancé unexpectedly passed before the litigation). The trial court found that the cohabitation did not, under the Agreement's terms, terminate spousal support; it held that the application of Louisiana law was not required when the Massachusetts contract was clear and unambiguous. The Agreement was not ambiguous, not against public policy, and was otherwise valid.

HOLDING: AFFIRMED

REASONING: The court agreed that the place of the litigation did not require application of Louisiana law when the contract was clear and unambiguous. The appellate court noted that the Agreement was a mutually-agreed upon contract and should be interpreted according to contract law. The Agreement clearly and unambiguously provides only two instances for modification of alimony—death or remarriage. To enforce the terms as written would invalidate a part of the consideration bargained for by one party. James also argued that enforcing the Agreement would be against public policy, permitting a wife to live in open concubinage. The court cited earlier jurisprudence to hold that, while open concubinage may be against public policy, the payment of spousal support through a contract is not.

St. Pierre v. St. Pierre

11-1579 (La. App. 1 Cir. 3/23/12); 2012 WL 996558

FACTS: Couple was married on October 1, 1999 and a divorce judgment was rendered on December 11, 2006. Following a trial, a judgment was entered on November 23, 2010 partitioning the former community property. Wife filed this appeal.

HOLDING: AFFIRMED

REASONING: Wife claimed that the trial court incorrectly determined that the parties' had a community property regime. Wife alleged that the parties had entered into an oral agreement prior to marriage stating there would be no community of acquets and gains during the marriage and that both parties acted in conformity with this agreement. The First Circuit noted that La. Civ. Code art 1790, which formerly that prohibited interspousal contracts, was repealed in 1980 and that spouses are now free to contract to the same extent as are unmarried persons; such contracts do not need judicial approval. Also, while a matrimonial agreement affects the classification and management of future assets, interspousal contracts only affect existing assets and debts. When a couple anticipates divorce it is permissible for them to enter into an interspousal contract without judicial approval to divide existing assets and debts. In this case, husband denied any such premarital agreement and no evidence was offered other than wife's testimony. Even if there were an oral agreement, it was not memorialized in writing. Finally, wife's admission that the agreement was made before marriage was contrary to the provision that interspousal contracts are permitted in contemplation of divorce. The trial court's judgment was affirmed.

b. Temporary Restraining Orders (TROs)

Burkart v. Burkart

10-2207 (La. App. 1 Cir. 7/7/11); 71 So. 3d 532

FACTS: Raymond and Sherie were married in 1993. On July 10, 2009, Sherie filed for divorce and sought child support and interim spousal support. She also filed a request for a Temporary Restraining Order (TRO) against Raymond to prevent him from alienating, encumbering, or otherwise disposing of any community property, as well as for an order requesting Raymond to produce a list of community property. A TRO was issued and a hearing for preliminary injunction and other issues was scheduled. At the hearing, the parties stipulated to the lifting of the TRO for certain of Raymond's law office accounts and the dismissal of a separate restraining order against harassment by Raymond. The hearing officer's recommendations stated that the injunctive relief should be dismissed without prejudice—but the recommendations did not specify which injunctions the dismissal recommendation applied to. Sometime thereafter, the trial court signed a judgment designating the recommendations of the hearing officer as temporary orders and issued a separate judgment terminating the community property regime.

After Raymond filed a motion for allocation of community assets, Sherie filed a motion for new or reissued order and preliminary injunction prohibiting Raymond from disposing of community property. Sherie explained that the hearing officer's recommendation incorrectly purported to recommend dissolution of *all* TROs, rather than only the order prohibiting harassment. The trial court then issued another TRO and set another hearing for the request of a preliminary injunction. Raymond filed an exception of *res judicata* as to the renewed or reissued preliminary injunction. This was overruled. After a hearing on various issues, the trial court ruled that the original TRO had never been dismissed by a subsequent judgment and converted the order to a preliminary injunction. Raymond appealed, alleging error in the trial court's granting a preliminary injunction against him without any evidence at a contradictory hearing, denying him due process.

HOLDING: AFFIRMED

REASONING: Article 3601 of the Code of Civil Procedure allows for injunctive relief in cases “where irreparable injury . . . may otherwise result to the applicant, *or in other cases specifically provided by law.*” Furthermore, La. R.S. 9:371 *et seq.* provides that in a divorce proceeding, a spouse can obtain an injunction against the disposition of community property until further order of the court. The court noted “ongoing uncertainty” in the jurisprudence as to whether the spouse must prove irreparable injury under 9:371. The court concluded that 9:371 addresses one of the “other cases specifically provided by law” where irreparable harm is not required to be shown under art. 3601. The only showing required is that the community property has not been partitioned and is subject to possible alienation or disposal by one or both parties. Because Raymond was given notice of the contradictory hearing, he was not deprived of an opportunity to be heard on the issues of the injunction. That the court enjoined him from taking certain actions based on the unapportioned status of the property does not amount to a denial of due process.

2. Interpretation of Contract

Hulshoff v. Hulshoff

11-1055 (La. App. 3d Cir. 12/7/11); 81 So. 3d 57

FACTS: Plaintiff and defendant were married in 2004 and had two children. In 2009, Plaintiff (husband) asked for a divorce and Defendant (wife) drafted divorce documents to save money. In May 2009, Plaintiff filed for divorce under CC art. 102. The stipulated documents were signed by the court on the same day. In September, Plaintiff filed an amended petition seeking to modify the stipulated judgment to reflect that Defendant could not move out of Louisiana with the children. The trial court issued a restraining order and set a hearing on the issues. Defendant argued *res judicata* because the consent judgment allowed her to move out of Louisiana. While the restraining order was pending, Defendant moved to Florida. Plaintiff then filed an amended petition seeking to nullify the stipulated judgment, a change in custody, and a return of the children. The court found that the consent agreement was not a nullity but that it did not provide express consent for Defendant to move out of the state; therefore the court found that Louisiana’s relocation statutes applied. After a lengthy finding of facts, the trial court entered judgment ordering that the children be returned to Louisiana and that the parents have “joint care, custody and control.” Finally, the court ordered the Defendant be named domiciliary parent if she relocated to Louisiana; otherwise, Plaintiff would be named domiciliary parent.

HOLDING: AFFIRMED

REASONING: The court held that the doctrine of *res judicata* is generally not applicable to child custody and child support decrees. The court then considered whether the consent agreement constituted an existing custody order allowing the Defendant to relocate. Under traditional principles of contract interpretation, the question is the intent of the parties at the time of contracting. The court examined the record and found that the agreement did not clearly permit Defendant to move out of state with the children. Thus, extrinsic evidence was admissible to consider the parties’ intent. The trial court was not persuaded by the parties’ conflicting

testimony as to what the true intent of their agreement was. The appellate court particularly noted that Defendant's own testimony supports the lower court's finding that her actions were inconsistent with her assertion that the agreement permitted her to relocate. The trial court rhetorically asked "if she was so confident the agreement permitted her to leave, why did she need to keep her move on that day secret from [Plaintiff]? Although she maintains it was because he had previously obtained a restraining order preventing her from leaving and she thought he would do that again, the Court finds her behavior questionable."

Defendant also argued that the lower court erred in finding her relocation in bad faith. The trial court found her stated reasons for relocation were "not legitimate," specifically that her testimony indicated she moved solely because she wanted to move, without benefit to the children. The appellate court additionally noted that her claim that she moved to Florida because she could not afford living in Louisiana was in no way supported by the record. Defendant also testified that Plaintiff knew she intended to move. In the face of conflicting testimony from the parties, the trial court stressed the concealment of the move, even though she was aware of the pending restraining order. Thus the court affirmed the trial court's findings.

3. Spousal Support

a. Generally

Barlow v. Barlow

11-1286 (La. App. 3 Cir. 4/11/12); 87 So. 3d 386

FACTS: Ray Barlow filed for divorce from his wife, Sandra. Two children were born during the marriage, one of whom was still a minor at the time of the divorce petition. On the day of filing, the couple signed a consent judgment on matters relating to temporary custody and use of the home and movables. They also agreed to a hearing for final issues a few months from the time of the consent judgment. Sandra filed an Answer and Reconvention seeking joint custody, child support, designation as domiciliary parent, exclusive use of marital home, and interim and final spousal support. The record did not reflect whether a hearing on the issues was ever held. The resulting litigation included numerous motions, exceptions, and a Petition of Nullity of the consent judgment. The trial court found Ray in contempt and ordered him to pay Sandra almost \$30,000 pursuant to the Consent Order as well as attorney's fees. On appeal, Ray contended that the trial court erred in denying his petition to annul and ordering him to pay child support arrearages, awarding Sandra final spousal support, calculating Sandra's final support award, and finding him in contempt and ordering him to pay attorney's fees.

HOLDING: AFFIRMED

REASONING: Ray's sole argument supporting annulment of the consent judgment was that the signing judge eventually recused herself, citing an inability to be fair and impartial. Allegedly, the judge handwrote the entry regarding depositing \$500 for every payday. The court of appeal noted that this was consistent with the oral stipulation made on the record. There was no evidence that the judge acted with prejudice against Ray at the time of the consent agreement. Ray was present with his attorney at the signing of the judgment.

The court then addressed Ray’s argument regarding final periodic support. The court did not accept Ray’s contention that Sandra’s eventual relationship with another man necessitated that such a relationship existed at the time of divorce, thus putting Sandra at fault and rendering her unable to receive support. Rather, the record reflected that continued hostility and threatened violence caused Sandra to leave. Thus, the court affirmed the award of final support to Sandra.

Finally, Ray alleged error in the trial court’s failure to find that Sandra received monetary gifts and was voluntarily unemployed for child support purposes. Sandra testified that she had not earned money for nearly 18 years but had become employed by the conclusion of the trial—all of which was reported to the trial court. Any monetary gifts were from her family in a time of need. Ray only offered his testimony. Thus, this was a judgment call for the trial court and the appellate court found no error. Further, because the appellate court affirmed the arrearages award, the court also affirmed the finding that Ray was in contempt.

b. Discovery

Sercovich v. Sercovich

11-1780 (La. App. 4 Cir. 6/13/12); 2012 WL 2147066

FACTS: After a fifteen-year marriage, Mrs. Sercovich filed for divorce and requested interim and final spousal support. Her husband had allegedly transferred his ownership interests in two companies nine years before the divorce. As part of the discovery process, Ms. Sercovich sought various corporate documents and tax returns from these companies. She served a Subpoena Duces Tecum on the companies, which they moved to quash. The trial court denied the motion.

HOLDING: REMANDED

REASONING: It is well established that the “test of discoverability is not whether the particular information sought will be admissible at trial, but whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The court noted that Ms. Sercovich sought the documents for the determination of Mr. Sercovich’s income, which would determine the amount and duration of periodic support. Whether or not Mr. Sercovich transferred his interests in the company would have affected his income. The court also noted that the record revealed a printout of online records of the Secretary of State identifying “Gary Sercovich” as a manager of one of the companies; the record further revealed a check issued by Mr. Sercovich in the company’s name. Thus, the documents were relevant but, because of the sensitive nature of the documents, remanded the matter for an *in camera* review of the documents to determine their relevancy.

c. Prescription

Delesdernier v. Delesdernier

12-38 (La. App. 5th Cir. 5/31/12); 2012 WL 1957632

FACTS: The Delesderniers married in June 1956 and had three children. In October 1982, the husband filed for divorce based on the parties' having lived separate and apart for one year. A judgment of divorce was rendered in June 1984, ordering the husband to pay \$2,700 per month in alimony and to maintain a \$250,000 life insurance policy on his life payable to the wife. Husband was further ordered to replace her vehicle every five years. On the same day of the judgment, the parties entered into a community property settlement.

According to the wife, the husband reduced his monthly payments from 1987 through August 1998 to \$1,000 per month. In August 1998, he allegedly increased the monthly payment to \$1,500. At trial, he admitted to reducing the payments, but he did not recall ever paying less than \$1,500—the wife produced no records supporting her allegations. He did not replace her car every five years; however, he bought her a Mercury Grand Marquis in 1998—the year she first requested a car.

In March 2010, wife filed a Rule for Contempt and Arrearages for past support. She also filed a Petition for Supplemental partition of Community Property, seeking an interest in the former husband's pension plan, which was not partitioned in the 1984 judgment. Husband filed a rule to enforce an extra-judicial modification of support. He thereafter filed an exception of prescription on arrearages, which the trial court denied after a hearing. The trial court considered the spousal support issues and rendered judgment without reasons, finding the former husband owed almost \$600,000 in arrearages, plus interest. The court found no extrajudicial modification between the parties to reduce the spousal support duty set out in the 1984 judgment. The trial court also denied the wife's Motion to Traverse, finding that the 1984 community property agreement acknowledged complete liquidation of the community assets which released the former husband from further community property claims. It also found that she waived her interest in the pension in exchange for the life insurance policy.

HOLDING: AFFIRMED as AMENDED

REASONING: The prescriptive period for spousal support arrearages is five years. Husband therefore argued that unless there was an interruption of prescription, the claims for arrearages from 1986 to March 2005 (five years prior to the rule's filing) are prescribed. Jurisprudence holds that payments made on a judgment ordering support are an acknowledgement of the debt and interrupt prescription. Here, the husband made a support payment every month. Because there was never a five-year lapse, the rule for arrearages never prescribed. Thus the trial court correctly denied the former husband's exception of prescription. The court also found that, because spousal support is a single obligation, the former husband's argument of imputation of debts was inapplicable.

As for the extrajudicial modification, the husband claimed that his wife agreed to reduce the monthly payments but he had no written proof of this claim. He did not recall when they

discussed this matter but testified that she never objected to the lower payments. Wife stated that she never sought legal action because it was too much pressure and she was intimidated by her former husband. As a result, the court found that there was no evidence presented to substantiate husband's claim that the parties modified the judgment extra-judicially, nor did he ever seek to obtain a written agreement or otherwise formal modification of the judgment.

Finally, the former husband argued that the court erroneously calculated the amount of arrearages. The trial court did not provide a breakdown of its award. The record reflected that the trial court used calculations provided by the wife, which resulted in over \$160,000 in arrearages for the replacement vehicles. As the mover for arrearages, she bore the burden of proof. The only evidence she offered was the fact that the monthly car note for the vehicle in 1998 was \$534, which the court apparently used in its arrearages calculations. She failed to provide evidence of the type or value of car she drove in the other years until 1998 or how much it would have cost to replace the cars with a comparable car. Thus, the appellate court found that she failed to meet her burden for arrearages. The court therefore reduced the amount of arrearages by \$77,430; the court amended the judgment to reflect to total amount to be \$518,738.

As for the pension and life insurance policies, both parties agreed that the community property partition agreement did not mention the pension. The issue of whether it was *considered* in the agreement was a question of fact, such that the trial court as fact-finder was afforded great discretion. The appellate court considered the agreement as a whole and in light of attending events. Husband testified that he and his attorney provided documentation of the pension and discussed it with his wife and her counsel. He indicated that she was concerned about the pension because she wouldn't benefit from it if he was not vested in the pension or if he died or stopped working before retirement. Thus, she suggested that she receive an insurance policy in lieu of the pension. The former wife testified that she was aware of the pension at the time of the Negotiations and knew about the possibility of not collecting on the pension—she admitted this was the reason for asking for the life insurance policy. Therefore, the appellate found no error in the trial court's ruling that wife had no legitimate claim to the pension.

d. Fault in Final Support Determination

Ashworth v. Ashworth

11-1270 (La. App. 3d Cir. 3/7/23); 86 So. 3d 134

FACTS: Wife sought a determination that she was not at fault for the dissolution of her marriage and that she was entitled to final periodic support. Husband contended that she abandoned the matrimonial domicile in 2007 and is therefore not entitled to support. The trial court found the wife free from fault and issued a judgment ordering final support for the wife in the amount of \$800 per month. Husband appealed.

HOLDING: AFFIRMED

REASONING: The former wife testified that she saw a woman sitting with the former husband in his truck before their separation. When she stopped to talk, she was told to leave, so she went to her mother's house nearby. She then found out that he was paying the woman for sex. Other

witnesses confirmed husband's infidelity. On October 31, 2007, wife packed and left the domicile. Husband admitted at trial that he never asked her to return. He further testified that by the end of the following year he was living with his girlfriend in the house and was having sexual relations with her. He removed the wife's name from the mailbox and drove the girlfriend to the wife's car to allow the girlfriend to drive the wife's car away in front of the wife and her friends.

Wife testified that she lost hope at reconciliation after these actions. The court noted that she suspected adultery based on what she saw in the truck and heard from others. The trial court used these indications to find that the wife's leaving the matrimonial domicile was justified. Additionally, the former husband's actions with the mailbox and cars indicated that he did not desire the former wife's return. Therefore, because the wife was justified and because her return was neither desired nor, more importantly, requested—the former husband could not prove abandonment.

McMullen v. McMullen

11-220 (La. App. 5th Cir. 12/13/11); 82 So. 3d 418

FACTS: The couple was married on August 3, 1991 and divorced in January 2009. In February, they agreed on interim child custody and support issues. A trial on final periodic support was heard on May 10, 2010 in which the husband's request for an involuntary dismissal for the wife's failure to meet her burden of proof was granted. The wife appealed this dismissal.

HOLDING: AFFIRMED

REASONING: The court cited to Louisiana CC art. 112, providing that a spouse may seek final support if the spouse is not at fault and in need of support. The court also noted that fault was formerly determined by analogy to grounds for separation. The court found that the wife clearly met this burden based on her allegations that the husband was mentally and physically abusive and the fact that the husband did not make any allegations of his own. The court, however, did not find that the wife proved "necessitous circumstances." The former wife earned around \$14,000 per year and had taken out \$11,000 in student loans to complete a degree at ITT Tech. The court finally cited to the fact that the trial court is vested with great discretion in making its decisions. Therefore, the court affirmed the lower court's ruling dismissing wife's claim for spousal support.

Schulze v. Schulze

11-867 (La. App. 3 Cir. 12/28/11); 2011 WL 6891982

FACTS: The couple divorced on July 1, 2010. Wife was found free from fault in the break-up of the marriage and awarded \$2,150 per month in final periodic spousal support. Husband appealed this judgment, claiming the court was incorrect in finding wife free from fault and that the amount of final periodic support was an abuse of discretion.

HOLDING: AFFIRMED

REASONING: Husband asserted that wife's excessive spending and her lack of desire to engage in intimate relations directly led to the dissolution of the marriage. The Third Circuit noted that a trial court's factual determination regarding fault is given great deference on review and will not be disturbed unless clearly wrong or manifestly erroneous. The spouse seeking support has the burden to show that she is free from fault; fault is defined as misconduct of a serious nature that is an independent, contributory or proximate cause of the marriage's failure. This court found that the evidence clearly showed that wife was free from fault. Husband complained of wife's spending habits, but the court found that wife agreed on several occasions to turn over financial management for the couple to husband, but he never attempted to assume that responsibility. Additionally, most of the extraordinary expenses stemmed from one child's rodeo activity, a hobby that the appeals court held husband could have curtailed if he had so chosen. The record also reflected that the couple participated in intimate relations prior to the divorce proceedings, contrary to husband's claim. Most importantly, this court found that the husband's admission of an extramarital affair was one direct cause of the divorce. This court found that husband's assertion of wife's fault was baseless.

Husband's second assignment of error argued that the amount of final periodic support awarded was an abuse of discretion. First, he claimed that the amount was based on incorrect financial information provided by wife. Upon review, the appeals court found that the amount was reasonable when factoring in wife's monthly expenses and her lack of income due to her inability to work; she suffered from severe rheumatoid arthritis. Husband additionally claimed that the amount awarded to wife was impermissible because it exceeded of his net income, in violation of La. Civ. Code art. 112. After reviewing the financial paperwork provided by husband, this court found that he underrepresented his monthly net pay and the amount awarded to wife was reasonable. The court held that the judgment was not an abuse of discretion and the judgment was affirmed.

Morel v. Morel

11-1134 (La. App. 1 Cir 1/13/12); 2012 WL 440397

FACTS: Couple was married on November 3, 1994 and husband filed for divorce on March 20, 2009. In her answer, wife sought interim and final periodic support, arguing she was in need of support and free from fault in the break-up of the marriage. The parties were divorced by judgment on June 4, 2010. Wife was awarded final periodic support of \$981 a month for four years and an additional \$485 a month towards a car payment until the loan was paid. Husband appealed both judgments.

HOLDING: AFFIRMED

REASONING: Husband claimed that the court erred in finding wife free from fault for the break-up of the marriage and that she was, therefore, entitled to final periodic support. La. Civ. Code art. 111 provides that a party must be free from fault to entitled to final periodic support; the party seeking support bears the burden of proof. In this context, fault is synonymous with conduct that would have entitled a spouse to a separation from bed and board under former La. Civ. Code arts. 138 and 139. Husband asserts that wife's drinking problem or "habitual intemperance" led to the demise of the marriage; this was a listed cause for separation in the

former La. Civ. Code arts. The trial court judge found that both parties had drinking problems, but that it was an incident of domestic abuse on the part of the husband that precipitated the marriage's demise. After reviewing the evidence, the First Circuit found that determination to be reasonably supported by the facts and was not clearly wrong. As to the amount of support, the appeals court found that it was reasonable under the circumstances and not an abuse of discretion. The trial court's decision was affirmed.

C. Property

1. Procedure

Delaney v. McCoy

47-420 (La. App. 2d Cir. 6/20/12); 2012 WL 2328047

FACTS: The parties were married in November 1973. In June of 1979, Defendant filed for legal separation; in July 1979, a judgment of separation was entered terminating the community property regime. In September 1979, Plaintiff filed a petition for settlement of the parties' community property. Plaintiff sent interrogatories to Defendant regarding his retirement plan, profit sharing, or stock purchase plan. He answered that the parties had no vested interest in the plan. After trial, a judgment was entered that the property be partitioned, setting forth which items of the former community were to be partitioned in kind and which by licitation. The judgment did not mention retirement benefits. In January 1980, the parties entered into an agreement partitioning the community property in kind; this agreement was not filed into the suit record and did not mention retirement benefits. In January 1980, the parties moved to dismiss the case with prejudice.

In December 2007, Defendant retired, and in 2008 Plaintiff filed a supplemental petition for partition of community property, alleging that the retirement benefits were omitted from the prior partition. Defendant filed exceptions of res judicata, no right of action, and no cause of action. The trial court denied these. On rehearing, the trial court granted the exception of res judicata. Plaintiff appealed and the Second Circuit found that Defendant did not introduce into evidence the suit record of the prior case, the prior judgment, and the community property settlement. The court denied his motion to supplement the record with the absent documents. On remand, all suit records were filed into evidence along with the extrajudicial community property settlement. Thus, the trial court again granted the exception of res judicata.

HOLDING: REVERSED AND REMANDED

REASONING: Under the Civil Code section dealing with rescission of partition of succession properties, the omission of a thing belonging to the succession is not a ground for rescission but for a supplementary partition (citing CC art. 1401). By analogy, this principle applies to partitioning community property. When co-owned property is omitted from the spouse's partition, the jurisprudence holds that each spouse continues as co-owner and is entitled to a supplementary partition. This is true even if the original partition explicitly purports to be a full and final settlement. Thus, the failure to include the retirement pay in the settlement agreement was a "mere omission" which can be amended by a supplemental partition.

Res Judicata requires the same parties, same identity of cause, and the same thing demanded. Because the original judgment and extrajudicial agreement did not consider the retirement benefits, the thing demanded was not the same. Defendant argued that the thing demanded in the 1979 partition was “all assets and liabilities.” Nevertheless, the record showed that there was no consideration of the existence of and entitlement to a share of the retirement benefits in these prior actions.

2. Classification of Property

a. Generally

Smith v. Smith

10-1818 (La. App. 1 Cir. 10/5/11); 2011 WL 4612849

FACTS: Parties were divorced in December 2004 and the community was retroactively terminated to March 2004. The parties were unable to agree to a partition of the community, so wife filed a petition in September 2005. A hearing was held in November 2009 and a judgment was issued in December. The judgment found that the community had a net value of \$188,300, including the value assigned by the trial court to the marital home. Husband appealed this judgment.

HOLDING: REVERSED in PART; RENDERED in PART; and REMANDED

REASONING: Husband submitted a copy of the act of donation by which he obtained the marital home. He received the property from his parents in 1992. He was married at the time of the donation and wife acknowledged in the act of donation that the property was the husband’s separate property and that all fruits would remain his separate property. Wife argued that lower court correctly found the home was community because she was the only party to submit a detailed descriptive list of community property for the trial court to consider. The court noted that the wife did not file a rule to show cause why her sworn list should not be deemed to constitute a judicial determination of the community assets and liabilities, nor was such a hearing held. The appellate court reviewed the record and found that the trial court erred in finding that the marital home was a community asset. Thus, the value of the home ought to be removed from the value of the community property regime. Nevertheless, there was evidence that the home was greatly improved during the marriage, raising the issue of reimbursement for one-half the amount or value of the community property used to improve the home. Thus, the case was remanded to allow wife to pursue a claim for reimbursement and for a final accounting of the regime’s value after considering the reimbursement and removing the home’s value from the calculation.

Boudreaux v. Boudreaux

11-1328 (La. App. 1 Cir. 5/2/12); 2012 WL 1550483

FACTS: Husband and wife married on July 4, 2005 and divorced on February 3, 2009. Husband sought a partition of community property, which was tried in October 2010. The partition

judgment was signed February 10, 2011. Husband alleged three errors in the judgment relating to classification of a houseboat, car, and dirt bike.

HOLDING: REVERSED IN PART, AMENDED IN PART, AFFIRMED IN PART

REASONING: As for the houseboat, the trial court found that the husband purchased it with separate funds. The court nevertheless relied on the fact that both parties' names appeared on the bill of sale and title and found it community property. The court noted that the bill of sale reflected that the purchasers were Rodney Boudreaux OR Jeanne Boudreaux. On the other hand, the original title was executed only by the husband, but this title was voided. Thereafter, two titles were issued with both spouse's names on them. The husband argued that the discrepancy arose from the wife's registration of the boat in both names. The wife testified that she registered the houseboat with husband's consent. The First Circuit cited article 2341 and held that property acquired with separate funds constitutes separate property. Furthermore, article 2343.1 allows for the transfer of separate property to community but only through authentic act if by gratuitous title. Thus, the houseboat remained husband's separate property.

As for the car, the only evidence on record was that it was purchased with the husband's separate property. The trial court's judgment classifying it as community property was reversed.

As for the dirt bike, the former wife introduced a document, created by her and signed by husband, listing the bike as belonging to her son. However, nothing in the record suggested that the bike was belonged to wife. Therefore the lower erred in awarding the former wife full ownership of the bike; that portion of the judgment was reversed.

Johnson v. Johnson

11-1855 (La. App. 1 Cir. 5/4/12) 2012 WL 1580633

FACTS: Husband and wife were divorced by judgment of the trial court on February 21, 2008 and made retroactive to the filing date of the petition for divorce, January 5, 2007. The parties entered into a stipulated agreement in which they agreed to sell two homes owned in community. The trial court rendered a judgment on May 12, 2011 that: 1) set the sales price of one house at \$200,000; 2) found wife in contempt of court for interfering with the sale of that home; 3) appointed a realtor to handle the sale of the home; 4) ordered the wife to pay one-half of the repair bill for the second home; and 5) authorized husband to act, without wife's signature, to sell both properties. Wife appealed this judgment and also claimed racial discrimination in the court's choice of realtor, argued that husband should have been held in contempt for failure to pay taxes, child support, and spousal support, and argued that the court failed to award her damages for husband's alleged delay in completing the sale of one of the properties.

HOLDING: AFFIRMED

REASONING: After a review of the record presented, the appeals court was unable to conclude that the trial court erred in its rulings; the record presented a reasonable basis for the finding of fact made and the law supports the resulting rulings. Specifically, this court pointed out that La. Civ. Code Ann. art 2355 grants a court the authority to authorize a former spouse to act

exclusively to manage an item of community property. The court also found that it was not error to conduct a hearing on the motion for contempt against wife, even though she did not have an attorney. “Constitutional protections are not required to be afforded in a civil contempt proceeding, where only the payment of money between the parties is at issue.”

Succession of Jenkins v. Leonard

47-1 (La. App. 2 Cir. 2/29/12); 87 So. 3d 230

FACTS: Prior to their marriage, husband and wife entered into a premarital agreement that established a separate property regime. The couple acquired ten tracts of land during the marriage. After the deaths of both parties, husband dying first, wife’s heirs received full ownership of the ten tracts of land. The executrix of the husband’s succession sought a declaratory judgment that at the time of her death, wife owned a one-half interest in four tracts and no interest in the remainder. The trial court determined that two of the tracts were the separate property of husband and improperly included in wife’s succession. Additionally, seven other tracts were co-owned and only one-half of each was to be included in wife’s succession. One tract was omitted from the judgment. The succession of the husband appealed, claiming that the court’s determination was incorrect for three of the tracts found to be co-owned and that one tract was left out of the judgment.

HOLDING: AFFIRMED in part; REVERSED in part; and RENDERED

REASONING: The court found that the couple did correctly establish a separate property regime and the fact that the parties purchased some assets together did not abolish the contractual regime nor convert it into one of acquets and gains. The trial court erred in applying La. Civ. Code Ann. art 2340’s presumption of community in this case. This court noted that “[w]hen a couple has clearly chosen to be separate in property and has followed the legal requirements to accomplish their intent, the mere inclusion of the name of a spouse and one’s marital status in a deed does not, standing alone, constitute evidence of an intent to make an asset community rather than separate.” The classification of the three tracts of land at dispute as community was clearly wrong and was reversed. The fourth, unclassified tract, was determined to be the husband’s separate property and improperly included in wife’s succession.

Benoit v. Benoit

11-0376 (La. App. 1 Cir. 3/8/12); --- So. 3d ---, 2012 WL 758961

FACTS: Troy and Tammy were married on the last day of 2000. This was their second marriage to one another. On March 8, 2006, Troy filed for divorce. Tammy reconvened, and both sought a partition of community property. A judgment of divorce was rendered on December 15, 2006. On January 14, 2008 Tammy filed a list of assets and liabilities of the community, and Troy filed the same in August of 2008. A trial on the partition of community property was held in January of 2010. The two stipulated as to classification, allocation, and/or valuation of certain assets, liabilities and claims to reimbursements. Both appealed the judgment on the contested issues.

HOLDING: VACATED

REASONING: Tammy argued that the family home ought to have been classified as co-owned property, having been acquired by the parties prior to their marriage. The record reflected that the two bought the house ten days prior to their second marriage; thus, the partition was subject to articles concerning ownership of property held in indivision. The court further found that the home was not susceptible to division into lots of equal value, so the home was to be sold and the proceeds evenly distributed.

Tammy then argued that the court erred in valuing the amount of homeowner's insurance proceeds received by Troy for Hurricane Katrina's damage to the home. The proceeds approached \$170,000, and the parties stipulated that previous payments had been evenly distributed between them. Thus, the trial court deducted these amounts from the total proceeds. Husband argued that the list of stipulated proceeds provided to the trial court already had already deducted the monies the parties received and split. However, he presented no evidence to support this argument. Because the record did not conclusively establish that the payments were excluded in arriving at the stipulated value of the insurance proceeds, the court affirmed the valuation of the trial court.

Tammy then argued that Troy was not entitled to reimbursement for his payments of community obligations during the community, including the first and second mortgages on the family home, property taxes, income taxes, and a truck note because the expended funds were community, not his separate funds. At the hearing, the parties stipulated that Troy received settlement funds between the two marriages for a motorcycle accident that occurred during the first marriage. These proceeds were placed in investment accounts, earning interest and dividends which were put into a joint checking account. The parties stipulated that the interest and dividends from the investment accounts totaled almost \$120,000. Bank records reflected that expenses of the parties, including community obligations, were paid out of the joint checking account. The appellate court found it evident that the community obligations exceeded the value of the interest and dividends placed into the joint account. The amounts paid during the second marriage totaled over \$110,000; additionally, over \$3,000 was paid on the second mortgage and the truck note. Furthermore, the testimony of Troy's investment manager indicated that additional funds for the couple's expenditures were automatically transferred into the joint account from the separate investment accounts. Tammy argued that because separate funds were commingled with community funds, all funds in the joint account became community. However, the court noted that the separate funds were not mixed with the community funds such that they were no longer capable of identification, and the amount of separate funds deposited into the account far exceeds the amount of interest and dividends deposited into the account. Thus, the court could not hold that the trial court erred in finding that separate funds were used to pay community obligations and awarding reimbursement to Troy.

Troy had also taken out a line of credit subsequent to the marriage to repair a house purchased during the marriage by his LLC which was established during the marriage. Thus, Troy argued that the indebtedness was attributable to the community because he had a duty to prudently manage former community property under his control. Nevertheless, the court noted that Troy admitted he took out the credit after the termination of the community. Thus, the trial court erred in classifying this as a community obligation.

Troy also purchased a car with his personal injury funds prior to the second marriage, though the car was titled in both of their names. Because the car was not community, but was co-owned property or separate property acquired prior to marriage, Troy was not entitled to reimbursement for separate funds used to buy the car. Troy asserted that the lower court erred in denying his reimbursement claims for subsequent payments on the community car with separate funds. Troy argued that Louisiana Civil Code article 2365 was amended in 2009 to diminish or eliminate reimbursement claims for vehicles. Troy argued that the article was amended in 2009 and, thus, the amended article did not apply for a period in which he sought reimbursement, when jurisprudence allowed these types of reimbursement claims. The appellate court was required to consider whether the amended article applied prospectively or retroactively. The court noted that the original article did not distinguish reimbursement claims based on the nature of the property subject to the obligation, but the 2009 amendment made it such that a spouse's right to reimbursement is reduced, or eliminated, based on the nature of the property. Thus, the article was substantive and cannot be applied retroactively. Therefore Troy was entitled to reimbursement on car note payments for the period when the amended article was not in effect.

Troy further argued that the lower court erred in reducing his reimbursements for one-half the mortgage payments on the co-owned home based on his enjoyment of the property. The court noted article 806 – a property article applying to all co-owners – allows such a reduction for necessary expenses or maintenance of the property; a mortgage is not such an expense. Furthermore, the mortgage at issue was incurred during the community and was presumed a community obligation. Thus, the controlling law was not the articles on co-ownership but that on satisfaction of community obligations. Thus the trial court erred in applying article 806.

Broussard v. Broussard

11-922 (La. App. 1 Cir. 12/21/11) 2011 WL 6752558

FACTS: Troy and Pamela were married in 1982. In 1997, Troy registered “The DWI Dr.” with the Secretary of State and stated that it was a trade name used in his business as a DWI criminal defense lawyer. The parties divorced in 2001, and Troy filed for a partition in 2007. After numerous filings, the trial court issued a judgment that the trade name and any funds directly or indirectly derived therefrom were Troy's separate property. Pamela appealed this judgment.

HOLDING: REVERSED AND REMANDED

REASONING: The court noted that the trial court focused on statutory and jurisprudential principles applicable to trademarks and trade names. The lower court determined that the phrase was either a trade name or trademark under Louisiana law; that “the DWI Dr.” was inseparable from Troy's practice; that he alone used the trademark to Pamela's exclusion; and that it could not be assigned separately from his practice's goodwill. The appellate court presupposed that these findings were correct but noted that he acquired “the DWI Dr.” during his marriage and during a community property regime. This is not changed by the fact that he exclusively used the name or by the trial court's finding that the name is “an inseparable part” of his practice's goodwill. This may be significant in proceedings where someone else was using the name, but it does not affect Pamela's attempt to assert a partial ownership right in the name as a community

asset. That right accrued in 1997 when Troy registered the name and did not cease until the termination of the community regime several years later. Thus, Troy did not overcome the presumption of community and the trial court manifestly erred in holding otherwise. The court then remanded the case to determine the value of the asset during the existence of the community and respective rights of the parties under the laws of community property.

b. Retirement Benefits

Ashley v. City of Alexandria Employees' Retirement System

11-1322 (La. App. 3d Cir. 3/7/12); 86 So. 3d 145

FACTS: Husband and wife were married in 1974. Husband worked for the City of Alexandria starting in 1976 and participated in an employee retirement system ("the System"). The two were divorced in 1997 but never obtained a community property division order. In 2002, husband executed a designation form, naming his daughter as his beneficiary in case of death. In 2005, he retired and received a lump-sum payment of over \$50,000 along with the monthly benefits. The daughter died in 2007. Two months later, husband died without naming another beneficiary. The System received notice of the former wife's claim to a portion of the benefits. She then filed a petition, seeking one half of community interest in the retirement benefits and one half of the amount husband already withdrew. The System filed a Motion for Summary Judgment arguing: 1) husband properly executed the designation form; 2) the System paid him pursuant to its plan and designation form; and 3) because wife did not notify the System of her claim to benefits before their payment, the System was discharged from all adverse claims under La. R.S. 23:638(A). Wife argued that the statute was unconstitutional, as it deprived her of a right without due process. The trial court granted the System's Motion.

HOLDING: AFFIRMED

REASONING: The court considered the designation form and the naming of the beneficiary for the payment of benefits. There was no dispute that husband's payments were made pursuant to the plan, nor was there a dispute that the System did not receive notice from wife until after husband's death. The System thereafter deposited the residual balance of husband's contributions into the court's registry; the trial court ordered the release of these funds to wife as administratrix of the daughter's estate. Thus, the designation form and payments were made pursuant to statutes, so the court affirmed the trial court's decision without reaching the constitutional questions.

Morales v. Morales

11-2081 (La. App. 1 Cir. 6/8/12); 2012 WL 2061434

FACTS: Couple was married in 1977, divorced in 1998 and their community property was partitioned in 1999. The district court found that wife was not entitled to a portion of husband's retirement benefits. Wife appealed.

HOLDING: AFFIRMED

REASONING: Wife asserts that the trial court erred in its decision by failing to examine the entire community partition document in order to ascertain the parties' intent, by excluding parole evidence, and in the ultimate conclusion that the parties did not intend wife to receive her community interest in husband's pension plan. This court pointed out the partition document is a compromise between the parties and must be interpreted according to the parties' true intent. The court applied La. Civ. Code art. 2046 to the compromise as it would be applied to a contract, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent". The court focused on a specific portion of the partition agreement that said the wife had a 50% interest in husband's employment benefits *other than retirement*. This language was found to be clear and did not lead to absurd consequences, so parole evidence was not necessary to establish the parties' intentions. The trial court's decision was affirmed.

c. LLC Interest

Eustis v. Eustis

11-800 (La. App. 5th Cir. 3/27/12); 2012 WL 1020779

FACTS: The parties were married in 1979 and divorced in 2008. The marital community was terminated effective May 3, 2007 when the divorce petition was filed. At the time of partition, the parties had community assets valued around \$5M, consisting of property, stocks, bonds, etc. The wife also had significant sums of money she sought to have classified as separate. The district court appointed a Special Master to assist with the classification and allocate the community property. Among the assets at issue was a fifty percent interest in an LLC ("L&E"). The trial court issued judgment decreeing that the parties would retain their twenty-five percent interest in L&E. The court denied the wife's alternative request to find the interest her separate property. The husband appealed the partition judgment, arguing that the interest should have been allocated to one party with an equalizing payment to the other party.

HOLDING: AFFIRMED

REASONING: Husband argued that the judgment forced him to remain a minority shareholder in a business with his ex-wife and former brother-in-law, the latter of whom is sole decision-maker for L&E. Husband also contended that the trial court erred in failing to allocate the interest to the wife because it would have made "more sense for [her] to remain in business with her brother." The former wife responded that there was no acrimony during the divorce so the husband's argument of an untenable business relationship is "nebulous." Wife further contends that the trial court properly allocated twenty-five percent of the business to each spouse because La. R.S. 9:2801(A) states that the court may divide assets and liabilities "equally or unequally or may allocate it in its entirety to one of the spouses." Thus, because the fifty percent interest was acquired during the marriage, it was community property. At the termination of the marriage, the court properly divided the interests equally such that the spouses were no longer co-owners but sole owners of twenty-five percent each.

d. Stocks

Funderburg v. Superior Energy Services, Inc.

10-517 (La. App. 5 Cir. 12/29/11); 83 So. 3d 1148

FACTS: Pursuant to a community property partition agreement, a husband granted his wife any and all stock options of his employer that were registered in his name. The options were granted to the husband three years prior pursuant to a Stock Option Agreement as a result of his employment. In August of 2004, the husband exercised his stock options, in contravention of the partition agreement. The wife subsequently filed a conversion claim against the employer, alleging that she was the owner of the stock per the partition agreement and that the employer converted the stock in allowing the former husband to exercise the stock option. The trial court granted the employer's Motion for Summary Judgment which asserted that, because the stock options granted to the former husband were non-transferrable, the former wife never validly obtained the right to exercise the stock options, and there could be no conversion.

HOLDING: AFFIRMED

REASONING: The court examined the Stock Option Agreement, which contained a non-transferability clause. Furthermore, the Stock Incentive Plan (under whose authority to Stock Option Agreement was issued) provided that the options under said plan were not transferable except under enumerated circumstances. The court then noted that corporate regulations cannot interfere with the operations of law establishing community ownership rights. Thus, the former wife owned an undivided one-half interest in the stock options. The employer, however, argued, that the ownership rights in the stock options did not give her the right to *exercise* the stock options. The court cited to previous jurisprudence to find that the husband validly transferred and assigned his interest in the stock options to his wife through the partition agreement; however, the transfer was burdened by and subject to the terms and conditions of the Stock Option Agreement and the Stock Incentive Plan. To succeed on a conversion claim, the former wife would have to prove a possessory interest in the stock options, i.e., that she had the *right to exercise the stock options* at the time the former husband exercised them. Although the court referred to the former husband's actions as "reprehensible in light of the partition agreement," the court further held that the wife did not follow the procedures of the Stock Option Agreement or the Stock Incentive Plan. As such, she had no possessory rights in the exercising of the stock options, so her conversion claim failed.

e. Mineral Rights

In re Succession of Tabor

11-1245 (La. App. 3 Cir. 4/4/12); 87 So. 3d 982

FACTS: Billy and Martha were married in 2000. Before their marriage, Martha inherited immovable property. In January 2010, Martha executed a mineral lease on her separate immovable property in favor of Petrohawk Properties. The agreement described the property burdened as a tract of 224.118 acres. Petrohawk tendered a conditional draft of over \$700,000 as a lease bonus. The draft had a notation in the upper left corner which stated that it was only to be

paid on approval of lease and on approval of Petrohawk no later than thirty banking days after arrival of the draft to the bank. Two months later, Billy died. Three days after his death, Petrohawk's bank issued a mineral lease bonus payment of over \$670,000 to Martha. The reason for the lower amount was because the tract was found to have fewer acres than initially stated.

Billy died testate, naming his daughter by first marriage as executrix. She opened his succession in April 2010 and sought half the amount Martha received from Petrohawk, claiming that the lease bonus was part of the community property. After a hearing of the issues, the trial court concluded that: the lease was a civil fruit of separate property and, therefore, community property; the lease bonus acquired this status when Martha received the conditional draft; and, although Martha only received payment after Billy's death, the succession's claim for one-half fruits survived. Martha appealed.

HOLDING: AFFIRMED AS AMENDED

REASONING: Martha did not reserve the civil fruits or mineral interests as separate property. Thus CC art. 2339 renders the lease bonus community property. The court then noted that when Billy died, the community regime ended. Thus, if Martha acquired the lease bonus before the regime terminated, it is community property; if she acquired it afterwards, it is her separate property. The sole legal question was when Martha acquired the bonus.

The court cited to the Louisiana Civil Law Treatise (2 A.N. Yiannopoulos, Louisiana Civil Law Treatise: Property §41) and examined the language of the agreements between the company and Martha. The court found suspensive conditions which were to be met before authorization could be obtained to pay the lease bonus (namely, the amount of acreage on the lot, valid title to the lot, the cancellation of any other leases, the absence of any encumbrance, etc.). Thus, until Petrohawk confirmed these conditions, Martha had no right to enforce or collect the payment of the draft. The record revealed that the conditions were satisfied two days before Billy died. Thus the trial court's judgment was affirmed.

3. Reconciliation and Reestablishment of the Regime

Ashmore v. Ashmore

11-538 (La. App. 3d Cir. 12/7/11); 80 So. 3d 693

FACTS: A couple was married in 1968 but was legally separated in by a judgment in September 7, 1979. The parties then "reconciled" several months thereafter. In 2004, the wife filed for divorce and a judgment was granted in 2007. In partitioning the property, issues arose as to whether the community regime that existed before the judgment of separation in 1979 was reestablished after they reconciled. The trial court determined that the regime was in effect from June 29, 1968 until September 27, 1979 and was then reestablished in 1985 upon reconciliation. The former husband appealed this determination, arguing that the regime was never reestablished after the judgment of separation.

HOLDING: REVERSED

REASONING: The court noted that in 1979, article 155 provided that the regime not reestablished upon reconciliation unless the parties executed a notarial act. The article was amended to be effective in 1980, providing that the regime is established by matrimonial agreement. Again the article was amended to establish a reestablishment of the regime unless the couple executed an agreement otherwise. The law was again amended in 1990 recognizing automatic reestablishment of the regime upon reconciliation retroactive for spouses separated before 1991. Lastly, the law was changed in 1995 regarding couples separated before 1991 to provide that those reconciled *after* September 6, 1985 would reestablish the regime automatically unless the spouses executed an agreement otherwise. The court then noted a First Circuit decision holding that because a couple reconciled before September 6, 1985, there was no automatic reestablishment of the regime. Similarly, the couple had reconciled before 1985 so that the regime existing before the 1979 judgment was not automatically reestablished. Thus, the Third Circuit reversed the trial court.

4. Partition

a. Generally

McCann v. McCann

11-2434 (La. 5/8/12); 2012 WL 1606029

FACTS: Rose filed for divorce against Walter in 2009; a judgment of divorce was entered in January 2010, leaving only the classification and partition of community property as an issue. Rose filed for a partition of community property in Family Court of East Baton Rouge in August 2009. In June 2010, Rose filed a motion to appoint a third party as manager of a community business, alleging that Walter had been hospitalized. Later that month, Walter died. His succession was later opened in the 19th JDC, and Rose moved to substitute Walter's daughter as executrix. In July 2010, the succession executrix filed an exception to subject matter jurisdiction, seeking to transfer the partition action to the 19th JDC. The Family Court overruled the exception and denied the motion. The Family Court signed a judgment in September 2010, substituting the daughter as executrix into the partition action as Defendant in Walter's place. The daughter appealed.

HOLDING: REVERSED

RATIONALE: The daughter argued that the Family Court erred in denying her exception of lack of subject matter jurisdiction and her motion to transfer the case to the 19th JDC. The parties did not dispute that the Family Court had jurisdiction over the partition action when it was initially filed; the only question was whether the Family Court retained jurisdiction after Walter's death.

The court reviewed the constitutional and legislative provisions concerning subject matter jurisdiction. The court noted that courts are classified as courts of general jurisdiction or limited jurisdiction—the former having authority to adjudicate most types of action, whereas the latter courts were established for special cases. As for original jurisdiction of district courts, the court cited the language of La. Const. art. V, section 16(A) to find that district courts do not have

original jurisdiction over partition actions when the legislature vests such authority in Family Courts. Looking to section 18 as well, the court noted that the legislature specified the jurisdiction of the Family Court of the Parish of East Baton Rouge in La. R.S. section 16:1401. Under these statutes and constitutional provisions, the Family Court has exclusive jurisdiction over “all actions between spouses and former spouses for partition of community property and property acquired pursuant to a matrimonial regime.” The court then considered whether the Family Court retained jurisdiction after the husband’s death.

The court noted that the legislature specified the parameters of the Family Court, and that the partition action—after Walter’s death—was “no longer an action to partition community property . . . instead, it became an action to partition such movable and immovable property between [Rose] and the succession legatees.” To give effect to the statute and constitution, the Louisiana Supreme Court held that the Family Court was divested of exclusive but limited subject matter jurisdiction when one of the former spouses died.

b. Adoption of Descriptive Lists

Lacombe v. Lacombe

11-1178 (La. App. 3 Cir. 2/1/12); 85 So. 3d 721

FACTS: Husband and wife were divorced in May 2002. Several motions were filed by both parties seeking to establish spousal support for wife and for partition of community property. Finally, wife filed a descriptive list of community property on April 4, 2011; husband did not. On April 28, 2011, wife filed a rule to show cause why her list should not be deemed a judicial determination of the community assets and liabilities and a hearing was set for May 31, 2011. Neither husband nor his attorney appeared at the hearing and the wife’s descriptive list was judicially accepted. One week later, husband filed a contradicting descriptive list and wife filed motion to quash. A hearing on both matters was held on July 11, 2011, at which the court reaffirmed the judicial determination of wife’s list and denied husband’s motion to reset the hearing on the descriptive lists. Husband appealed.

HOLDING: AFFIRMED in part; REVERSED in part

REASONING: First, husband asserts that it was an error to order him to pay spousal support without a previous order of support or voluntary payments. Pursuant to a stipulation between the parties in 2001, husband gave wife \$1,400 per month. He claimed that these payments were for the satisfaction of community debts, but the Third Circuit noted that the agreement described the payments’ purpose to be meeting debts and living expenses. “A stipulation...binds all parties and the court.” The court held that husband’s payments were voluntary as they were not court ordered. Accordingly, trial court did not err in awarding permanent support.

In his next assignment of error, husband argues that the trial court improperly refused to consider his descriptive list, even though both parties filed their respective lists over two years late. The court noted that the consequences affecting husband are not the result of his two-year delay, but rather derived from the fact that he delayed in filing his list until one week after the last hearing, at which wife’s list was presented to the court. When he finally submitted his list, wife’s list had

been judicially accepted and the court was not required to grant husband a new hearing. “Louisiana jurisprudence...does not consider delay or error in the attorney’s performance of his duty, even if inadvertent, as grounds for granting a new trial.”

c. Rescission for Lesion

Marks v. Marks

11-1140 (La. App. 1 Cir. 12/21/11); 2011 WL 6779762

FACTS: Husband and wife entered into a consent judgment to partition community property on November 14, 2008 and were divorced on August 9, 2009. On July 29, 2010, wife filed a petition to rescind the consent agreement for lesion, arguing that she received less than one-fourth of the fair market value of the community property and that she was not represented by counsel in the partition proceedings. Husband responded with an exception of no cause of action and res judicata, asserting that the consent agreement was a judicial partition that could not be set aside for lesion. The trial court sustained husband’s objection of no cause of action and found the res judicata objection moot. Wife appealed the judgment.

HOLDING: REVERSED and REMANDED

REASONING: A judicial partition is not subject to being set aside for lesion. But La. Civ. Code Ann. art. 814 allows an extrajudicial partition to be rescinded for lesion. On review of the record, the First Circuit was unable to determine whether the consent judgment was a judicial partition or rather a judicial recognition of an extrajudicial partition, which would be susceptible to rescission. If the wife’s allegations were accepted as true, the court held that a cause of action had been stated. Therefore, the trial court’s finding of no cause of action was reversed and the determination that the res judicata was moot was remanded to the lower court for further proceedings.

II. Children

A. Custody

1. Original Judgment

McFall v. Armstrong

10-1041 (La. App. 3 Cir. 9/13/11); 75 So. 3d 30

FACTS: Couple was married on April 16, 1994 and had three children during the marriage. Husband filed for divorce on October 15, 2009, and sought custody of the minor children. Wife filed a reconventional demand on November 2, 2009 also seeking divorce and custody of the minor children. Husband claimed wife had a substantial drug addiction. Husband filed a Supplemental and Amended Petition for Divorce, claiming he was entitled to divorce under La. Civ. Code art. 103(2) because of wife’s alleged adulterous affair. The trial court issued its judgment on September 7, 2010 which: 1) denied and dismissed husband’s request for divorce; 2) awarded joint custody of the children; 3) designated wife as domiciliary parent; and 4)

awarded husband visitation on alternate weekends, an additional week during summer months, and alternate holidays. Additionally, the court found wife in contempt in denying husband visitation under to an earlier order, but denied husband court costs and makeup visitation. Finally, wife was ordered to obtain an independent assessment of her need for substance abuse treatment. Husband filed this appeal.

HOLDING: AFFIRMED in part; REVERSED in part; and REMANDED

REASONING: Husband alleged the trial court erred in: 1) failing to grant him a divorce based on wife's adultery; 2) failing to award him makeup visitation and court costs in connection with wife's contempt judgment; 3) ignoring a mental health evaluator's recommendation for wife's drug treatment; 4) accepting a witness as an expert; 5) failing to consider all relevant factors in determining the best interests of the children; and 6) granting him minimal visitation time with the children.

Husband claimed that divorce should have been granted on the basis of wife's adultery based on the testimony of her alleged extramarital partner. The trial court found the wife's testimony denying the affair more convincing and this court did not find any reason to disturb that judgment.

Husband alleged that he should have been awarded court costs and makeup visitation time with the children following the trial court's judgment that wife was in contempt by ignoring the visitation schedule. The appeals court found that trial court committed legal error by not following the mandates of La. R.S. 9:346 and granting husband the relief requested. This portion of the trial court's judgment was reversed and remanded.

Next, husband claimed the court erred in not accepting the evaluator's recommendation concerning wife's drug treatment and instead ordered an independent evaluation. This court noted that the trial court had broad discretion in accepting or rejecting expert testimony and was not manifestly erroneous in its decision.

Fourth, husband alleged that the trial court's acceptance of a social worker as an expert in domestic violence intervention was incorrect. Here the appeals court found that the lower court did not err in accepting the witness as an expert. The witness was properly established as an expert under La. Code of Evidence art. 702 and was in compliance with the accept *Daubert* standards.

Husband then alleged that the trial judge failed to consider all relevant factors when determining the best interests of the child. Specifically, he argued that the trial court did not consider how wife's drug addiction impacted her ability to care for and nurture the children. After a review of the evidence, this court found that the award of custody and visitation was premature. Husband had filed a Petition for Domestic Abuse Protection on October 9, 2009, but no final determination on that petition had been issued. La. R.S. 9:364 makes a judgment on a protective order imperative prior to a custody determination. This portion of the judgment was vacated and remanded for further proceedings.

Husband's appeal on the visitation schedule was rendered moot by the previous determination.

Mendoza v. Mendoza

11-113 (La. App. 5th Cir. 12/13/11); 82 So. 3d 411

FACTS: Nicole and Kevin divorced in 1998 with two minor children. Joint custody was ordered by consent of the parties and Nicole was the domiciliary parent. The arrangement continued until 2006, when Nicole became embroiled in a bitter divorce from her second husband; Nicole had also been diagnosed with a bipolar condition. In May 2006 a second consent judgment was entered making Kevin the domiciliary parent. After various skirmishes between the parties, the court entered a judgment in November 2010 granting Kevin sole custody with specific visitation rights to Nicole.

HOLDING: AFFIRMED

RATIONALE: Nicole argued that the court should have applied the heightened *Bergeron* standard. However, the record revealed that there was never a considered decree issued by the lower court. Nicole also objected to the exclusion of her doctor's deposition because she had not requested the subpoena for the doctor's appearance at trial in sufficient time for service. She was granted additional time but failed to do so. Therefore, the court did not find an abuse of the lower court's discretion. Thirdly, Nicole appealed the awarding of sole custody to Kevin. Because the parties consented to the joint custody decree, with Kevin being the domiciliary parent, the court considered whether there had been a material change in circumstances. The record reflected that, because of work schedules, the parties relied on babysitters. Furthermore, Nicole was ordered to submit to a mental health evaluation by a psychologist, after which she was diagnosed with a bipolar condition—noting that there were elevations in the scale for paranoia as well as mania. The child's babysitter also testified that she had recently quit her duties as babysitter because the situation with Nicole was insufferable—Nicole would harass her via text messages and emails. The babysitter also testified that the children witnessed Nicole "key" Kevin's truck. Thus, the lower court found a change in Nicole's behavior since the 2006 consent decree and that a change in custody was in the children's best interests. The appellate court found no error in this determination. The fourth assignment of error was an alleged failure to consider all relevant factors in deciding the children's interests. The court noted that CC art. 134 is not exhaustive. The record contained substantial evidence that Nicole's mental health "redounds negatively" on the children. It also caused problems with the children's school environment and was not conducive to promoting a close relationship between the children and the father. Thus, the court did not find merit in Nicole's appeal.

2. Modification of Agreements

Lunney v. Lunney

11-1891 (La. App. 1 Cir. 2/10/12); 91 So. 3d 350

FACTS: Divorced parties had three children over the course of their marriage, two of whom had special needs. In 2008, the parties agreed to joint custody with physical custody being shared

between the two parents for half of each week. Two years later, wife moved to change the custody arrangement to have the children with her all weekdays and alternating weekends, arguing the continuing needs of two of the children necessitated such a change. After a 3-day hearing, the court found that wife failed to meet her burden of proving a material change in circumstances in order to modify the judgment. The court ordered that the parties continue sharing equal physical custody, but on an alternating week basis.

HOLDING: AFFIRMED

REASONING: The wife argued that a material change in circumstances was not necessary in the case because both parties stipulated that the original arrangement was unworkable. The court was not persuaded by this argument because the record contained testimony that the former husband would continue with the original judgment rather than accept the wife's proposed plan.

Wife also argued that the trial court erred in not allowing the middle child to testify. The trial court noted in its reasoning that the other two children testified, which provided sufficient information, and that the middle child was not listed as a witness. The court also stated that the trial court carefully reviewed the fact-intensive issues and did not err in its findings.

The court cited to previous First Circuit jurisprudence and determined that modifications to stipulated visitation could be made on a showing that they were in the best interest of the child because they were not so substantial as to require a material change in circumstances. The trial court noted that the new schedule maintained the time with each parent but reduced the amount of times the children went from house to house. In light of psychiatric evidence on the damage of changing houses too frequently, the court affirmed the finding that the slight change in custody order was in the best interest of the children.

Skipper v. Skipper

46-935 (La. App. 2d Cir. 2/1/12); 86 So. 3d 707

FACTS: Mark and Michele were married in 2001 and divorced in 2008. They had one child born with Usher Syndrome (a condition affecting hearing, vision, and mobility). Testimony revealed that the child's condition will progressively worsen to the point of total blindness and deafness. On the date of the divorce, the parties consented to a stipulation for joint custody with Michele being the domiciliary parent. In March 2011, Mark filed a motion to modify custody, alleging that Michele was not flexible with the visitation schedule, that she refused to agree to reasonable requests for additional visitation, that she scheduled appointments and events to conflict with Mark's visitation, that she refused to allow Mark the chance to give childcare for the child, and that she failed to notify Mark about appointments and activities. A hearing established the following facts: the child is a third-grader, he is under the care of multiple doctors, he has seven teachers for his condition, the mother is an occupational therapist and trained to work with kids with disabilities, that her job allows her to be with the child during the summer and holidays while her working hours are flexible, that the father is a pharmacist at Walgreens and is unable to be with the child as often, that he has never been involved in the child's schooling nor met any of his teachers or therapists. The court then considered the factors

under CC art. 134 and awarded a specific visitation schedule for the parties, from which Michele appealed.

HOLDING: AMENDED in PART; AFFIRMED as AMENDED; and REVERSED in PART

REASONING: Michele argued that the lower court abused its discretion in modifying the custody, alleging that the schedule centered around Mark's work schedule rather than best interests of the child. In support of the trial court's judgment, the Second Circuit cited to CC art. 134, as well as RS 9:335(A)(2)(b) and Louisiana jurisprudence. Then the court noted that the child was bright, happy, and well-adjusted, despite his disabilities. Michele testified to the complications of the child's disabilities and the issues it creates for custody exchanges. She also testified to the comparative flexibility of schedules and involvement with the child's education and treatment. The court reviewed the record and was convinced that both were loving parents. However, because the paramount interest is that of the child, the court found that the schedule was inappropriately worked around Mark's work schedule. Nevertheless, the previous visitation schedule was also not in the child's best interest because it only allowed Mark four days a month. Thus, the court amended the trial court's visitation order to allow Mark to visit with the child every other weekend from Friday evening to Tuesday morning.

Michele also argued that the trial court erred in awarding the dependency deduction for income tax purposes to Mark every other year because Mark did not put forth any evidence to demonstrate that he would benefit from the deduction. The trial court determined that Mark paid over half of the child support obligation. However, the statute provides that the non-domiciliary parent is entitled to claim the dependency deduction *only if* the court deems that the right to claim the deduction would substantially benefit him without substantially harming the other. Thus, the trial court erred in awarding the deduction to Mark and was reversed.

Bonnecarrere v. Bonnecarrere
11-61 (La. App. 1 Cir. 7/1/11); 69 So. 3d 1225

FACTS: In 2008, wife filed for divorce from her husband with whom she had two children. She requested that the court order joint custody of the children and designate her as the domiciliary parent, with the father having liberal visitation at his parents' home. The husband filed a motion and order for visitation ensuring that he would have visitation with the children when he was back in the country from military leave; he also requested a hearing to set the permanent visitation schedule. At the hearing, the parents entered into a stipulation which was memorialized in a judgment.

The judgment provided that the parents would have joint custody, that the mother would be the domiciliary parent, and that the father would have visitation according to a specific holiday schedule and reasonable visitation decided by the parents. At no point, however, was the father to remove the children from Louisiana. A month later, the father moved to set a visitation schedule because he had moved to Minnesota. Following a hearing, the court issued judgment maintaining joint custody and the initial judgment memorializing the stipulation. However, the geographic limitation would be removed in 2011, and the father was granted additional summer visitation (from two weeks to an entire month).

The First Circuit in *Bonnecarre v. Bonnecarre*, 09-1647 (La. App. 1 Cir. 4/14/10), 37 So. 3d 1038, reversed the modification of the father's physical custody. Thereafter, the father moved for sole custody or, alternatively, joint custody and designation as domiciliary parent or, in another alternative, a modification of the custody in the summer holiday and the geographic restriction. His argument for changes in circumstances arose from his pending marriage and the mother's pending divorce from a second husband, her erratic behavior, and other grounds. The trial court issued a judgment awarding the father custody of the children each year from September 1 until one week after the completion of the school year while the mother had custody from one week after the school year until August 31 of each year and for the first seven days of the Christmas school holiday. The father was to pay all transportation costs. The mother appealed this judgment.

HOLDING: AFFIRMED

REASONING: The court noted the different burdens of proof for modifying a custody judgment and that the burden for a stipulated judgment is proving that "a change materially affecting the welfare of the child has occurred since the original decree and that the proposed modification is in the best interest of the child." The court also noted that, if a court has made a considered decree of permanent custody, there is a heavy burden of proving that the continuation of the present custody is "so deleterious as to justify a modification" or probing "by clear and convincing evidence that the harm to be caused by a change of environment is substantially outweighed by its advantages to the child." The court of appeal noted that the trial court erroneously applied the latter, more onerous. Nevertheless, the court reviewed the record to find that the father established a change in circumstances materially affecting the welfare of the child.

Father had remarried and moved to Virginia where he and his second wife were both employed and lived in a four-bedroom house. The mother was in an "unstable relationship, with several domestic disturbances and verbal altercations." The mother also admitted that her second husband hit her older child as a form of discipline. She also interfered with the scheduled custody agreement. Finally, she spoke ill of the father in front of the children. Having found a change in circumstances materially affecting the children's welfare, the court considered the best interests of the children in modifying the custody and relocation of the children. The court considered the factors in article 134 and the fact that the relocation statutes primarily consider the best interest of the child, with parallel factors to article 134. Because the practical effect of custody modification would be relocation, the court considered the following facts under the factors articulated in the relocation statute.

The children lived with the mother next door to their maternal grandmother whom they saw on a daily basis while occasionally visiting their paternal grandparents. Based on the mother's job, she was able to spend more time at home with them, and she had memberships to the zoo and aquarium. The children also are involved in extracurricular activities and attend church and Sunday school. The younger child had ADHD and Oppositional Defiant Disorder, which required daily medication. The record did not reflect any adverse effect on the child's health during the father's custody.

The father's actions during custody showed that he, more so than the wife, facilitated communication with the mother (whereas the mother thwarted the father's access to the children when she had custody of them). The record also reflected that the father was no longer deployable and that he and his wife both sustained good incomes and were in a loving relationship. The mother worked only part time and had trouble paying her bills, often with a negative checking account balance.

Finally, the court stressed the discord of the mother's new relationship and the fact that the mother was diagnosed and medicated for depression. In affirming the decision, the court stressed the mother's unwillingness to facilitate contact with the father and her poor choices in her personal life, resulting in an unstable home. Thus, although the children will leave their primary caretaker and home in Louisiana, the totality of the circumstances warranted an affirmation of the trial court's modification of custody.

Kingston v. Kingston

11-1629 (La. App. 1 Cir. 12/21/11); 80 So. 3d 774

FACTS: Husband and wife divorced on March 17, 2008 and had two minor children of the marriage. The parties entered into a consent judgment at that time that, among other provisions, prohibited either party from entertaining overnight guests of the opposite sex or allowing a future significant other from babysitting the children during the exercise of visitation rights. In September 2010, wife filed a rule to modify the terms of the consent agreement to allow her fiancé to babysit the children and remain overnight while she had custody. She argued that the court entered the consent judgment without any consideration of the best interests of the children; therefore it was against public policy and should be recognized as a nullity. Husband contested the modification, claiming wife failed to state a cause of action and further, she failed to allege a material change in circumstances that would warrant a modification. The trial court noted that the mother was in a long-term, stable relationship, the children were older than at time of divorce, and fiancé had stayed overnight at times as well as accompanying wife and children on vacations. The court found that the requested modification would not cause a shocking or new situation for the children and that the wife's relationship was beneficial to them. The applicable provisions of the consent judgment were lifted and husband filed this appeal.

HOLDING: REVERSED

REASONING: Husband challenged the trial court's overruling of his objection of no cause of action and the decision to lift the consent judgment's restriction. The custody judgment at issue was a non-considered decree, entered into by stipulation or consent of the parties without a court receiving evidence as to parental fitness. To modify a consent decree, the moving party must prove that there has been a change in circumstances that materially affects the welfare of the children and that the proposed change is in the children's best interest.

This court found that a party's engagement does not constitute a material change in circumstances standing alone, but given all the circumstances and testimony taken as a whole, a trial court would not always be in error in concluding that it may warrant a change.

At the hearing, wife testified that her relationship had significantly progressed in a positive manner. The appellate court noted that while this progression might constitute a change in circumstances, wife had failed to prove that it was a change in circumstances affecting the welfare of the children so as to make modification of custody appropriate. The court further noted that even if the wife's claim did establish a material change, the lifting of the consent judgments prohibition would not be in the best interests of the child. Wife testified that the fiancé spent time with the children and had bonded with them in the presence of the prohibitions and this court held that lifting such bans would not be in the children's best interest.

3. Domiciliary Parent Designation

Corral v. Corral

47-294 (La. App. 2d Cir. 6/13/12); 2012 WL 2120889

FACTS: Mark and Eloisa were married in 2005. They had one child during the marriage, and on July 23, 2010, Mark filed for divorce, seeking joint custody and designation as domiciliary parent. Eloisa reconvened, seeking domiciliary parent status. In October 2010, the parties stipulated joint custody with visitation as follows: Eloisa had physical custody from noon Sunday to 8:00 am Thursday or "upon delivery at school"; Mark had physical custody from 8:00 am Thursday until noon Sunday. Furthermore, Eloisa had the "right of first refusal" to keep the child if Mark worked on the evenings during his custody. Both parties were prohibited from having overnight guests of the opposite sex when the child was present.

In October 2011, the trial court ruled on custody issues. The evidence established: the child was performing well in school; the mother was employed as a bartender working weekends; she was born in the Philippines, but had been in the U.S. since 2001 and had not obtained citizenship; Mark was a member of the USAF, stationed at Barksdale Air Force Base as an aircraft repairman; Mark had been deployed at least once during the marriage for four months; he also had temporary duty assignments from eight days to two weeks at a time. Eloisa attended all the child's school events and was primarily responsible for making sure homework was completed; Mark attended no school events. The trial court awarded joint custody with Mark named as the domiciliary parent and the two had "split custodial care" of the child as follows: Eloisa had visitation of the child every Monday after school until the following Thursday 8:00 am when the child is returned to school and alternating Sundays from 9:00 am to 2:00 pm; Mark had custody from Thursday after school until the following Monday with the exception for alternating Sundays from 9:00 am to 2:00 pm. Holidays were also determined according to a schedule in the judgment.

Eloisa appealed, contending that the trial court failed to consider all the factors in CC art. 134 in designating Mark as domiciliary parent. She also alleged evidence of Mark's extramarital affairs and "sexual lifestyle."

HOLDING: AFFIRMED

REASONING: The court is not bound to a mechanical application of article 134 but each case is decided in light of the totality of the circumstances. La. R.S. 9:335(A)(2)(b) provides that

physical custody be shared equally, though strict equal time is not mandated. The testimony revealed that the child is well-adjusted and bright and each parent testified that the other was a good parent. Furthermore, the current custody and visitation schedule worked “pretty good for the most part.” A counselor met with the child and noted that he had affection for each parent but verbalized a preference for Mark. The counselor, having evaluated each parent, suggested Mark be designated the domiciliary parent. Each parent testified against the other’s qualification as a parent and about the other’s infidelity during the marriage. Eloisa also admitted to behaviors such as experimenting with cocaine and to serving beer at the child’s sixth birthday party. Pictures of Eloisa urinating in public and scantily dressed at bars were also admitted into evidence. Neighbors testified that Eloisa’s partying increased in frequency and intensity when Mark was deployed. Because the overarching concern is the best interest of the child, the court could not find that the trial court abused its discretion in awarding domiciliary parent status to Mark. Nevertheless, the court recognized that both parents were entitled to joint physical custody.

Cortez v. Cortez

11-1485 (La. App. 1 Cir. 3/29/12) 2012 WL 1079201

FACTS: Dave and Heather were married in 2009 with one child born during the marriage. The family lived next to Dave’s brother and his wife. Heather was a registered nurse and Dave was a financial consultant at a local bank and part-time National Guardsman. After the BP spill, Dave was deployed, during which time Heather relied heavily on his family in helping to care for the child. Around May 2010, she claims to have been diagnosed with cancer and relied further on her sister-in-law for the child’s care. In June 2010, the parents executed a document giving temporary provisional care to Dave’s brother and sister-in-law.

Dave and Heather’s relationship deteriorated and Dave filed for divorce on November 22, 2010. When Heather was served, she moved with the child to her mother’s house in Mississippi. The two stipulated to an interim custody schedule pending the trial court’s decision on the issues. Thereafter, Heather answered and reconvened on December 10, 2010. Both spouses sought exclusive use of the matrimonial domicile, custody of the child, and child support. Heather also alleged Dave’s fault for the relationship’s demise.

Following a trial, the court signed a judgment on June 1, 2011, awarding the parties joint custody with Dave as domiciliary parent. Heather’s was ordered to pay Dave \$640.50 per month for child support. The custody implementation order awarded physical custody to Heather every other weekend, 6:00 pm Friday to 6:00 pm Sunday, along with alternating holidays, four weeks during the school summer vacation, mother’s day, Heather’s birthday, and the child’s birthday from 2:00 pm to 6:00 pm. Heather appealed.

HOLDING: AFFIRMED

REASONING: Louisiana CC art. 134 lists the relevant factors for designating domiciliary parents. Because the determination is fact-intensive and because the trial court has the best opportunity to see the witnesses and examine evidence, the court recited the trial court’s findings. The First Circuit noted that Heather’s avoidance of parental responsibility and Dave’s

care of the child proved Dave's "greater love, affection, and emotional ties" to the child and his greater capacity and disposition to give love and affection. The court further noted that while Heather was the primary caregiver for the first few months of the child's life, thereafter Dave's brother and sister-in-law were primary caregivers. Heather suffered from depression and PTSD but was not found to be impaired in her ability to raise the child; Dave was shown to drink in excess in social settings but was not a diagnosed alcoholic. Heather avoided caring for the child for extensive periods of time, whereas Dave exercised responsibility during his time of duty. Thus, the court found ample evidence in the record to support the trial court's ruling.

Griffith v. Lary

11-512 (La. App. 1 Cir. 9/20/11); 2011 WL 4375321

FACTS: Mark and Evlyn were never married but were the parents of a daughter. The two shared custody of the child: Mark spent Tuesday and Thursday nights of one week and Thursday, Friday, and Saturday nights of the following week with the child. Mark thought the two would share custody until the Evlyn graduated college. However, the schedule continued even after she graduated. Mark then married a schoolteacher and had physical custody of a four-year-old son every other week. Evlyn was employed full-time but sought work specifically in her field. Mark filed a petition seeking joint custody of their daughter and designation as domiciliary parent with equal sharing of physical custody. Before a hearing, the parties stipulated to joint custody, such that the sole issues to be tried were the designation of domiciliary parent and the sharing of physical custody. Only Mark testified. The court awarded joint custody, designated Evlyn as domiciliary parent, and granted Mark physical custody according to a detailed schedule. Mark appealed the designation of domiciliary parent and the failure to award him equal physical custody.

HOLDING: AFFIRMED AS AMENDED

REASONING: The court noted that La. R.S. 9:335(B)(1) requires the court to designate a domiciliary parent when implementing a custody decree unless exceptional circumstances exist. Thus, even though Evlyn's pleadings did not formally or technically request the designation, this was not strictly required, nor does the designation without formal request deny Mark any due process considering that his pleadings put domiciliary status at issue. The court noted that Evlyn averred that Mark was unfit as a domiciliary parent and that she would allow Mark "visitation," indicating that she thought she was exercising the rights of a domiciliary parent. Thus, despite lack of formalities, the trial court did not err in awarding Evlyn the status of domiciliary parent.

Finally, the court noted that the lower court is constantly guided by the best interests of the child. Equal physical custody is preferred if feasible. Mark argued that the parties lived close and that the daughter and Mark's son had a good relationship with each other. Mark also testified that he was often not afforded the "whole Sunday" and that there were other issues with the existing custody schedule. Mark also testified the daughter was doing well with the existing schedule and that Evlyn was the primary caregiver. His only concern was Evlyn's occasional evening shifts; nevertheless, he testified that he trusted her and that she was a "good person." Considering the entirety of the record, the court affirmed the designation of domiciliary parent status in Evlyn.

However, because there was no reason for the trial court to deny Mark's request to have physical custody until Sunday evening, the court amended the custody schedule to reflect as much.

4. Rights of Nonparents

Harp v. Penney

11-345 (La. App. 3d Cir. 12/7/11); 2011 WL 6058615

FACTS: Penny and Chris were parents of one child, though they never married. Both were in high school during the child's birth. Penny, Chris, and Chris' parents all filed petitions seeking custody of the child. They all entered into a consent judgment signed January 28, 2009—awarding Chris and Penny joint legal custody and equal physical custody with additional stipulations concerning overnight guests. In March 2009, Penny filed a Rule to Modify the existing judgment based on allegations that Chris was charged with multiple DWIs and possession of marijuana. Chris filed a Motion for Contempt, alleging that Penny violated the overnight guest provision of the agreement. The grandparents filed a petition and rule for contempt and other relief. They insisted that they have a custody cause of action under CC art. 133 or, alternatively, that they have visitation rights under art. 136. The trial court concluded that Chris' criminal activity amounted to a material change in circumstances but further concluded that Penny failed to prove by clear and convincing evidence that the child's best interests would be served by awarding Penny sole custody because of her numerous liaisons with many different men. The court further found that the grandparents proved that the child would be harmed if either Chris or Penny were awarded custody. Thus, all three parties were granted joint custody with the grandparents designated as domiciliary custodians. Penny appealed.

HOLDING: AFFIRMED

REASONING: Penny argued that her eventual marriage to her last "paramour" entitled her to application of "the reformation rule" thereby prohibiting the trial court, and the appellate court, from considering her immoral behavior. The court cited jurisprudence to find that she was not entitled to such an application. The consent judgment did not "cure" her acts or remove them from the consideration before the courts. The courts could still consider her numerous liaisons with other men. Testimony indicated that she had become pregnant with different men at different times but had miscarriages. The court noted that events occurring before the consent judgment are not relevant to Penny's ability to prove a material change in circumstances, but such evidence was highly relevant to determining the child's best interest and awarding custody in the trial court's considered judgment.

The trial court further found that the grandparents met their burden in expressing concern over Chris's arrests after the consent judgment. Thus, there was ample evidence of a material change of circumstances since that consent judgment to modify custody.

Likewise, the court considered Penny's past behavior as it related to the child's best interest and to the grandparents' burden to prove that sole custody in Penny would also result in substantial harm to the child. The court noted the voluminous evidence before the trial court: Penny's previous drug use, her purchase of drugs with the child in the car, her paramours, having two

men in her apartment at the same time when the child was present, that the child was subjected to smoking in the home, etc.

Janway v. Jones

47-203 (La. App. 2d Cir. 3/30/12); 88 So. 3d 713

FACTS: Wendi Janway married Matthew Jones and the couple moved to Houston. In January 2004, Wendi moved in with her parents in Louisiana to recover from a medical procedure, so Matthew moved back to Louisiana as well. In August 2006, Wendi gave birth to a daughter. Wendi's health declined, so the Janways and Matthew shared the responsibility of raising the daughter. Matthew, Wendi, and the daughter moved out but Ms. Janway continued to aid in looking after the daughter if Wendi became ill. Wendi died in 2009 and the daughter stayed with the Janways for about four to six weeks. She moved back in with Matthew, but the grandparents looked after her while Matthew worked. The grandmother, in September 2010, made a decision regarding the child's schooling without consulting Matthew, who met with the Janways and insisted on being consulted for any such decisions. In November 2010, the child informed the grandparents that Matthew was dating someone. In December 2010, the grandparents planned a vacation with the child without consulting Matthew, but he allowed her to go on the vacation. Later that month, the grandmother allegedly took property from Matthew's house. Thereafter, Matthew informed them that they would no longer have an influence on his daughter. The grandmother thereafter emailed the child's teacher, making derogatory comments about Matthew, and she tried to get Matthew fired from his job. In January 2011, the grandparents filed a petition seeking visitation. They also began showing up unannounced and attended the child's gymnastics and dance classes. Matthew obtained a restraining order. After a hearing, the trial court found that visitation with the grandparents would not be in the child's best interests. The grandparents appealed.

HOLDING: AFFIRMED

REASONING: The court cited La. R.S. 9:344(A) and CC art. 136(B) and noted that the burden is on the movant-relative seeking visitation to prove extraordinary circumstances and that the visitation is in the child's best interest. It is less difficult for parents of noncustodial parents—they need not show extraordinary circumstances, but only the best interests of the child are served by allowing visitation. The grandparents argued that any negative comments about Matthew were made outside the presence or knowledge of the child. The record, however, indicated that the grandmother undermined the child's relationship with her father. Such evidence included an email from the grandmother to the child's teacher, a voicemail from the grandmother for Matthew's acquaintance, both of which exhibited the grandmother's "irrational behavior." A psychologist also testified that the grandmother was "overbearing." Thus, the trial court was correct in denying grandparent visitation. Furthermore, there was no evidence that Matthew was an unfit father. The child was thriving in school and extracurriculars. Overall, the evidence suggested that the grandparents were attempting to interfere with and sabotage the child's relationship with her father. Thus, the trial court's denial of visitation.

Duplessy v. Duplessy

12-69 (La. App. 5 Cir. 6/28/12); 2012 WL 2476441

FACTS: Plaintiff was around two years old when his mother married Defendant. Plaintiff refers to Defendant as his stepfather, though the testimony revealed that Defendant adopted Plaintiff when he was a child. The child at issue was born in July 1996. According to Plaintiff, when the child was three months old, Plaintiff received a call from the child's biological father (Plaintiff's cousin) indicating that he had been arrested and, as such, could not care for the child. Plaintiff testified that he and his wife at the time agreed to care for the child and wound up doing so for four years. In 2001, Plaintiff's mother and Defendant adopted the child, allegedly at Plaintiff's request because Plaintiff was going through a bad divorce; Plaintiff maintained that he continued to provide care for the child and acted as his father. It was undisputed that the child refers to Plaintiff as "dad" and the Defendant as "Pawpaw." Plaintiff contended that the child lived with him from 1996 to July 2009 except for a period of time in 2006. Defendant contended that the child lived with him and his wife from the time he was adopted until the wife (Plaintiff's mother) filed for divorce in May 2007. The wife died in 2009. The child lived with Plaintiff after her death until July 2009 when Defendant picked the child up from school and refused to return him to the Plaintiff's house. Plaintiff filed a petition for custody against Defendant seeking sole custody. After trial, the court rendered judgment awarding Plaintiff sole custody, finding that sole custody to Defendant would result in substantial harm to the child such that Plaintiff's sole custody was in the child's best interest. Defendant appealed.

HOLDING: AFFIRMED AND REMANDED

REASONING: Defendant argued that the court erred in failing to recognize his constitutional rights as the child's adoptive father when it applied Louisiana Civil Code articles 131 and 133, the law for determining custody between parent and non-parent. Defendant alleged that he had the constitutional right to determine his son's upbringing.

The court noted that a court-appointed expert interviewed the child in the presence of each party and found that the child was more attached to Plaintiff—the bond was positive, warm, and respectful. In contrast, the child and Defendant sat on opposite ends of the couches and did not make eye-contact; the Defendant spoke to the child in a commanding way. Furthermore, the child attended church with the Plaintiff but had not seen a dentist or doctor with the Defendant. Plaintiff would afford more access to the child's extended family than would Defendant, who indicated he could not co-parent with Plaintiff. Thus, sole custody in Defendant would result in the child being denied access to extended family. The record also reflected that the Defendant was retired and lived off Social Security and food stamps. Further, Defendant may have punished the child by withholding food from him at times. For all these reasons, the appellate court affirmed the trial court's award of sole custody to Plaintiff.

The appellate court remanded the case to determine whether it would be in the child's best interest to have visitation with the Defendant and, if so, the extent thereof.

B. Child Support

1. Generally

Dejoie v Guidry

10-1542 (La. App. 4th Cir. 7/13/11); 71 So. 3d 1111

FACTS: Guidry, self-employed, appeals a judgment increasing his monthly child support obligation from \$1,000 in a stipulated consent judgment to \$4,017. He argued that the wife did not prove a material change in circumstances. He also alleged errors in determining his adjusted gross income.

HOLDING: AFFIRMED

REASONING: In determining a parent's gross income, the trial court is not limited to a party's salary or reported income. Mr. Guidry received in-kind payments from his wholly-owned company, including a company car and business-provided apartment. Thus, although his "salary" remained the same, the trial court was correct in considering all sources of Guidry's income. Furthermore, Guidry was not entitled to a reduction of his business's gross receipts by expensing accelerated depreciation of its assets. The statute expressly excludes from "ordinary and necessary expenses" amounts which are allowable by the IRS for accelerated component of depreciation expenses. Additionally, the record reflected that Guidry enjoyed personal use of the company's credit card up to a limit of \$10,000 a month, which the court considered in its calculation of his monthly income. Therefore, the record indicated that Guidry's adjusted gross income more than doubled (nearly tripled) from the stipulated agreement to the time of the hearing. Thus, the trial judge did not error in finding a material change in circumstances that justified an increase in child support.

The court also addressed the argument that the child support award was excessive. The parties' combined income exceeded the guidelines, and thus the trial court had wide discretion. The court distinguished previous jurisprudence, which extrapolated the guidelines "without concern and discretion by the court in balancing the needs and lifestyle of the child." In this case, the trial court considered and discussed the needs of the child in extrapolating the guidelines. Ultimately, Guidry made more than \$6,000 per month and had no out-of-pocket expenses other than child support. The trial court's ruling was, therefore, affirmed.

Department of Children and Family Services v. Seaman

11-1366 (La. App. 3 Cir. 3/7/12); 86 So. 3d 785

FACTS: Following the divorce of the parents, the Louisiana DCFS filed a rule to show cause why the mother of the two children should not be ordered to pay child support. Mother received a bachelors degree in 1991 and was an elementary school teacher until 1997. From 1997 until dissolution of her marriage, she alternately worked in husband's offices or in one of the stores that he co-owned. After divorce, she left the state and worked multiple jobs, with an average pay of \$10.00. The children remained with the father. At the hearing on the rule, the court found that mother was voluntarily unemployed or underemployed and ordered her to pay \$756 per

month in child support. Mother appealed the finding that she is voluntarily underemployed or unemployed.

HOLDING: AFFIRMED

REASONING: Mother asserts that trial court erred in finding her voluntarily unemployed or underemployed. She stated that she left Louisiana because she did not have a place to live and moved in with a friend in Colorado. She was not immediately able to gain a Colorado teacher's certificate due to unspecified pending criminal charges in Louisiana. She eventually did receive the certificate, but had not yet found employment as a teacher. She asserted that this state of her employment was not her fault and should not negatively impact her on child support. The Third Circuit held that the trial court's factual determination that mother was voluntarily unemployed was not manifestly erroneous. Mother only offered her own testimony to prove her assertions, without any corroborating evidence or testimony. The trial court did not abuse its discretion.

2. Modification of Support/Custody

Ficarra v. Ficarra

11-568 (La. App. 5 Cir. 2/14/12); 88 So. 3d 548.

FACTS: Salvatore and Fay were married in 1991 and had one child. The parties separated in November 1994 and in February 1995, Salvatore filed for divorce. In a consent judgment, Fay was given sole custody of the child and Salvatore was to pay \$550 monthly in child support. In July 2001, Fay moved to increase the child support due to a substantial change in the child's health—the child apparently developed a serious heart problem requiring surgeries, causing seizures, etc. Furthermore, because of the child's ADHD, he had to attend private school. In May 2004, Salvatore moved to reduce child support because he suffered a heart attack in January of that year and, thus, was unable to work. After a hearing, the trial court rendered judgment granting Fay's increase in child support. Salvatore appealed the decision.

HOLDING: AFFIRMED

REASONING: The appellate court noted that the trial court found incredible Salvatore's testimony that he gave up a life-long trade to work for his twenty-one-year-old daughter's new company at below minimum wage. Rather, the court accepted the testimony of the Special Master, Salvatore's company's accountant, and the company's balance sheets to affirm the trial court's finding of Salvatore's monthly income.

Next, Salvatore argued that the court erred in including camp/child care expenses and private school expenses in calculating the child support obligation. The court noted that the lower court's judgment was clear in finding these expenses as extraordinary educational expenses, not simple "childcare expenses." Thus, the applicable statute, 9:315.6 (and note 9:315(C)(5)(c)) allows these extraordinary expenses to be added to the basic child support obligation. Given the evidence of the costs of treating the child's health problems and the testimony of the private school's counselor, the trial court did not err in adding these expenses to the child support obligation.

Finally Salvatore argued that the lower court erred in failing to consider the benefit Fay derived from living in her parents' home rent-free. Fay acknowledged that she owed her parents \$50,000 and was paying them back monthly. Furthermore, the language of La. R.S. 9:315(C)(5)(c) is permissive in allowing a court to consider as income other benefits derived from expense-sharing or other resources.

Hernandez v. Hernandez

11-526 (La. App. 5th Cir. 12/28/11); 83 So. 3d 168

FACTS: Reynold filed for divorce from his wife, Nicole, who answered and filed a reconventional demand seeking divorce. Both sought incidental relief as well. In November 2009, the two entered into a consent judgment regarding issues of custody and support for their two minor children. They agreed to share equally physical custody, with both designated as co-domiciliary parents. Neither would pay child support but each would provide equally all tuition, fees, and costs for the children. Reynold agreed to maintain health and hospitalization insurance for the children; Nicole agreed to maintain dental and vision insurance coverage for the children. In October 2010, Reynold moved to decrease or modify child support, alleging a significant change in circumstances. Specifically, he alleged that the children's costs had increased, as had Nicole's income. The court issued a judgment in November 2010, finding a change in circumstances and granting the motion. The court noted that the income of both parties increased, as had school-related costs. The parties were allowed to continue enjoying joint physical custody on a shared custody basis, but Nicole was ordered to pay \$209.96 per month in child support. The judgment also stated that after January 2011, "tuition and registration fees shall not be shared between the parties, but as to all matters, the judgment remains unchanged." Nicole appealed.

HOLDING: AFFIRMED

REASONING: The court noted that the child support guidelines are to be used in the establishment of and any modification of child support. The court then recited the law regarding necessity of a change in circumstances for modification of child support and noted that Reynold bore the burden of proof. Specifically, the lower court found that both parties' income had increased, as had school-costs. But Reynold's transportation costs and the children's health costs (borne by Reynold) had increased. The lower court then utilized the guidelines for modifying the child support obligation. Notably, in the court's calculations under the guidelines, Reynold's increased costs were \$60 per month for insurance and \$30 per month for transporting the children from LaPlace to Metairie in his personal vehicle.

Nicole did not object to the figures used in the calculations but, rather, to the existence of a "material change." The court disagreed—Reynold proved that his insurance costs and transportation cost had increased. Furthermore, his savings had been depleted to meet his obligations under the consent judgment. Furthermore, the record reflected that Nicole's income increased by \$14,000 per year. Finally, the court noted that La. R.S. 9:315.6 (regarding the inclusion of tuition expenses) is permissive. Therefore, Nicole's argument that it was error not to add school costs to the basic child support obligation was unpersuasive.

D. Relocation

Martin v. Martin

11-1496 (La App. 3d Cir. 5/16/12); 89 So. 3d 526

FACTS: Husband filed for divorce from his wife, and the court issued an interim judgment ordering joint custody of the child. No domiciliary parent was designated. The father was entitled to custody every other weekend and one evening per week and other times agreed by the parents. The court later issued a custody decree designating the mother as the domiciliary parent subject to the father's visitation as set forth in the implementation plan. The plan provided that the father had alternating weekends, alternating holidays, and five weeks during the summer. Months later, the mother notified the father that she was moving from Vernon Parish to Covington, LA. The father objected, and the court found the mother in contempt of court for violating the implementation plan by having an overnight guest of the opposite sex, failing to provide school records to the father, and failing to comply with the visitation schedule. The court further decreed that the child be returned to Vernon Parish and that the father be the domiciliary parent subject to the mother's visitation rights.

HOLDING: REVERSED in PART; AFFIRMED in PART

REASONING: The court noted the varying burdens of proof for modification of custody orders and held that only the best interest of the child and changed circumstances standard applied here.

The court then addressed the relocation procedures when custody is shared: the non-custodial parent is entitled to notice and the custodial parent must seek judicial authorization or consent before relocating. There are repercussions for relocating the child before obtaining authorization or consent, as required in La. R.S. 9:355.6. Furthermore, it may be grounds for a modification of custody. The court noted that the mother violated the 60-day notification requirement and that she relocated the child without the court's authorization or the father's consent.

The Third Circuit disagreed with the custody modification, however. The court noted that violation of the relocation *may or may not* be grounds for modification. The facts indicated that the child was seven and had lived with the mother his whole life. The mother was moving for a new job with a substantially higher salary; the two also lived with her new husband in Mandeville. Conversely, the father was facing foreclosure and would have to live with his relatives for an unspecified amount of time. He also frequently works nights and weekends with inconsistent hours. Thus, the trial court abused its discretion in removing the mother as domiciliary parent. The court rejected the father's arguments for modification based on the mother's alleged non-compliance with the implementation order.

Morales v. Bergeron

12-71 (La. App. 1 Cir. 5/3/12); 2012 WL 1564628

FACTS: Parties in this matter were never married, but are the parents of a minor child over whom they share joint custody. Mother filed a petition requesting permission to relocate the child from Raceland, LA to Corpus Christi, TX; father opposed the proposed relocation. A

judgment allowing the child to spend alternating two-week time periods in each location was signed on March 21, 2011. Mother subsequently filed for sole custody and permanent relocation to Texas. On August 18, 2011, a judgment was entered that denied mother's relocation, named her as domiciliary parent, and denied a child support modification. Mother appealed.

HOLDING: AFFIRMED

REASONING: In support of her request of relocation, mother argued that the trial court rendered a legally inconsistent judgment by designating her a domiciliary parent, but denying the relocation request. La. R.S. 9:355.12 lists twelve, non-exclusive factors a court shall consider when addressing a proposed relocation. The First Circuit found that the lower court properly considered all twelve factors and denied the relocation as not in the best interest of the child. Additionally, the reason for designating mother as domiciliary parent was that the parents could not mutually agree regarding the child's health and welfare; therefore it was in the child's best interest to name one as the domiciliary parent for decision making purposes. The First Circuit held that the trial court's judgment was not legally inconsistent.

E. Filiation

In re Succession of Bailey

11-147 (La. App. 5th Cir. 11/29/11); 82 So. 3d 322

FACTS: Decedent was married to Mildred and the couple had two children (Appellees). During their marriage and subsequent divorce, five children were born (Appellants) who also claimed Decedent as their father. In April 2009, Appellees filed a Petition for Eviction, Possession of Premises, Return of Property, TRO, and Attorney's Fees against Appellants. Thereafter, Appellants filed a Petition for Possession with Appointment of Administration in July 2009. Within a year of decedent's death, Appellants filed a Petition to Establish Paternity. Appellees filed an exception of prescription, arguing that the time period to establish filiation had prescribed. The trial court sustained the exception of prescription. This appeal followed.

They argued that the trial court ought to have equitably "filled the gap" between the 2005 repeal of former art. 209 and the enactment of CC art. 197 regarding filiation of those over nineteen; that the court should have ruled that equitable estoppel prevented prescription when the decedent claimed and raised the appellants their entire lives; that a new trial ought to have been granted; and that the former art. 209 was unconstitutional.

HOLDING: AFFIRMED

REASONING: Former article 209 provided that a child had to file a filiation claim within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever occurred first. The new article 197 imposes a peremptive period of one year from the date of the death for succession purposes only. In this case, each appellant was at least nineteen before the repeal of article 209 in 2005. Therefore, the court did not find a "gap in the law" because each had met the nineteen-year peremptive age limit.

As for equitable estoppel, the court noted that the doctrine is a last resort and cannot prevail against positive substantive law. Thus, article 209 was a clear and unambiguous positive law in effect when the appellants reached the age of nineteen. As such, equitable estoppel cannot undermine article 209, which clearly provided the time frame for filiation actions.

As for the constitutionality of article 209, the court reviewed the record, which indicated that the article's constitutionality was improperly raised in a memorandum opposing an exception. A memorandum is not a pleading under the Code of Civil Procedure and, thus, not a proper procedure to challenge the article's constitutionality.

III. Interdicts

In re Helm

11-500 (La. App. 4th Cir. 11/2/11); 84 So. 3d 601

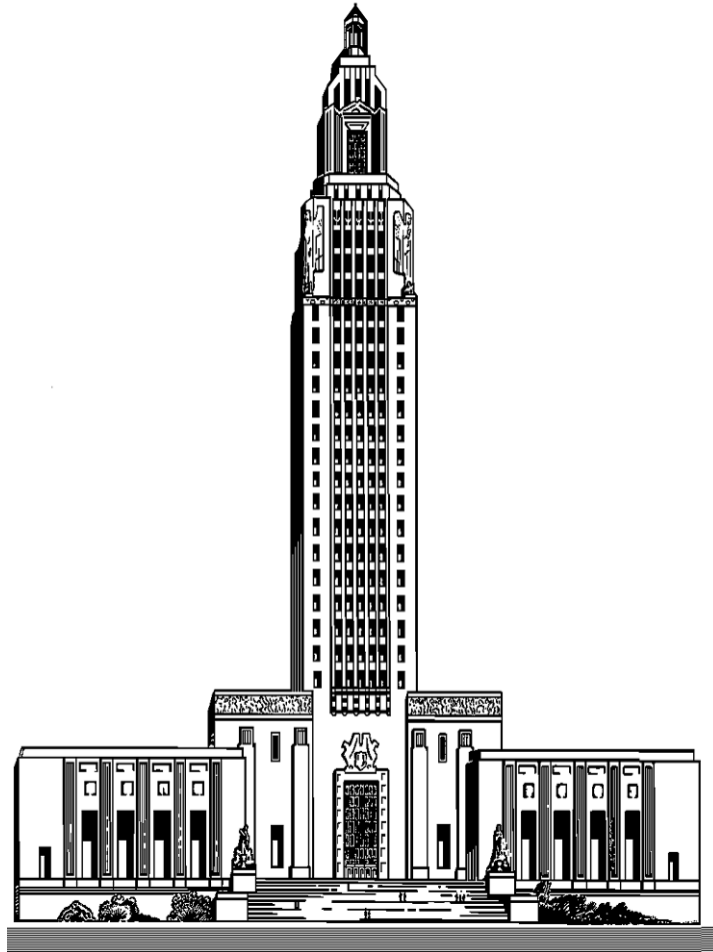
FACTS: Henry Helm was interdicted. Through his appointed attorney, he appealed the appointment of his wife as his curatrix. He argued that his appointment of his niece as procuratrix made her, not his spouse, his curatrix. The trial court found that Mr. Helm was unable to make a sound decision when he made his procuration.

HOLDING: AFFIRMED

REASONING: For a person to express a legal preference for a certain curator, a prospective interdict must explicitly nominate or designate him as curator in the event of interdiction. The Code of Civil Procedure article 4561(C)(1), schedules the preference of curators when presented with more than one candidate. The court noted that Mr. Helm's procuration argument failed because the record did not indicate that he introduced an act of procuration into evidence. The record indicated that Mrs. Helm attached a copy of the act of procuration to her petition for interdiction, but it was never offered into evidence at trial. Thus, the procuration act was not considered in determining the issues. Thus, his wife was entitled to preference of appointment.

The court then, *sua sponte*, questioned the co-undercurators, removing one because of an irremediable conflict of interest arising from the duty of the office of undercurator and the obligations of a surety to the curatrix. In this case, the undercuratrix undertook to obligate herself as a legal surety for the curatrix. Her obligation became solidary, albeit conditional, with the curatrix's obligation to cover any losses or damages to the interdict which may be caused by maladministration. Thus, she was not able to maintain adequate security against such damages when she became a legal surety for the curatrix. The court remanded the case to determine whether the married co-undercuratrices were in a community property regime. The record was unclear, but if there were a community property regime, the other undercuratrix's own interest in the community property could be adversely affected by the other undercuratrix's obligation as surety which would, in turn, affect his performance as undercurator.

SELECTED LEGISLATION
from the
2012 Regular Session
of the
Louisiana Legislature



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I. Children

A. Custody/Visitation

Broome (SB 153)

Act No. 627

Amends the statutes on relocation of a child's residence by removing the definitions of "equal physical custody" and "parent entitled to primary custody". It also removes the "intent" portion of the "relocation" definition.

Establishes the applicability of this statute and reduces the distance requirement when seeking court permission for a relocation from 150 miles to 75.

Details the persons authorized to propose a relocation of a child's primary residence.

Establishes the procedures for opposition to a proposed relocation.

Establishes that a non-parent may object only if they have been awarded custody but not if they have only been awarded visitation.

La. R.S. 9:355.9 lists the effects of an objection or failure to object to a proposed relocation.

A trial on the proposed relocation shall be assigned within sixty days after filing the motion.

The court, on its own motion or on motion of either party may appoint an independent mental health expert to assist in determining the best interests of the child.

Any change in the principal residence of a child, including one not meeting the seventy-five mile threshold, may constitute a change of circumstances warranting a modification of custody.

The court may consider ordering persons awarded custody or visitation to use current technology to facilitate communication with the child.

Nevers (SB 261)

Act No. 763

Removes extraordinary circumstances requirement for grandparent visitation under La. Civ. Code art. 136.

B. Support

Armes (HB 224)

Act No. 64

Amends La. R.S. 46:236.3(E)(1)(a), (g), and (o) (Enforcement of support by income assignment) by removing the word “employer” but leaving the term “payor”. Additionally, removes and replaces “must” with “shall”.

Williams (HB 481)

Act No. 87

Establishes that child support overpayments are excluded from recovery from unemployment compensation benefits.

Johnson (HB 1205)

Act No. 444

Establishes that a child support order follows the child and a caretaker who is not the current obligee listed is entitled to an amended order.

Thompson (HB 1208)

Act No. 613

Establishes that under certain circumstances, a certificate of partial compliance for a support order may be issued allowing for a suspension of a license to be lifted or modified.

C. Filiation

Riser (SB 90)

Act No. 621

Provides for a new birth certificate after judgment of filiation upon request of the child.

D. Adoption

Landry (HB 912)

Act No. 603

Changes “service of process” to “notice of filing” during an intrafamily adoption. Changes current practice of setting a court date first; parties in opposition must file an answer prior to a date being set. Social security numbers may be redacted from the copies of the notice being served.

Amends the previous language of the duties of the department to perform home studies from “need not investigate” to “shall not investigate”.

E. Education

Richard (HB 1209)

Act No. 831

Provides that during an expulsion a pupil shall be placed in an alternative school or in an alternative educational placement. Adds a requirement for attendance by the pupil in such an alternative educational placement as well as a duty on parents, tutors, or legal guardians to ensure the pupil’s attendance. Adds criteria for determining if a pupil should be placed in an alternative education setting and provides a list of supports available to pupils in such settings

Long (SB 685)

Act No. 845

Requires parents to attend or participate in at least one parent-teacher conference each year; participation may be by conference call if more than one teacher is involved.

Ward (SB 764)

Act No. 861

Amends the state student code of conduct in relation to bullying. Moves the responsibility of such action from the appropriate school board directly to the school itself. Includes requirements for employee training on bullying. Establishes a comprehensive definition of bullying and applicable reporting procedures. Does not limit employees or students rights of free speech.

Morrell (SB 119)

Act No. 624

Requires public school governing authorities to adopt a policy allowing school nurses and trained employees to administer certain medication to students under certain circumstances.

II. Abortion

Ward (SB 330)

Act No. 646

Establishes the crime of criminal abortion when an abortion is performed by anyone other than a physician licensed by the state of Louisiana.

Broome (SB 708)

Act. No 685

Increases from two to twenty-four hours the time prior to an abortion that an ultrasound must be performed in most circumstances. Amends the requirement for the ultrasound image to be displayed and the audio rendering of the fetal heartbeat to note that the woman does not have to view or hear the procedures even though the procedures are required.

Alario (SB 766)

Act No. 738

Establishes that no abortions will be performed in Louisiana if the fetus is at twenty weeks or more gestation with the exceptions of when the mother's life is at risk, there exists a great possibility that situation will result in great physical harm to the mother, or if the pregnancy is futile.

III. Judicial & Administrative

Schroder (HB 227)

Act No. 66

Allows field officers for family and child support programs to be designated by the Support Enforcement Services program secretary.

Broome (SB 467)

Act No. 660

Amends the grounds and documentation needed to initiate services for families in need.

Richardson (HB 202)

Act No. 698

Changes procedures for transferring juveniles to adult facilities following a criminal indictment. The appropriate court is now given discretion for such a transfer as opposed to making the action mandatory. Also changes the process for determining a juvenile's capacity to proceed to trial.

Broome (SB 152)

Act No. 730

Amends the age requirements for a minor's appearance for a child in need of care hearing as well as the information a court may use to make a decision.

Martiny (SB 519)

Act No. 792

Administration changes to the confidentiality of records of juvenile proceedings.

IV. Criminal

St. Germain (HB 70)

Act No. 42

Makes it unlawful for a person convicted of a sex offense to establish a residence or physically reside within three miles of his victim, to knowingly be present within 300 feet of his victim, and to communicate in any way with the victim or the victim's immediate family member unless the victim consents to such communication in writing.

Lopinto (HB 191)

Act No. 191

Extends the prohibition for a person convicted of certain sex offenses when the victim is under the age of thirteen from establishing a residence or having a physical presence within one thousand feet of a child care facility.

Abramson (HB 441)

Act No. 197

Adds provisions for a protective order of unlimited duration, in addition to other punishment, whenever a person is convicted of stalking under 14:40.2.

Amends La. R.S. 46:2136 (Protective orders) to establish a court's authority to issue a protective order of either unlimited or specific duration when a defendant is ordered to refrain from abusing, harassing, or interfering with a petitioner.

Thierry (HB 620)

Act No. 205

Amends La. R.S. 14:91.5 (Unlawful use of a social networking website) to make "intentional" use a prerequisite. Exempts websites that provide only the following services: photo-sharing, electronic mail, or instant messaging. Websites used to buy and sell goods, to disseminate news, or operated by a government agency are also excepted.

Landry (HB 207)

Act No. 207

Creates the crime of female genital mutilation and includes penalties for parents, guardians, or responsible persons who allow such an act on a minor child. Religious practice is not a defense to this crime.

Moreno (HB 1201)

Act No. 223

Bars anyone convicted or who has pled guilty to a crime listed in La R.S. 15:587.1(C) from owning, operating or in any way participating in the governance of, or residing in a family child day care home.

Lopinto (HB 577)

Act No. 268

Provides penalties for persons required to report child abuse and fail to do so. Additionally, establishes that any person eighteen or older has a duty to report the sexual abuse of a child that they witness.

Leger (HB 166)

Act No. 380

Extends the definition of a mandatory reporter of child abuse to include school coaches, including but not limited to public technical or vocational school, community college, college, or university coaches and coaches of intramural or interscholastic athletics.

Abramson (HB 49)

Act No. 446

Provides that a person being recruited, etc. during human trafficking is actually a law enforcement officer is not a defense of the crime. Includes in the crime of trafficking those who sell or offer to sell travel services. Raises the penalty if the crime involves a minor to a fine of not more that \$100,000 and imprisonment at hard labor to at least fifty years or life.

Includes the acts of promotion and advertisement in the crime of pornography involving juveniles. Consent of the juvenile is not a defense. Increases the penalties for a second or subsequent conviction of intentional possession or distribution of pornography involving juveniles to a fine of not more than \$75,000 and imprisonment at hard labor for not more than forty years, without benefit of parole.

Consent is not a defense for the crime of computer-aided solicitation of a minor.

The penalty for the crime of prostitution with a person under eighteen was established as a fine of not more than \$50,000 and imprisonment for not less than fifteen years and not more than fifty. If the minor is under the age of fourteen, the fine is not more than \$75,000 and the prison term is not less than twenty-five years and not more than fifty. Being the victim of trafficking of children for sexual purposes is an affirmative defense.

Lack of knowledge that the person is under eighteen is not a defense nor is consent.

A conviction of human trafficking is grounds for the termination of parental rights.

Kostelka (SB 121)

Act No. 535

Establishes the crime of domestic abuse battery as assault with a dangerous weapon committed by one household member upon another. Defines "household member"

as any person of the opposite sex currently living in the same residence or has lived in the same residence within five years of the occurrence, with the defendant as a spouse, whether married or not, or any child currently living in the residence or living in the residence within the last five years, or any child of the offender regardless of where the child lives. Also includes mandatory minimum sentencing of two years at hard labor without the benefit of parole upon a conviction where a child thirteen or younger was present at the commission of the offense.

Morrell (SB 4)

Act No. 614

Provides for criminal penalties for the knowing and willful failure of a required person to report the abuse or neglect of a child that results in serious bodily harm, neurological impairment, or death of the child.

Penalties for this crime are also extended to anyone eighteen or older who witness sexual abuse of a child and fails to report the abuse to authorities.

The definition of “teaching or child care provider” is expanded to include people who assist in teaching, bus drivers, coaches, professors, technical or vocational instructors, technical or vocational school staff members, college or university administrators, college or university staff member, or any person who provides such services to a child in a voluntary or professional capacity. All of these people are now classified as “mandatory reporters”.

Establishes the “organizational or youth activity provider” of mandatory reporters as any person who provides activities for children, including administrators, employees, or volunteers of any day camp, summer camp, youth center, or youth recreation programs or any other organization that provides organized activities for children.

Erdey (SB 753)

Act No. 693

Provides that if a registered sex offender is not in compliance with establish procedures to use a public library, it is unlawful for them to be present in or on library property or with one-thousand feet of a public library.

Lafleur (SB 623)

Act No. 840

Changes the definition of “sex offense” in relation to confidentiality of crime victims who are minors and victims of sex offenses to the perpetration or attempted perpetration of stalking, misdemeanor carnal knowledge of a juvenile, obscenity, or any offense listed in La. R.S. 15:541(24).

Greene (HB 433)

Act No. 124

Provides that an adjudication hearing for a minor charged with a crime of violence as defined in La. R.S. 14:2(B) shall be commenced within sixty days.

Norton (HB 600)

Act No. 454

Establishes the crimes of failure to report a missing child and failure to report the death of a child. Time periods relative to this crime depend on the child's age and this act establishes relative penalties.

White (SB 536)

Act No. 536

Adds molestation of a person with a physical or mental disability to the crimes that require the registration as a sex offender.

Hoffman (HB 370)

Act No. 579

Provides for the convening of a multidisciplinary team regarding the disposition of cases involving pregnant women who test positive for controlled dangerous substances while under arrest. Disposition may include involuntary commitment to a treatment facility.

Martiny (SB 243)

Act No. 638

Provides criminal penalties for any person who fails to report the homicide, rape, or sexual abuse of a child except when the person is bound by any privilege of confidentiality recognized by law.

LSU — CLE
Recent Developments
Insurance Law

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I. 2012 Insurance Legislation.

- A. Act 91.** Enacts R.S. 22:1188.1 to require payment of “clean claims” under long-term case policy within 30 days, imposing interest at rate of 1% per month after 45 days.
- B. Act. 198.** Amends R.S. 22:887 to require notice of reinstatement of any property insurance be given policy holder, producer, mortgagee and other person shown on policy.
- C. Act. 201.** Amends R.S. 22:1926(A) to require any person who “suspects” insurance fraud shall report to insurance fraud section of DOI.
- D. Act 271.** Numerous technical corrections to Title 22.
- E. Act 309.** Amends R.S. 22:1706 to prohibit public adjuster from acting as appraiser or umpire if he adjusted any part of claim.
- F. Act. 632.** Exempts Citizens from requirements for posting bond.
- G. Act 824.** Permits vehicle certificate of insurance to be displayed on “mobile electronic device.”

II. Automobile Liability Coverage.

- A. Regular Use.** *Gonzales v. Geisler*, 72 So.3d 992 (La. App. 2nd Cir. 2011). When he struck plaintiff, defendant was operating a Yukon owned by a corporation and available for his regular use. The Yukon did not meet the definition of a covered “non-owned auto” under policy on his personal auto. Case contains a good statement of the rationale for excluding autos furnished or available for regular use.
- B. Diminution in Value.** *Sandoz v. Bougeous*, 64 So.3d 322 (La. App. 5th Cir. 2011), *writ denied*, 63 So.3d 1043 (La. 2011). Under collision coverage, GEICO paid the full cost for repair of plaintiff’s BMW. Plaintiff’s claim for diminution in value was rejected because the GEICO policy expressly provided that its liability for loss “will not exceed the cost to repair or replace the property...and will not include compensation for any diminution in the property’s value that is claimed to result from the loss.”
- C. Limits — Allocation of Compensatory and Punitive Damages.** *Manton v. Audubon Nature Institute, Inc.*, 64 So.3d 326 (La. App. 4th Cir. 2011), *writ denied*, 64 So.3d 227 (La. 2011). Plaintiff was rear-ended by an intoxicated driver with \$1,000,000 primary liability coverage with Travelers under policy that did not exclude punitive damages. Westchester provided excess coverage, excluding punitive damages. Plaintiff settled with Travelers for \$750,000. Pursuing claim against Westchester, plaintiff

sought to allocate a portion of the Travelers' settlement to punitive damages, thereby increasing Westchester's exposure. The court held that damages must first be allocated to compensatory damages, thus giving Westchester full benefit of the underlying Travelers coverage.

- D. Rental Agreement.** *Czop v. White*, 80 So.3d 1255 (La. App. 5th Cir. 2011), *writ denied*, 85 So.3d 704 (La. 2012). Plaintiff was injured by intoxicated driver of Avis rental car. As required by La. R.S. 22:1296(B), Avis provided liability insurance coverage to driver, but terms of the rental agreement terminated coverage for driver operating the vehicle under the influence of alcohol. The court reversed summary judgment in favor of Avis and its insurer, finding that the contract provision against public policy. Also, the court noted there was a genuine issue as to whether the negligent renter signed the agreement.
- E. Trucker Policies/MCS-90 Endorsement.** *Jurey v. Kemp*, 77 So.3d 83 (La. Ct. App. 1st Cir. 2011). Kemp was the owner of a tractor and flatbed trailer which he used to perform transportation services for D&M as an independent contractor. After having some modifications made to the flatbed trailer by Baker Metal Works, Kemp picked up the trailer with the tractor and was involved in an accident with plaintiffs. Under its policy with D&M, Liberty Mutual provided coverage for the operation of the tractor while Kemp was engaged in performing transportation services for D&M. Kemp also had a "bobtail" liability policy for operation of his equipment outside the scope of his transportation services for D&M. On cross motions for summary judgment, the court found that Kemp was not in the scope of providing transportation services to D&M at the time of the accident, nor were the modifications to the trailer required maintenance of the trailer. The court also held that the MCS-90 endorsement was inapplicable because the tractor and trailer were not being used in interstate commerce. See also, *Lopez v. Manint*, 76 So.3d 1223 (La. App. 5th Cir. 2011)(MCS endorsement not applicable to intrastate activity).

III. Uninsured Motorist Coverage.

- A. Insureds — Non-Resident Guest Passengers.** *Bernard v. Ellis*, __ So.3d __ (La. 2012), 2011-2377 (La. 7/2/12), 2012 WL 2512772. A sharply divided Supreme Court held UM coverage was mandated for guest passengers in an auto injured by the negligence of an uninsured motorist. The policy on the vehicle in which they were riding expressly extended UM coverage only to the named insured and relatives who were residents of the named insured's household. The plaintiffs were relatives of, but did not reside with, the named insured. Since the plaintiffs were not UM insureds under the policy, the issue became whether the passengers were liability insureds for whom UM coverage was mandated under La. R.S. 22:1295. The insurance policy extended liability coverage to "any person with respect to an accident arising out of that person's use of the vehicle."

The insurer argued that, while the passengers may have been using the insured auto, the accident did not arise out of their use. The majority found the policy language too restrictive in violation of the Motor Vehicle Liability Policy required under the Compulsory Insurance Law that must extend coverage to anyone “using such motor vehicle . . . with the express or implied permission of the named insured.” Since the plaintiff passengers were “using” the vehicle with permission, they were entitled to liability coverage and therefore mandatory UM insureds. **Note:** Justices were split four to three. The Court affirmed a seven to five en banc decision of the Fourth Circuit and overruled the First Circuit’s decision in *Batiste v. Dunn*, 68 So.3d 673 (La. App. 1st Cir. 2011), *writ denied*, 71 So.3d 295 (La. 2011).

B. Waiver.

1. **Authority to Execute.** *Gunter v. State Farm Mut. Auto. Ins. Co.*, 88 So.3d 444 (La. 2012). In per curiam opinion, Supreme Court held corporate representative’s authority to execute waiver may be established explicitly or implicitly. A corporate resolution is not required. Actions of policy jury demonstrated administrator’s authority to obtain insurance coverage, including execution of waiver.
2. **Authority — Summary Judgment Evidence.** *Melder v. State Farm Mut. Auto. Ins. Co.*, 66 So.3d 603 (La. App. 3rd Cir. 2011). Insurer’s summary judgment evidence, which failed to show that person who executed waiver was properly authorized, was insufficient to shift the burden of production to the plaintiff.
3. **Authority — Wife.** *LeBlanc v. Lavergne*, 86 So.3d 823 (La. App. 3rd Cir. 2012), *writ denied*, 90 So.3d 441 (La. 2010). Wife exercised selection of “economic only” coverage for policy issued in husband’s name. As a “named insured” under the policy definition, the wife had authority to execute waiver.
4. **Policy Number.** *Phillips v. Bush*, 67 So.3d 1264 (La. App. 5th Cir. 2011), *writ denied*, 68 So.3d 522 (La. 2011). If available, the policy number must be stated on the UM waiver form. Even if the renewal policy for which the form was executed would be assigned a new policy number, the waiver should state the prior policy number. Further, the affidavit of the insured that the policy number was unavailable was not sufficient; an affidavit from the insurance company was required. Therefore, insurer’s evidence was not sufficient to rebut plaintiff’s motion for summary judgment that waiver form without policy number was invalid.

5. **Application Number.** *Dozier v. Okoorkwo*, 82 So.3d 516 (La. Ct. App. 1st Cir. 2011). If the policy number is not available, only the other five *Duncan* tasks are essential. Insertion of the application number and later modification of the application number by the insurer did not invalidate waiver.
 6. **Rejection Modified by Another Document.** *Hall v. Federated Mut. Ins. Co.*, 80 So.3d 727 (La. App. 2nd Cir. 2011), *writ denied*, 85 So.3d 92 (La. 2012). Injured truck driver sought UM coverage under his employer's policy. The employer had executed the commissioner's form rejecting all UM coverage. He then executed an insurance company form which allowed him to elect coverage only for "directors, officers, partners or owners of the named insured" with reduced limits. The company form expressly rejected UM coverage for other employees. The court held that the rejection of coverage for the truck driver was valid.
 7. **Renewal.** *Johnson v. Safeway Ins. Co. of LA.*, 76 So.3d 653 (La. App. 3rd Cir. 2011). UM waiver remained valid through five changes in covered autos because the limits of liability remained the same.
 8. **Typographical Errors.** *Rodriguez v. Direct General Ins. Co. of La.*, 86 So.3d 651 (La. App. 5th Cir. 2002). Typographical errors in name of insured on renewal policies did not affect continuing validity of prior waiver.
- C. **Uninsured Motor Vehicle — Hit and Run.** *Payton v. Progressive Sec. Ins. Co.*, 66 So.3d 1194 (La. App. 4th Cir. 2011). Motorcycle rider claimed UM coverage for allegedly being hit by unknown vehicle running stop sign. Court found disputed expert testimony sufficient evidence of a hit.
- D. **Choice of Law.** *Collins v. Downes*, 83 So.3d 1177 (La. App. 4th Cir. 2011). The issue was whether a policy provision reducing underinsured motorist coverage by the amount of liability coverage was enforceable. The policy had been issued by State Farm to an Ohio resident covering an auto licensed, titled and registered in Ohio. Subsequently, the vehicle owner moved to Louisiana, but did not notify State Farm of the change. When rear-ended in Louisiana, the auto was being operated by a Louisiana resident with the permission of the owner. Making a choice of law analysis, the court concluded that Ohio had a more substantial interest in the uniform application of its laws governing insurance contracts, including the enforcement of the reduction clause.

IV. Personal Liability Coverage.

- A. **Exclusion for Injury to an Insured.** *Keyes v. Thibodeaux*, 85 So.3d 1284 (La. App. 3rd Cir. 2012). Husband was injured when he fell from roof of wife's residence, allegedly due to her fault. Evidence showed that husband and wife had lived separate and apart for 15 months. The court held that the husband's claim against the wife's homeowner's insurer was not barred by the insured exclusion because the husband was not a resident of his insured's wife's household.
- B. **Intentional Injury.** *Romano v. Altentaler*, 77 So.3d 282 (La. App. 1st Cir. 2011). As a deputy sheriff, plaintiff responded to a domestic dispute call. In a physical encounter initiated by defendant, plaintiff slipped and fell, severely injuring his shoulder. The defendant's Farm Bureau policy excluded coverage "resulting from intentional acts or directions by you or any insured. The expected or unexpected results of these acts or directions are not covered." The court held that the "plain intent of this language is exclude coverage for intentional acts of an insured, even when the results of such acts may be unexpected."

V. General Liability Coverage.

A. **Additional Insured.**

1. *Jones v. Capitol Enterprises, Inc.*, 89 So.3d 474 (La. App. 4th Cir. 2012). In this class action arising out of a sandblast project against the general contractor, Capitol, and the owner, Sewage and Water Board of New Orleans ("S&WB"), court found each defendant 50% responsible. Issue was whether S&WB was covered as an additional insured under Capitol's CGL policy, which extended additional insured status when required by written contract, "but only with respect to liability arising out of: (1) 'your work' performed for that insured..." Distinguishing other cases, court found that this additional insured provision extended coverage to S&WB for its own fault arising out of Capitol's work. Court stated this was a case of first impression in Louisiana, and it was adopting majority rule nationwide.
2. *Batiste v. City of New Orleans*, 85 So.3d 800 (La. App. 4th Cir. 2012), *writ denied*, 89 So.3d 1195 (La. 2012). City contracted with SMG to manage city-owned theatre. SMG leased theatre to Orleans Parish School Board for a graduation event. Plaintiff, who fell at that event, sued City, SMG and OPSB. City was an additional insured under SMG's CGL policy, "but only with respect to liability arising out of your (SMG's) operations..." Since allegations included negligence in SMG's operations, City was an additional insured.

- B. Covered Activity.** *Burmaster v. Plaquemines Parish Government*, 81 So.3d 805 (La. App. 4th Cir. 2011). The plaintiffs brought suit against the Plaquemines Parish Government for damages arising out of levee failures during Hurricane Katrina. Great American issued a policy to Plaquemines Parish Government which identified the covered activity as “amateur athletic association – softball/baseball/soccer, etc.” The court affirmed the trial court’s summary judgment finding that the policy did not provide coverage for other activities of the Parish.
- C. Covered Damages — Bodily Injury.** *Preau v. St. Paul Fire & Marine Ins. Co.*, 645 F.3d 293 (5th Cir. 2011). Plaintiff, an anesthesiologist, strongly recommended former associate to hospital without disclosing associate’s drug abuse. While employed by the hospital, intoxicated associate caused substantial bodily harm to a patient. After settling with the patient, the hospital sued and obtained judgment against plaintiff for misrepresentation. St. Paul denied coverage under plaintiff’s CGL policy. The court held that the judgment against plaintiff was for “economic damages” and not for “bodily injury damages” covered under a CGL policy, even though the measure of damages was based upon the cost to the hospital of the injuries to its patient.
- D. Breach of Contract Exclusion.** *Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Casualty Co.*, 677 F.3d 250 (5th Cir. 2012). Architecture firm brought suit against contractor for copyright infringement for using plans for another project in breach of its contract with architecture firm. CGL insurer denied coverage under “breach of contract” exclusion. Finding no binding Louisiana authority, Fifth Circuit made an “*Erie* guess” that Louisiana would follow the “but for” analysis, rather than the “incidental relationship” test. Under the “but for” test, the injury is only considered to have arisen out of the contractual breach if the injury would not have occurred but for the breach of contract. Since the architecture firm’s claim for relief under the federal copyright laws would exist even in absence of the contract, the “breach of contract” exclusion was not applicable. But see, *Mentz Const. Services, Inc. v. Poche*, 87 So.3d 273 (La. App. 4th Cir. 2012)(suit against contractor alleged only breach of duties that were “explicitly and implicitly set forth in the contract”).
- E. Auto Exclusion.** *McQuirter v. Rotolo*, 77 So.3d 76 (La. App. 1st Cir. 2011). Petition alleged that Rotolo, in the course and scope of his employment by Micor, rear-ended plaintiffs in an auto accident. The petition further alleged that Rotolo and Micor were agents for Cox Communications. Under its agreement with Micor, Cox claimed that it was an additional insured under the “insured contract” exception to the contractual liability exclusion in Micor’s CGL policy with Scottsdale. The court, however, found that Scottsdale’s auto exclusion applied to coverage extended to Cox for an insured contract. Since Rotolo was also an insured

under the CGL policy, the auto exclusion unambiguously excluded coverage for operation of any auto by any insured.

- F. Employer Exclusion.** *Moreno v. Entergy Corp.*, 79 So.3d 406 (La. App. 5th Cir. 2011), *writ granted*, 85 So.3d 705 (La. 4/13/12). Insured's employee sued defendant, who in turn file third party demand for indemnity against Insured. Court held that employer's liability exclusion in CGL policy excluded coverage for the third party claim arising out of bodily injury claim of insured's employee.
- G. Property Damage Exclusions — Insured's Work.** *BG Real Estate Services, Inc. v. Rhino Systems of Canada, Inc.*, 78 So.3d 285 (La. App. 5th Cir. 2011), *writ denied*, 82 So.3d 289 (La. 2012). Due to contractor's faulty workmanship, owner was required to replace roofs on two buildings. Court held that CGL exclusions (j)(5) and (6) were not applicable because the damage occurred after the work was complete. Instead, the court applied the "work" exclusion, Exclusion (l), finding that the defective work was not performed by a subcontractor.
- H. Property Damage Exclusions — Damage to Other Property.** *Burns v. Barbara Enterprises, Ltd.*, 83 So.3d 1165 (La. App. 4th Cir. 2011). While CGL policy excludes coverage for repairing or replacing the insured's faulty work, the plaintiff produced sufficient evidence to defeat summary judgment that the faulty work caused damage to other property, resulting from the contractor's failure to properly align the piers supporting the building.
- I. PCOH Exclusion.** *Baseline Const. & Restoration of Louisiana, LLC v. Favrot Realty Partnership*, 86 So.3d 66 (La. App. 4th Cir. 2012). Insured contractor's Hurricane Katrina repairs to apartment complex were completed prior to the inception of Catlin's CGL policies. While those policies were in effect, the apartment complex was damaged by Hurricane Gustav, and complex owner claimed that damages resulted from faulty repair work by a contractor. The Catlin policy had an endorsement excluding coverage for property damage included in the products-completed operations hazard and arising out of your work. The court found that insured's allegedly faulty repair work was within the PCOH. Thus, coverage was excluded under the Catlin policies.
- J. Assault & Battery and Related Exclusions.** Courts continue to hold that these exclusions bar coverage. *Williams v. Andrus*, 74 So.3d 818 (La. App. 3rd Cir. 2011)(murder); *Fenn v. Colony Ins. Co.*, 80 So.3d 695 (La. App. 3rd Cir. 2011)(stabbing).
- K. Garage Liability Policy.** *Davis v. Catlin Specialty Ins. Co.*, 80 So.3d 580 (La. App. 5th Cir. 2011). Garage insurer denied coverage for wrongful death claim brought against garage for death of a homeless person

sleeping on the premises when the garage was not in operation. The policy covered “garage operations” which was defined as “ownership, maintenance or use of premises for garage business . . .” The court held that liability allegedly arising out of the ownership of the garage location was covered, regardless of whether the garage operations were in progress.

VI. Other Liability Issues.

A. **Waiver of Defenses and Liability for Settlement.** *Arceneaux v. Amstar Corp.*, 66 So.3d. 438 (La. 2011). This cumulated action was brought by plaintiffs seeking recovery for hearing loss at sugar refineries between 1947 and 1994. Continental insured defendant T&L during the period 3/1/1963-1978 under policies excluding coverage for bodily injury to employees, except this exclusion was deleted by special endorsement effective 12/31/75. Continental undertook the defense of T&L for four years without reserving rights. Thereafter, Continental withdrew its defense and denied coverage. T&L settled all claims for \$35,000 per plaintiff, for which it sought reimbursement from Continental. The Supreme Court considered the following issues:

1. **Waiver.** Under *Steptore*, Continental waived its coverage defense as to all pre-denial plaintiffs. Such waiver applied only to its employee exclusion defense and not to the terms of its policies. Also, waiver did not apply to plaintiffs joined in the suit after Continental denied coverage (post-denial plaintiffs).
2. **Defense.** By withdrawing its defense, Continental breached its duty to defend. The petition did not unambiguously exclude all coverage because the employee exclusion was not applicable from 12/31/75 to 3/1/78. Forfeiture of policy defenses is not an appropriate remedy for wrongful refusal to defend. Instead, the insurer is liable for the insured’s reasonable defense costs and, if appropriate, statutory penalties. (*Steptore* and *Hooley*, distinguished).
3. **Settlement.** *Hooley* stands for the proposition that, when the insurer wrongfully refuses to defend, the insured is free to settle without the insurer’s approval.
4. **Allocation.** For the post-denial plaintiffs, Continental is liable (under *Southern Silica* and *Norfolk Southern*) only for its pro rata share of the settlements. Its pro rata share is determined by the ratio of the length of employment during the covered period to the total length of employment by T&L.

B. Personal Injury Liability Coverage — Limits. *Johnson v. Orleans Parish School Board*, 90 So.3d 386 (La. 2012). CGL policy provided BI/PD limit of \$1,000,000 per occurrence with no aggregate. Personal injury liability coverage stated: “Aggregate Limit shall be the per occurrence bodily injury liability limit unless otherwise indicated.” Reversing lower courts, Supreme Court held that policy unambiguously provided PIL aggregate limit of \$1,000,000.

C. Direct Action Statute.

1. **Insurer’s Liability.** *Johnson v. Orleans Parish School Board*, 90 So.3d 390 (La. 2012). Insurers sought appellate review of judgment providing that “HANO’s insurers should have to pay all sums owed by HANO to the class, subject to their right to seek contribution from the other insurers.” Supreme Court held that Direct Action Statute does not extend protection of liability policy to risks not covered by or excluded from policy. Insurers were entitled to summary judgment for any claims falling outside their coverage.

2. **Failure to Sue Insured.** *Stewart v. Continental Cas. Co.*, 79 So.3d 1047 (La. App. 1st Cir. 2011), *writ denied*, 82 So.3d 285 (La. 2012). In October 2007, attorney advised her clients to obtain other legal counsel, acknowledging her malpractice in bankruptcy proceeding. In March 2008, new counsel filed suit against attorney’s professional liability insurer, without naming the attorney “as a professional courtesy.” In May 2010, the insurer filed an exception on the ground that the direct action statute requires that the insured be sued. Suit was amended to name the attorney. Applying La. R.S. 9:5605, court held that the claim against the attorney was preempted because preemptive periods may not be renounced, interrupted or suspended. Likewise, court dismissed the suit against the professional liability insurer on the grounds that a direct action could not be maintained without joining the insured, noting the maxim, “No Good Deed Goes Unpunished.”

3. **Insurers of Dissolved Corporation.** *Oxy USA Inc. v. Quintana Production Co.*, 79 So.3d 366 (La. App. 1st Cir. 2011) *writ denied*, 84 So.3d 536 (La. 2012). Under Texas law, suit against a Texas corporation was barred three years after dissolution. Likewise, plaintiff cannot maintain a direct action against the dissolved corporation’s insurers.

4. **Self-Insurer.** *Gachassin v. U-Haul Co. of Arizona*, 82 So.3d 490 (La. App. 3rd Cir. 2011). U-Haul as self-insurer provided liability protection for customer. Court questioned whether plaintiff had

right of direct action against U-Haul for customer's negligence. In any event, such action could not be maintained after dismissal of customer.

- D. Delivery of Policy.** *Anton, Ltd. v. Colony, Ins. Co.*, 77 So.3d 417 (La. App. 5th Cir. 2011). Roofer contended that insurer could not rely on "flat roof exclusion" because policy was not delivered to him prior to loss, relying on *Louisiana Maintenance Services Inc. v. Certain Underwriters at Lloyd's of London*, 616 So.2d 1250 (La. 1993). The policy had been received by the agent who mailed policy to the insured. The court held that delivery to the agent was constructive delivery to the insured.
- E. Notice of Cancellation.** *Manh An Bui v. Farmer's Ins. Exchange*, 68 So.3d 656 (La. App. 1st Cir. 2011), *writ denied*, 74 So.3d 212 (La. 2011). Insurer presented *prima facie* evidence in accordance with La. R.S. 22:887 that it mailed notice of cancellation to the insured. However, both insured and wife signed affidavits that the notice had not been received. The court held that there was a genuine issue of fact as to whether the notice of cancellation was transmitted to the insured as required by *Broadway v. All-Star Insurance Corp.*, 285 So.2d 536 (La. 1973).
- F. Interest — Excess Insurer.** *Gabarick v. Laurin Maritime (America), Inc.*, 649 F.3d 417 (5th Cir. 2011). Excess insurer deposited policy limits in an interpleader action approximately one year after suit was filed. Court held that excess insurer was not liable for pre-judgment interest because the deposit was made before the primary insurer had exhausted its limits. Excess insurer had not unreasonably delayed and was not unjustly enriched by failing to file the interpleader earlier.
- G. Reformation.** *Fruge v. Amerisure Mut. Ins. Co.*, 663 F.3d 743 (5th Cir. 2011). Court held that a CGL policy may be reformed after the accident on the ground that defendant and insurer were in mutual error in naming the defendant as an insured, even though reformation affected another insurer.
- H. E & O Policy.** *Haun v. Cusimano, Inc.*, 86 So.3d 84 (La. App. 4th Cir. 2012). Tenant was injured allegedly due to real estate manager's fault. Manager's E&O policy did not provide coverage because it excluded coverage for bodily injury.

VII. Property Insurance.

- A. Post-Loss Assignment.** In Re: Katrina Canal Breaches Litigation, 63 So.3d 955 (La. 2011). The Federal Fifth Circuit certified the question to the Louisiana Supreme Court whether an anti-assignment clause in a homeowner's insurance policy bars an insured's post-loss assignment of the insured's claims under the policy. The Louisiana Supreme Court

responded: “There is no public policy in Louisiana which precludes an anti-assignment clause from applying to post-loss assignments. However, the language of the anti-assignment clause must clearly and unambiguously express that it applies to post-loss assignments.”

- B. Replacement Cost.** *Jouve v. State Farm Fire & Cas. Co.*, 74 So.3d 220 (La. App. 4th Cir. 2011), *writ denied*, 76 So.3d 1157 (La. 2011). Insureds sold their hurricane damaged house without making repairs. Under their homeowner’s policy, plaintiffs were entitled to replacement cost only if the property were repaired or replaced. Instead, insureds were entitled under the policy only to actual cash value, which the court defined as replacement cost value less depreciation.
- C. Coverage Trigger.** *Mangerchine v. Reaves*, 63 So.3d 1049 (La. App. 1st Cir. 2011). Plaintiffs purchased home on July 26, 1996 and insured the property with Travelers on July 26, 1997. Plaintiffs filed a rehibitory action against the sellers and real estate agencies and also sought first-party property damage coverage under their Travelers policy, alleging that pre-existing black mold infestation caused structural damage. Travelers’ policy covers “loss...which occurs during the policy period...” The court pointed out that “loss” in first-party coverage is not necessarily synonymous with “property damage” in third-party coverage. Also, the court found the term “occurs” can be defined as both “to come into existence” and “to become evident or manifest.” Finding “occurs” to be ambiguous, the court held that the trigger for first-party property coverage was manifestation of the “loss.”
- D. Chinese Drywall.** *Ross v. C. Adams Const. & Design, L.L.C.*, 70 So.3d 949 (La. App. 5th Cir. 2011). Plaintiff sued Louisiana Citizens, their homeowner’s insurer, for damage to their home caused by defective Chinese drywall. The court held that the homeowner’s policy excluded coverage. While the court found that the drywall caused direct physical loss to the property, coverage was excluded by (1) faulty, inadequate, or defective materials exclusion; (2) latent defect exclusion; (3) corrosion exclusion and (4) pollution exclusion. Also, policy did not cover damage to personal property under the “smoke” peril. See also, *In Re Chinese Manufactured Drywall Products Liability Litigation*, 759 F.Supp.2d 822 (ED La. 2010); *Widder v. Louisiana Citizens Property Ins. Corp.*, 82 So.3d 294 (La. App. 4th Cir. 2011), *writ denied*, 76 So.3d 1179 (La. 2011) (lead contamination alleged from internal and external sources).
- E. Loss Payee.** *Citi Mortgage, Inc. v. Chase*, 81 So.3d 255 (La. App. 5th Cir. 2011), *writ denied*, 85 So.3d 93(2012). Chase, as executor of the named insured’s estate, converted the insurance proceeds without satisfying Citi’s mortgage, a loss payee in the policy. Court held that the insurer had the duty to name loss payees on the check.

- F. Prescription — Class Action.** *Duckworth v. Louisiana Farm Bureau Mut. Ins. Co.*, 78 So.3d 835 (La. App. 4th Cir. 2011), *writ granted*, 85 So.3d 99 (La. 2012). Plaintiffs filed an individual action against their property insurer for hurricane damage. When faced with an exception of prescription, they contended that prescription was suspended because they were putative plaintiffs in a class action. Court held that plaintiffs forfeited entitlement to the suspension provisions of La. C.C.P. art. 596 when they filed an individual lawsuit prior to class certification. Court cited other cases reaching the same result.
- G. Settlement.** *Galacia v. Louisiana Citizens Property Ins. Corp.*, 88 So.3d 656 (La. App. 4th Cir. 2012), *writ denied*, 90 So.3d 414 (La. 2012). Plaintiff owned two buildings (Banks Street and Gayoso Street) which sustained storm damage covered by Citizens. In settlement of mass joinder litigation, plaintiff received \$60,000. Plaintiff then filed this suit, contending that settlement was for Banks Street property only. The trial court granted plaintiff's motion to reopen case. Citizens then filed a motion to vacate settlement, which the court granted, ordering plaintiff to return the \$60,000. Upon plaintiff's refusal to do so, his suit was dismissed. That judgment was affirmed.

VIII. Life Insurance.

- A. Notice Requirement.** *Turner v. O.M. Financial Life Ins. Co.*, 822 F.Supp.2d 633 (W.D. La. 2011). Life insurer failed to give the notice required by La. R.S. 22:905 to declare a policy forfeited or lapsed for non-payment of premium.

IX. Health and Accident Insurance.

- A. Medical Expenses — Reimbursement.** *American Postal Workers Union, AFL-CIO Health Plan v. Tippett*, 82 So.3d 379 (La. App. 3rd Cir. 2011). After settling his automobile tort claim for \$650,000, Tippett refused to reimburse the plaintiff Plan the \$48,000 the Plan had paid for his medical expenses on the ground that the settlement had not made him whole. The Plan provided for reimbursement regardless of whether the insured was made whole and without reduction for attorneys' fees and costs. The court held that the Plan was entitled to reimbursement, but subject to reduction for the one-third attorney fees paid by Tippett on the settlement proceeds. This deduction was based on Directive 175 of the Commissioner of Insurance which provides that "an insurer invoking a subrogation or reimbursement provision is required by the public policy of this State to contribute to the attorney fees incurred in obtaining a recovery from a third party."

B. Disability Definition and Penalties. *Scott v. UNUM Life Ins. Co. of America*, 80 So.3d 740 (La. App. 2nd Cir. 2011), *writ denied*, 85 So.3d 119 (La. 2012). “Regular attendance of a physician” does not mandate monthly visits to a physician, but rather that the insured must be under the customary care of his doctor. Policy definition of disability cannot be more restrictive than La. R.S. 22:990 which requires that alternative employment must provide insured “with substantially the same earning capacity as his former earning capacity prior to the start of the disability.” Award of penalties and attorney fees was justified because insurer applied policy definition of disability rather than definition required by statute. Penalty of “double the amount” of benefits means that the insured is entitled to his benefits plus the same amount as penalties. Court contrasted the language in La. R.S. 22:1821 with La. R.S. 22:1973 which authorizes a penalty of “two times the damages” in addition to the damages.

X. Penalties.

A. Attorney Fees. *Arceneaux v. Amstar Corp.*, 66 So.3d 438 (La. 2011). The only breach of La. R.S. 22:658 (now 22:1892) was failure to timely pay an invoice for defense costs. The penalty statute authorizes attorney’s fees only for the “prosecution and collection of such loss.” Under *Sher*, legal interest on penalties runs from date of judgment. (Case also discussed in Section VI, *supra*).

B. Damages Sustained” Under La. R.S. 22:1973(C). *Durio v. Horace Mann Ins. Co.*, 74 So.3d 1159 (La. 2011). For breach of the duty of good faith and fair dealing imposed on insurers by La. R.S. 22:1973(A), Subpart (C) provides that the insured “may be awarded penalties . . . not to exceed two times the damages sustained” The Supreme Court held that the “damages sustained” do not include the contractual liability of the insurer under its policy, but only the additional damages authorized for breach of the duties imposed by Subpart (A). The Court affirmed the award of \$167,333 for mental anguish, lost wages and retirement income losses, plus double penalties in the amount of \$334,666. The Court also reversed the award of attorney fees, finding that breach of La. R.S. 22:1892 occurred before the 2006 amendment authorizing attorney fees.

C. Class Action — Initiation of Loss Adjustment. *Oubre v. Louisiana Citizens Fair Plan*, 79 So.3d 987 (La. 2011). La. R.S. 22:1892(A)(3) provides an insurer “shall” initiate loss adjustment of a property damage claim within 14 days of notification of loss by the claimant [or 30 days in case of a catastrophic loss]. Failure to comply “shall” subject the insurer to the penalties provided in La. R.S. 22:1973. In this class action, the plaintiffs sought imposition of penalties on Citizens for failure to timely initiate loss adjustment Hurricane Katrina. Reversing the fifth circuit, a divided Supreme Court held that the insured was not required to show bad

faith. The majority concluded that the provisions of Section 1982(A)(3) were mandatory both as to the initiation of loss adjustment and the imposition of the Section 1973 penalty. Further, the majority concluded that the minimum penalty of \$5000 was mandated. Initiation of loss adjustment required “a substantive and affirmative step to accumulate the facts necessary to evaluate the underlying claim.” Mailing of \$1500 check to each claimant without investigation of underlying loss did not constitute initiation of loss adjustment.

D. Misinterpretation.

1. *Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675 (5th Cir. 2011). Seacor and Commonwealth agreed on the amount of damage sustained by Seacor in Hurricanes Katrina and Rita. Commonwealth, however, contended that both the named windstorm and the flood deductibles were applicable. The court held that only the windstorm deductible applied. Seacor sought penalties under La. R.S. 22:1892 and 1973 on the ground that Commonwealth acted in bad faith because it misinterpreted its policy. The court denied penalties, distinguishing *Louisiana Bag Co., Inc. v. Audubon Insurance Co.*, 999 So.2d 1104 (La. 2008). Because “the dispute here was not whether the policy covered Seacor’s damages but rather which deductibles and liability limits applied.” Also, the Fifth Circuit said it was not bound by *Louisiana Bag* because “Louisiana does not follow does not follow *Stare Decisis*.” [But see also, *Chalmette Retail Center, LLC v. Lafayette Ins. Co.*, 21 So.3d 485 (La. App. 4th Cir. 2009), *writ denied*, 31 So.3d 392 (La. 2011)(misinterpretation is not legal justification for failure to pay timely)].
2. *Maxey v. Universal Cas. Co.*, 74 So.3d 302 (La. App. 3rd Cir. 2011). Plaintiff sued his automobile insurer seeking payment under comprehensive coverage for loss of auto. Plaintiff’s unlocked auto was left in his driveway with a key under the floor mat. The stolen auto was later found at a remote location having been destroyed by fire. The insurance policy excluded coverage for theft “if evidence exists that forcible entry was not required to gain access to the automobile.” The parties filed cross motions for summary judgment whether this was a theft loss or a fire loss. The court found that it was a fire loss, and the insurer then timely paid the claim. Plaintiff, however, sought penalties and attorney’s fees allegedly due as a result of the insurer’s misinterpretation of its own policy. The denial of penalties was affirmed, distinguishing *Louisiana Bag* as a case in which the misinterpretation involved a legal issue. Here, the court concluded that the insurer sought judicial resolution of a factual question – whether the damages were the result of fire or theft.

- E. Failure to Investigate or Tender.** *Guidry v. State Farm Fire & Cas. Co.*, 74 So.3d 1276 (La. App. 3rd Cir. 2011), *writ denied*, 80 So.3d 472 (La. 2012). “Eggshell” plaintiff, with long history of prior related medical problems, was involved in two rear-end collisions within two weeks. The negligent drivers in both cases had minimum liability insurance. Plaintiff was insured by Progressive, with \$25,000 UM limits and \$5,000 med pay limits. Progressive made no tender for either accident. The liability insurer settled the claims arising out of the first accident, and the case went to trial by jury for the second accident. The jury found that plaintiff was not injured in the first accident. For the second accident, the jury awarded \$10,000 in general damages and \$20,000 in past medical expenses. The court held that the general damages award was not abusively low for the “aggravation injuries” to the plaintiff who was already disabled with extensive pre-existing injuries. Against Progressive, the jury awarded damages under the penalty statutes of \$50,000 in general and special damages, plus \$10,000 in attorney’s fees, and the trial judge awarded \$100,000 in penalties. These awards were affirmed based upon Progressive’s failure to take depositions to investigate the nature and extent of plaintiff’s injuries from the accident and its failure to tender any amounts for medical expenses which deprived plaintiff of access to needed surgery for four years. The two concurring judges found that the damage award was appropriate for breach of the duties of good faith and fair dealings under La. R.S. 22:1973(A) and that the trial judge had discretion under La. R.S. 22:1973(C) to award penalties up to two times the damages awarded under subpart (A).
- F. Attorney Fees under La. R.S. 22:1892 plus Treble Damages under La. R.S. 22:1973.** *Leland v. Lafayette Ins. Co.*, 77 So.3d 1078 (La. App. 3rd Cir. 2011), *writ denied*, 82 So.3d 285 (La. 2012). Finding insurer guilty of bad faith in handling of Hurricane Rita claim, the jury awarded attorney fees under La. R.S. 22:658 (now §1892) and damages and penalties under La. R.S. 22:1220 (now §1973). Award of attorneys’ fees was proper because the first satisfactory proof of loss was submitted after the August 15, 2006, the effective date of the amendment to §1892 authorizing attorneys’ fees. In addition to the contractual claim of \$145,000, the court affirmed the award of damages under §1220 [which consisted of \$5,000 for loss of rental income, \$53,000 for loss of personal income (insured’s loss of billable hours), and \$30,000 in interest and \$90,000 for mental anguish], penalty of double the amount of damages, plus one-third attorney fees on the entire recovery. The court reversed, based on the *Durio* case, only the inclusion of the contractual claim in the penalties. The total recovery on a \$145,000 contractual claim was \$970,000.
- G. Third Party Claim — Failure to Make Timely Written Offer.** *State Farm Mut. Auto. Ins. Co. v. Norcold, Inc.*, 88 So.3d 1245 (La. App. 3rd Cir. 2012). Semars suffered fire damage to their antique car collection and building, for which they were compensated by their property insurer, State

Farm. Semars and State Farm then sued Norcold, Inc. (manufacturer of defective refrigeration unit that caused fire) and its excess insurers. American Home provided \$1.5 million excess of Norcold's \$500,000 SIR. The court affirmed award against American Home of penalties, attorney fees and damages for violation of R.S. 22:1892(A)(4) which states: "All insurers shall make a written offer to settle any property damage claim, including a third-party claim, within 30 days after receipt of satisfactory proofs of loss of that claim." After Norcold tendered its SIR to American Home, it failed to make a written offer. Finding the applicable penalty provision to be 22:1892(B)(1), the court awarded the 50% penalty, plus \$150,000 in attorney fees each to Semars and State Farm. The court also affirmed the award of \$225,000 general damages for mental anguish to the Semars. The opinion had no discussion of the statutory basis for such award of general damages.

- H. **Tender of Undisputed Amount.** *Maloney Cinque, L.L.C. v. Pacific Ins. Co., Ltd.*, 89 So.3d 12 (La. App. 4th Cir. 2012), *writ denied*. Owner of truck stop casinos presented complex claims for property damage and business income losses arising out of Katrina. Court awarded penalties because disagreements over applicable co-insurance penalty and amount of BI loss did not justify failure to tender timely the undisputed amount.
- I. **Summary Judgment/Reasonableness.** *Merwin v. Spears*, 90 So.3d 1041 (La. 2012). Whether insurer's initial decision to deny claim was reasonable involves fact issues barring summary judgment against insurer. Summary judgment is "rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith."

XI. Insurance Agents.

- A. **Breach of Duties.** *Prest v. Louisiana Citizens Property Ins. Co.*, 85 So.3d 729 (La. App. 4th Cir. 2012), *writ granted*, 85 So.3d 1280 (La. 2012). Court found that agent had not exercised reasonable diligence in seeking requested increase in coverage and had failed to advise insured that increase had not occurred. Court affirmed award of special damages in the amount of the requested coverage increase plus general damages of \$75,000 for mental anguish, finding "a special likelihood of genuine and serious mental distress, arising from special circumstances," citing *Morrissey v. State*, 567 So.2d 1081 (La. 1990).

B. Peremption.

1. **Failure to Obtain Coverage.** *Dupont Bldg., Inc. v. Wright & Percy Ins.*, 88 So.3d 1263 (La. App. 3rd Cir. 2012). Building owner brought suit against insurance agent alleging negligent failure to obtain wind and hail damage coverage. Court held that the one year peremption period commenced when the insured could have read his policy to determine the lack of coverage.
2. **Annuity.** *Bijaux v. Broyles*, 88 So.3d 523 (La. App. 3rd Cir. 2012), *writ denied*. Peremption under La. R.S. 9:5606 is applicable to sale of an annuity.

**RECENT DEVELOPMENTS IN
LABOR AND EMPLOYMENT LAW
2011-2012**

William R. Corbett*

© 2012 Frank L. Maraist Professor of Law, Paul M. Hebert Law Center, Louisiana State University. I thank Jordan Stone, LSU Law Class of 2013, and Ellen Miletello, LSU Law Class of 2012, for their assistance in the preparation of this paper. All alleged facts discussed in this paper are as stated by the courts in the opinions or in other sources cited. This paper was last updated October 21, 2012.

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I. THE CURIOUS WORLD OF EMPLOYMENT LAW

Employment Law Stripped to the Bare Essentials

It seems that every year a story comes along that reminds us that in 49 of 50 U.S. states (Montana, not included), most employees work under employment at will, meaning they can be fired without a job-related reason. The most significant restriction on employment at will is the federal, state, and local employment discrimination laws. This year's featured story reminds us of all the foregoing employment law and adds lessons on the distinction between independent contractors and employees, the disparate impact theory of discrimination, and the fruits of "resume fraud." The story also reminds us that it may be easier to learn employment law in the context of exotic dancing.

Sarah Tressler is a former society reporter for the Houston Chronicle. The Chronicle fired Ms. Tressler in March 2012, and she retained an attorney and filed a charge with the Equal Employment Opportunity Commission alleging gender discrimination. According to reports, Ms. Tressler worked for the Chronicle and moonlighted as an exotic dancer at "high-end gentlemen's clubs." As her work at the Chronicle changed from freelance to fulltime, her moonlighting activities decreased. Unfortunately, Ms. Tressler also maintained a blog about her nocturnal job: "Diary of an Angry Stripper." The blog included many details and was quite revealing, including pictures of the author in a "Slutty Claus" outfit. A rival newspaper, the Houston Press, discovered the blog and thought it would make a juicy story. When the story broke, the Chronicle fired Ms. Tressler in May 2012, giving as a reason that she did not include on her employment application that she had worked as a stripper. Ms. Tressler explained her anger at being fired: she had been told by many editors that she was doing a good job at the Chronicle, and regarding the employment application, she said that there were no questions that covered her dancing and she answered all questions asked honestly. She also explained that "stage rotation" provides a good workout, and because she did not have a gym membership, some days she would go in and dance just to get in a good workout. Ms. Tressler's attorney, "celebrity lawyer" Gloria Allred explained her theory of the gender discrimination claim: "[M]ost exotic dancers are female, and therefore to terminate an employee because they had previously been an exotic dancer would have an adverse impact on women, since it is a female-

dominated occupation.” See Alan Duke, *Reporter, Fired for Stripping, Charges Gender Discrimination*, CNN Entertainment (May 11, 2012), available at <http://www.cnn.com/2012/05/10/showbiz/texas-stripper-writer-fired/index.html>. Ms. Allred also explained that when Ms. Tressler danced at clubs, she was an independent contractor, not an employee of the clubs, and that is why she did not list exotic dancing on her employment application with the Chronicle.

All’s well that ends well: Ms. Tressler has a job with another publication, and she has published a book (*Diary of an Angry Stripper*) and her website indicates she is developing an app with pictures, video and a stripper workout.

See Sarah Tressler, *Stripper Journalist Fired From Houston Chronicle, Suing Paper For Gender Discrimination*, Int’l Bus. Times (May 11, 2012), available at <http://www.ibtimes.com/articles/340108/20120511/sarah-tressler-sues-houston-chronicle-stripper-journalist.htm>.

See also *Texas Society Reporter Fired for Stripping; Sues Paper*, USA Today Online (May 11, 2012), available at <http://www.usatoday.com/news/nation/story/2012-05-11/texas-reporter-fired-stripper/54899284/1>; *Journalist Sarah Tressler Fired by Houston Chronicle for Stripping*, ABC News Online (Mar. 30, 2012), available at <http://abcnews.go.com/blogs/headlines/2012/03/journalistsarah-tressler-fired-by-houston-chronicle-for-stripping/>.

And now, with the edification provided by that story, you are prepared to proceed through Recent Developments in Labor and Employment Law.

Which Does Virginia Love More: Babies or Employment at Will?

A former waitress alleged that she had a sexual relationship with the co-owner and manager of the restaurant, Junior, and became pregnant. See *Shomo v. Junior Corp.*, No. 7:11-cv-508, 2012 WL 2401978, 33 IER Cases 1745, 19 Wage & Hour Cas. 2d (BNA) 308 (W.D. Va. June 1, 2012), discussed in Lawrence E. Dubé, *Court Finds No Virginia Public Policy Claim for Waitress Fired After Refusing Abortion*, Daily Lab. Rep. (BNA) No. 113, at A-2 (June 12, 2012). She alleged that, when she told Junior she was pregnant, he told her she should have an abortion, and he offered to pay for it. She alleged that he told her that customers preferred slender waitresses to pregnant ones. Plaintiff refused to have an abortion and was fired. The federal district court made an *Erie (R.R. Co. v. Tompkins)* guess

that, although Virginia recognizes the tort of wrongful discharge in violation of public policy, the state strongly adheres to employment at will, and the tort theory as recognized by the state is a narrow exception. The court “reluctantly” dismissed the state tort claim, but plaintiff was allowed to proceed on her pregnancy discrimination claim under Title VII.

Not Just Your Teeth

A federal district court held that an African American plaintiff suing for race discrimination by a fast food restaurant did not produce sufficient evidence to avoid summary judgment although she presented evidence that a regional manager once directed the store manager to “whiten up the store.” *See Hardin v. J& S Restaurants, Inc.*, No. 1:10-CV-235, 2012 WL 1565352 (E.D. Tenn. May 2, 2012). The court explained that the statement was not direct evidence of race discrimination because it required inferences to get from that statement to “fire black employees and hire white employees.”

“Don’t Stand So Close to Me”

In a sad story of star-crossed lovers in the workplace, a man had a “tumultuous” romantic relationship with a female co-employee that ended badly. He filed a sexual harassment lawsuit based upon her conduct at work toward him. *Conklin v. County of Suffolk*, 859 F. Supp. 2d 415, 2012 WL 1560390 (E.D.N.Y. May 3, 2012). He alleged that she did the following: “frequent use of the water cooler in his area; intentional use of his desk to read her newspaper; leaving unnecessary notes for him at his workspace; and making passing, derogatory comments to him about his wife.” *Id.* at 420. He also alleged that she yelled at him and hit him outside the employer’s building. On the other hand, he had followed her to the home of another male friend of hers, looked in the house, and followed her when she left, causing her to crash her car into a pole. For that, plaintiff had been arrested and charged with harassment and endangerment. The court concluded that the conduct alleged by plaintiff did not constitute sexual harassment. The court noted that harassment of a co-worker is not necessarily “because of sex” when it stems from a failed relationship. Specifically, the court observed that “the Plaintiff conveniently began to subjectively feel that he was being harassed the day that his relationship with [female coworker] went sour.” *Id.* at 428.

Fired for Being Dirty Old Men?

Plaintiffs sued their employer for terminating them based on their age. The employer responded that it fired them for regularly (almost daily) exchanging e-mails with sexually explicit photographs, in violation of the employer's electronic communications policy. The employer discovered the emails while investigating a sexual harassment complaint against one of the plaintiffs. Plaintiffs attempted to prove pretext by showing that other employees violated the policy and were not terminated, but the court concluded that the proposed comparators were not similarly situated. The court also rejected as unsupported by the evidence the argument that sending sexually explicit emails was commonplace at the employer's business. The defendant employer won on summary judgment. *See Hodczak v. Latrobe Specialty Steel Co.*, 451 Fed. Appx. 238, 113 Fair Empl. Prac. Cas. (BNA) 1409, 2011 WL 5592881 (3d Cir. Nov. 17, 2011),

The Scent of Discrimination

The plaintiff began having difficulty breathing when she worked around particular co-employees who wore Japanese Cherry Blossom perfume. Plaintiff requested that her employer ask employees to refrain from wearing the perfume at work. When her co-employees became aware of plaintiff's problems, some allegedly intentionally wore the perfume, and some mocked her on Facebook. Eventually, plaintiff requested that she be permitted to work from home, but the employer refused. When discussions about reasonable accommodations broke down, plaintiff sued for disability discrimination. The employer moved for summary judgment, arguing in part that no reasonable accommodation was possible given that members of the public had access to the workplace, and the employer could not create a fragrance-free environment. The court considered the things the employer could have done to help and held that plaintiff plausibly pled a claim. The court understood plaintiff's request for accommodation to be adoption of a workplace policy prohibiting not just one perfume, but all—a fragrance-free workplace. *See Core v. Champaign County Bd. of County Comm'rs*, No. 3:11-cv-166, 2012 WL 3073418 (S.D. Ohio July 30, 2012).

Run for The Hills

Eliza Sproul, a former field clearance coordinator and production coordinator for the MTV reality series *The Hills*, filed suit against the television network claiming she was sexually harassed, forced to smoke

marijuana, and denied meals, breaks, overtime, and pay. See Eriq Gardner, *Former MTV Staffer Sues Alleging Sex and Drugs on "The Hills,"* The Hollywood Reporter (Oct.19, 2011). The problems began in 2010 with a trip to film in Costa Rica where she was paired with a local resident employed by MTV to run errands. When she got into his van, the man allegedly took off his shirt and began making sexual advances. She alleged he later forced her to smoke marijuana with him in the forest. Sproul also claims to have been sexually harassed by other employees and forced to work long hours by other employees. She alleged that another local person employed by MTV, while alone with her, told her about his ex-girlfriends and showed her "various parts of his body." Complaint ¶ 15. Sproul eventually broke down and was admitted into a Costa Rican hospital where she remained until her fiancé could fly to Costa Rica and take her back to the U.S. The complaint filed in California Superior Court is included in the story. *Sproul v. New Remote Productions; M.T.V. Networks*, Case No. BC 471719 (filed Oct. 18, 2011).

Sleeping with the Enemy

An assistant U.S. attorney represented the NLRB in unfair labor practice cases against U-Haul. U-Haul alleged in a complaint, asserting legal malpractice claims, that the assistant U.S. attorney had a sexual relationship with a paralegal employed by the firm representing U-Haul. U-Haul further alleged that the attorneys representing the NLRB obtained attorney-client privileged information from the paralegal, including litigation strategy information. The federal district court dismissed U-Haul's legal malpractice claims on a motion for judgment on the pleadings in *U-Haul Int'l v. United States*, No. 2:08-CV-00729-KJD-PAL, 2012 WL 48047 (D. Nev. Jan. 9, 2012). One requirement for a legal malpractice claim is a duty owed by the attorney, which usually is established through the attorney-client relationship. In U-Haul's claims, the attorney being sued represented U-Haul's adversary in the litigation. Although courts, in rare circumstances, may find that a duty is owed by an attorney to a third party, "[n]o Nevada Court has recognized a duty owed to opposing counsel." *Id.* at *2.

Of Cats and Foxes and Tardiness

An annual survey, conducted by jobs website CareerBuilder, on reasons for employee tardiness in reporting to work revealed leading causes that are predictable: traffic (31%); insomnia (18%); and weather (11%). Among the

creative reasons for tardiness were an employee's cat being afflicted with hiccups and another late employee's car keys being stolen by a fox. Suspicious excuses that turned out to be true included an employee's leg being caught between the subway platform and a subway car and an employee taking a personal call from the state governor. *See That Darned Cat and Other Excuses Highlighted in Annual Tardiness Survey*, Lab. Rel. Week (BNA) No. 26, at 177 (Jan. 26, 2012).

II. UNITED STATES SUPREME COURT CASES (DECIDED AND PENDING)

A. Employment Discrimination

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012). Facts: Claimant was a school teacher at an ecclesiastical school affiliated with the Lutheran Church. She was classified as a "called" teacher, who had taken religious classes and who was involved for about 45 minutes each day in religious teaching. She spent the rest of her seven-hour teaching day teaching secular subjects. Unlike contract teachers, called teachers, who were hired by the church congregation, could not be dismissed without cause. When the teacher became ill at a church golf outing, she was unable to begin a school year, and she was encouraged by school administrators to take a disability leave of absence with the assurance that she would have a job when she was healthy. Teacher was diagnosed with narcolepsy. When the school board adopted a position that employees who were on disability leave for more than six months should resign their calls so that their positions could be filled, teacher presented a work release note from her doctor. After tumultuous negotiations between teacher and the principal and board, including denial of teacher's attempted return to work and her threat to commence litigation, the church rescinded her call and she was notified of her termination. Teacher filed a charge with the EEOC, alleging discrimination and retaliation on the basis of disability. The EEOC sued the church and school for disability retaliation, and teacher intervened. The district court granted summary judgment in favor of the defendant, holding that it lacked subject matter jurisdiction and could not inquire into the claims because of the "ministerial exception" to the ADA, a court-created exception, based on the First Amendment's guarantees of religious freedom,

to employment discrimination claims between a religious organization and one of its ministers. The Sixth Circuit reversed, construing the ministerial exception more narrowly. The Sixth Circuit applied the primary duties test to the case and concluded that a teacher who spent six hours and fifteen minutes out of a seven-hour day on secular teaching duties did not come within the ministerial exception.

Issue: Whether the ministerial exception shields a church-affiliated school from a disability retaliation claim by a teacher labeled as a minister who spent most of her workday teaching secular subjects.

Holding and Rationale: Yes. The Court’s opinion, authored by Chief Justice Roberts, posed the issue as follows: “[W]hether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group’s ministers.” *Id.* at 699. The Court noted that no Supreme Court opinion had yet addressed the ministerial exception to the federal employment discrimination laws, although many courts of appeals have recognized such an exception. The Court began by agreeing that the ministerial exception exists. The Court also resolved a circuit split by holding that the ministerial exception is an affirmative defense rather than a jurisdictional bar. *Id.* at 709 n.4. Turning to application of the exception to the case, the Court declined to adopt a “rigid formula for deciding when an employee qualifies as a minister,” but concluded that the exception did apply to the case before it. *Id.* at 707. First, the church held the complaining teacher out as a minister with a role distinct from most church members. Second, her title as a minister was indicative of significant religious training followed by a formal commissioning. *Id.* Third, the teacher held herself out as a minister. *Id.* at 707-08. Fourth, her “job duties reflected a role in conveying the Church’s message and carrying out its mission.” *Id.* at 708. The Court summarized as follows: “In light of these considerations—the formal title given [the teacher] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that [the teacher] was a minister covered by the ministerial exception.” *Id.*

The Sixth Circuit, applying the “primary duties” test, had held that the ministerial exception did not apply. The Supreme Court noted three errors of the Sixth Circuit: The court 1) failed to see relevance in the fact that the teacher was a commissioned minister; 2) attached too much significance to the fact that lay and called teachers at the school performed the same

religious duties; and 3) placed too much emphasis on the teacher's performance of her secular duties. The Court stated that the Sixth Circuit had made the amount of time that the teacher spent on religious and secular duties determinative of the issue, and the issue cannot "be resolved by a stopwatch." *Id.* at 709.

See Jay P. Warren, *Court Sets Standard for Religion Defense to Title VII Claims*, 40 Labor & Employment Law 2 (Winter 2012).

Applying *Hosanna-Tabor: Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, 114 Fair Empl. Prac. Cas. (BNA) 1316 (S.D. Ohio Mar. 29, 2012). A federal district court, applying *Hosanna-Tabor*, held that the ministerial exception did not apply to bar the Title VII claim of a technology coordinator, employed by private Catholic schools, who oversaw the computer systems at the schools and instructed students on computer usage. Plaintiff was terminated after she notified the principal that she was pregnant and would need maternity leave. The first reason given was that plaintiff was fired for "becoming pregnant outside of marriage." However, that reason was changed to termination because plaintiff used artificial insemination to become pregnant, which also violated the philosophy and teachings of the Roman Catholic Church. Plaintiff sued for pregnancy discrimination under federal and state employment discrimination laws. The court, applying the considerations from *Hosanna-Tabor*, concluded that plaintiff's job duties showed that she was not a minister for purposes of the ministerial exception. Indeed, the court found it "dispositive" that plaintiff was not permitted to teach Catholic doctrine because she was a nonCatholic. *Id.*, 2012 WL 1068165 at *5.

Kloekner v. Solis, 639 F.3d 834 (8th Cir. 2011), *cert. granted*, 132 S. Ct. 1088, 181 L.Ed.2d 805, 80 USLW 3090, 80 USLW 3119, 80 USLW 3421, 80 USLW 3425 (U.S. Jan 13, 2012) (No. 11-184).

Issue: Whether the Federal Circuit or the federal district courts have jurisdiction over "mixed cases" under the Civil Service Reform Act when an employee challenges her termination before the Merit Systems Protection Board and asserts discrimination claims. The Eighth Circuit explained the issue as follows:

The appeal requires us to again consider complex statutes governing federal employee complaints of wrongful employment action. The jurisdictional issue arises because Congress in the Civil Service Reform Act of 1978 bifurcated judicial review of MSPB decisions. Most petitions for review of final MSPB decisions must be filed in the Federal Circuit, 5 U.S.C. § 7703(b)(1), whose jurisdiction is exclusive, 28 U.S.C. § 1295(a)(9). However, actions seeking review in “[c]ases of discrimination” are filed in an appropriate district court, as provided in federal anti-discrimination statutes. 5 U.S.C. § 7703(b)(2).

Kloeckner, 639 F.3d at 834. The Eighth Circuit held that “because in this case the MSPB did not reach the merits of Kloeckner’s discrimination claims in dismissing her mixed case appeal as untimely, the district court properly ruled that the Federal Circuit had exclusive jurisdiction to review the MSPB’s dismissal.” *Id.* at 838.

Vance v. Ball State Univ., 646 F.3d 461 (7th Cir. 2011), *cert. granted*, 2012 WL 2368689, 80 USLW 3301, 80 USLW 3700, 80 USLW 3707 (U.S. June 25, 2012) (No. 11-556, 11A192).

Facts: Plaintiff, the only African American in her department at the university, filed a charge with the EEOC alleging a racially charged hostile working environment. Plaintiff argued that three of the persons engaging in racial harassment were her supervisors.

Issue: Whether one is a supervisor for purposes of Title VII when one has the authority to direct an employee’s daily activities but lacks the authority to hire, fire, demote, promote, transfer, or discipline the employee.

Holding and Rationale of the Seventh Circuit: No. The court applied the standard for imposing liability for co-worker harassment (knew or should have known and failed to take prompt and effective remedial action—negligent in discovering and remedying the harassment) rather than the standard for supervisor harassment from *Faragher* and *Ellerth*. Under the supervisor standard, the employer is strictly liable for harassment inflicted by supervisors unless the harassment did not result in a “tangible employment action” and the employer can assert and satisfy an affirmative defense. The Seventh Circuit held that plaintiff’s assertions--that one of the harassers was her supervisor because she had the authority to tell plaintiff

what to do and she did not clock in like other hourly employees—were inadequate to make the employee a supervisor. The Seventh Circuit explained that it had not joined other circuits that consider authority to direct an employee’s daily activities to be adequate for supervisor status. Instead, the Seventh Circuit adheres to the standard that a supervisor has the power to directly affect the terms and conditions of an employee’s employment (fire, hire, promote, demote, transfer or discipline).

B. Employee Retirement Income Security Act (ERISA)

U.S. Airways, Inc. v. McCutchen, 663 F.3d 671 (3d Cir. 2011), *cert. granted*, 2012 WL 1439294, 80 USLW 3638, 80 USLW 3700, 80 USLW 3707 (U.S. Jun 25, 2012) (No. 11-1285, 11A879).

Facts: A health care plan administered by U.S. Airways paid for a plan participant’s medical expenses after he was involved in auto accident. Participant then recovered judgment against third parties. U.S. Airways, which had not sought to enforce subrogation rights, demanded reimbursement of entire amount of medical expenses paid, although participant’s net recovery, once legal fees were deducted, was lower than amount paid and demanded by U.S. Airways. The summary plan description provided as follows: “You will be required to reimburse the Plan for amounts paid for claims out of any monies recovered from a third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise.”

Issue: Whether plan participant could assert equitable limitations, such as unjust enrichment, on the administrator’s equitable claim.

Holding and Rationale of the Third Circuit: Yes, held the Third Circuit. The court said that the case presented the issue left open in *Sereboff v. Mid Atlantic Medical Servs., Inc.*, 547 U.S. 356 (2006): “whether § 502(a)(3)'s requirement that equitable relief be ‘appropriate’ means that a fiduciary like US Airways is limited in its recovery from a beneficiary like McCutchen by the equitable defenses and principles that were “typically available in equity.” *McCutchen*, 663, F.3d at 675-76. The court agreed with the plan participant’s argument that the term “appropriate equitable relief” limits relief to what is appropriate under traditional equitable principles, including specifically in the case before the court, unjust enrichment. *Id.* at 676. The Third Circuit disagreed with circuits that had held that it would be

“pioneering federal common law” to place equitable limitations on an equitable claim. *Id.* at 678. The court relied on *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), for the proposition that the benefit plan is subject to modification and even equitable reformation. *McCutchen*, 663 F.3d at 678. The court noted the distinction that in *Amara* the basis for reformation was intentional misrepresentations by the employer, but it insisted that the broader point of *Amara* is that with courts sitting in equity, “contractual language was not as sacrosanct as it is normally considered to be when applying breach of contract principles at common law.” *Id.* at 679. Thus, applying unjust enrichment, the court held that requiring the participant to provide full reimbursement to the administrator would constitute “inappropriate and inequitable relief” and would be a windfall to U.S. Airways. *Id.* “Equity abhors a windfall.” *Id.* The Third Circuit decision is in conflict with decisions of the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits, holding that courts should not apply common law theories to alter express terms of an ERISA plan.

C. Family and Medical Leave Act and 11th Amendment Immunity

Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

Facts: Plaintiff was employed by the Court of Appeals of the state of Maryland. When Coleman requested sick leave, he was informed he would be terminated if he did not resign. Plaintiff sued the state court in federal district court. The district court dismissed the suit on the basis that the Maryland Court of Appeals is an entity or instrumentality of the State for purposes of sovereign immunity. The district court concluded the FMLA’s self-care provision did not effectively abrogate the State’s 11th Amendment immunity from suit. The Fourth Circuit affirmed, distinguishing *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which the Supreme Court held that the family-care provision did abrogate the immunity. The *Hibbs* decision, however, did not support a finding of congruence and proportionality regarding the self-care leave provisions in the FMLA, as there was no evidence that Congress sought to address sex discrimination in the self-care provision nor that, even if Congress had sought to address such sex discrimination, there would be evidence

supporting such a history of discrimination by the states. Thus, the self-care leave provisions do not pass the congruence-and-proportionality test.

Issue: Whether Congress abrogated the states' Eleventh Amendment immunity from lawsuit in the FMLA's self-care provision of leave.

Holding and Reasoning: No. A plurality opinion reasoned as follows. The Family and Medical Leave Act of 1993 (FMLA) entitles an employee to take up to 12 work weeks of unpaid leave per year for four reasons including "(D) the employee's own serious health condition when the condition interferes with the employee's ability to perform at work." States, as sovereigns, are immune from damages suits, unless they waive that defense. Congress may also abrogate the States' immunity pursuant to its powers under §5 of the Fourteenth Amendment. The intent of Congress to abrogate the states' immunity under the FMLA is clear. However, to assess whether Congress validly exercised the power requires an assessment of the evil or wrong to be remedied and the means Congress adopted to remedy it. *Id.* at 1333. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted. *Coleman*, 132 S. Ct. at 1334 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). The injury, sex discrimination or sex stereotyping in sick-leave policies, was not pervasive at the time the FMLA was enacted. The legislative history indicates a concern for economic burdens resulting from job loss due to illness and a concern for discrimination based on illness, not sex. *Id.* at 1335. The court concluded that removing the states' immunity "is not a congruent and proportional remedy." *Id.* The Court further rejected the argument that the self-care provision could be bootstrapped as a "necessary adjunct" to the family-care provision. Finally, the Court rejected the argument that, because the self-care provision helps single parents retain their jobs when they become ill and most single parents are women, the provision has an adequate connection to sex discrimination. The Court stated that, although a disparate impact may be relevant evidence of discrimination, it is insufficient to prove a constitutional violation. *Id.* at 1337. Finally, the Court observed that a state is not required to assert its 11th Amendment immunity. A state may either waive its immunity or create a parallel state law cause of action. *Id.* at 1337-38.

Justice Scalia, concurring in the judgment, called for the Supreme Court to abandon the 'congruence and proportionality' approach in favor of one that is properly tied to the text of § 5. *Id.* at 1338 (Scalia, J., concurring in the judgment).

D. Public Employees and the Constitution

Knox v. Service Employees Int'l Union, Local 1000, 132 S. Ct. 2277 (2012).

Facts: The case involved a fee assessment under a union shop agreement. Under California law, public-sector employees in a bargaining unit may vote to create an “agency shop” arrangement under which all the employees are represented by a union selected by the majority. Employees in the unit are not required to join the union, but as a condition of employment, employees are required to pay a “fair share fee” to defray costs of collective bargaining if they elect not to join the union and pay full union dues. However, the Supreme Court has held that, under such an arrangement, First Amendment concerns are implicated. In view of those concerns, a union cannot require nonmembers to contribute to its political and ideological projects. *Knox*, 132 S. Ct. at 2284 (citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)). Furthermore, under the Supreme Court’s decision in *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986), a union is required to send an annual fee notice to nonmembers. In *Hudson* the Court required “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.” *Hudson*, 475 U.S. at 310. In the *Knox* case, the union issued the annual *Hudson* notice. During the year, the union assessed an additional temporary fee (a 25% increase) for political activities regarding state ballot issues. Employees who had filed a timely objection after the regular *Hudson* notice were required to pay only 56.35% of the temporary increase. The plaintiffs filed a class action, representing two classes of nonunion employees—those who objected to the union’s annual *Hudson* notice and those who did not object. Their §1983 claims alleged that the special assessment violated their First, Fifth, and Fourteenth Amendment rights.

Issues:

- 1) Whether a state, consistent with the First and Fourteenth Amendments, may condition employment on the payment of a special union assessment intended for political expenditures without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to object. This was the claim of the objectors.
- 2) Whether a state, consistent with the First and Fourteenth Amendments, may condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot

measures. This was the claim of the nonobjectors.

Holdings and Rationales:

To comply with First Amendment restrictions, “the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out.” *Id.* at 2293. The Court reasoned that permitting unions to impose an initial opt-out requirement on nonmembers with the *Hudson* notice is a “substantial impingement on First Amendment rights,” and a second opt-out for the special fee could not be justified. *Id.* The union may impose a special assessment or dues increase to meet new expenses but only after the union provides fresh notice and receives affirmative consent of members to exact payment. “[W]hen a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent.” *Id.* at 2296.

A case to watch is *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), *petition for cert. filed*, 80 USLW 3368 (Nov. 29, 2011) (No. 11-681). One issue raised in the cert. petition was stated as follows: May a State, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the State for greater reimbursements from its Medicaid programs? The Seventh Circuit held that the First Amendment did not prohibit an agreement compelling nonunion state employees to pay fair share fees. Because the court determined that the personal assistants were state employees, it held that the case was controlled by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), in which the Supreme Court held that agency shop agreement between a board of education and a teachers’ union could require teachers who were not union members to pay fees to the union for collective bargaining services.

The Court has invited the Solicitor General to submit a brief regarding the granting of certiorari. *See Harris v. Quinn*, ___ S. Ct. ___, 2012 WL 2470091 (U.S.), 80 USLW 3716 (June 29, 2012).

Elgin v. Dept. of Treasury, 132 S. Ct. 2126 (2012).

Facts: Plaintiffs were federal employees discharged pursuant to 5 U.S.C. § 3328, which bars from Executive agency employment anyone who knowingly and willfully failed to register for the Selective Service as

required by the Military Selective Service Act, 50 U.S.C. App. § 453. Plaintiff Elgin challenged his discharge before the Merit Systems Protection Board (MSPB), claiming that § 3328 is an unconstitutional bill of attainder and unconstitutionally discriminates based on sex when combined with the Military Selective Service Act's male-only registration requirement. An Administrative Law Judge dismissed the case for lack of jurisdiction, ruling that an employee is not entitled to MSPB review of agency action based on an absolute statutory bar to employment. Rather than appealing to the Federal Circuit, plaintiffs filed a lawsuit in federal district court, raising the challenges to the constitutionality of the law and seeking declaratory and injunctive relief and reinstatement. The district court rejected the argument that it lacked jurisdiction and went on to deny plaintiffs' claims on the merits. On appeal, the First Circuit vacated and remanded with instructions to dismiss for lack of jurisdiction, instructing that the CSRA provides a forum to adjudicate the constitutionality of a federal statute and plaintiffs were "obliged to use it."

Issue: Whether the Civil Service Reform Act is the exclusive means of judicial review when a qualifying employee challenges an adverse employment action, arguing that a federal statute is unconstitutional.

Holding and Rationale: Yes. It is fairly discernible that Congress intended the statute's review scheme to provide the exclusive avenue to judicial review for covered employees who challenge covered adverse employment actions, even when those employees argue that a federal statute is unconstitutional. The Court reasoned that the claims could be meaningfully reviewed in the Federal Circuit. The proper inquiry should be whether Congress' intent to preclude district court jurisdiction was "fairly discernible in the statutory scheme," applying the test of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). The Court found this "fairly discernible" from the CSRA's text, structure, and purpose. *Elgin*, 132 S. Ct. at 2133. The text of the CSRA precludes extrastatutory review to those employees to whom the CSRA grants administrative and judicial review. The Court found the statute to be comprehensive in prescribing remedies, protections, actions protected, and a system of review before the MSPB and the Federal Circuit. Plaintiffs sought to carve out an exception for constitutional challenges to federal statutes. However, nothing in the CSRA precludes review of constitutional claims. *Elgin*, 132 S. Ct. at 2134. The purpose of the CSRA is to create an integrated review scheme to replace inconsistent decisionmaking and duplicative judicial review. That review scheme would

be undermined if constitutional claims circumvented MSPB review. Furthermore, the Court found that CSRA scheme can provide meaningful review of constitutional claims. Regardless of whether the MSPB as an agency would be powerless to declare a statute unconstitutional is jurisdictional, the Federal Circuit can “meaningfully address” those issues. The CSRA empowers the MSPB to take evidence and find facts for Federal Circuit review. Plaintiff’s claims are subject to meaningful review within the CSRA scheme. The Court also rejected plaintiffs’ argument that the CSRA did not preclude their suit because their claims were “wholly collateral” to the CSRA scheme. In sum, the Court held that “it is fairly discernible that the CSRA review scheme was intended to preclude district court jurisdiction over [plaintiff’s constitutional challenges to statutes].” *Id.* at 2140.

E. Fair Labor Standards Act

Christopher v. SmithKline Beechman Corp., 132 S. Ct. 2156 (2012).

Issue: Whether pharmaceutical sales representatives are covered by the outside sales exemption of the FLSA. That exemption provides as follows:

any employee employed in a bona fide executive, administrative, or professional capacity ... or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])....

29 U.S.C. § 213(a)(1). The Ninth Circuit held that the salesmen were exempt.

Holding and Rationale: Yes. The Court rejected the DOL’s view that the pharmaceutical detailers are not exempt outside salesmen. The parties agreed that the DOL’s regulations on point were properly promulgated and were entitled to *Chevron* deference. However, the parties disagreed about whether the DOL’s interpretation of the regulations was entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997). The Court withheld *Auer* deference and gave the Department of Labor’s interpretation of the FLSA a measure of deference proportional to its power to persuade, and the Court found the interpretation of its regulations “quite unpersuasive.” *Christopher*, 132 S. Ct. at 2169. The Court stated that one reason it withheld *Auer* deference was that the agency sought to impose

“massive liability” on the business for conduct that occurred before DOL announced its interpretation. Furthermore, the pharmaceutical industry would have had no reason to suspect violations of the FLSA because DOL had not brought enforcement actions despite the “decades-long practice of classifying pharmaceutical detailers as exempt employees.” *Id.* at 2168. Rejecting the DOL’s interpretation, the Court looked to the statutory language and the regulations and concluded that the pharmaceutical sales reps “qualify as outside salesmen under the most reasonable interpretation of the DOL’s regulations.” *Id.* at 2174.

Symczk v. Genesis Healthcare Corp, 656 F.3d 189 (3d Cir. 2011), *cert. granted*, 2012 WL 609478, 80 USLW 3512, 80 USLW 3700, 80 USLW 3707 (U.S. 2012) (No. 11-1059, 11A570).

Issue: “[W]hether an FLSA collective action becomes moot when (1) the putative representative receives a Rule 68 offer in full satisfaction of her individual claim prior to moving for “conditional certification,” and (2) no other potential plaintiff has opted in to the suit.” *Genesis Healthcare*, 656 F.3d at 197.

Holding and Rationale of the Third Circuit: No. The court found the use of Rule 68 as a tool or weapon for “strategic curtailment of representative actions” to be in conflict with the purposes of section 216(b).

“When a defendant’s Rule 68 offer threatens to preempt the certification process, reconciling the conflicting imperatives of Rules 23 and 68 requires allocating sufficient time for the process to ‘play out.’ . . . By invoking the relation back doctrine, a court preserves its authority to rule on a named plaintiff’s attempt to represent a class by treating a Rule 23 motion as though it had been filed contemporaneously with the filing of the class complaint. Consequently, ‘the relation back’ principle ensures that plaintiffs can reach the certification stage.”

Id. The Third Circuit reached a result consistent with the Fifth, Tenth, and Eleventh Circuits, and inconsistent with the Fourth, Seventh, and Eighth Circuits.

F. Immigration

Arizona v. United States, 132 S. Ct. 2492 (2012).

Facts: Arizona statute S.B. 1070 was enacted to provide a comprehensive

framework in dealing with illegal immigrants in the state. The United States sought to enjoin the law as preempted. The law has multiple parts but § 5(C) makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State. The district court granted the injunction and the Ninth Circuit affirmed.

Issue: Whether federal law dealing with combating the employment of illegal immigrants preempts §5(C) of Arizona Senate Bill 1070.

Holding and Rationale: Yes. The Federal Government's broad power over immigration stems from Art. I, § 8, cl. 4 of the Constitution and its inherent power to control and conduct foreign relations. The Supremacy Clause gives Congress the power to preempt state law. State law must yield to federal law in at least 2 circumstances absent an express provision: when Congress has occupied the field and when state law conflicts with federal law. Section 5(C) is preempted as it stands as an obstacle to the federal regulatory system. Congress, in enacting the Immigration Reform and Control Act of 1986 (IRCA), explicitly targeted employers for punishment for violation of the Act. "The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose." *Arizona*, 132 S. Ct. at 2505.

G. Longshore and Harbor Workers' Compensation Act

Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350 (2012).

Issue: "Whether the phrase 'those newly awarded compensation during such period' in Longshore Act § 6(c), applicable to all classes of disability except permanent total, can be read to mean 'those first entitled to compensation during such period,' regardless of when it is awarded." Quoted from *cert.* petition filed in case.

Holding: "[A]n employee is 'newly awarded compensation' when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf." *Roberts*, 132 S. Ct. at 1354.

Pacific Operators Offshore, LLP v. Valladolid, 132 S. Ct. 680 (2012).

Issue:

The Outer Continental Shelf Lands Act, 43 U.S.C., §§ 1331-1356 (OCSLA), governs those who work on oil drilling

platforms and other fixed structures beyond state maritime boundaries. Workers are eligible for compensation for “any injury occurring as the result of operations conducted on the outer Continental Shelf.” 43 U.S.C. § 1333(b) (2006). When an outer continental shelf worker is injured on land, is he (or his heir):

- (1) always eligible for compensation, because his employer's operations on the shelf are the but for cause of his injury (as the Third Circuit holds); or
- (2) never eligible for compensation, because the Act applies only to injuries occurring on the shelf (as the Fifth Circuit holds);
- (3) sometimes eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf (as the Ninth Circuit holds)?

Quoted from *cert.* petition.

Holding:

[W]e conclude that the Ninth Circuit's “substantial-nexus” test is more faithful to the text of § 1333(b). We understand the Ninth Circuit's test to require the injured employee to establish a significant causal link between the injury that he suffered and his employer's on-OCS operations conducted for the purpose of extracting natural resources from the OCS.

Although the Ninth Circuit's test may not be the easiest to administer, it best reflects the text of § 1333(b), which establishes neither a situs-of-injury nor a “but for” test. We are confident that ALJs and courts will be able to determine whether an injured employee has established a significant causal link between the injury he suffered and his employer's on-OCS extractive operations.

Pacific Operators Offshore, LLP, 132 S. Ct. at 691.

III. ISSUES WORTH WATCHING

A. Discrimination Against the Unemployed

Many employers have limited employment opportunities to those who are currently employed and refused to consider the unemployed. *See, e.g.*, Discrimination against the unemployed, CBS 60 Minutes Overtime, available at http://www.cbsnews.com/8301-504803_162-57380914-10391709/discrimination-against-the-unemployed/. The EEOC held a meeting to examine the issue on Feb. 16, 2012. *See* Press Release, *Out of Work? Out of Luck*, available at <http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm>.

At the federal level, bills were introduced in Congress. S. 1471 & H.R. 2501 are the Fair Employment Opportunity Act of 2011, 112th Congress, 2011–2012. The text of S.1471 is available at <http://www.govtrack.us/congress/bills/112/s1471>.

The Act declares it an unlawful practice for certain employers with at least 15 employees for each working day in each of at least 20 calendar weeks in the current or preceding calendar year to:

- (1) fail or refuse to consider for employment or to hire an individual as an employee based on present or past unemployment regardless of the length of time such individual was unemployed;
- (2) publish an advertisement or announcement for any job with provisions indicating that such an unemployed status disqualifies an individual and that an employer will not consider or hire an individual based on such status; and
- (3) direct or request that an employment agency account for such status when considering, screening, or referring applicants.

The Act Prohibits an employment agency (including agents and persons maintaining a website publishing job advertisements or announcements), based on such an individual's status as unemployed, from:

- (1) failing or refusing to consider, screen, or refer an individual for employment;
- (2) limiting, segregating, or classifying individuals in any manner limiting access to job information; or

(3) publishing an advertisement or announcement for any job vacancy that includes provisions indicating that such an individual is disqualified and that an employer will not consider or hire such individuals.

At the state level, Oregon became the second state, after New Jersey, to pass legislation prohibiting discrimination against the unemployed in job advertisements. *See Oregon Becomes Second State in Nation to Ban Discrimination Against Unemployed in Job Ads*, www.Salem-News.com (Mar. 29, 2012), available at <http://oregon.salem-news.com/2012/03/oregon-state-nation-ban-discrimination-unemployed-job-ads/>. Bills have been introduced in several other states.

B. Discrimination Based on Criminal Background

On April 25, 2012, the EEOC issued Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The following demographic information highlights the EEOC's concern with disparate impact discrimination: "Arrest and incarceration rates are particularly high for African American and Hispanic men. African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population. Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men."

C. Discrimination Based on Credit History

Seven states (California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington) have passed laws restricting the use of credit reports for employment purposes, and bills are pending in about 30 more states. *See* John Herzfeld, *Employers Would be Wise to Avoid Checking Credit Histories, Attorneys Suggest*, Daily Lab. Rep. (BNA) No. 48, at A-12 (Mar. 12, 2012). The EEOC has held hearings and filed lawsuits based on employers' use of credit histories, which can have a disparate impact on applicants in violation of Title VII. *See, e.g., EEOC v. Kaplan Higher Educ. Corp.*, N.D. Ohio, No. 1:10 CV 2882, filed 12/2010), <http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm>.

D. Computers and Social Media

Employers have been using social media as a device for screening applicants and checking social media to learn about the communications and activities of current employees. *See, e.g.*, Manuel Valdes & Shannon McFarland (Associated Press), *Employers Asking Job Applicants for Facebook Passwords*, nola.com (Mar. 20, 2012), available at http://www.nola.com/business/index.ssf/2012/03/employers_asking_job_applicant.html. Recently, section 7 of the National Labor Relations Act has emerged as a check on such employer activity. A number of cases recently have alleged that employers were interfering with concerted activity for mutual aid or protection. *See* Susy Hassan, *The NLRB's Evolving Stance on Regulating Employee Social Media Use*, 2011-Nov. Bus. L. Today 1; Christine Neylon O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 Suffolk U. L. Rev. 29 (2011).

Hispanics United of Buffalo, Inc., 2011 WL 3894520 (Sept. 2, 2011) became the first case of its kind in which an ALJ found that the discharge of employees for Facebook postings violated the NLRA. *See Administrative Law Judge Finds New York Nonprofit Unlawfully Discharged Employees Following Facebook Posts*, at <http://nlrb.gov/news/administrative-law-judge-finds-new-york-nonprofit-unlawfully-discharged-employees-following-fac> (on NLRB website). The Acting General Counsel of the Board issued a memorandum summarizing the social media cases of the last year. *See Acting General Counsel Releases Report on Social Media Cases*, at <http://nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases> (on NLRB website). The Acting General Counsel issued a second memorandum in January 2012. *See* <https://nlrb.gov/news/acting-general-counsel-issues-second-social-media-report>. He issued a third on May 30, 2012, evaluating the social media policies of seven businesses, finding six to violate the NLRA, but finding Wal-Mart's not to violate the Act. *See* Memorandum OM 12-59, available at <http://www.nlrb.gov/search/simple/all/social%20media>.

The NLRB held that a rule in an employee handbook regarding

employee postings violated Section 8(a)(1) in *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 12, 2012). The rule stated as follows:

Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

The Board stated that the standard to evaluate such rules is “whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Id.* (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf’d*, 203 F.3d 52 (D.C. Cir. 1999)). The Board concluded that the language of the rule “clearly encompasses concerted communications protesting the Respondent's treatment of its employees. Indeed, there is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule.” *Id.*

Another source of potential liability for employers is the Stored Communications Act, 18 U.S.C. §§ 2701 et seq. *See, e.g., Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003).

Maryland became the first state to enact a law regulating employers’ ability to demand of applicants or employees their passwords to personal accounts or services through an electronic communications device. *See Kathy Lundy Springuel, Maryland is First State to Restrict Employer Demands for Employee, Applicant Passwords*, Daily Lab. Rep. (BNA) No. 85, at A-12 (May 2, 2012). The law also prohibits employees from downloading employer proprietary information or financial data to various unauthorized sites and preserves the right of employers to conduct investigations. Similar bills are pending in other states, including California, Illinois, Minnesota, and New York. *Id.* A similar bill was introduced in Congress (Social Networking Online Protection Act, S. 3074 & H.R. 5050). *See Derrick Cain, Democrats Offer Bill Aiming to Protect Worker Privacy*

on *Social Networking Sites*, Lab. Rel. Week (BNA) No. 26, at 864 (May 9, 2012); Derrick Cain, *Senators Offer Legislation to Prohibit Employers From Getting Private Passwords*, Lab. Rel. Week (BNA) No. 26, at 911 (May 16, 2012).

Finally, employers that access social media sites risk violating the Fair Credit Reporting Act, 15 U.S.C. §§ 1681et seq. See Rhonda Smith, *Access to Job Applicants' Social Media Sites Could Cause Legal Challenges*, *Attorney Says*, Daily Lab. Rep. (BNA), No. 48, at A-7 (Mar. 3, 2012).

E. Pregnancy and Caregiver Discrimination

The EEOC held a public meeting on Feb. 15, 2012 to focus on pregnancy and caregiver discrimination. See Press Release, *Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelists Tell EEOC* (Feb. 15, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/2-15-12.cfm>. The EEOC issued a guidance on caregiver discrimination in 2007, available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

See Linda B. Dwoskin, *Discrimination Against Caregivers: What It Is and What an Employer Can Do to Prevent Claims*, Daily Lab. Rep. (BNA), No. 116, at I-1 (June 15, 2012).

F. Retaliation: The Most Dangerous Claim

Retaliation is now the most commonly filed charge with the EEOC. See Charge Statistics FY 1997 Through FY 2011, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm/>. The case law in the Supreme Court has been generally favorable to plaintiffs. See generally Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525 (2011); Harold J. Datz, *Retaliation Cases—A Growing and Important Field of Employment Law*, Daily Lab. Rep. (BNA) No.77, at I-1 (Apr. 20, 2012).

G. Employment Protection for Older People

The Supreme Court's ruling that plaintiffs asserting claims under the Age Discrimination in Employment Act must prove but-for causation in order to recover still is rankling to some. See *Gross v. FBL Fin. Servcs.*,

Inc., 557 U.S. 167 (2009). The Protecting Older Workers Against Discrimination Act (S.2189 in the current session), introduced in two sessions of Congress, would overturn *Gross*. Available at <http://www.govtrack.us/congress/bills/112/s2189>. Furthermore, long-term unemployment of older workers is a persistent concern. See Chris Opfer, *Senate Committee Considers Laws to Fight Long-Term Unemployment of Older Workers*, Daily Lab. Rep. (BNA) No. 95, at A-13 (May 16, 2012) (discussing proposed Older Worker Opportunity Act, S.145, available at <http://www.govtrack.us/congress/bills/112/s145>). The Older Worker Opportunity Act would create tax incentives for employers to employ older workers in flexible work programs.

IV. EMPLOYMENT DISCRIMINATION LAWS (GENERALLY)

A. Evidence of Discrimination

Causation Standards: Two years after the Supreme Court announced that “because of” as used in the Age Discrimination in Employment Act means “but for” causation in *Gross v. FBL Fin. Servcs., Inc.*, 557 U.S. 167 (2009), courts continue to apply the *McDonnell Douglas* pretext analysis to ADEA claims. See, e.g., *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943 (10th Cir. 2011); see also *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1278 (10th Cir. 2010) (“Although we recognize that *Gross* created some uncertainty regarding burden-shifting in the ADEA context, we conclude that it does not preclude our continued application of *McDonnell Douglas* to ADEA claims.”). Curiously, the Tenth Circuit in *Simmons* stated as follows: “[Plaintiff] has not challenged the district court’s holding that there is no direct evidence of discrimination, so we evaluate her ADEA claim using the three-step framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 . . . (1973).” *Simmons*, 647 F.3d at 947. After the Supreme Court’s decision in *Gross*, what is the relevance of whether there was direct evidence? Other circuits have agreed that *McDonnell Douglas* still applies under the ADEA: *Velez v. Thermo King Day P.R. Inc.*, 585 F.3d 441 (1st Cir. 2009); *Leibowitz v. Cornell Univ.*, 584 F.3d 487 (2d Cir. 2009). Joining other circuits, the Ninth Circuit stated in a recent decision, “We join them and hold that nothing in *Gross* overruled our cases utilizing this framework to decide summary judgment motions in ADEA cases. The *McDonnell Douglas* test is used on summary judgment, not at trial.” *Shelley v. Geren*, 666 F.3d 599, 607 (9th Cir. 2012).

Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 26 A.D. Cases 389 (6th Cir. 2012).

Issue: Whether the proper causation standard to be used in jury instructions for claims under the Americans with Disabilities Act is “sole cause.”

Holding and Rationale: No. The Sixth Circuit explained that for seventeen years it had required “sole cause,” having imported it from the Rehabilitation Act of 1973. However, the court stated that “[o]ur interpretation of the ADA not only is out of sync with the other circuits, but it also is wrong.” *Lewis*, 681 F.3d at 315. The court also rejected the plaintiff’s argument to adopt “motivating factor” as the standard under the ADA. The court explained that the Supreme Court’s analysis that the statutory “because of” language in the ADEA means “but-for causation” applies equally to the ADA. *Id.* at 318. “[T]he same tools of statutory construction that require us to resist importing the ‘solely’ language from the Rehabilitation Act into the ADA require us to resist importing the ‘motivating factor’ burden-shifting framework of Title VII into the ADA.” *Id.* at 321.

Ponce v. Billington, 679 F.3d 840 (D.C. Cir. 2012).

Facts: For Title VII claim, jury instruction stated that race, sex, or national origin must be proven as the “sole reason” for nonselection, and then stated plaintiff must prove that “but for” race, sex, or national origin he would have been hired.

Issue: Whether the jury instruction incorrectly stated the standard of causation.

Holding and Rationale: Yes, “sole reason” was incorrect, but it was not reversible error because the instruction went on to define “sole reason” as meaning “but for.” The court explained “a little black-letter law.” *Ponce*, 679 F.3d at 843. There are two separate ways in Title VII to establish liability: 1) “because of” under 42 U.S.C. § 2000e-2(a)(1), the single-motive theory, which requires but-for causation and usually employs the *McDonnell Douglas* analysis; and 2) “motivating factor” under 42 U.S.C. § 2000e-2(m), the mixed-motives case, for plaintiffs who cannot establish but-for causation. *Id.* at 844-45. The court explained that these are “alternative ways of establishing liability” and a plaintiff can proceed under both simultaneously and need not allege in the complaint that the action is pretext or mixed-motives. *Id.* at 845. However, “at some point [plaintiff] must

place the employer and the court on notice as to the theory or theories under which he intends to proceed.” *Id.* The court gave an example of such a time—when the court is ruling on a motion for summary judgment. *Id.* The court agreed that there is a difference between sole cause and but for, and it took the blame for having used the sole cause language, and “banish[ed] the word ‘sole’ from our Title VII lexicon.” *Id.* at 846. The court found the jury instruction not to be an abuse of discretion. Further, the court found no contention by plaintiff’s counsel that the case was mixed-motives.

Keys v. Humana, Inc., 684 F.3d 605 (6th Cir. 2012).

Issue: Whether the claim of a plaintiff asserting individual disparate treatment under Title VII is due to be dismissed for failure to plead in the complaint the elements of the *McDonnell Douglas* prima face case.

Holding and Rationale: No. The Supreme Court’s decisions in *Twombly* and *Iqbal* did not alter its holding in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). *Twombly* and *Iqbal* did establish a “plausibility” standard for assessing whether a complaint’s factual allegations support its legal conclusions. That standard does apply to causation in discrimination claims. Thus, the complaint must allege sufficient “factual content” from which a court could draw the reasonable inference of discrimination because of a protected characteristic. “If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied.” *Keys*, 684 F.3d at 610.

Lahrichi v. Lumera Corp., 433 Fed. Appx. 519 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2780 (U.S. 2012) (No. 11-1267, 11A342).

Plaintiff lost Title VII case on summary judgment. In cert. petition, he asked Supreme Court to clarify whether a plaintiff must submit evidence that every reason asserted by defendant is pretextual. Plaintiff also argued that the Ninth Circuit erred by mechanically dismissing his claim because he adduced no evidence of a similarly situated comparator. The Supreme Court denied certiorari.

B. Coverage and Jurisdiction

Partners as Employees

Reprising its litigation with Sidley Austin of several years ago, the EEOC sued Kelley, Drye & Warren under the Age Discrimination in Employment Act regarding its policy of de-equitizing partners at age 70 and

thereafter compensating them solely with discretionary annual bonuses. *See* Kevin P. McGowan, *EEOC Sues Law Firm for Alleged Bias Against Partners Who Work Past Age 70*, Daily Lab. Rep. (BNA) No. 19, at A-1 (Feb. 1, 2010) (discussing *EEOC v. Kelley Drye & Warren*, S.D.N.Y., No. 10-CV-0655, complaint filed 1/28/10)). The EEOC settled the lawsuit for \$574,000. On April 10, 2012, the U.S. District Court for the Southern District of New York approved a three-year consent decree in which the firm amended its partnership agreement to eliminate the practice at issue. *See* Kevin P. McGowan, *EEOC, Law Firm Settle Age Bias Suit for \$574,000 and Changes in Practice*, Daily Lab. Rep. (BNA) No. 70, at A-1 (Apr. 11, 2012).

Culbreth v. Washington Metro. Area Transit Auth., No. 10-33221, 2012 WL 959385, 26 A.D. Cases 176 (D. Md. Mar. 20, 2012).

Issue: Whether the Washington Metropolitan Area Transit Authority was shielded from suit under the Genetic Information Non-discrimination Act by the 11th Amendment of the U.S. Constitution.

Holding and Rationale: Yes. The WMATA possesses state immunity through an interstate compact. “Absent a waiver, WMATA can only be subject to suit if GINA abrogates the agency’s Eleventh Amendment Immunity” pursuant to a valid exercise of its enforcement powers under §5 of the Fourteenth Amendment. The district court applied the congruence and proportionality test and found “there is no evidence of a pattern or practice of discrimination by state employers on the basis of genetics. . . . GINA is not congruent or proportional to the harm to be remedied. . . . [E]ven if Congress intended to act pursuant to Section 5, the legislation is not congruent or proportional to the injury, and any abrogation of Eleventh Amendment immunity was ineffective.” *Culbreth*, 2012 WL 959385, at *6.

C. Procedures

In the aftermath of *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), much commentary and case law is sorting out the implications for employment class actions. *See, e.g.*, Patrick Dorrian, *Attorneys Discuss Impact of Dukes Case on Class Actions Under Employment Laws*, Daily Lab. Rep. (BNA), No. 57, at C-4 (Mar. 23, 2012).

One casualty of *Dukes* is *Puffer v. Allstate Insurance Co.*, 675 F.3d 709 (7th Cir. 2012). The intervenors in the case shifted strategy after *Dukes*, dropping their pattern or practice theory and asserting only the disparate

impact theory. The Seventh Circuit held that because plaintiff failed to meaningfully develop an argument regarding the disparate impact theory in the trial court, the intervenors' disparate impact claim was waived.

One hope for plaintiffs after *Dukes* may be an approach in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 2012 WL 3061874, 81 USLW 3062, 81 USLW 3154, 116 Fair Empl. Prac. Cas. (BNA) 288 (U.S. Oct. 1, 2012) (No. 11A1172, 12-113).

The plaintiffs had sued their employer for racial discrimination, and the district court denied certification. The plaintiffs renewed a motion for class certification in the appellate court on the basis of *Dukes*. The Seventh Circuit noted that it may seem that *Dukes* would be a perverse basis for renewing a motion for certification because *Dukes* was “possibly a milestone” in favor of defendants. Moreover, the theory of discrimination asserted by plaintiffs looked very much like the one at issue in *Dukes*: the allegations were that the company delegated discretion over decisions that influenced compensation of its 15,000 brokers to 135 complex directors who supervised 600 branch offices, and within each branch office, each had substantial autonomy. Two practices of the employer, teaming and account distributions were challenged as producing a disparate impact. The Seventh Circuit posed the issue this way: “whether the plaintiffs’ claim of disparate impact is most efficiently determined on a class-wide basis rather than in 700 individual lawsuits.” *McReynolds*, 672 F.3d at 490. The court explained the efficiency of class resolution of issues this way:

“Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained—and remember that the class has 700 members. But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful.”

Id. at 490-91. Turning to FRCP Rule 23(c)(4), the court stated that it provides “when appropriate, an action may be brought or maintained as a class action with respect to particular issues.” The court concluded that the two issues it had identified could most efficiently be addressed on a class-wide basis. The court explained that after the issues were resolved in a class action, if they were resolved in favor of plaintiffs, what could follow would be hundreds of separate suits, but they would be less complex with claim or issue preclusion applying for matters already resolved under 23(c)(4).

See Jessie Kokrda Kamens, *Professors Say Recent Seventh Circuit Ruling May Not Make “Issue Certification” a Trend*,” Daily Lab. Rep. (BNA) No. 50, at A-9 (Mar. 14, 2012). Some commentators have suggested that the *McReynolds* decision may provide a blueprint for litigants trying to overcome the obstacles to class action litigation. *Id.*

EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012), *reh’g and reh’g en banc denied* June 8, 2012.

Facts: The EEOC filed a class action lawsuit alleging sexual harassment, naming one employee and “approximately 270 similarly situated female employees.” The EEOC had attempted conciliation of the one employee’s charge, and after the efforts failed and the employer notified the EEOC that conciliation was futile, the EEOC filed the class action. After a number of dismissals that left 67 class members, the district court barred the EEOC from seeking relief for the 67 women because the EEOC had not conducted a reasonable investigation and bona fide conciliation of the claims. The district court awarded almost \$4.5 million in attorneys’ fees and expenses to the prevailing party defendant.

Issue: Whether the EEOC was required to conduct an investigation and engage in conciliation regarding the claims of each member of the class.

Holding and Rationale: Yes. The court chronicled the 1972 amendment that gave the EEOC the power to file suit in its own name. The court explained, however, that the conciliation model was not abandoned. After an employee files a charge of discrimination, the EEOC is required to investigate to determine reasonable cause. If reasonable cause is found to exist, then the EEOC attempts to remedy the discrimination through the informal process of conference, conciliation, and persuasion. *CRST*, 679 F.3d at 672. The court explained that the EEOC’s administrative process and power of suit

are “sequential steps in a unified scheme for securing compliance with Title VII.” *Id.* (quoting *EEOC v. Hickey–Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974)). The EEOC did not investigate and attempt conciliation of the allegations of the 67 persons. The Eighth Circuit concluded that the EEOC had failed to satisfy its statutory pre-suit obligations, and the district court did not abuse its discretion in dismissing the lawsuit. Because the Eighth Circuit reversed a couple of the district court’s grants of summary judgment, the defendant was no longer a prevailing party because it had live claims pending against it. The award of attorneys’ fees and expenses was thus vacated.

The dissent objected to the “unprecedented obligations” imposed on the EEOC to fulfill its presuit duties for each individual when pursuing a class claim. *CRST*, 679 F.3d at 695 (Murphy, J., dissenting).

The EEOC also took umbrage. *See* Jay-Anne B. Casuga, *Lopez Calls CRST ruling “Unprecedented,” Says EEOC Will Review Case, Weigh Options*, Daily Lab. Rep. (BNA) No. 37, at C-1 (Feb. 24, 2012).

EEOC v. Service Temps Inc., 679 F.3d 323 (5th Cir. 2012).

Facts: Defendant raised the defense that EEOC did not conciliate in good faith for the first time in motion for summary judgment.

Issue: Whether defense of failure to conciliate was waived when the defendant first responded to the complaint with an answer that failed to raise the defense.

Holding and Rationale: Yes. FRCP Rule 9 requires that for special matters, like conditions precedent, the pleader must raise them with particularity in the operative pleading. “[T]o deny that a nonjurisdictional condition precedent like conciliation had been performed, [defendant] was required to do so with particularity in its answer.” *Service Temps.*, 679 F.3d at 333. Furthermore, the district court’s denial of leave to amend the answer was within its discretion where defendant failed to account for its delay. *Id.* at 334.

Universal Agreements to Mediate: The EEOC and Family Dollar Stores signed a national universal agreement to mediate future discrimination charges prior to formal EEOC investigation or litigation. The EEOC has entered into 257 national and regional universal agreements to mediate with private sector employers. *See EEOC, Family Dollar to Mediate Future Charges*, Lab. Rel. Week (BNA) No. 26, at 1334 (July 18, 2012).

GINA: The EEOC published its final rule extending the recordkeeping requirements under Title VII and the ADA to employers covered by Title II of the Genetic Information Nondiscrimination Act (GINA). 29 CFR Part 1602, available at [http://op.bna.com.ezproxy.law.lsu.edu/dlrcases.nsf/id/edue-8r4pcp/\\$File/EEOC%20final%20rule%20--%20GINA%20recordkeeping.pdf](http://op.bna.com.ezproxy.law.lsu.edu/dlrcases.nsf/id/edue-8r4pcp/$File/EEOC%20final%20rule%20--%20GINA%20recordkeeping.pdf). The rule took effect on April 3, 2012.

V. AMERICANS WITH DISABILITIES ACT

ADA Amendments Act: The regulations implementing the ADA Amendments Act took effect on May 24, 2011. *See* <https://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>. The EEOC's question-and-answer document on the topic may be useful. *See*

http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

The EEOC also has PowerPoint slides on the regulations.

See EEOC Commissioners Discuss Highlights of Final ADA Amendments Act Regulations, Daily Lab. Rep. (BNA) No.57, at C-1 (Mar. 24, 2011); Patrick Dorrian, *EEOC Commissioner, Plaintiffs' Lawyer Review ADA in Light of Post-2008 Amendments*, Daily Lab. Rep. (BNA) No. 123, at C-1 (June 26, 2012).

EEOC v. Resources for Human Development, 827 F. Supp. 2d 688, 25 A.D. Cases 964 (E.D. La. Dec. 7, 2011).

“[A]ccording the EEOC Guidelines to the ADA the appropriate deference, the Court should recognize that severe obesity qualifies as a disability under the ADA and that there is no requirement to prove an underlying physiological basis.” *EEOC*, 827 F. Supp. 2d at 695.

Ekstrand v. School District of Somerset, 683 F.3d 826, 26 A.D. Cases 641 (7th Cir. 2012).

Facts: Plaintiff taught kindergarten at school from 2000 to 2005. In the spring of 2005, she asked to be reassigned to teach a first-grade class, and the school agreed. She was relocated to a first-grade classroom with no exterior windows in a busy, loud area of the school. She requested a change of rooms several times but was denied. In the fall of 2005, plaintiff began to experience symptoms of seasonal affective disorder, a form of depression.

She took a leave of absence, initially 3 months but extended for the entire school year and the next school year. After her leave commenced, her psychologist sent a letter to the school district office opining that natural light was crucial to plaintiff's recovery and that the room without windows had been a major cause of her condition. Plaintiff sued the school district under the ADA, asserting a claim for failure to make reasonable accommodation. The jury returned a verdict in her favor, and the district court denied motion for judgment as a matter of law.

Issue: Whether a reasonable jury could conclude that plaintiff was a qualified individual with a disability and that the school district knew about it, but failed to accommodate her with a new classroom.

Holding: Yes. The Seventh Circuit had ruled in a previous appeal of a ruling on summary judgment that there was sufficient evidence for plaintiff to survive the motion. “[U]nless evidence favoring [plaintiff] in the pretrial stage has since *vanished* (and there is no allegation that it has), we are presented with the same situation as before. Just as there was sufficient evidence for a possible verdict in [plaintiff's] favor on these very issues in the last appeal, so is there ample evidence at the post-trial stage for a reasonable jury to have found in [plaintiff's] favor.” *Ekstrand*, 683 F.3d at 829.

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

In its original opinion, a Seventh Circuit panel held that “the ADA does not require employers to reassign employees, who will lose their current positions due to disability, to a vacant position for which they are qualified.” 673 F.3d 543, 547 (7th Cir. 2012). The Seventh Circuit noted the circuit split: *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc) and *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc), holding that the ADA requires reassignment to vacant positions; compare with *Huber v. Wal-Mart Stores*, 486 F.3d 480, 483–84 (8th Cir. 2007) holding no such assignment required.

Using a procedural device, the panel overruled Seventh Circuit precedent and reversed its decision, holding that “[t]he Supreme Court has found that accommodation through appointment to a vacant position is reasonable. Absent a showing of undue hardship, an employer must implement such a reassignment policy.” *EEOC v. United Airlines, Inc.*, 693 F.3d at 764. The court described the reasonable accommodation analysis that the district court

must conduct under the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002):

In this case, the district court must first consider (under Barnett step one) if mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation. Assuming that the district court finds that mandatory reassignment is ordinarily reasonable, the district must then determine (under Barnett step two) if there are fact-specific considerations particular to United's employment system that would create an undue hardship and render mandatory reassignment unreasonable.

EEOC v. United Airlines, Inc., 693 F.3d at 764.

The Supreme Court denied certiorari in a case in which the Fourth Circuit affirmed a district court's ruling that the ADA does not require such assignment to a vacant position. *See Jackson v. FujiFilm Manuf. USA Inc.*, 447 Fed. Appx. 515, 2011 WL 4495512 (4th Cir. Sept. 29, 2011), *cert. denied*, 132 S. Ct. 2104 (2012), and *reh'g denied*, 2012 WL 2368724, 80 USLW 3708 (U.S. June 25, 2012) (No. 11-1064).

Peer v. F5 Networks, Inc., No. 11-cv-879, 3/19/12, 2012 WL 924349, 25 A.D. Cases 1727 (W.D. Wash. Mar. 19, 2012).

Facts: Plaintiff had some problems at work and was diagnosed with major depression. Plaintiff sent an email to her supervisor saying her new work schedule was stressing her out and exhausting her. The next day she sent a message on Facebook to her manager stating that she had spent every workday for the previous week "dream[ing] up practical ways to kill myself." Finally, she posted on her Facebook wall that "work feels like a war zone" and that she has "some serious PTSD." The company gave plaintiff a letter informing her she would not be allowed to return to work until she produced a valid work release from a health care provider. Despite plaintiff's providing a return-to-work release from her doctor, the employer would not permit her to resume work, citing the suicide message and stating that her return to work posed a direct risk or threat. The company assured plaintiff that it would engage in an interactive process with her and her doctor to determine what kinds of accommodations would be needed for

plaintiff to perform the essential functions of her job without direct risks or threats. Plaintiff's attempts to clarify what the employer would require for her to return were unavailing, and the employer sent her a termination letter stating that she and her doctor did not address the issue of whether she remained a threat of harm. Plaintiff sued under the ADA and state discrimination law. Both parties moved for summary judgment. In support of its summary judgment motion, the defendant company argued that plaintiff was not a "qualified individual" within the meaning of the laws because she posed a direct threat to her own safety and that she lost any protection under the laws because of her failure to participate in a good faith interactive process regarding accommodations.

Issue: Whether there were triable issues on the breakdown of the interactive process and the direct threat defense.

Holding and Rationale: Yes. On the employer's motion for summary judgment, the court denied the motion, ruling that the employer failed to meet "its threshold burden of showing the absence of any genuine issue of fact with respect to whether Ms. Peer acted in good faith in conjunction with the interactive process." *Peer*, 2012 WL 924349 at *5. The court elaborated: the employer provides "little in the way of specifics as to what engaging in the interactive process actually means or what type of attestations would be required." *Id.* The court concluded that a reasonable juror could find that plaintiff acted in good faith and the employer caused a breakdown in the interactive process. On plaintiff's motion for summary judgment, the court denied the motion, ruling that defendant had produced substantial evidence in support of its direct threat defense.

VI. TITLE VII/SECTION 1981

Hamilton v. Southland Christian School, Inc., 680 F.3d 1316 (11th Cir. 2012).

Facts: Plaintiff was a teacher at a small Christian school. As the court put it, she got "pregnant, married, and fired [i]n that order." *Hamilton*, 680 F.3d at 1317. After learning that plaintiff was pregnant, she and her fiancé married. Plaintiff met with the school's administrators to request maternity leave during the next school year. Plaintiff admitted to them that she became pregnant before getting married. She was fired because, as the

administrator expressed it, “there are consequences for disobeying the word of God.” *Id.* at 1317-18. Plaintiff filed a charge with the EEOC alleging pregnancy discrimination. After receiving her right-to-sue letter, plaintiff filed suit in federal district court. The district court granted summary judgment on the pregnancy discrimination claim because plaintiff did not produce evidence of a nonpregnant comparator who was treated differently.

Issue: Whether plaintiff established a prima facie case of termination because of pregnancy rather than because of engaging in premarital sex.

Holding and Rationale: Yes. The court explained that discrimination can be proven by direct or circumstantial evidence. Regarding the absence of comparator evidence, the court explained that plaintiff did not have to present evidence of a comparator if she had enough other circumstantial evidence to raise a reasonable inference of intentional discrimination.

Hamilton, 680 F.3d at 1320. Plaintiff testified that the administrators made comments about the maternity leave and the difficulty of replacing a teacher for part of a year. The administrator testified in his deposition that, if plaintiff had said she was sorry that she had sinned against the Lord and the school, she would not have been fired. However, plaintiff testified that she and her husband prayed to God for forgiveness and expressed remorse to the administrator. Based on the evidence, the Eleventh Circuit held that plaintiff had established a genuine issue of material fact about the reason she was fired.

Defendants argued on appeal that the ministerial exception, as interpreted by the Supreme Court in *Hosanna-Tabor*, should apply to the case, but the court held that the issue was not properly raised and preserved by the defendant.

Turner v. Kansas City Southern Ry. Co., 675 F.3d 887 (5th Cir. 2012) (revised June 22, 2012).

Facts: EEO claimed that three African American employees whom employer purportedly fired for rules violations actually were fired because of race.

Issue: In work-rule violation cases, how close must the similarly situated comparator be?

Holding and Rationale: The circumstances must be “nearly identical”—same job or responsibilities, same supervisor or employment status determined by same person, and essentially comparable violation histories.

However, “nearly identical” is not the same as “identical.” *Turner*, 675 F.3d at 893. For violations, similarity may turn on comparable seriousness of the offenses rather than on how the employer codes infractions under its rules and regulations.

See also Harris v. Warrick County Sheriff’s Dept., 666 F.3d 444 (7th Cir. 2012).

“To establish that employees not in the protected class were treated more favorably, the [p]laintiff must show that those employees were similarly situated with respect to performance, qualifications and conduct. . . . As relevant here, this inquiry does not require ‘near one-to-one mapping between employees,’ . . . but the employees receiving more lenient disciplinary treatment must at least share ‘a comparable set of failings’

[Plaintiff] has identified several white deputies who had performance problems but were not terminated. But none of them violated standard operating procedures, disobeyed direct orders, or showed a lack of commitment to the job during their probationary periods. So they cannot be considered similarly situated to [plaintiff].”

Harris, 666 F.3d at 449.

EEOC v. Boh Bros. Constr. Co., LLC., 689 F.3d 458 (5th Cir. 2012).

Facts: Employee, charging party, worked at a construction company. His supervisor called him names, including “faggot,” “pussy,” and “Princess,” and made jokes about plaintiff’s “being gay.” In his deposition, the supervisor admitted calling the employee the names, but added that he did not call him anything that he did not call his own son who worked in the maintenance crew. The supervisor explained that he called employee “Princess” because he discussed using Wet Ones wipes at work rather than toilet paper, and the supervisor thought that was “kind of gay . . . sounded like a homo.” The supervisor also simulated sex with employee when he bent over at work and on one occasion “[employee] awoke from napping in

his car and found [his supervisor] attempting to open his car door, motioning as if he were zipping up his pants [and] said something like, ‘If that car door would have been open, my p**** might have been in your mouth.’” Employee complained of the conduct, and it was investigated leading to a conclusion that employee and the supervisor had engaged in inappropriate behavior. Employee later was laid off for lack of work, rehired in another department, and laid off again for lack of work. Employee filed a charge with the EEOC and the EEOC subsequently filed a lawsuit, claiming sexual harassment and retaliation. The EEOC won a jury verdict for actual and punitive damages. Defendant filed a motion for judgment as a matter of law, which was denied.

Issue: Whether the EEOC established a claim of unlawful same-sex sexual harassment.

Holding and Rationale: No. The court observed that there was “plenty of evidence that Wolfe is a world-class trash talker and the master of vulgarity in an environment where these characteristics abound.” *Boh Bros.*, 689 F.3d at 459. There was, however, little evidence that the claimant failed to conform to masculine stereotypes, and that was fatal under the sex stereotyping theory pursued by the EEOC. The court summarized the theories of the parties:

“The EEOC's case depends on the proposition that sex stereotyping by a member of the same sex can constitute sexual harassment under Title VII. Its theory is that Wolfe harassed Woods because Woods did not, in Wolfe's view, conform to the male stereotype. Boh Brothers counters that same-sex stereotyping, even assuming it was present here, cannot constitute sexual harassment under Title VII because it is not one of the three evidentiary paths established to show same-sex harassment by *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 . . . (1998).”

Boh Bros., 689 F.3d at 461. The three types of actionable same-sex sexual harassment described in *Oncala* were 1) harasser is homosexual; 2) harasser is motivated by general hostility to members of the same sex in the workplace, and 3) comparative evidence about how the harasser treats members of both sexes in a mixed-sex workplace. The Fifth Circuit

explained that it had not previously been presented with the issue of whether *Oncale*'s listing of types of same-sex sexual harassment claims excludes other types, such as the sex stereotyping at issue in the case before it. The court stated it had some reluctance to permit a sex stereotyping theory in a same-sex sexual harassment claim, as the Supreme Court did not recognize it in *Oncale*. *Id.* at 461-62. However, rather than decide that issue, the court decided the case on narrower grounds, finding that there was insufficient evidence that the claimant conformed to nonconformance stereotypes: the only evidence of non-stereotypically masculine behavior in the record was the claimant's use of "Wet Ones," and the court found that insufficient to sustain a verdict. *Id.* at 463. Thus, the court left open the question of whether sex-stereotyping can support a same-sex sexual harassment claim, although it expressed reluctance to recognize such.

Meditz v. City of Newark, 658 F.3d 364 (3d Cir. 2011).

Facts: Plaintiff, a white man, sued Newark for disparate impact racial discrimination based on the city's residency requirement for its non-uniformed work force. Plaintiff was not hired because he lived outside Newark. He argued that the residency requirement had a disparate impact on whites because Newark's population did not reflect the racial composition of the relevant labor market. Plaintiff's theory was that the residency requirement had a significant negative impact on hiring of white, non-Hispanic employees, and that, if not for the residency requirement, many more white, non-Hispanics would have been hired. Plaintiff contended that the relevant labor market was the six-county area surrounding Newark and presented evidence regarding the ethnic composition of that general population and data regarding the ethnic composition of government employment and private employment in each of the surrounding counties. Plaintiff also provided employment statistics for government employees in Essex County, which has its county seat in Newark. All of the comparative statistics adduced by plaintiff showed much higher percentages of white, non-Hispanic persons than the percentage for the government employees of Newark. Plaintiff argued that the disparity was caused by the residency requirement. The district court granted summary judgment in favor of Newark, holding that plaintiff did not establish a prima facie case of disparate impact because plaintiff's statistics did not establish discrimination. The district court reasoned that there was

no need to look beyond Newark's borders to define the relevant labor market because Newark is New Jersey's largest city. The district court did not find a statistically significant deviation between the white non-Hispanics employed by the city (9.24%) and those living in the city (14.2%).

Issue: Whether plaintiff had identified a relevant labor pool for the disparate impact analysis and established a prima facie case.

Holding and Rationale: Not resolved--remanded. The district court did not engage in the type of analysis to determine a relevant labor market and then to determine the standard deviations between the at-issue workforce and the relevant labor market, as approved by the Supreme Court in *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). In developing the relevant labor pool, the court should consider factors such as geographic location, flow of transportation facilities, locations from which private employers draw their workforce, and commuting patterns. *Meditz*, 658 F.3d at 373. The court explained that the district court mistakenly had interpreted circuit precedent as saying that the only reason to look outside city limits is a lack of minorities within the city. Thus, the court remanded to the district court 1) to determine the relevant labor pool to which Newark's nonuniformed workforce should be compared and then 2) to conduct a "complete and correct" statistical analysis. *Id.* at 374. The Third Circuit further reversed the district court's conclusion that even if plaintiff had established a prima facie case of disparate impact, the defendant prevailed anyway on the business necessity defense. The appellate court pointed out that the district court had relied on a definition of business necessity from a Supreme Court decision that was changed by Congress in the Civil Rights Act of 1991. *Id.* at 374. The court noted that the business necessity argument of defendant Newark was very similar to that rejected by the Third Circuit in an earlier case involving a city residency requirement.

Morales-Cruz v. Univ. of Puerto Rico, 676 F.3d 220 (1st Cir. 2012).

Facts: Plaintiff claimed that the university refused to extend her probationary period and thus effectively removed her from the faculty for the asserted reason that she did not report a sexual relationship between her male co-teacher and a student. Plaintiff asserted the gender stereotyping theory.

Issue: Whether plaintiff asserted a viable gender stereotyping claim.

Holding and Rationale: No. The court first defined the gender stereotype

theory: “[A]n individual suffers an adverse employment action because she either conforms or fails to conform to some stereotype or stereotypes attributable to her gender.” *Morales-Cruz*, 676 F.3d at 224-25. The court then explained why plaintiff’s claim failed:

“[T]he plaintiff asserts that she was unfairly terminated because the Dean and others expected her, as a woman, to report the student-teacher relationship. This is the heart of her gender-stereotyping claim—but the allegation that she was held to a different standard because she was a woman does not follow from any factual content set out in the pleading or any reasonable inference therefrom. By the same token, the supposed stereotype of which the plaintiff complains is not one that, by common knowledge or widely shared perception, is understood to be attributable to women. To say that women, but not men, are expected to be forthcoming about the sexual foibles of others is sheer speculation—and speculation, unaccompanied by any factual predicate, is not sufficient to confer plausibility.”

Id. at 225.

Townsend v. Benjamin Enters., Inc., 679 F.3d 41(2d Cir. 2012).

Issues:

1) “[W]hether there is a viable claim of retaliation under Title VII . . . , for participating in an internal employer investigation prior to any proceeding before the . . . (‘EEOC’)” *Townsend*, 679 F.3d at 44.

2) “[W]hether an employer is liable under Title VII for sexual harassment committed by a senior executive who is a proxy or alter ego for the employer, despite the existence of a possible affirmative defense under the Supreme Court’s decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 . . . (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 . . . (1998).” *Id.*

Holdings and Rationales:

1) No. The issue regarding the participation clause was a matter of first impression in the circuit. The court based its holding on a reading of the plain language of the participation clause. “[T]he plain language of the

participation clause . . . requires that the investigation in which the employee participates be ‘under’ Title VII, not merely integral to effectuating its purposes.” *Id.* at 50-51.

2) Yes. “[T]he *Faragher/Ellerth* affirmative defense builds upon rather than repudiates the theory of proxy/alter ego liability articulated in the Court’s prior cases.” *Id.* at 52.

VII. AGE DISCRIMINATION IN EMPLOYMENT ACT

Dediol v. Best Chevrolet, Inc., 655 F.3d 435 (5th Cir. 2011).

In a case of first impression, the Fifth Circuit recognized a claim for hostile work environment under the ADEA. The issue had come before the Fifth Circuit on two prior occasions, but the court had not reached the issue. The Fifth Circuit in recognizing the extension of the Title VII hostile environment claim to the ADEA agreed with the Sixth Circuit in *Crawford v. Medina General Hosp.*, 96 F.3d 830 (6th Cir. 1996). The Fifth Circuit reversed summary judgment in favor of the employer on both age and religious hostile environment claims.

ADEA (Reasonable Factors Other Than Age): EEOC Issues Regulations for Reasonable Factor Other than Age, 29 CFR 1625. See Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, available at <https://www.federalregister.gov/articles/2012/03/30/2012-5896/disparate-impact-and-reasonable-factors-other-than-age-under-the-age-discrimination-in-employment#h-8>.

The ADEA provides that it is not unlawful for an employer to take an action otherwise prohibited by the ADEA if the “differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623(f)(1).

This defense is only available for disparate impact discrimination. The EEOC’s new regulation defines RFOA as a “non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.” 29 CFR § 1625.7(e)(1). In order to use this defense, the employer must show that “the employment practice was both: (1) reasonably designed to further or achieve a legitimate business purpose; and (2) administered in a way that reasonably achieves that purpose in light of facts that were known or should have been known to the employer.” The EEOC’s new regulation

also provides that the following nonexclusive list of factors is relevant when determining whether the RFOA applies: “1. The extent to which the factor is related to the employer’s stated business purpose; 2. The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination; 3. The extent to which the employer limited supervisor’s discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes; 4. The extent to which the employer assessed the adverse impact of its employment practice on older workers; and 5. The degree of the harm to individuals within the protected age group, in terms of both the extent of the injury and numbers of person adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.” 29 CFR § 1625.7(e)(2).

See Carrie Corcoran, EEOC's Amended Regulation Raises the Bar for Employers Seeking to Prove the ADEA's 'Reasonable Factors Other than Age' Defense, Daily Lab. Rep. (BNA) Insights (June 8, 2012).

Bondurant v. Air Line Pilots Ass’n, 679 F.3d 386 (6th Cir. 2012).

Facts: During reorganization from bankruptcy, Northwest Airlines extracted a concession from the union of a 40% wage cut for all pilots, and Northwest gave the union a claim in its bankruptcy to be disbursed as shares of stock. For pilots to receive a full share, a brightline cutoff date was established by the union to determine eligibility for a full share of a bankruptcy claim; thus any pilot working on July 31, 2006, received a full share, while pilots not employed on that date received a share commensurate with the actual number of months they worked during the concessionary period. For plaintiffs, who reached age 60 and retired before the date, the formula resulted in their receiving a 20/85 share rather than a full share, and the difference was over \$100,000 to each plaintiff. Plaintiffs sued the union under the ADEA, state discrimination law, and the Railway Labor Act.

Issue: Whether the union’s brightline cutoff date was based on a reasonable factor other than age.

Holding and Rationale: Rejecting plaintiffs’ disparate treatment claims, the court turned to the disparate impact claims. The Sixth Circuit did not decide

whether plaintiffs could establish a prima facie case of statistical discrimination. Regardless, the court held that while the union's plan may have created effects correlated with age, it was a reasonable, if imperfect effort to reconcile conflicting objectives in distributing shares quickly while not giving all pilots full shares. The court "[did] not think that this line-drawing exercise as applied to older pilots was the result of discrimination. It was based on reasonable factors arising from limited bankruptcy funds to be distributed according to written criteria." *Bondurant*, 679 F.3d at 396.

VIII. EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

Stoffels v. SBC Communications, Inc., 677 F.3d 720 (5th Cir. 2012), *cert. denied*, 2012 WL 2931194, 81 USLW 3047, 81 USLW 3153 (U.S. Oct. 1, 2012) (No. 12-73).

Issue: Whether defendants' practice of offering reimbursements for telephone services to retirees who lived outside of defendants' service region constituted a "pension plan" under ERISA.

Holding and Rationale: No. The plaintiffs contended that this plan was a "pension plan" within the meaning of ERISA. The Fifth Circuit found the plan indistinguishable from the concession plan found not to be an ERISA plan in *Boos v. AT&T*, 643 F.3d 127 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 816 (2011):

In both cases, RBOCs [Regional Bell Operating Companies] provided discounted telephone services to employees who lived in region of their services. These concessions derived from a common source, the telephone concessions offered by AT&T prior to the forced divestiture of the RBOCs. To ensure that employees who lived out of region received similar benefits to those received by in-region employees, the RBOCs in both cases reimbursed out-of-region employees for competitors' telephone services. In both cases, a plaintiff class then contended that the OOR plan for retirees was a pension plan governed by ERISA. Finally, in both cases, [the judge] ruled that the OOR concession and the in-region concession were actually part of the same program, which program was not a

pension plan under ERISA.

Stoffels, 677 F.3d at 728-29.

IX. FAMILY AND MEDICAL LEAVE ACT

Breneisen v. Motorola, Inc., 656 F.3d 701 (7th Cir. 2011), *cert denied*, 132 S. Ct. 2382 (2012) (No. 11-1093).

Issue: Whether exacerbation of a pre-existing condition, allegedly caused by a supervisor, qualifies plaintiff for FMLA protection.

Holding and Rationale: No. Agreeing with the Sixth Circuit (*Edgar v. JAC Prods., Inc.*, 443 F.3d 501 (6th Cir. 2006)), the Seventh Circuit explained that recognizing the exacerbation theory

“would contravene the straightforward premise of the FMLA—to protect employees from adverse actions by their employers during finite periods when short-term personal or family medical needs require it. When serious medical issues render an employee unable to work for longer than the twelve-week period contemplated under the statute, the FMLA no longer applies. This is true regardless of the cause of the infirmity.”

Breneisen, 656 F.3 at 705. The Seventh Circuit reasoned that cause of the exacerbation is irrelevant under the FMLA. However, even if causation were relevant, it would not help plaintiff because the alleged exacerbating conduct occurred after a second, unprotected leave. *Id.*

X. FAIR LABOR STANDARDS ACT

Minor v. Bostwick Labs., Inc., 669 F.3d 428 (4th Cir. 2012).

Issue: Whether an internal oral complaint constitutes protected activity for purposes of the FLSA anti-retaliation provision.

Holding and Rationale: Yes. Section 215(a)(3) of the FLSA makes it unlawful for a covered employer to “discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or

related to this chapter.” The Fourth Circuit relied on the Supreme Court’s ruling in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), which the court stated was not directly controlling, but its reasoning was helpful and persuasive. In *Kasten*, the Court held the word ‘filed’ does not unambiguously require a writing and that “the antiretaliation provision ... cover[s] oral complaints.” The Fourth Circuit stated the proper standard: “a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.” *Minor*, 669 F.3d at 439 (quoting *Kasten*, 131 S. Ct. at 1335).

Dellinger v. Science Applications Int’l Corp., 649 F.3d 226 (4th Cir 2011), *cert. denied*, 132 S. Ct. 1542 (2012) (No. 11-598).

Issue: Whether a prospective employee can sue a prospective employer under the FLSA antiretaliation provision, §215(a)(3).

Holding and Rationale: No. Section 215(a)(3) prohibits retaliation ‘against any employee’ because the employee sued to enforce the Act’s substantive rights. “Employee” is defined in relationship to an employer. Section 203(e)(1) provides that an employee is “any individual employed by an employer.” Thus, by using the term “employee” in the antiretaliation provision, Congress was referring to the employer-employee relationship. Although plaintiff was an applicant for employment with defendant and her application had been approved on a contingent basis, she never began work. Section 203(g) provides that “employ” means “suffer or permit to work.” Therefore, an applicant who never began work or performed any work could not, by the language of the FLSA, be an “employee.”

The dissenting judge found the majority’s decision to be in conflict with the Supreme Court’s holding that under Title VII former employees are covered in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See Dellinger*, 649 F.3d at 231 (King, J., dissenting). The dissent argued that the analysis of *Robinson* should have been followed and the same result reached.

National Restaurant Ass’n v. Solis, ___ F. Supp. 2d ___, 2012 WL 1921115 (D.D.C. May 29, 2012), *appeal dismissed*, 2012 WL 3244056 (D.C. Cir. Aug 01, 2012) (No. 12-5209).

Plaintiff challenged the rule promulgated by the Department of Labor in 2008 denying the tip credit to employers that do not provide notice to

employees that they will use the tip credit. *See* 29 C.F.R. §531.59(b). The rule went into effect on May 5, 2011. The plaintiffs claimed the DOL violated the Administrative Procedures Act. The court rejected the argument, finding that the more detailed final rule “logically followed” from the more general proposed rule. The final rule is not required to be identical to the proposed rule.

XI. COMPUTERS AND PRIVACY

See discussion Part XII.B, *infra*, regarding the National Labor Relations Board’s exploration of the coverage under the National Labor Relations Act of employees’ posting and communicating via computers and the Internet.

United States v. Nosal, 676 F.3d 854 (9th Cir. 2012)(en banc).

Facts: In an important case involving interpretation of the Computer Fraud and Abuse Act (CFAA), the Ninth Circuit, en banc, held that there was no criminal violation in a case in which the defendant and his alleged co-conspirators allegedly exceeded their authority by accessing their employer’s computer system and obtaining information to defraud their employer and help defendant set up a competing business. A former employee of an executive search firm convinced some of his former colleagues who were still working for the company to help him start a competing business. The employees used their log-in credentials to download source lists, names and contact information from a confidential database on the company’s computer, and then transferred that information to defendant. The employees were authorized to access the database, but their employer had a policy that prohibited disclosing confidential information. The government indicted defendant on 20 counts, including violation of the CFAA. The district court dismissed the CFAA count, ruling that “exceeds authorized access” could not be interpreted to incorporate corporate computer use policies. A Ninth Circuit panel reversed the district court, and the Ninth Circuit granted rehearing en banc.

Issue: Whether the statutory language “exceeds authorized access” incorporates the violation of corporate policies governing the use of computers and information.

Holding and Rationale: No. The CFAA was not intended to cover employee misappropriation of trade secrets, violations of corporate computer use policies or violations of an employee duty of loyalty. The CFAA

defines “exceeds authorized access” as “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.” *Nosal*, 676 F.3d at 856 (citing 18 U.S.C. §1010(e)(6)). The court found that this “refer[red] to data or files on a computer that one is not authorized to access.” *Id.* at 857. Thus, the statutory language covered “hacking,” but not uses in violation of a computer use policy. The more expansive interpretation advocated by the Government would “expand the scope of criminal liability to everyone who uses a computer in violation of computer use restrictions.” *Id.* The court speculated that employees’ use of their employers’ computers, in violation of computer use policies, to chat with friends, check sports highlights, shop, etc. would be subject to prosecution at the whim of the U.S. attorney. “[M]inor dalliances would become federal crimes.” *Id.* at 860. This would change the fundamental law governing the relationship between employer and employee from tort and contract law to criminal law. *Id.* The court quipped that falsely advertising oneself on Craigslist as “tall, dark, and handsome,” when one was actually “short and homely” could get the false advertiser who violated the advertising policy of the website “a handsome orange jumpsuit.” *Id.* at 862. The Ninth Circuit recognized this ruling deviated from its sister circuits and urged them to reconsider. *Id.* at 863 (citing *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 2166 (2011); *United States v. John*, 597 F.3d 263 (5th Cir.2010); *Int’l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418 (7th Cir.2006)). The court concluded, the statutory language “exceeds authorized access” “is limited to violations of restrictions on *access* to information, and not restrictions on its *use*.” *Nosal*, 676 F.3d at 864

The dissent accused the majority of “knocking down straw men—far-fetched hypotheticals involving neither theft nor intentional fraudulent conduct, but innocuous violations of office policy.” *Id.* at 864 (Silverman, J., dissenting). The dissent argued that the statutory language of the CFAA is aimed at “knowing and intentional fraud,” such as the conduct at issue in the case before the court. *Id.* at 867.

WEC Carolina Energy Solutions, LLC v. Miller, 687 F.3d 199 (4th Cir. 2012).

Facts: Defendant Miller resigned from his position as Project Director for plaintiff WEC Carolina Energy Solutions, Inc. (WEC). Twenty days later,

defendant made a presentation to a potential customer of WEC on behalf of WEC's competitor, Arc Energy Services, Inc. (Arc). The customer ultimately chose to do business with Arc. Plaintiff WEC contended that before resigning, defendant Miller, acting at Arc's direction, downloaded WEC's proprietary information and used it in making the presentation. Thus, it sued Miller, his assistant, and Arc for, among other things, violating the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030.

When defendant Miller worked for WEC, the company provided him with a laptop computer and cell phone, and authorized his access to the company's intranet and computer servers. According to WEC's complaint, defendant had access to numerous confidential and trade secret documents stored on computer servers. To protect its confidential information and trade secrets, WEC instituted policies that prohibited using the information without authorization or downloading it to a personal computer. These policies did not restrict Miller's authorization to access the information. Defendants filed 12(b)(6) motions, and the district court dismissed, holding that WEC failed to state a claim for which the CFAA provided relief.

Issue: Whether an employee who is authorized to access information on computers, but uses that information in violation of company policies, violated the CFAA.

Holding and Rationale: No. The court described the CFAA as “primarily a criminal statute designed to combat hacking.” *WEC*, 687 F.3d at 201. Plaintiff alleged that defendants violated § 1030(a)(2)(C), (a)(4), (a)(5)(B), and (a)(5)(C), which require that a party either access a computer “without authorization” or “exceed[] authorized access.” *Id.* at 203. The Court found defendants’ conduct to be outside of the scope of this statute. The Fourth Circuit adopted a narrow reading of the terms “without authorization” and “exceeds authorized access” and held that they apply “only when an individual accesses a computer or information on a computer without permission or obtains or alters information on a computer beyond that which he is authorized to access.” *Id.* at 206. The court noted that its decision probably would disappoint employers who hope to use the CFAA as a threat to prevent employee misuse of computers:

Our conclusion here likely will disappoint employers hoping for a means to rein in rogue employees. But we are unwilling to contravene Congress's intent by transforming a

statute meant to target hackers into a vehicle for imputing liability to workers who access computers or information in bad faith, or who disregard a use policy.

Id. at 207.

XII. NATIONAL LABOR RELATIONS ACT

A. Decisions

D.R. Horton, Inc., 357 NLRB No. 184, 192 L.R.R.M. (BNA) 1137, 2012 WL 36274 (2012).

Facts: Home building company, on a corporate-wide basis, began requiring new and current employees to sign a “Mutual Arbitration Agreement” as a condition of employment, which provided that employment-related disputes must be resolved through arbitration and prohibited class or collective arbitral or judicial litigation of claims. A law firm advised the business that it had been retained to represent a nationwide class of employees who alleged they had been misclassified as exempt from coverage under the Fair Labor Standards Act. The firm gave notice of intent to initiate class arbitration.

Issue: “[W]hether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.” 2012 WL 36274 (N.L.R.B.) at *1.

Holding and Rationale: Yes, the MAA illegally restricted employees’ Section 7 right to engage in concerted activity for mutual aid or protection. The Board declared that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.” *Id.* at *3. Turning to whether the rule violated section 8(a)(1), the Board applied the analysis of *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). Under the first prong of that analysis, the Board held that the rule of the MAA expressly restricts activities protected by section 7, and so there was a violation of section 8(a)(1). The Board traced its

interpretation of the NLRA to the earlier Norris-LaGuardia Act, which prohibited enforcement of a variety of types of “yellow-dog” contracts, including some comparable to the MAA in the case before the Board. *Id.* at *7.

The Board then turned to the argument that holding such restrictions on class or collective actions to be illegal under the NLRA would conflict with the Federal Arbitration Act (FAA). The Board found no conflict: “[H]olding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” *Id.* at *15. Alternatively, the Board reasoned that even if its finding of no conflict between its interpretation of the NLRA and the FAA were incorrect, the FAA would then conflict with the Norris LaGuardia Act and, that law, passed seven years after the FAA, provides that it repeals all Acts and parts of Acts in conflict with it. *Id.* at *16 (citing Norris LaGuardia Act §15).

Finally, the Board considered the argument that its holding would be in conflict with two recent Supreme Court decisions regarding arbitration: *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-1776 (2010) (arbitration panel exceeded its authority by permitting class antitrust claim when commercial shipping charter agreement's arbitration clause was silent on class arbitration); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1751-1753 (2011) (claim that class-action waiver in consumer arbitration agreement was unconscionable under state law was preempted by FAA). The Board explained that neither case was applicable because neither of those cases involved either waiver of rights protected by the NLRA or employment agreements.

Business interests have filed numerous briefs urging the Fifth Circuit to deny enforcement of the Board’s decision. See Lawrence E. Dubé, *Groups Blast NLRB’s D.R. Horton Ruling in a Barrage of Fifth Circuit Amicus Briefs*, Daily Lab. Rep. (BNA) No. 116, at A-1 (June 15, 2012) (discussing *D.R. Horton Inc. v. NLRB*, 5th Cir., No. 12-60031, amicus briefing closed 6/7/12). For praise of the decision and exhortations about the power it gives employees to act as a group, see Patrick Dorrian, *NLRB Collective Action Rights Ruling Offers Opportunity, Agency Officials, Attorneys Say*, Daily Lab. Rep. (BNA) No. 122, at C-1 (June 25, 2012).

Frankl v. HTH Corp., 650 F.3d 1334, (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821(2012) (No. 11-622, 11A344).

The Ninth Circuit held that “§ 10(j) assigns the Board a ‘power’ but does not mandate the case-by-case involvement of the Board as a multi-member organization in exercising that power. Thus, with respect to the Board's power to file petitions under § 10(j), it was sufficient that a quorum of the Board in 2007 decided to assign decisions as to individual petitions to the General Counsel.” *Frankl*, 650 F.3d at 1354.

Harborlite Corp., 357 N.L.R.B. No. 151, 192 L.R.R.M. (BNA) 1124, 2010-11 NLRB Dec. P 15519, 2011 WL 6464376 (2011).

The Board held that a lockout was not rendered unlawful notwithstanding the employer’s repeated threats to begin hiring permanent replacements. The Board reasoned that the unlawful threat to hire permanent replacements was effectively withdrawn before any permanent replacements were hired, and so the lawful lockout did not become unlawful because of the threats. The Board distinguished *Ancor Concepts*, 323 N.L.R.B. 742 (1997), *enf. denied*, 166 F.3d 55 (2d Cir. 1999), by stating that the employer’s announcement in that case that the locked out employees had been permanently replaced could have confused the workers about their bargaining strength. The basis for the distinction was a letter sent by the employer to the union in *Harborlite*, after the employer repeatedly had threatened to hire permanent replacements, in which the employer said that as a gesture of good will, it had decided to make the replacements temporary until further notice. Thus, the Board held that “[i]n light of the [employer’s] effective withdrawal or, at least, deferral, of its threats of permanent replacement, and its assurances to the Union that unit employees would be reinstated if the Union accepted the [employer’s] terms, we find that the [employer’s] statements did not taint the otherwise lawful lockout.” Dissenting, Chairman Pearce found the case indistinguishable from *Ancor Concepts* and explained that he interpreted the employer’s letter as reinforcing the previous threats to permanently replace the locked out employees.

Roundy’s v. NLRB, 674 F.3d 638, 192 L.R.R.M. (BNA) 3079 (7th Cir. 2012).

Roundy’s, the business, ejected union handbillers from commons areas in

front of stores. Roundy's leased the 23 stores to other businesses and held nonexclusive easements over the commons areas, including the private sidewalks in front of the stores and parking lots, where the handbilling took place. The Board held that under *Babcock* and *Lechmere*, a business has no right to exclude union representatives engaged in Section 7 activity from areas where it lacks an exclusionary property interest. The burden is on the business to establish such an exclusionary interest under state law. The Board determined, and the Seventh Circuit agreed, that the business did not satisfy its burden to prove such an interest under Wisconsin law.

B. Social Media and the NLRA

A recent survey indicates that many employers discipline workers for misuse of social media. *See Employers Increasingly Discipline Workers Over Misuse of Social Media, Survey Finds, Daily Lab. Rep. (BNA) No. 100, at A-5 (May 24, 2011)*. The NLRB waded into the sea of employees posting derogatory comments about their employers on social networking sites. An acting regional director issued an unfair labor practice charge alleging that an employee was terminated in violation of the National Labor Relations Act for posting derogatory comments about his employer on his Facebook page. *American Med. Response of Conn., NLRB Reg. 34, No. 34-CA-12576 (complaint issued Oct. 27, 2010)*, discussed in *NLRB Alleges Company Illegally Fired Worker for Negative Facebook Comments, Daily Lab. Rep. (BNA) No. 214, at A-3 (Nov. 5, 2010)*. The subject employee posted on her Facebook page from her home computer a negative statement about her supervisor. When she got supportive responses from coemployees, she posted more negative comments about the supervisor. The complaint alleged that the employee was fired because her postings violated the company's internet policy—"blogging and internet posting policy." One particular provision prohibited employees from making "disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, co-workers and/or competitors." *Id.* The complaint alleged that the employee was terminated for engaging in protected concerted activity for mutual aid or protection and that several of the company's rules were illegal. The case subsequently settled, but it generated considerable attention and controversy. *See, e.g., Robert G. Brody & Sami Asaad, Does the NLRA Give Employees a Right to Badmouth Employers Online? So Far, No, but Change Is in the Air, Daily Lab. Rep.*

(BNA) No. 94, at I-1 (May 16, 2011). More complaints in similar cases have been issued. See *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872 (complaint issued May 9, 2011), discussed in Lawrence E. Dubé, *NLRB Complaint Challenges Firing of Five Who Shared Job Complaints on Facebook*, Daily Lab. Rep. (BNA) No. 97, at A-1 (May 19, 2011).

The Board found no ULP violation by an employer for firing an employee for posting photos and comments about his employer on his Facebook page in *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, 358 NLRB No. 164, 358 NLRB 1, 194 L.R.R.M. (BNA) 1041, 2012 WL 4482841 (Sept. 28, 2012). The Board noted that “[t]his is the first case in which the Board has ruled on an unlawful discharge allegation involving Facebook posts.”

Hispanics United of Buffalo, Inc. became the first case of its kind in which an ALJ found that the discharge of employees for Facebook postings violated the NLRA. See *Administrative Law Judge Finds New York Nonprofit Unlawfully Discharged Employees Following Facebook Posts*, available at <http://nlrb.gov/news/administrative-law-judge-finds-new-york-nonprofit-unlawfully-discharged-employees-following-fac> (on NLRB website). The Acting General Counsel of the Board issued a memorandum summarizing the social media cases of the last year. See *Acting General Counsel Releases Report on Social Media Cases*, at <http://nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases> (on NLRB website). The Acting General Counsel issued a second memorandum in January 2012. See <https://nlrb.gov/news/acting-general-counsel-issues-second-social-media-report>. He issued a third on May 30, 2012, evaluating the social media policies of seven businesses, finding six to violate the NLRA, but finding Wal-Mart’s not to violate the Act. See Memorandum OM 12-59, available at <http://www.nlrb.gov/search/simple/all/social%20media>.

C. Rules

1. Posting Notice of Rights Under the NLRA

The NLRB adopted a rule requiring every employer subject to the National Labor Relations Act to post a notice informing employees of their

rights under the NLRA. *See* 75 Fed. Reg. 80410-01 (Dec. 22, 2010), 2010 WL 5171849 (F.R.). The final rule was published August 2011. 76 Fed. Reg. 54,006. The rule is at 29 C.F.R. § 104.210. Due to legal challenges, the NLRB announced that the notice posting requirement was postponed until April 30, 2012. *See* Lawrence E. Dubé, *NLRB Postpones Notice Posting Deadline; Regulation Now Set to Take Effect April 30*, Daily Lab. Rep. (BNA) No. 247, at A-10 (Dec. 27, 2011). Lawsuits were filed challenging that rule. On March 2, the USDC for District of Columbia upheld the rule as within the Board's broad rulemaking authority under section 6 of the NLRA. *See National Association of Manufacturers v. NLRB*, No. 11-cv-2629, 192 L.R.R.M. (BNA) 2999, 2012 WL 691535 (D.D.C. Mar. 2, 2012). However, the court held that "the Board exceeded its authority under the NLRA when it promulgated a rule that labels any failure to post the required notice to be an unfair labor practice." 2012 WL 691535, at *15. The court also ruled that "the NLRA does not authorize the Board to enact a rule which permits it to toll the statute of limitations in any future unfair labor practice action involving a job site where the notice was not posted." *Id.* at *16.

In a second lawsuit, the USDC for South Carolina held that the Board exceeded its authority in adopting the rule. *Chamber of Commerce of the United States v. NLRB*, 193 L.R.R.M. (BNA) 2026, 2012 WL 1245677 (D.S.C. Apr. 13, 2012). The court stated as follows: "Based on the statutory scheme, legislative history, history of evolving congressional regulation in the area, and a consideration of other federal labor statutes, the court finds that Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner." 2012 WL 1245677, at *14.

On April 17, 2012, the D.C. Circuit enjoined the NLRB from enforcing the posting rule, and the Board acquiesced, announcing that its regional offices will not implement the rule. *See* Lawrence E. Dubé, *NLRB Notice Rule Enjoined Pending Appeal; D.C. Circuit to Hear Arguments in September*, Lab. Rel. Week (BNA) No. 26, at 712 (Apr. 18, 2012). In a brief filed in the D.C. Circuit, the Board urged the court to affirm the district court ruling that the Board had the authority to adopt the regulation, but also urged the court to reverse the rulings regarding the two enforcement provisions—

unfair labor practice and tolling of statute of limitations. *See* Lawrence E. Dubé, *Board Defends Notice-Posting Regulation; Amicus Brief Cites Supporting LMRA History*, Daily Lab. Rep. (BNA) No. 136, at A-2 (July 16, 2012).

2. Streamlined Election Procedures

The NLRB proposed rule changes regarding representation elections that likely would reduce the time between the filing of a petition for election and the holding of the election. *See* 76 Fed. Reg. 36812-01 (June 22, 2011), discussed in Lawrence E. Dubé, *NLRB Proposes Election Case Rule Changes That Immediately Draw Praise and Protests*, Daily Lab. Rep. (BNA) No. 119, at AA-1 (June 22, 2011); Steven Greenhouse, *N.L.R.B. Rules Would Streamline Unionizing*, N.Y. Times (June 21, 2011). Some of the provisions intended to streamline procedures and move more expeditiously to representation elections include: 1) parties could file petitions electronically with requirement of service on all other interested parties; 2) petitioner would be required to file with the petition evidence supporting showing of interest (rather than current rule requiring filing evidence within 48 hours of filing petition); 3) *Excelsior* list is changed so that the list of eligible voters provided by employer to union would include both telephone numbers and, where available, e-mail addresses, and list would have to be provided in electronic form unless employer certifies that it does not have capacity to provide it in that form, and employer would be required to serve the list electronically on other parties simultaneously with service on the regional office; 4) regional director would set hearing seven days after notice of hearing, and notice of hearing would set due date (due no later than date of hearing) for Statements of Position (new form replacing the current Questionnaire on Commerce Information), which will facilitate identification of issues to be resolved at pre-election hearing (failure to state a position would preclude a party from raising certain issues and participating in their litigation); 5) for pre-election hearing, the issue is whether there is a question of representation, and resolving disputes regarding individual employees' eligibility or inclusion in unit is not necessary and thus would be deferred to post-election determination; 6) would retain requirement that objections to election be filed within seven days after votes tallied, but evidence supporting objections must be filed

simultaneously rather than current requirement of within seven days of filing objections; 7) current rule would be maintained permitting a party to request review of regional director's decision dismissing a petition, but if regional director directs an election, all requests for Board review would be deferred until after an election.

The election procedure rule was challenged, and the USDC for the District of Columbia held that the rule was invalid because it was promulgated without a Board quorum on the final vote. *See Chamber of Commerce of U.S. v. N.L.R.B.*, 2012 WL 1664028 (D.D.C. May 14, 2012). The court reasoned that a quorum of the Board must have participated in the final vote, and only two of the three members at the time voted. The court went on to say that "nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so. In the meantime, though, representation elections will have to continue under the old procedures." 2012 WL 1664028, at *10.

3. The Future of NLRB Rulemaking

NLRB Chairman Mark Gaston Pearce said in a speech that the Board will persist in rulemaking despite the challenges it has faced. *See John Herzfeld, Board to Stick with Rulemaking Despite Resistance, Pearce Says*, Lab. Rel. Week (BNA) No. 26, at 1111 (June 13, 2012).

D. Recess Appointments and Resignations

The first half of 2012 featured controversy over Board member appointments as well as a member resignation. First there was the controversy of the President's making recess appointments of three Board members in January after the Board membership dwindled to two. Stephen Dinan & Susan Crabtree, *Obama Defies Congress with "Recess" Picks*, Wash. Times (Jan. 4, 2012), available at <http://www.washingtontimes.com/news/2012/jan/4/obama-unprecedented-recess-appointment/print/>. Opponents in Congress argued that the President could not make recess appointments because the Senate was holding pro forma sessions every three days. The Department of Justice issued a memorandum concluding that the recess appointments were lawful: "The convening of periodic pro forma sessions in which no business is to be

conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause." Cheryl Bolen, *Justice Department Releases Opinion Finding Recess Appointments Lawful*, Daily Lab. Rep. (BNA) No. 8, at AA-1 (Jan. 12, 2012). The issue of the legality of the recess appointments emerged as a defense in a case before the Board, *Center for Social Change Inc.*, but the Board by a 5-0 vote refused to rule on the matter, explaining as follows: "Historically, the Board has declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act. Instead, it has applied the well-settled presumption of regularity of the official acts of public officers in the absence of clear evidence to the contrary." A federal district court declined to address an argument attacking the recess appointments in *Paulsen v. Renaissance Equity Holdings LLC*, 849 F. Supp. 2d 335, 193 L.R.R.M. (BNA) 2048 (E.D.N.Y. 2012), because its resolution of other issues was dispositive. The issue of the constitutionality of the recess appointments may yet be decided by a court. The U.S. Chamber of Commerce has filed a motion to intervene in a case and raise the issue. See Denise M. Keyser & Mary Cate Gordon, *President Obama's Controversial Recess Appointments: Heading to Supreme Court*, Daily Lab. Rep. (BNA) No. 72, at I-1 (Apr. 13, 2012) (citing Chamber of Commerce Motion for Leave to Intervene, *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Mar. 15, 2012)). The article by Keyser and Gordon provides background and analysis of the arguments on each side.

The beginning of 2012 also saw the resignation of a Board member. See Steven Greenhouse, *Labor Board Member Resigns Over Leak to G.O.P. Allies*, N.Y. Times (May 27, 2012), available at http://www.nytimes.com/2012/05/28/business/gop-labor-board-member-terence-flynn-quits-over-leak.html?_r=1&pagewanted=print. The Board's inspector general determined that Member Terence Flynn, who was one of President Obama's recess appointments, had violated ethics rules when he served as a staff lawyer for a Republican member of the Board in 2010 and 2011 by sharing details about pending cases with lawyers who had cases before the Board. Member Flynn resigned on May 26, 2012.

E. The Year of the Lockout

The year 2011 may be remembered as “the year of the lockout.” The lockouts in the NFL and NBA were big news items. Furthermore, of the 19 major work stoppages in 2011, 17 were lockouts, not strikes. *See* Bureau of Labor Statistics, Dept. of Labor, News Release, *Major Work Stoppages in 2011* (Feb. 8, 2012). The report defines “major work stoppage” as including strikes and lockouts that involve 1,000 or more workers and last at least one shift. The burgeoning use of lockouts by employers was featured in a New York Times article. Steven Greenhouse, *More Lockouts as Companies Battle Unions*, N.Y. Times, Jan. 22, 2012, available at http://www.nytimes.com/2012/01/23/business/lockouts-once-rare-put-workers-on-the-defensive.html?_r=1&pagewanted=all. The article stated that “[w]ith many private-sector labor unions growing smaller and weaker, and with public-sector unions under attack in numerous states, some employers think the time is ideal to use lockouts, a forceful approach they were once reluctant to use.” *Id.*

F. Protected Activity by Nonunion Employees

The NLRB launched a web page describing the rights of nonunion employees to engage in concerted activity. *See* <http://nlrb.gov/concerted-activity>.

XIII. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT

United Steel Workers of Am. Local 2660 v. United States Steel Corp., 683 F.3d 882 (8th Cir. 2012).

Facts: U.S. Steel conducted a mass layoff at an iron ore plant without giving the full 60 days’ notice under the WARN Act. The union filed a complaint seeking damages.

Issue:

- 1) Whether “massive and precipitous drop in customer orders” in late 2008 constituted “unforeseeable business circumstances” excusing employer from giving full 60 days’ notice.
- 2) Whether short letter sent only a few days before layoff was sufficient

notice.

Holding and Rationale:

1) Yes. “U.S. Steel thought it could survive the economic downturn until the unprecedented effects on the steel industry manifested themselves in late November 2008, thus requiring immediate action in its commercially reasonable business judgments. In light of these circumstances, we conclude that U.S. Steel satisfied its burden of proving that the conditions giving rise to the unforeseeable business circumstances exception have been met.”

United Steel Workers, 683 F.3d at 888-89.

2) Yes. Employer developed plan and notified employees as quickly as it could, and all that is required is a brief statement of the basis for reducing the notice period.

A bill was introduced in Congress that would amend the WARN Act 1) to decrease the number of employees required for a mass layoff; 2) reduce the number of employees for an employer to be covered; 3) increase the notice period from 60 to 90 days; and 4) double backpay awards for violations. *See* Derrick Cain, *Sen. Sherrod Brown Offers Bill to Bolster Law Requiring Employee Notice of ‘Mass Layoffs,’* Daily Lab. Rep. (BNA) No. 118, at A-5 (June 19, 2012) (discussing Forewarn Act, S. 3297).

XIV. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

Carder v. Continental Airlines, Inc., 636 F.3d 172 (5th Cir.), *cert. denied*, 132 S. Ct. 369 (2011).

Issue: Whether the Uniform Services Employment and Reemployment Rights Act (USERRA) provides for a cause of action based on a hostile work environment.

Holding and Rationale: No. The Fifth Circuit is the first federal appellate court to consider the issue. First, the court looked at the express language of the statute. Under USERRA, an employer may not deny “any benefit of employment” to an employee in a uniformed service. *See* 38 U.S.C. § 4311(a). The statute defines the phrase “benefit of employment” in § 4303(2), but does not mention “harassment, hostility, insults, derision,

derogatory comments, or any other similar words.” *Carder*, 636 F.3d at 176. Therefore, a cause of action for hostile work environment cannot be found in the express language of the statute. Second, the court considered the legislative history and underlying policies of the statute. The court noted that Congress intended the statute to be interpreted broadly, but the court determined that it must consider the case law interpreting other antidiscrimination statutes. The court noted that the language of discrimination statutes under which a hostile environment claim is recognized contain the phrase “terms, conditions, or privileges of employment” upon which courts have relied to infer that the statute provides for a hostile work environment claim. *Id.* at 178. The Supreme Court has placed great significance on this phrase in finding that a statute provides for a claim of hostile work environment. Because no such similar language is contained in USERRA, which was enacted after the Supreme Court’s reliance on the Title VII language, the court held that Congress did not intend to provide for a hostile work environment claim under the statute. “[B]ased on the distinct text of USERRA, its legislative history, and its policies and purposes, we decline to infer a cause of action for hostile work environment under USERRA.” *Id.* at 179.

United States v. Alabama Department of Mental Health and Mental Retardation, 673 F.3d 1320 (11th Cir. 2012).

Facts: Plaintiff worked for the ADMH from 1987 to his deployment in December 2003. After his deployment, ADMH failed to rehire plaintiff. Plaintiff filed a USERRA complaint with the Department of Labor. Thereafter the United States sued ADMH under USERRA. The District Court ruled that sovereign immunity does not bar the suit.

Issue: Whether sovereign immunity bars the United States from filing suit against the state of Alabama.

Holding and Reasoning: No. ADMH acknowledged that states do not have immunity from federal court suits brought and controlled by the United States to vindicate interests of the federal government. However, ADMH argued that the real plaintiff in the lawsuit was the individual. The court noted that “[a] number of our sister circuits have rejected States’ contentions that lawsuits brought by the United States on behalf of specific victims are simply private lawsuits masquerading in costume.” *Alabama Department*,

673 F.3d at 1328. Where the federal government has decided that a case is of sufficient importance to take action on the individual's behalf, the court was not willing to second guess that decision. "The United States has a clear and substantial interest in enforcing USERRA to achieve the law's goal of encouraging service in the armed forces." *Id.*

XV. EMPLOYEE POLYGRAPH PROTECTION ACT

Cummings v. Washington Mutual, 650 F.3d 1386 (11th Cir. 2011).

Bank did not violate the Employee Polygraph Protection Act because it had reasonable suspicion, under Act's "ongoing investigation exemption," to ask branch manager to take polygraph.

Miller v. Natural Resources Recovery, LLC, Civ.A. 10-357, 2011 WL 3841641, 32 IER Cases 1335 (M.D. La. Aug. 9, 2011).

Facts: Plaintiff was employed by defendant NRR when an unspecified amount of cash went missing from the NRR cash box. Plaintiff stated that she and two other employees had access to the cash box. The three were called into the office to give their statements concerning the missing money. Plaintiff alleged that she was asked by a manager about her willingness to participate in and cooperate with a polygraph examination. Plaintiff did not refuse the polygraph examination and was informed that it would be conducted the next day. The following day, plaintiff took the polygraph exam, administered by defendant Overton, owner of defendant Overton Polygraph. After plaintiff's exam was completed, Overton told her that "her responses to his questions were analogous to, among other things, the responses he had seen from 'serial killers,' that she 'blew the charts out of the water,' and that she had notably failed the examination." *Miller*, 2011 WL 3841641, at *1. In response, plaintiff requested a second exam, believing the first exam involved errors or defective equipment. Plaintiff asserted that Overton denied her request since she had "clearly failed." After the results were reported to management, an office manager told plaintiff that, because she failed the polygraph, she could have been arrested and convicted. Plaintiff was suspended with pay and told to attend a meeting at which she was given the options of either resigning and collecting unemployment benefits or participating in a second polygraph examination. If she opted to participate in a second exam, if she failed the second one she would be immediately fired, but, if she passed she would be reinstated to her

former job. She opted to have a second polygraph. The employer converted her suspension with pay to a suspension without pay until she passed the second test. Plaintiff contacted another polygraph service to try to arrange the second exam. However, the owner told her that he had been asked by the employer to do the first exam, but had declined because he believed the exams would violate the EPPA. Based on that information, plaintiff declined to participate in a second exam. She was then placed on indefinite suspension without pay. She sued defendants NRR, Overton and Overton Polygraph in state court, asserting claims against defendants for violation of the EPPA and various tort claims. Defendants removed to federal court, and all defendants filed 12(b)(6) motions.

Issues:

- 1) Whether plaintiff alleged a violation of the EPPA.
- 2) Whether Overton, as an individual, and Overton Polygraph, the business entity, may be deemed “employers” within the meaning of the EPPA.

Holdings and Rationales:

1) Yes, plaintiff stated a claim under the EPPA. Section 2002 of the EPPA provides, in part, that “... it shall be unlawful for any employer ...(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test.” 29 U.S.C. § 2002. Plaintiff clearly alleged that she was asked to submit to a polygraph. Although plaintiff clearly consented, neither the EPPA nor case law provides that consent absolves an employer of its liability for the initial request. Although the EPPA contains several exceptions to its general prohibition of employer-requested/-required polygraph examinations, it does not contain an exemption for employee consent. The Court also noted that NRR’s actions were not protected by the exemption in section 2006(d) (the ongoing investigation exemption). NRR did not follow necessary procedural protections in sections 2006(d) and 2007 to be covered by that exemption. “The EPPA makes it unlawful for ‘any employer’ to ‘discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against . . . any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test. . . .” *Miller*, 2011 WL 3841641, at *5. Although defendant NRR argued that it did not terminate plaintiff, it cited no authority in support of its argument that indefinite suspension without pay is not the equivalent of termination.

2) Yes. The EPPA defines “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.” 29 U.S.C. § 2001(2). A polygraph examiner either employed for or whose services are otherwise retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an employer with respect to the examinees.” 29 U.S.C. § 2001(2). However, the Fifth Circuit has held that a polygraph examiner may be an employer, depending on its role. *See Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721 (5th Cir. 2002). Whether Overton and Overton Polygraph were “employers” under the EPPA required factual development, and plaintiff had pled sufficiently under the notice pleading requirements of FRCP Rule 8(a) to put the defendants on notice of the nature of the claims against them under the EPPA.

XVI. JONES ACT

Mendez v. Andarko Petroleum Corp., 466 Fed. Appx. 316 (5th Cir. 2012), *petition for cert. filed*, 81 USLW 3007 (June 25, 2012) (No. 11-1535).

Facts: Plaintiff was injured on a floating gas production platform moored in ocean water 5,000 feet deep approximately 210 miles from Sabine Pass, Texas. Spars float on the ocean’s surface but are moored to large anchors in the seabed below. In addition to these mooring lines, an underwater infrastructure of flow lines and export pipeline systems, as well as umbilicals extending from the spar to the subsea well heads, used to transport oil and gas to shore-based facilities attach the spar to the ocean floor. A study estimated the costs to move the spar 100 miles was \$42 million. *Id.*

Issue: Whether the spar upon which plaintiff was working when he was injured was a Jones Act vessel.

Holding and Rationale: No. This means plaintiff could not establish he was a seaman for the purposes of Jones Act liability. “To qualify as a seaman under the Jones Act, a plaintiff must demonstrate, among other things, that he has ‘a connection to a vessel in navigation ... that is substantial in terms of both its duration and its nature.’” *Mendez*, 466 Fed. Appx. at 318. The Fifth Circuit relied on the Supreme Court case, *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). That case provided that “a watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered

practically incapable of transportation or movement.” *Stewart*, 543 U.S. at 495. In *Stewart*, the Supreme Court had discussed approvingly a Fifth Circuit case holding that a floating casino was not a vessel--*Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995). The Fifth Circuit then quipped: “Disconnecting the RED HAWK from the sea floor would make disconnecting a casino boat from the shore look as easy as unplugging a toaster. The RED HAWK, therefore, embodies the distinction between theoretical capability, which it has, and practical capability, which it does not.” *Mendez*, 466 Fed. Appx. at 319.

XVII. LOUISIANA LAW

Caplan v. Ocshner Clinic, LLC, 799 F. Supp. 2d 648 (E.D. La. 2011). Doctor claimed detrimental reliance on representation that he would be employed for five years.

“Even taking Plaintiff’s version of the facts as true and making all reasonable inferences in his favor, Plaintiff was relying on an extra-contractual statement directly contradicted by the written agreement he signed. Under the contract, this provision could not be waived except in writing. The Court concludes that, in line with the aforementioned Fifth Circuit opinions, Plaintiff’s purported reliance in this case was unreasonable as a matter of law.”

Caplan, 799 F. Supp. 2d at 653.

Glover v. Smith, No. 11–30595, 2012 WL 2137958 (5th Cir. June 13, 2102). Making an *Erie* guess, in view of Louisiana courts of appeal decisions, the Fifth Circuit states that, after the 1997 repeal of La. R.S. 51:2256, Louisiana state employment discrimination law does not provide a cause of action for retaliation.

Slaughter v. Board of Sup'rs of Southern Univ. & Agricultural & Mechanical College, 76 So. 3d 438 (La. App. 1st Cir. 2011), *writ denied*, 77 So. 3d 970, 2011-2110 (La. 1/13/12).

The case discusses Louisiana’s wage payment statutes, La. R.S. 23:631-635,

and denies penalty wages and attorney's fees under 23:632 based on the defendant's good faith defense.

Act 486 of 2012 amended R.S. 37:2950(A):

§ 2950. ~~Felony convictions'~~ Criminal record effect on trade, occupational, and professional licensing

A. Notwithstanding any other provisions of law to the contrary, a person shall not be disqualified, or held ineligible to practice or engage in any trade, occupation, or profession for which a license, permit, or certificate is required to be issued by the state of Louisiana or any of its agencies or political subdivisions, solely because of a prior criminal record, except in cases in which ~~the applicant has been convicted of a felony, and such a~~ conviction directly relates to the position of employment sought, or to the specific occupation, trade, or profession for which the license, permit, or certificate is sought.

B. Any decision which prohibits an applicant from engaging in the occupation, trade or profession for which the license, permit or certificate is sought, which is based in whole or in part on conviction of any crime, as described in Subsection A, shall explicitly state in writing the reasons for the decision.

C. Any complaints concerning violations of this Section shall be adjudicated in accordance with procedures set forth for administrative and judicial review, contained in Title 49 of the Louisiana Revised Statutes of 1950.

D. (1)(a) This Section shall not be applicable to:

(i) Any law enforcement agency.

(ii) The Louisiana State Board of Medical Examiners.

(iii) The Louisiana State Board of Dentistry.

(iv) The Louisiana State Board of Nursing.

(v) The Louisiana State Board of Practical Nurse Examiners.

(vi) The State Racing Commission.

(vii) The State Athletic Commission.

(viii) The Louisiana State Board of Pharmacy.

(ix) The Louisiana State Bar Association.

(x) The Louisiana Professional Engineering and Land Surveying Board.

(xi) The Louisiana State Board of Architectural Examiners.

(xii) The Louisiana State Board of Private Investigator Examiners.

- (xiii) The Louisiana State Board of Embalmers and Funeral Directors.
- (xiv) The Louisiana State Board of Elementary and Secondary Education.
- (b) Nothing herein shall be construed to preclude the agency, in its discretion, from adopting the policy set forth in this Section.
- (2) This Section shall not be applicable to the office of alcohol and tobacco control of the Department of Revenue.



**RECENT DEVELOPMENTS –
LEGISLATIVE AND JURISPRUDENTIAL**

Mineral Rights

2012

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RECENT DEVELOPMENTS –
LEGISLATIVE AND JURISPRUDENTIAL
Mineral Rights

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I. INTRODUCTION

A. Prefatory Remarks:

Your presenter deems it appropriate to make brief comment as to the scope of this presentation. As stated by your presenter in his section of the 2011 Recent Developments Seminar, that year (2011) was the “first year during which the topic of Mineral Rights [was] presented at the Recent Developments CLE Seminars.” In order to create a baseline for future presentations, your presenter (in connection with that initial presentation) had to “reach back” to identify relevant material in the then previous two or three years.¹

As also stated last year, the “title of this Seminar slot – Mineral Rights – might seem misleading, or certainly narrow, to some. Taking its name from the class at the Paul M. Hebert Law Center, it covers relevant cases and other developments – both jurisprudential and legislative – in the ever changing and evolving area of the law applicable to oil and gas. A broader label might be ‘energy law,’ or some such, and for that reason, a case or two which are not

¹ This 2012 edition begins with cases reported in 61 So.3d of the West Reporter Series and beyond, ending with 90 So.3d issue of the West Reporter Series.

purely within the ambit of mineral rights, properly speaking, are also covered for completeness and for the interest of the practitioner in this area.”

Amplifying on that observation, cases are collected by reference to the West Digest Topic of “Mines and Minerals,” a category which your presenter has always felt was a bit out of place in our civil law jurisdiction. Other cases – perhaps not purely in the nature of “mineral rights” – are also included if they are deemed of interest to those who practice in this area.

B. Industry Developments:

With the possible exception of Insurance Law, no other slot in this seminar is as “industry specific” as the topic of Mineral Rights. It is appropriate to review both the legislative and jurisprudential developments on this topic in the context of the industry developments which form the back-drop for our consideration of these matters.

One of the biggest issues in the past year involving the oil and gas industry is that the tremendous success of shale plays – including Louisiana’s Haynesville Shale in Northwest Louisiana – has led to an abundance of natural gas which, in turn, has led to low market prices for natural gas.² Many operators have tended to redirect their efforts (and capital) to oil and gas plays that produce liquids which, for the most part, have enjoyed higher returns on investment in the form of per barrel prices for oil and other liquids.

Indeed, the success of the shale plays has led to such an abundance of natural gas that the industry has turned to a liquefaction process which allows for the export of liquefied natural gas to other countries which pay a higher price for the product than is currently attainable domestically. In a transaction which closed on July 31, 2012, your presenter had the honor of representing the developer of an existing LNG project which added liquefaction services at the LNG Terminal at Sabine Pass in Cameron Parish, by constructing two liquefac-

² “Working natural gas inventories remain at historically high levels for the time of year. As of June 29, 2012, according to EIA’s Weekly Natural Gas Storage Report, working inventories totaled 3,102 Bcf, 602 Bcf greater than last year’s level and 573 Bcf above the five-year average. The weekly report from June 15, 2012, marked the first time in EIA’s history that working inventories surpassed the 3,000 Bcf mark during the month of June. EIA expects that inventory levels at the end of October 2012 will set a new record high slightly above 4,000 Bcf (U.S. Working Natural Gas in Storage Chart), although the projected increase of 1,525 Bcf in working gas inventory during the 2012 injection season (from the end of March to the end of October) would be the smallest build since 1991. In 2013, working inventory levels recede from record highs, although they will still remain abundant compared with recent history.” Short-Term Energy Outlook, U.S. Energy Information Administration, Release of July 10, 2012.

tion trains with a nominal production capacity of at least 182,500,000 MMBtu per annum and related equipment and facilities. In a transaction which closed on July 31, 2012, the project converts the existing LNG Terminal (built in 2005) into a facility capable of liquefying and exporting domestic U.S. natural gas in addition to importing and regasifying foreign-sourced LNG. As stated in media reports, this “world-class project will be the first LNG terminal in the world capable of both importing and regasifying LNG and liquefying and exporting natural gas.”

This economic fact of life is also one of the factors contributing to the excitement attending the Brown Dense Play in Southwestern Arkansas and Northeastern Louisiana. Significant lease acquisitions have taken place in that trend, motivated in large part by the fact that, in contrast to the Haynesville Shale, it is believed that the Brown Dense will predominately produce liquid hydrocarbons.

The Tuscaloosa Marine Shale has also seen a steady, increasing level of exploration. Devon Energy Corporation, a major player in this trend, recently announced that its fourth horizontal well in this area is producing 384 barrels of oil per day, stated to be “its strongest yet.” In addition to that successful well in northern St. Helena Parish, Devon has two other TMS well projects in progress – one in Tangipahoa Parish and one in West Feliciana Parish.

On the national front, and in case you have not noticed, there is a Presidential Election currently underway, and it is reasonable to expect that there will be competing proposals relative to the energy policy of our nation (or, more accurately, the absence of one). I’ll leave it at that.

The Gulf of Mexico is slowly returning to a level of activity which was seen prior to the Deepwater Horizon tragedy of April of 2010.

As will be discussed in Part II, concerning legislation, the industry – along with other interests -- was heavily involved in the legislative process in 2012 as the Legislature undertook to consider competing legislative proposals relative to so-called “legacy lawsuits.”³ Other legislative actions were taken, including one which has drawn the displeasure of this presenter.

³ “‘Legacy litigation’ refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of [the Supreme] Court’s decision in *Corbello v. Iowa Production*, 02-0826 (La.2/25/03); 850 So.2d 686. These types of actions are known as ‘legacy litigation’ because they often arise from operations conducted many decades ago, leaving an unwanted ‘legacy’ in the form of actual or alleged contamination.” *Marin v. Exxon Mobil Corporation*, 2009-2368, 2009-2371 (La. 10/19/10); 48 So.3d 234, fn. 1.

Finally, Senate Concurrent Resolution No. 53 requests the Louisiana State Law Institute to “study legal issues surrounding groundwater and surface water law and any needs for revisions to current law.” While not explicitly so stated in the body of the Resolution, this study seems to have a potential impact on the access to water to be utilized in the frac’ing process employed by operators in shale plays such as the Haynesville and the Tuscaloosa Marine Shale.

II. LEGISLATION

A. Act No. 795 enacting LA. REV. STAT. ANN. § 30:28I:

“Pre-Entry Notice” to Surface Owner

Act No. 795 of 2012 enacts LA. REV. STAT. ANN. § 30:28I. That statute directs the Commissioner of Conservation to hold a rule-making hearing under the Administrative Procedure Act⁴ and thereafter “promulgate rules, regulations, and orders necessary to require an operator, agent, or assigns, to provide a single notice to the surface owner of lands on which the drilling operations are to be conducted.” That notice is referred to in the statute as a “pre-entry notice.”

The statute provides the following parameters to be embodied in the rule to be promulgated by the Commissioner of Conservation, to-wit:

- (a) The “pre-entry notice” must be sent to the surface owner no less than thirty days prior to construction operations of a drilling location on the property by the operator for the purpose of commencing drilling operations on the well described in the “pre-entry notice.” The notice must be provided “in the form required by the commissioner,” and no subsequent notice to the surface owner is required.
- (b) The “pre-entry notice” must include the following information, to-wit:
 - (i) The contact name, email address, and phone number for the operator.
 - (ii) The proposed well name and pad location including section, township, range, and surface plat of the pad location, if available.
 - (iii) A statement that the operations will commence sometime later than thirty days after the date of the notice.

⁴ LA. REV. STAT. ANN. § 49:950, *et seq.*

- (c) No “pre-entry notice” shall be required if the operator has a “contractual relationship” with the surface owner.
- (d) If the operator is facing “loss or termination of a mineral lease,” or if other “emergency circumstances” might exist, the operator may make application to the Commissioner to either waive the necessity for the “pre-entry notice” or “reduce the thirty-day requirement for such notice.” The Commissioner may act in respect of such notice “without notice or hearing.”
- (e) No “pre-entry notice” is necessary “for preparatory activities such as an inspection, surveying, or staking.” Further, it is provided that neither the statute nor the rules promulgated pursuant thereto “shall be construed as altering or reducing the doctrine of correlative rights or altering or reducing the operator’s obligation to conduct his operations with due regard for the rights of the surface owner.”
- (f) If an existing drilling pad is already located on the property, no “pre-entry notice” is necessary unless the operator intends to “expand the drilling pad or access road.”

The statute defines a “surface owner” as “the person or persons shown in the assessor’s rolls of the parish as the owner of the surface rights for the land for which a pre-entry notification would be required.”

Finally, it is stated that, “[a]fter receipt of the pre-entry notice, the surface owner shall make no alterations to a completed drilling location with the malicious intent to interfere with the drilling operations for which the owner received the pre-entry notice.”

Comments

Your presenter is not a big fan of “feel good” legislation of this type as it assumes that a surface owner is unaware of the fact that his land is subject to either a mineral servitude or a mineral lease. Existing law already provides for a notice to the land owner if the well is proposed to be drilled at a location within

five hundred (500') feet of any "residential or commercial structure."⁵ While the legislation might "feel good," it will be viewed by the industry as unnecessary "red tape."

If the land is not subject to a mineral servitude, the land owner would own the "right" to the minerals in the land⁶ and, presumably, has granted a mineral lease to the operator such that the statute does not apply by reason of the existence of a "contractual relationship" with the surface owner.⁷ Thus, seemingly, the statutory definition of "surface owner" is intended to be a landowner whose land is subject to a mineral servitude; only such a person would be considered the "owner of surface rights for the land."

By tethering the determination of who is a "surface owner" to whom a "pre-entry notice" is due, to the records of the Assessor, rather than of the Clerk of Court, the statute imposes a new burden on an operator; one would think that the records of the Assessor do not permit one to discern whether assessed land is, or is not, subject to a mineral servitude.

If land is co-owned, and the operator has obtained the consent of not less than eighty (80%) per cent of the owners of the land, the operator may lawfully operate, even if some interest less than twenty (20%) per cent has not consented to the operation.⁸ It is unclear if this right to operate is impeded by this statute.

⁵ "Upon a determination by the commissioner that a residential or commercial structure is located within five hundred feet of the proposed drilling site, he shall convey that information, together with written notice of a public hearing thereon, by means of an official notice delivered by first class mail, to any person owning a residential or commercial structure within a five hundred foot radius of the proposed site and to the local governing authority in whose jurisdiction the property is located." LA. REV. STAT. ANN. § 30:28D(3).

⁶ LA. REV. STAT. ANN. § 31:6 ("Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.").

⁷ LA. REV. STAT. ANN. § 30:28I(1)(c).

⁸ LA. REV. STAT. ANN. § 31:166 ("A co-owner of land may grant a valid mineral lease . . . as to his undivided interest in the land but the lessee or permittee may not exercise his rights thereunder without consent of co-owners owning at least an undivided eighty percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner.").

If a well is producing and is later deepened or sidetracked (as opposed to merely being reworked), it is not clear if another “pre-entry notice” is required. Such an activity involves the use of a drilling rig. Hopefully, this will be clarified in the rule to be promulgated by the Commissioner of Conservation.

Although it is provided that no “pre-entry notice” shall be required if the operator has a “contractual relationship” with the surface owner, a question is presented as to whether a party operating under a farmout agreement⁹ meets this definition. Until such an operator has drilled a well and earned an assignment of the mineral lease, it is a stranger to the surface owner, and probably cannot be said to have a “contractual relationship” with the lessor.¹⁰

One might also be concerned that the carve-out for “loss or termination of a mineral lease” might not be sufficient protection to an operator who, while not facing lease termination within a month, still is subject to contractual limitations whereby it cannot operate, say, during a hunting or agricultural season – a not uncommon provision in certain parts of the state. Hopefully, this circumstance would constitute an “emergency circumstance” in the eyes of the Commissioner of Conservation.

The statement that the “surface owner shall make no alterations to a completed drilling location with the *malicious* intent to interfere with the drilling operations for which the owner received the pre-entry notice,” is not particularly comforting if it is to be inferred that interference by the surface owner is

⁹ “A farmout agreement is a contract to assign oil and gas lease rights in acreage upon the completion of a drilling obligation and performance of the other provisions contained therein.” *Robinson v. North American Royalties, Inc.*, 509 So.2d 679 (La.App. 3rd Cir. 1987).

¹⁰ “To the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes responsible directly to the original lessor for performance of the lessee’s obligations.” LA. REV. STAT. ANN. § 31:128.

problematic only if it is “malicious.” “Self-help” is never condoned by the courts, and this should not be construed as altering that well-established tenet.¹¹

¹¹ There is probably no greater judicial expression of the disdain toward “self-help” than that expressed in *Thayer v. Littlejohn*, 1 Rob. 140, 141 (La. 1841), where the court observed, as follows: “While we regret the obligation we are under of recording in our judgment a resort to force and violence by any of the inhabitants of the State, instead of an application to courts of justice, in redressing their grievances, we are much gratified by the opportunity of expressing our approbation of the due sense which those of our fellow citizens who constituted the jury in the district court, manifested of their duty to prevent the recurrence of acts showing such disregard of the law, and all attempts to seek redress through violence and force, by persons who fancy themselves injured, or are really so. And we are surprised that the defendants should have conceived the idea that they could excite our sympathy or commiseration. We would have cheerfully granted damages for the frivolous appeal, if they had been asked, or if we thought ourselves authorized to grant them when not demanded.” Ouch!

B. Act No. 812 enacting LA. REV. STAT. ANN. § 30:4(L):

Reporting of Fluids Used in Hydraulic Fracturing (“Frac’ing”)

Act No. 812 of 2012 enacts LA. REV. STAT. ANN. § 30:4(L). That statute directs the Commissioner of Conservation to make “any reasonable rules, regulations, and orders that are necessary to require the operator of a well, which utilizes the application of fluids with force or pressure in order to create artificial fractures in the formation for the purpose of improving the capacity to produce hydrocarbons, to report no later than twenty days following the completion of hydraulic fracturing stimulation operations,” certain information.

The rule requires the reporting, “in a manner determined by the commissioner,” of the following information, to-wit:

- (a) The type and volume of the hydraulic fracturing fluid.
- (b) A list of additives used, including the specific trade name and the supplier of the additive.
- (c) A list of ingredients used in the hydraulic fracturing fluids, with certain specificity as provided by the Federal Regulations. If an ingredient is “subject to trade secret protection under the criteria set forth in 42 U.S.C. 11042(a)(2),” the rules to be promulgated by the Commissioner shall “require the operator to provide the contact information of the entity claiming trade secret protection for the listed product and to report, at a minimum, the chemical family associated with such ingredient.”

Any information provided pursuant to the rule shall be subject to the Louisiana Public Records Act.¹²

The provisions of the statute “shall not apply to operations conducted solely for the purposes of sand control or reduction of near wellbore damage.”

¹² LA. REV. STAT. ANN. § 44:1, *et seq.*

Comments

The adoption of this legislation in Louisiana is part of a nationwide movement requiring the disclosure of this type of information.¹³ Vermont has actually banned hydraulic fracturing, but this is somewhat illusory since Vermont does not have much of an oil and gas industry in any event.

Actually, the Commissioner has already promulgated a rule calling for the disclosure of information of this type, and has prescribed that it be reported on Louisiana Office of Conservation Form WH-1.¹⁴

¹³ Arkansas: Rule B-19 of Rules of Arkansas Oil and Gas Commission; Ohio: Section 1508.10(A)(9) of the Revised Code of Ohio; Oklahoma: OAC 165:10-3-10; Pennsylvania: 25 Pa. Code § 78.55; Texas: HB 3328, 2011 Leg., 82 Sess.; Wyoming: Wyo. Oil & Gas Comm'n. § 3-8(c).

¹⁴ See LAC 43:XIX.118C.

- C. Act No. 743 amending LA. REV. STAT. ANN. § 30:5.1 and enacting LA. REV. STAT. ANN. § 30:5.1B:

Authority of the Commissioner to Create Units for “Ultra Deep Structures”

In 1999, the Legislature adopted Act No. 1094 which enacted LA. REV. STAT. ANN. § 30:5.1. That statute authorized the Commissioner to create a unit for a “deep pool” which is a “pool at a depth in excess of fifteen thousand feet true vertical depth.”

By Section 1 of Act No. 743, the text of LA. REV. STAT. ANN. § 30:5.1 was renumbered so that the authority to create a unit for a “deep pool” has been continued – with very minor changes -- as Part A of that statute.

Part B of that statute has now been added. It essentially mirrors the structure of Part A (pertinent to “deep pool units”), and now authorizes the Commissioner to create a unit for an “ultra deep structure,” being a “structure at a depth in excess of twenty two-thousand feet true vertical depth.”

Comments

Part A of LA. REV. STAT. ANN. § 30:5.1 (originally enacted in 1999) regulates the creation of “deep pool” units, while Part B (enacted in 2012) governs the creation of “ultra deep structure units.” For purposes of Part A, the definition of a “pool” would be the general definition of that term in the Conservation Act,¹⁵ which is:

“Pool” means an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both. Each zone of a general structure which is completely separated from any other zone in the structure is covered by the term “pool” as used in this Chapter. However, to promote the development and production of marginally commercial sands, a zone may contain one or more common accumulations and the overall stratigraphic interval of the zone may be considered and treated as a pool for all purposes of this Chapter.

¹⁵ LA. REV. STAT. ANN. § 30:3(6).

For purposes of Part B, the term “structure” is defined “as a unique geologic feature that potentially traps hydrocarbons in one or more pools or zones.”¹⁶

The maximum size of a “ultra deep structure unit” is 9,000 acres. The applicant for such a unit must submit a “plan of development,” as to which it is statutorily to be presumed “that a reasonable plan of development will include at least one well for each three thousand acres contained in the unit.” An “ultra deep structure unit” may “be served by one or more wells.”

Interested parties have the right to seek the revision or dissolution of an “ultra deep structure unit” if the Commissioner determines, after a hearing, that such relief is appropriate. In such hearing, the operator has the burden of proof. “If the commissioner determines that the unit operator has not substantially complied with the plan of development, the unit operator shall be required to show cause why the unit should not be reduced in size.”

Although Part B(11) of the statute provides that the “provisions of Subsection A of this Section shall not be applicable to any unit well drilled in a unit established pursuant to this Subsection,” that language would not seem to explicitly state that a “deep pool unit” could not be created for subsurface depths deeper than 22,000 feet since such depths are, obviously, also deeper than 15,000 feet.

Part B(13) of the statute reads, as follows:

While the provisions of this Subsection authorize the initial creation of a single unit to be served by one or more wells, nothing herein shall be construed as limiting the authority of the commissioner to approve the drilling of alternate unit wells on drilling units established pursuant to R.S. 30:9(B).

This passage parallels the corresponding provisions in Part A(9) of the statute. This express reference to “alternate unit wells” in LA. REV. STAT. ANN. § 30:5.1(9), prior to the enactment of Act No. 743, was cited as legislative recognition of the authority to create such units, by the court in a case covered by this presenter in 2011.¹⁷

¹⁶ LA. REV. STAT. ANN. § 30:5.1B(1).

¹⁷ *James Tigner Walker, et al v. J. W. Operating Company, et al*, Civil Docket No. 555,247, 19th Judicial District Court, East Baton Rouge Parish, Louisiana, currently on appeal to the Court of Appeal, First Circuit, as Docket No. 2012-CA-0662. Oral argument is anticipated for September 2012.

In a Press Release issued on July 26, 2012, Scott Angelle, (then) Secretary of the Department of Natural Resources, applauded the announced plans of McMoRan Exploration Company to drill a 30,000 foot onshore well in an “area where the borders of Iberia, St. Martin and Iberville Parishes meet . . . , with drilling on the planned 30,000-foot well to commence by the end of 2012.” The Press Release continued, as follows:

Angelle said that the potential to draw new investment and activity in ultra-deep energy exploration, bringing with it new energy industry spending that can support job creation both in the industry and in the communities surrounding new activity, was a primary driver in DNR having recommended new law in the recent legislative session that specifically addressed the Office of Conservation’s regulation of ultra-deep oil and natural gas wells. The law, as passed by the Legislature, defines “ultra-deep” wells as those drilled to tap into reservoirs at 22,000 feet or deeper below surface and includes provisions outlining rules for how drilling units can be established at that depth and determining the size of those units. The process of establishing a drilling unit for a well can be critical in establishing the rights of operators to explore for oil and natural gas and the rights of landowners to share in the proceeds of oil and natural gas production.

D. Act No. 743 amending LA. REV. STAT. ANN. § 30:10:

Revisions to Risk Fee Act, Imposing New Obligation to Pay Royalties on Behalf of a Party Who Has not Participated in the Cost, Risk and Expense of a Well

Section 1 of Act No. 743 also amends LA. REV. STAT. ANN. § 30:10, the Risk Fee Act. Originally enacted in 1984,¹⁸ the legislation establishes a framework by which an “owner”¹⁹ who desires to drill a well may give notice and an opportunity to participate in the cost, risk and expense of a proposed drilling operation, to “all other owners in the unit.”²⁰ This would include a third party owning a mineral lease which covers land in the unit.

If the notified party does not elect to participate, the party drilling the well may recover, in addition to the costs of “drilling, testing, completing, equipping, and operating the unit well, including a charge for supervision,” attributable to the non-participating owner, a “risk fee” equal to two hundred per cent of such allocated costs. This is euphemistically referred to as the “Risk Fee Act.”

¹⁸ Act No. 345 of 1984, effective January 1, 1985.

¹⁹ “‘Owner’ means the person, including operators and producers acting on behalf of the person, who has or had the right to drill into and to produce from a pool and to appropriate the production either for himself or for others.” LA. REV. STAT. ANN. § 30:3(8).

²⁰ Because an unleased land owner or unleased mineral servitude owner “has . . . the right to drill into and to produce from a pool and to appropriate the production either for himself or for others,” such person would meet the definition of an “owner” such that the notice, if sent by the “owner drilling or intending to drill a unit well,” would seemingly need to be sent to “all other owners,” including an unleased land owner or unleased mineral servitude owner. However, LA. REV. STAT. ANN. § 30:10A(2)(e)(i) provides that “[t]he provisions of Subparagraph 2(b) . . . above with respect to the risk charge shall not apply to any unleased interest not subject to an oil, gas, and mineral lease.” Seemingly, the only feature of the Risk Fee Act that does not apply to an unleased owner is the imposition of the risk charge.

The Risk Fee Act has been revised in several respects, the more salient of which are summarized, as follows:

- (a) Express reference is now made to an owner intending to drill an “alternate unit well,” as well as a “cross-unit well.”²¹ The prior formulation was an “owner drilling or intending to drill a unit well, including a substitute unit well.”
- (b) Notices and responses under the Act are to be sent by “registered” mail rather than by “certified mail.” They can also be sent by any “other form of guaranteed delivery and notification,” but not by e-mail.
- (c) Among the information to be provided by the operator to the notified owner is an Authorization for Expenditure (“AFE”) “dated within one hundred twenty days of the date of the mailing of the notice.”
- (d) Subsection A(2)(i) indicates that the operator may invoke the benefits of the Risk Fee Act by sending a written notice to “all other owners in the unit prior to the actual spudding of any such well.” The underscored language is new in that the prior text of the Act did not have such a temporal limitation. There is conflict, however, in that Subsection A(2)(a)(i)(ee) requires the operator to provide to the notified owner certain well logs and other well data,

²¹ The term “cross-unit well” is not defined in the statute, but has reference to a unit well which crosses unit lines and produces from both the unit where the surface location is situated as well as an adjacent unit under which the well is perforated for production. Orders authorizing “cross-unit wells” have been issued by the Louisiana Office of Conservation. A typical Finding contained in such orders states the following with respect to the allocation of production from a “cross-unit well,” as follows:

That unit production from each cross unit lateral should be allocated to each unit in the same proportion as the perforated length of the lateral, as defined in the DEFINITIONS section herein, in that each unit bears to the total length of the perforated lateral as determined by an “as drilled” survey performed after the cross unit well is drilled and completed; and that unit production should continue to be shared on a surface acreage basis.

“[i]n the event that the proposed well is being drilled or drilled at the time of the notice.”

- (e) The “risk fee” is two hundred (200%) per cent with respect to a unit well, a substitute unit well, or a cross-unit well, but is one hundred (100%) per cent with respect to an alternate unit well. In either case, the costs as to which the “risk fee” may be assessed are “the cost of drilling, testing, and completing” the unit well, but “exclusive of amounts the drilling owner remits to the nonparticipating owner for the benefit of the nonparticipating owner’s royalty and overriding royalty owner.”

The principal change in this scheme is that the operator now has the obligation to pay royalties to the lessor of the non-participating party as well as overriding royalty interest burdening the lease(s) of the non-participating party. It is to this new feature that the following comments are directed.

Comments

Where to begin? It is difficult for your presenter to overstate how unconscionable and ill conceived – for lack of stronger words that one can state here – this legislation is as it pertains to the amendments to LA. REV. STAT. ANN. § 30:10, particularly to the Risk Fee Act. My commentary follows, and I apologize in advance if my disdain for this legislation is not cogently expressed.

Without any apparent consideration whatsoever for public policy or equity, this legislation unnecessarily upsets a century of jurisprudence as it pertains to the right of an operator who spends its own dollars, to be reimbursed prior to the owner of a non-consenting interest receiving any revenue.²²

²² See, e.g., *Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 351, 38 So. 253 (1905) (Supreme Court ordered “that plaintiffs are entitled to and do have and recover of the defendants herein, . . ., one-fifth of all the oil produced by said defendants on said tract of land, on plaintiffs reimbursing one-fifth of all the expenses, ordinary and incidental, incurred in producing, transporting, and preserving the same, and, if sold, the additional expenses of sale.”).

To that end, Act No. 743 fails to recognize that public policy should not create a disincentive for the drilling of wells.²³ This legislation does precisely that.

While it is difficult to imagine to what perceived harm or inequity this legislation was directed, it has been reported that land owners in the area overlain by Haynesville Shale had experienced non-payment of royalties by operators in situations in which mineral leases were HBP²⁴ from shallow, long producing formations, and the acreage was unitized for more expensive Haynesville Shale units in which the operator elected to not participate. Having made an election to not participate in the drilling of an expensive Haynesville well, the lessee received no revenue and, hence, paid no royalties to its lessor.

For the entire history of mineral jurisprudence since enactment of the Conservation Act,²⁵ an operator who, at its sole cost, risk and expense, drills a well which is unitized by the Commissioner, has been able to recoup its drilling and completion costs out of the share of production allocated by the unit to a party who elects to not participate in the cost, risk and expense of drilling.²⁶

This right was explicitly recognized by the Supreme Court in the case which upheld the constitutionality of the Conservation Act.²⁷ In that case, the court addressed the plaintiff's contention that the Conservation Act was invalid because, among other things, it made "no provision . . . for collecting or enforcing" the operator's right of reimbursement of drilling costs.

The Supreme Court rejected this contention by noting that "[t]he answer to this [contention] of course is that the [operator] has had and will have possession of all of the proceeds from the production of the well and may retain

²³ As long ago as fifty years, the industry has looked askance on one who, in the vernacular of the industry, "free rides." See W. D. Curlee, *The Problem of the "Free-Riding" Lessee and Some Suggested Solutions*, 9 ANN. INST. ON MIN LAW 21 (1962).

²⁴ HBP = "Held by production."

²⁵ Enacted by Act No. 157 of the 1940 Louisiana Legislature, now codified in LA. REV. STAT. ANN. § 30:1, *et seq.*

²⁶ This very important aspect of Louisiana law pertinent to oil and gas was the subject of a paper presented by your presenter in 2008 at the Institute on Mineral Law. See Patrick S. Ottinger, *After the Lessee Walks Away – The Rights and Obligations of the Unleased Mineral Owner in a Producing Unit*, 55 ANN. INST. ON MIN LAW 59 (2008).

²⁷ *Hunter Co. Inc. v. McHugh*, 202 La. 97, 11 So.2d 495 (1943).

all of the proceeds until the drilling of the well and putting it on production is entirely paid for.”

Prior to this legislation, the operator was entitled to receive the full revenue stream attributable to the interest of the non-participating party and had no obligation to pay the royalties due to the lessor of the non-participating party. Rather, the non-participating party had the obligation to pay its own royalty even though it was receiving no revenue from the well in which it did not participate.²⁸

This legislation alters that long-standing remedy or reimbursement by disallowing the operator from retaining “all of the proceeds until the drilling of the well and putting it on production is entirely paid for.” The revenue stream is now to be diminished by the royalty and overriding royalty due to parties to whom the non-participating party is personally obligated, and with whom the operator has no contractual relationship.

The Risk Fee Act now provides that the “nonparticipating owner shall be entitled to receive from the drilling owner for the benefit of his lessor royalty owner that portion of production due to the lessor royalty owner under the terms of the contract or agreement creating the royalty between the royalty owner and the nonparticipating owner reflected of record at the time of the well proposal.”²⁹

Additionally, “the nonparticipating owner shall receive from the drilling owner for the benefit of the overriding royalty owner the lesser of: (I) the nonparticipating owner’s total percentage of actual overriding royalty burdens associated with the existing lease or leases which cover each tract attributed to the nonparticipating owner reflected of record at the time of the well proposal; or (II) the difference between the weighted average percentage of the total actual royalty and overriding royalty burdens of the drilling owner’s leasehold within the unit and the nonparticipating owner’s actual leasehold royalty burdens reflected of record at the time of the well proposal.”³⁰

²⁸ *Gulf Explorer, LLC v. Clayton Williams Energy, Inc.*, 2006-1949 (La.App. 1st Cir. 6/8/07); 964 So.2d 1042 [“Clayton Williams has no contractual relationship with Gulf’s lessors; under the facts presented herein, Clayton Williams has no obligation to pay Gulf’s royalty and overriding royalty owners before it legally recoups its expenses from production pursuant to LSA-R.S. 30:10A(2)(b)(i).”].

²⁹ LA. REV. STAT. ANN. § 30:10A(2)(b)(ii)(aa).

³⁰ LA. REV. STAT. ANN. § 30:10A(2)(b)(ii)(bb).

The Act does not make a distinction as to the manner in which the overriding royalty interest might have been created. An overriding royalty interest may be created by reservation in a sublease³¹ or by an assignment by a working interest owner.³² It is one thing to require the operator who elects to invoke the benefits of the Risk Fee Act to pay the overriding royalty to a sublessor (which presumably was created in a legitimate transaction). However, as unpalatable as even that is, to require the operator to pay the overriding royalty to an assignee creates an opportunity for abuse, particularly where the non-participating owner of a mineral lease has assigned to itself or an affiliate a significant overriding royalty interest in an attempt to receive revenue during the period of “payout.”

With regard to the new obligation to pay royalties to the “lessor royalty owner” of the nonparticipating owner, this would seem to not require the payment of proceeds to the owner of a mineral royalty under the tract of land burdened by the mineral lease of the nonparticipating owner. Additionally, it is common that the operator will not incur the expense to examine title to lands on which it does not hold a mineral lease. How does the operator satisfy itself that it is paying the proper parties?

Concerning the new obligation to pay proceeds to the owner of an overriding royalty interest burdening the mineral lease of the nonparticipating owner, why is such a person – most typically an industry participant, including one who has farmed-out its lease to the nonparticipating party -- worthy of protection by this new legislation? The formula to determine how much is to be paid imposes additional burdens, risks and costs on the operator.

And lest one thinks that the legislation was designed to protect the landowner (or overriding royalty owner) of the non-participating party, those interests already had a remedy in that their lessee was personally responsible for the payment of royalties (and overriding royalties), even if “out of pocket.” In fact, if the non-participating lessee did not timely pay its lessor, the latter had a potent remedy in the form of a written notice of non-payment under Article 137 of the Mineral Code, and the potential to recover the royalties due, plus double that amount as damages, plus interest, plus attorney’s fees, as well as dissolution in certain cases.

³¹ *Hankamer v. Texaco, Inc.*, 387 So.2d 1251 (La.App. 1st Cir.), writ granted 392 So.2d 669 (La. 1980), case dismissed 403 So.2d 651 (La. 1981).

³² See Patrick S. Ottinger, *What’s in a Name? Assignments and Subleases of Mineral Leases Under Louisiana Law*, 58 ANN. INST. ON MIN LAW 283 (2011).

This enactment became effective on August 1, 2012. How it will be applied to a variety of situations remains to be seen. Among other scenarios brought into question are wells drilled pursuant to a notice issued prior to the effective date of the amendment, but not yet commenced; wells spud prior to the effective date but not completed; wells subject to the Risk Fee Act which are producing on the effective date, but not yet paid out, etc.

Since the right of an operator to be reimbursed out of “all of the proceeds” was one of stated bases for upholding the constitutionality of the Conservation Act, one wonders if a constitutional challenge could be asserted based upon Article I, Section 2, of the 1974 Constitution which addresses the divestiture of vested rights; or Article I, Section 4(b), of the 1974 Constitution which addresses the taking of property without just compensation, or Article III, Section 15(A), of the 1974 Constitution which requires that an act of the legislature must be limited to one subject matter.

Turning to substantive features of the legislation, prior law required that proposals to drill a well, and responses thereto, under the Risk Fee Act were to be dispatched by “certified” mail. This legislation changes that mode of delivery to “registered mail, return receipt requested, or other form of guaranteed delivery and notification method, not including electric communication or mail.” Does this mean a reliable commercial courier service (United Parcel Service, Federal Express) works, but certified mail does not?

The legislature strikes again on this one. Prior to its amendment in 2001, the Well Cost Reporting Statute³³ provided that notice under that statute was to be made by *registered* mail. One case decided under the original statute held that a notice sent by *certified* mail was ineffective, even though it was established that the letter was in fact received.³⁴ So how did the legislature fix that problem? Rather than amending the statute to say that notice could be by “registered or certified mail,” it changed the statutorily mandated mode of delivery to “certified mail.”

In this case, the opposite was accomplished. The legislation changes the statutorily mandated mode of delivery from “certified” to “registered” mail. Should not the issue be to require a mode of delivery that ensures receipt, and could that not be best accomplished by “registered or certified mail”? Why create an unnecessary technicality or trap for the unwary?

³³ LA. REV. STAT. ANN. § 30:103.1, *et seq.*

³⁴ *Browning v. Exxon Corporation*, 848 F.Supp. 1241 (M.D. La.), *aff'd* 43 F.3d 668 (5th Cir. 1994).

This is not a mere matter of semantics. Because the statute is penal in nature, it would be strictly construed and that could lead to an inequity brought about by a hyper-hyper technicality.³⁵

In summary, the law should be grounded in the promotion of a public policy which encourages, rather than discourages, one to assume the cost, risk and expense involved in the drilling of an exploratory oil and gas well. That policy is promoted when the revenue stream to which such a risk taker is entitled is not diminished by the responsibility to pay the royalty proceeds to a party who already has both an entitlement to such proceeds and a meaningful remedy for the recovery thereof. This amendment to existing law removes that incentive by adding a price tag to the availment of the Risk Fee Act by an owner desiring to drill a well.

Correspondingly, the Act – without apparent reason or logic – removes (or at least greatly ameliorates) a significant incentive to a unitized mineral lessee to participate in the cost, risk and expense involved in the drilling of an exploratory oil and gas well,³⁶ and, instead, creates a disincentive to such mineral lessee to participate.³⁷

Fortunately, the obligation that the operator must pay the royalty and overriding royalty interest on behalf of the non-participating party only arises in the case that the operator has chosen to avail itself of the Risk Fee Act. It does not apply if the operator has elected to not invoke that statutory right. This will unquestionably lead to an operator making a more considered decision before it elects to utilize the Risk Fee Act. The fear is that a court will interpret the legislation in a different way.

³⁵ *Scurlock Oil Company v. Getty Oil Company*, 324 So.2d 870 (La.App. 3rd Cir. 1976) (statute, being penal, “should be construed strictly against the party seeking to impose the penalty.”).

³⁶ “If I don’t pay my share of costs, I’ll have pay my royalty owners ‘out of pocket’ while I am getting no revenue from the producing well.”

³⁷ “Why should I risk my dollars since the operator will have to pay my royalty owners in case the well is a successful well?”

E. Act No. 702 amending LA. REV. STAT. ANN. § 19:2, et seq.:

Imprescriptible Minerals Resulting from Acquisition
by a Legal Entity Vested With Power of Expropriation

On first blush, Act No. 702 would not seem to have much relevance to Mineral Rights in that it amends certain sections of Title 19, Expropriation, including Section 2 which identifies the types of juridical persons enjoying the power of expropriation. This Act made numerous procedural and other changes to the law of expropriation (including a change to the so-called “St. Julien Doctrine”),³⁸ but for our immediate purposes, your presenter wishes to highlight only one change made to the statute.

Signed by the Governor on June 11, 2012, Act No. 702 amended LA. REV. STAT. ANN. § 19:2 so as to expand the “created for” standard of eligibility for the right to expropriate, to now include a legal entity which is “engaged in” certain specified activities.

Comments

We must digress. Article 149 of the Louisiana Mineral Code deals with “imprescriptible minerals,” that is, a mineral servitude which is not subject to the prescription of non-use. Basically, if land is acquired by an “Acquiring Authority,” and the vendor reserves minerals in such transaction, the “prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority, or any successor that is also an acquiring authority.” These are usually called “imprescriptible minerals.”

As defined in Article 149, an “Acquiring Authority” includes, in addition to the Federal and State governments, and certain political subdivisions thereof, “any legal entity with authority to expropriate or condemn, except an electric public utility acquiring land without expropriation.”

LA. REV. STAT. ANN. § 19:2 specifies the types of “legal entity with authority to expropriate or condemn,” and, hence, which non-governmental legal entities would constitute an “Acquiring Authority.”

³⁸ Taking its name from the decision in *St. Julien v. Morgan Louisiana & Texas Railroad Company*, 35 La. Ann. 924 (1883), this doctrine stands for the proposition that a landowner who acquiesces in the installation of facilities on its property by a party having the power of expropriation, forfeits the right to demand the removal of the facilities and is relegated to a claim for money damages. It is now codified in LA. REV. STAT. ANN. § 19:14.

Prior to this legislation, those included certain entities which were “created for” certain purposes, e.g., the construction of railroads, toll roads, or navigation canals; the construction and operation of street railways, urban railways, or inter-urban railways; the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage; the piping and marketing of natural gas for the purpose of supplying the public with natural gas; the purpose of transmitting intelligence by telegraph or telephone; the purpose of generating, transmitting and distributing or for transmitting or distributing electricity and steam for power, lighting, heating, or other such uses, and piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline.

In view of the foregoing, it was both necessary and sufficient to examine the organizational papers of a legal entity involved in such a transaction (a legal entity being a vendee in a sale of land wherein the vendor reserves a mineral servitude) in order to determine if the legal entity had been “created for” any of the purposes stated in LA. REV. STAT. ANN. § 19:2.

As noted, Act No. 702 expanded the “created for” standard of eligibility for the right to expropriate, to now include a legal entity which is “engaged in” the specified activities.³⁹

Thus, if a corporation (for example) was created “for any lawful activity,”⁴⁰ but is in fact “engaged in” certain specified activities, a reservation of a mineral servitude in a sale to such entity might be imprescriptible.

When, prior to the adoption of Act No. 702, the standard was “created for,” a title examiner had the ability to find the articles⁴¹ and make a determination as to whether the vendee was an “Acquiring Authority,” and, hence, to determine if the vendor’s mineral servitude was or was not subject to prescription.

³⁹ Although LA. REV. STAT. ANN. § 19:2(11) listed, as an entity having the right to expropriate, “any domestic or foreign limited liability company *engaged in* any of the activities otherwise provided for in this Section,” this Subsection, by its explicit terms, does not reach or apply to corporations or partnerships.

⁴⁰ As permitted by LA. REV. STAT. ANN. § 12:24B(2), Articles of Incorporation must state, “In general terms, the purpose or purposes for which the corporation is to be formed, or that its purpose is to engage in any lawful activity for which corporations may be formed under this Chapter.”

⁴¹ The articles would be available in the office of the Secretary of State, LA. REV. STAT. ANN. § 12:25A(1), as well as “the office of the recorder of mortgages of the parish in which the registered office of the corporation is located,” LA. REV. STAT. ANN. § 12:25D.

Now that the touchstone has been extended to an entity which is “engaged in” those specified activities (even if not explicitly “created for” such purpose), this is a factual matter not reflected by the public records and would seemingly require an inquiry as to the activities in which the entity is or has been “engaged.”

And worse, the transaction in question might be for unrelated purposes, but if that entity is “engaged in” a prescribed activity in another parish or state (unrelated to the transaction at hand), is that sufficient? Nothing in the new formulation requires that the land purchase (with attendant reservation of a mineral servitude) actually be effectuated in connection with a qualifying activity in which the vendee is then “engaged.”

In other words, a corporation which is created for the generic purpose of engaging in “any lawful activity” might be engaged in a qualifying activity in Bossier Parish, and thereby might enjoy the power of expropriation in Terrebonne Parish, even though its activities in that latter parish are unrelated to the conduct of (or “engagement in”) the specified activity. If you are examining title to land in that southern parish and find that the entity purchased property wherein the vendor reserved minerals, is the mineral servitude prescriptible or not? What inquiry must the title examiner make to ascertain the status or character of the reserved mineral servitude?

Admittedly, the concern expressed herein might be assuaged somewhat by the requirement in Subparagraph B of Article 149 that the “instrument or judgment shall reflect the intent to reserve or exclude the mineral rights from the acquisition and their imprescriptibility as authorized under the provisions of this Section and shall be recorded in the conveyance records of the parish in which the land is located.”

If there is no reference in the deed to the minerals’ “imprescriptibility as authorized under the provisions of this Section,” the inquiry should end there. This conclusion is reinforced by Subparagraph G(2) of Article 149 which states that the “provisions of this Chapter shall not apply to: * * * [a] transfer in which the acquiring authority neither expressly reserves or excludes nor conveys to the transferor a mineral right otherwise subject to prescription.”

However, even with compliance with this requirement, it is still necessary to inquire into the facts to determine that the vendee is in fact an “Acquiring Authority” by reason of the fact that it has “engaged in” a prescribed activity. Said differently, merely stating, in the deed or judgment, that the reserved minerals are “imprescriptib[le] as authorized under the provisions of” Article 149, does not make it so.

F. Act No. 779 amending and reenacting LA. REV. STAT. ANN. § 30:29:

Regulatory Changes to “Legacy Litigation”

Act No. 779 amends and reenacts Subsections C(1), (2) and (3) of Section 29 of Title 30 (LA. REV. STAT. ANN. § 30:29). It also enacts Subsections B(5), (6), (7), and L of that statute.

Section 2 of Act No. 779 announces the applicability of the new legislation, as follows:

The provisions of this Act shall not apply to any case in which the court on or before May 15, 2012, has issued or signed an order setting the case for trial, regardless of whether such trial setting is continued.

Subsections B(5), (6), (7), and L of LA. REV. STAT. ANN. § 30:29 are new.

Subsection B(5) authorizes a party to compel attendance, at a deposition or trial, “any employee, contractor, or representative” of the Department of Natural Resources, who was “involved in the formulation of the feasible plan approved by the department under Subsection C” of LA. REV. STAT. ANN. § 30:29. Additionally, the attendance of a similar representatives of “an agency that reviews and provides comments” may also be compelled. However, discovery “regarding the department’s review, approval, or structuring of the feasible plan” may not be allowed “until after the department submits its final feasible plan with reasons to the court.” Costs incurred by the Department in responding to a subpoena shall be paid by the party issuing the subpoena.

Subsection B(6) establishes a procedure whereby a party who is sued in a “legacy lawsuit” may, within sixty (60) days of being served, “request that the court conduct a preliminary hearing to determine whether there is good cause for maintaining the defendant as a party to the litigation.” At the hearing, evidence may be submitted in affidavit or written form. The initial burden is on the plaintiff “to introduce evidence to support the allegations of environmental damage.” Following that, “the moving party shall have the burden to demonstrate the absence of a genuine issue of material fact that the moving party caused or is otherwise legally responsible for the alleged environmental damage.” However, the “rules governing summary judgments . . . shall not apply to the preliminary hearing.”

Within fifteen days after the preliminary hearing, “the court shall issue an order on any timely request for preliminary dismissal.” If granted, it shall be without prejudice to the right of “all parties . . . to rejoin the dismissed defendant during the litigation upon discovery of evidence not reasonably available at the time of the hearing.” A party who is successful in securing a preliminary dismissal and who is not later joined “shall be entitled to a judgment of dismissal with prejudice following the final nonappealable judgment on the claims asserted by the party against whom the preliminary dismissal was granted.”

The finding of the court “shall be without prejudice of any party to litigate the legal responsibility of any potentially responsible party, the allocation of responsibility among the potentially responsible parties, and any other issues incident to the finder of fact’s determination of the party or parties who caused the damage or who are otherwise legally responsible for the alleged environmental damage.” This new procedure is supplemental “to the pretrial rights and the remedies” available under the Code of Civil Procedure, “including the right to civil discovery.”

Subsection (7) creates authority for a “notice of intent to investigate.” While it does not appear that the issuance of such a notice is mandatory, such notice, if issued, shall include the following, to-wit:

- (i) A description of the property alleged to have been damaged;
- (ii) A description of the alleged environmental damage;
- (iii) The general location of the alleged environmental damage on the property;
- (iv) The name and address of all known owners of the property; and
- (v) The name and address of the current operator.

A copy of the notice shall be mailed by certified mail to all persons identified in the notice, by the party issuing such notice. If issued, a copy shall be mailed or physically delivered to the Department of Natural Resources. If such is done, the “prescriptive period that applies to any claim covered by [LA. REV. STAT. ANN. § 30:29] shall be suspended for a period of one year,” presumably from the date of delivery to the Department.

If a party submits a notice of intent to investigate, “any subsequent judicial demand by the party under the provisions of [LA. REV. STAT. ANN. § 30:29] shall identify on a map the location of any alleged environmental damage and include the results of any environmental testing performed on the property.” “Failure to include this information at the time of the filing of the judicial demand shall result in exclusion of the information.”

Subsection L is added to address a situation where a “responsible party is entitled to indemnification against punitive damages arising out of the environmental damage that is subject to the provisions of [LA. REV. STAT. ANN. § 30:29], a responsible party who admits “responsibility for the remediation of the environmental damage under applicable regulatory standards pursuant to the provisions of the Code of Civil Procedure Article 1563” “shall waive the right to enforce the contractual right to indemnification against such punitive damages caused by the responsible party’s acts or omissions.” Such waiver of the right to indemnification against punitive damages shall not apply to any other claims or damages.

Subsections C(1), (2) and (3) of LA. REV. STAT. ANN. § 30:29 are amended.

A couple of references in the prior law to “applicable standards” have been amended to read “applicable *regulatory* standards.”

It is now provided that, if the court holds a hearing pursuant to (new) Article 1563 of the Code of Civil Procedure in respect of a limited admission by a party, it is not necessary that the Department conduct a public hearing “for the same environmental damage.”

From the date of submittal of a plan of remediation by a party who admits liability or is found by the court to be legally responsible, there shall be no *ex parte* communication, either directly or indirectly, with “any employee, contractor, or representative” of the Department of Natural Resources “regarding the formation of the feasible plan.” This fact shall be certified to by the Department.

Subsection (b) has been added to Subsection C(3) to LA. REV. STAT. ANN. § 30:29. It provides that, if the Department “preliminarily approves or structures a preliminary plan that requires the application of regulatory standards of an agency other than the department or that provides an exception from the department’s standards,” the plan so developed shall, within fifteen (15) days of development of the plan, be submitted to the Department of Environmental Quality and to the Department of Agriculture and Forestry. Upon such submission, the other agencies have thirty (30) days within which to “provide written comments regarding the plan.” The responsible party will be liable for costs incurred by the reviewing agencies.

Within thirty (30) days of receipt by DNR of the written comments from another agency, “ the department shall file in the court record the final plan, with written reasons that the department determines to be the most feasible plan to evaluate or remediate the environmental damage under applicable regulatory standards,” together with any comments submitted by any other agency. “Based on the findings of the department, the department may issue any compliance order it deems necessary to either the operator of record or, where applicable, a party found responsible or admitting responsibility for implementing the most feasible plan to evaluate or remediate the environmental damage under applicable regulatory standards. If a compliance order is issued against the responsible party who is not the current operator of record, the responsible party shall give the current operator of record notice of the compliance order within thirty days of the responsible party’s receipt of the compliance order.”

Comments

Commencing with the 2003 Supreme Court decision in *Corbello v. Iowa Production*,⁴² there has been a spate of litigation which have resulted in significant monetary awards as well as settlements involving significant dollar amounts. Judgments, verdicts and settlements in the range of hundreds of millions of dollars have been reported.

Because there is no obligation on the part of the plaintiffs to actually use the money to clean up the property, E&P companies faced the possibility of “paying twice,” once to the plaintiffs and then again later when the regulatory bodies issued compliance orders.⁴³

⁴² 2002-0826 (La. 2/25/03); 850 So.2d 686, *rehearing granted in part, opinion clarified, and otherwise rehearing denied*, (La. 6/20/03); 850 So.2d 714; *judgment rendered on remand*, 2001-567 (La.App. 3rd Cir. 8/6/03); 851 So.2d 1253.

⁴³ *Magnolia Coal Terminal v. Phillips Oil Company*, 576 So.2d 475 (La. 1991) (“The most difficult problem with affirming the part of the trial court’s judgment which awards damages for failure to clean up the oil contamination is that the landowner receives a money judgment with no restriction on the use of the money. Plaintiff is apparently free to use this money for purposes other than restoring the land, and the public is thus left unprotected. Moreover, the Commissioner has ordered defendant to clean up the site, and defendant is possibly exposed to paying twice for the restoration.” J. Lemmon, concurring).

In 2003, Act No. 1166 added LA. REV. STAT. ANN. § 30:2015.1.⁴⁴ That legislation proved largely ineffectual, so the Louisiana Legislature enacted Act No. 312 of 2006, which added LA. REV. STAT. ANN. § 30:29, effective June 8, 2006. This legislation is generally referred to as “Act 312.”

A principal motivation to the recent legislative action was a recognition that remediation of E&P sites was held hostage to court proceedings under Act 312. Court decisions were far from consistent in interpreting Act 312 and, in the view of some, inconsistent with the general understanding of the import and objective of that legislation. This recent legislation was the result of an extensive (read, “expensive”) lobbying effort on behalf of both landowners and the oil and gas industry.

Subsection B(5) was enacted to address a situation which arose in a case whereby lawyers for landowners sought to depose the Secretary of the Department of Natural Resources, an attempt which was aggressively resisted.⁴⁵

The nature of a “legacy lawsuit” is that many parties are joined to the action, long after the time when such parties had any activities on the land in question. More often than not, a party who is joined has no records because its activities were under a mineral lease which has either expired or been assigned to third parties, with the records being delivered to the assignee. Subsection B(6) creates a mechanism whereby a defendant who feels it has no involvement in the matter can seek to be dismissed.

⁴⁴ This statute regulates the remediation of usable ground water. Subsection L states that the “Section shall not apply to oilfield sites or exploration and production (E&P) sites regulated by the Department of Natural Resources, office of conservation. ‘Oilfield site’ or ‘exploration and production (E&P) site’ means any oilfield site or exploration and production site as defined in R.S. 30:29(I)(4).”

⁴⁵ *Tensas Poppadoc, Inc. v. Chevron U.S.A. Inc.*, 2010-124 (La.App. 3rd Cir. 10/27/10); 49 So.3d 1020.

G. Act No. 754 enacting Articles 1552 and 1563 of LA. CODE CIV. PROC.:

Procedural Changes to “Legacy Litigation”

Act No. 754 enacted two new articles of the Code of Civil Procedure, to-wit:

- (a) Article 1552 addresses “environmental management orders” and is placed in Title IV (Pre-Trial Procedure) of Book II (Ordinary Proceedings) of the Code of Civil Procedure.
- (b) Article 1563 addresses the effect of a limited admission of liability in environmental damage lawsuits. It is placed in Chapter 1 (Consolidation of Cases and Separate Trials of Issues of Liability and Damages) of Title IV (Pre-Trial Procedure) of Book II (Ordinary Proceedings) of the Code of Civil Procedure.

Article 1552 provides that, upon the request of a party or of the Office of Conservation, the court in a suit brought under LA. REV. STAT. ANN. § 30:29 – a “legacy lawsuit” – “shall direct the attorneys for the parties to appear before the court to develop an environmental management order.”

The environmental management order shall authorize all parties to access the property in order to perform inspections and environmental testing. All test results shall be submitted to all parties and to the Department of Natural Resources, Office of Conservation, within thirty (30) days of receipt. Failure to provide the results of testing shall preclude that party from admitting those results into evidence in the civil action.

The environmental management order shall include “reasonable terms” for the following, to-wit:

- (1) Access to the property;
- (2) Investigation and environmental testing;
- (3) Sampling and testing protocols; and
- (4) Specific time frames within which to conduct such testing and sampling.

Article 1563 specifies the effect to be given to a party's limited admission of liability. This correlates to LA. REV. STAT. ANN. § 30:29C(1) which provides, as follows:

If at any time during the proceeding a *party admits liability for environmental damage* or the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefor, the court shall order *the party or parties who admit responsibility* or whom the court finds legally responsible for the damage to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage. The court shall order that the plan be developed and submitted to the department and the court within a time that the court determines is reasonable and shall allow the plaintiff or any other party at least thirty days from the date each plan or submittal was made to the department and the court to review the plan or submittal and provide to the department and the court a plan, comment, or input in response thereto. The department shall consider any plan, comment, or response provided timely by any party. The department shall submit to the court a schedule of estimated costs for review of the plans or submittals of the parties by the department and the court shall require *the party admitting responsibility* or the party found legally responsible by the court to deposit in the registry of the court sufficient funds to pay the cost of the department's review of the plans or submittals. Any plan or submittal shall include an estimation of cost to implement the plan.

A party who admits liability under this provision may “elect to limit this admission of liability . . . to responsibility for implementing the most feasible plan to evaluate, and if necessary, remediate all or a portion of the contamination that is the subject of the litigation to applicable regulatory standards.”

It is also provided that a limited admission as authorized by this new article “shall not be construed as an admission of liability for damages under R.S. 30:29(H),⁴⁶ nor shall a limited admission result in a waiver of any rights or defenses of the admitting party.”

Comments

The amendments brought about by Act No. 754 are designed to facilitate both the resolution of a “legacy lawsuit” as well as give some comfort to a party who wishes to remediate the land but is concerned that its actions in doing so would prejudice its position in the litigation.

⁴⁶ “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. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court. This Section shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease.”

III. STATE JURISPRUDENCE

A. The Mineral Lease:

Lease Maintained by Operations

***H & K Limited of Louisiana, L.L.C. v. Martin Producing, L.L.C.*, 46,338 (La.App. 2nd Cir. 5/18/11); 70 So.3d 847**

The plaintiff purchased a tract of land in Caddo Parish on September 10, 2008. Its vendor, Eagle Water, Inc., had granted a mineral lease for a primary term of three (3) years on March 14, 2005. The lease was held by the defendants.

Plaintiff demanded a release of the lease, contending that it had expired by its terms.

The court set forth the “pertinent facts,” as follows:

- December 6, 2007: The tract subject to the Lease was pooled and integrated into a single drilling and production unit (the “Drilling Unit”) and Chesapeake Operating, Inc. (“Chesapeake Operating”) was named operator of the Drilling Unit;
- August 2007: Chesapeake Operating commenced vertical drilling on a well identified as the Chiggero 14–1, which was located on the Drilling Unit. No oil, gas or other minerals were produced by the well at that time;
- February 17, 2008: Chesapeake Operating drilled the horizontal portion of Chiggero 14–1 with continuous operations as reflected by the well activity report;
- May 14, 2008: The primary term of the Lease would have terminated unless it was maintained pursuant to other provisions of the Lease. Drilling of the Chiggero 14–1 horizontal well continued;

- June 12, 2008: The completion process for Chiggero 14–1 began and subsequently ended on June 18; and
- July 19, 2008: The Chiggero 14–1 well began production of natural gas in paying quantities which has continued since.

The trial court granted defendants' motion for summary judgment, upholding the lease. On appeal, the Court of Appeal, Second Circuit, affirmed, as follows:

Paragraph 6, as stated herein, provides unambiguous provisions for the extension of the primary term beyond three years. The language of the Lease is clear, and the trial court made the correct linguistic determination. The second sentence of paragraph 6 is disjunctive and the action by Chesapeake Operating served to extend the term of the Lease. It is undisputed that Chesapeake Operating commenced horizontal drilling on the tract on February 17, 2008, which date is clearly prior to the expiration of the primary term of the Lease; nor is it disputed that Chesapeake Operating was engaged in continuous operations of the horizontal well through its completion. Therefore, because on March 14, 2008 (the date upon which the primary term would have expired) Chesapeake Operating was “then engaged in operations for drilling, completion or reworking, or operations to achieve or restore production, with no cessation between operations or between such cessation of production and additional operations of more than ninety (90) consecutive days,” the Lease was extended beyond the primary term by the operations and production that occurred. This determination by the trial court was not in error.

Comments

The case is both correct and significant in view of the technologies utilized in the drilling of horizontal laterals in the Haynesville and other shale plays. It illustrates how traditional notions of lease maintenance which were developed by the use of conventional drilling techniques must adapt to more modern methods employed in shale and other non-conventional fields.

Lessee Obligated to Acquire Top Lease

***Pilkinton v. Ashley Ann Energy, LLC*, 46,650 (La.App. 2nd Cir. 11/2/11); 77 So.3d 465, writ denied, 2011-2657 (La. 2/10/12); 80 So.3d 484**

Plaintiffs, landowners, entered into an agreement with defendant to enter into a “top lease”⁴⁷ that would become effective upon the expiration of the primary term under the existing mineral lease held by KCS, which would expire about four months from the parties’ agreement. Defendants paid plaintiffs a portion of the agreed upon amount of bonus consideration and issued to plaintiffs a draft representing the remainder of the bonus, to be payable “upon approval of title” of the landowner’s property, “but not later than 20 banking days after sight.”

Before the expiration of KCS’s primary term, KCS applied for a permit to drill a well on a tract within the same unit as plaintiffs’ property. Upon learning about the permit, defendants “considered this permit for a unit well as a title defect and ordered their bank to dishonor the draft.” Due to defendants’ failure to pay the draft, plaintiffs filed suit, seeking to enforce the agreement to lease.

Plaintiffs filed a motion for summary judgment seeking to enforce the Agreement to Lease and to order defendants to pay the draft.

Defendants filed a cross-motion for summary judgment arguing that KCS’s application for a drilling permit “clouded” defendant’s title, and resulted in plaintiffs’ breach of its warranty obligation.⁴⁸

The district court awarded summary judgment to plaintiffs, stating that “[d]efendants further clearly and unambiguously manifested their intent to be bound by the ‘top lease’ through their delivery of the draft payment to the Petitioners as consideration and through their recordation of the ‘top lease’ in the Bossier Parish conveyance records.” Defendants appealed.

⁴⁷ “Top leases are leases granted by landowners during the existence of another mineral lease that become effective if and when the existing lease expires or is terminated.” *Mobil Exploration and Producing Southeast, Inc. v. Latham*, 44,996 (La.App. 2nd Cir. 2/3/10); 31 So.3d 1149.

⁴⁸ Article 120 of the Louisiana Mineral Code provides for a lessor’s warranty stating, “A mineral lessor impliedly warrants title to the interest leased unless such warranty is expressly excluded or limited. The liability of the lessor for breach of warranty is limited to recovery of money paid or other property or its value given to the lessor for execution or maintenance of the lease and any royalties delivered on production from the lease.”

On appeal, the Court of Appeals, Second Circuit, affirmed the district court's grant of summary judgment. In its reasoning, the court determined that "the KCS well permit was not a flaw in the Pilkintons' title and ownership of their property," and defendants were not entitled to terminate the lease and refuse payment of the bonus draft.

Additionally, the court found that plaintiffs' knowledge of the drilling permit was not grounds for error that vitiated the parties' consent. Defendants knew that the KCS lease was in existence until expiration of its primary term. The court stated that "the KCS lease itself implied that the company would desire to develop its investment in the lease by exploring for oil and gas during the remainder of the primary term of the lease." The possibility of KCS drilling a well "was an accepted risk by the defendants upon entering the Agreement to Lease." The trial court's grant of partial summary judgment to plaintiffs was affirmed.

Comments

While it is traditional that a lessee which issues a bonus draft may avoid responsibility for its payment in the event of a title defect, the court did not consider the issuance of a drilling permit to the "under-lessee" to be such a defect as justified the refusal to pay it.

The language of the Agreement to Lease was so specifically worded as to not allow the lessee to avoid payment of the draft if the existing lease was maintained in force and effect.

Liberative Prescription Applicable to Claim by School Board for Unpaid Royalties

***Vermilion Parish School Board v. ConocoPhillips Company*, 11-999 (La.App. 3rd Cir. 2/1/12); 83 So.3d 1234**

Between 2005 and 2006, plaintiff, the Vermilion Parish School Board (VPSB), on behalf of itself and the State, filed three different suits against multiple defendants, all involving “claims for underpayment of royalties derived from Section 16 mineral leases occurring in the 1990’s.” Section 16 consists of property owned by the State, but held in trust “for schools.”

Ultimately, the trial courts granted defendants’ exceptions of prescription, stating that the “the three-year prescriptive period in La.Civ.Code art. 3494(5) is applicable because only the State [not the VPSB] is immune from liability.”⁴⁹

Plaintiff appealed all three judgments, and all three matters were consolidated on appeal. Plaintiff’s argument was “based on its position that the revenues from the mineral leases are derived from Section 16 lands, which are state-owned properties, making La.Civ.Code art. 3494(5)’s three-year liberative prescription inapplicable. The VPSB argues that it entered into the leases on behalf of the State.”

On appeal, the Court of Appeals, Third Circuit, reversed the trial courts’ judgments. In its reasoning, the court stated, “[c]learly, Section 16 lands are owned by the State. Both jurisprudence and statutory authority provides that Section 16 lands are owned by the State with school boards given the administrative authority over lands.”⁵⁰

⁴⁹ In the first two cases, defendants, Unocal and Amerada Hess, respectively, were successful in filing exceptions of prescription based on La. C.C. art. 3494(5). In the third case against ConocoPhillips, “the VPSB entered into a stipulated consent judgment. Reserving all rights of appeal, the VPSB agreed not to oppose the exception of prescription in order to place the action in the same procedural posture for appeal as the other two matters.”

⁵⁰ Citing, *Ebey v. Avoyelles Parish School Board*, 03-765 (La.App. 3rd Cir. 12/17/03); 861 So.2d 910, *writ denied*, 04-196 (La. 3/26/04); 871 So.2d 349; *School Board of Avoyelles Parish v. U.S. Department of Interior*, 09-30660, 09-30897, 09-31102 (5 Cir. 2011); 647 F.3d 570, “The school board is not the true owner of Section 16 lands; the State of Louisiana is the true owner of Section 16 lands who vests the management of these trust lands in local school boards.”

As for the ownership of the mineral rights in Section 16, the court stated that:

Section 16 lands are lands owned by the State but managed by the school boards for the benefit of public education. The State still owns the minerals in Section 16 lands but as part of the administrative scheme of the lands, the school boards were given the authority to lease the lands.

Thus, the minerals rights in Section 16 are owned by the State, and VPSB was merely acting as an agent in leasing these rights. As a result, “the VPSB’s claims that Defendants have improperly calculated and underpaid royalties on the Section 16 lands mineral leases are not prescribed pursuant to La.Civ.Code art. 3494(5).” The court reversed the trial courts’ exceptions of prescription and remanded the issue for further proceedings.

Comments

The decision seems correct.

What Constitutes “Commencement of Operations”

***Cason v. Chesapeake Operating, Inc.*, 47,084 (La.App. 2nd Cir. 4/11/12); 92 So.3d 436**

Plaintiffs owned land in Red River Parish, and executed a mineral lease with Pride Oil and Gas in 2005 covering these lands. The primary term for the lease was five years, ending on May 31, 2010.

The lease contained a clause stating that lease could extend beyond the primary term, as long as the lessee “engaged in operations for drilling.” The lease also contained the following clauses: (1) a clause permitting ingress and egress on “adjacent or adjoining lands” to build needed roads and pipelines, and (2) a clause permitting assignment of rights, in whole or part. Between 2005-2009, several assignments occurred on behalf of the lessee, and defendants obtained an interest in the lease.

According to plaintiffs, “none of the assignees or sublessees took any actions that would continue the lease beyond its primary term—no drilling operations or drilling permit from the Office of Conservation.” On June 7, 2010, “feeling that the . . . lease had expired,” the plaintiffs leased the same tract to another operator, who obtained a drilling permit.

On May 29-31, 2010, the defendants “entered the lease tract to cut trees and stack the lumber; and on June 1, after getting approval from OneCall, Chesapeake’s men entered and began building a road and well pad.” A drilling permit was obtained after May 31, 2010, and “[t]he well was spudded on July 22.”

Plaintiffs filed suit alleging that the “minor work performed on the lease tract on May 29-31 did not constitute ‘operations for drilling’ sufficient to continue the lease beyond its primary term.” Plaintiffs asserted that the lease terminated on May 31, 2010. Plaintiffs also demanded damages for trespass, and an injunction to cease all operations.

Defendants argued that its activities constituted “commencement of operations,” sufficient to maintain the lease beyond its primary term. At trial, defendants introduced the testimony of an expert witness, a former Louisiana Commissioner of Conservation, who examined defendants’ activities and stated that these actions, “putting surveyors on the ground, staking the well and cutting trees to lay a road . . . equaled ‘commenced operations.’”⁵¹

⁵¹ It should be noted that the expert “testified that this was not standard practice, but the lease tract posed ‘special difficulties’ requiring extensive prep work.”

The trial court found that defendants had engaged in sufficient activity before and after the lease term to continue the lease beyond the primary term under existing jurisprudential interpretations of the “habendum clause.”

The plaintiffs appealed the adverse judgment to the Court of Appeals, Second Circuit. In its reasoning, the court cited to Louisiana case law on the issue of whether defendants’ activities on the premises amounted to engaging in operations sufficient to continue the lease term.⁵²

The court found that, while actual drilling is not necessary, where the mineral lease provides for “commencement of operations,” preliminary operations taken in compliance with the lease may be sufficient, so long as they are taken in good faith and the well is begun and completed.

The court noted that the questions of whether preliminary operations were taken, as well as whether those actions were taken in good faith, are factually sensitive. Here, the court found that, in light of the jurisprudence and the expert testimony received at the trial court, the trial court “did not abuse its broad discretion” in finding that defendants, in good faith, engaged in operations for drilling before expiration of the primary term.

The court of appeals affirmed the judgment of the district court.

Comments

The decision of the appellate court is supported by a substantial body of authority, including the cases cited by the court. The exigencies of drilling wells is such as to justify a flexible rule to determine when operations are commenced for purposes of lease maintenance. It is not uncommon to see parties address this issue in the lease form by adding a requirement that a well be “spud” in order for operations to be deemed to have commenced. Such a clause certainly brings certainty to the situation.

⁵² See *Allen v. Continental Oil Co.*, 255 So.2d 842 (La.App. 2nd Cir. 1971), *writ ref’d*, 260 La. 701, 257 So.2d 156 (1972) (“The general rule seems to be that actual drilling is unnecessary . . . hauling lumber on premises, erection of derricks . . . moving machinery on the premises and similar acts preliminary to the beginning of actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations.”); *Breaux v. Apache Oil Corp.*, 240 So.2d 589 (La.App. 3rd Cir. 1970) (“[B]uilding a board road and turnaround to the well location satisfied a clause requiring the lessee to ‘commence operations for the drilling of a well’ before the expiration of the lease.”).

Parties Not Owning Interest in Mineral Lease Liable for Royalties

Oracle 1031 Exchange, LLC v. Bourque, 11-1133 (La.App. 3rd Cir. 2/8/12); 85 So.3d 736, writ denied, 2012-0546 (La. 4/20/12); 85 So.3d 1272

In May 2007, plaintiffs, Exchange, Delphi, and Oracle, identified a potential oil and gas prospect in Vermilion Parish. Between 2007 and 2008, a well drilled on the property produced a small amount of oil.

In 2009, defendants, royalty interest owners in the prospect, sent demand letters to plaintiffs demanding royalties from the proceeds. Plaintiffs, in response, filed a petition for concursus, and deposited a sum into the court's registry. Defendants answered the concursus, filed a reconventional demand against Exchange and a third party demand against Delphi and Oracle for penalties and attorney's fees.

The trial court held that, although the royalties had been paid pursuant to LA. REV. STAT. ANN. § 31:139,⁵³ defendants "were entitled to, from [plaintiffs], damages of double the amount of royalties due, interest of the sum from the date due, and reasonable attorney's fees to be determined in a separate, further proceeding." Additionally, the court found that the defendants, as plaintiffs-in-reconvention, were not entitled to dissolution of the leases, and that costs were to be paid by plaintiffs.

Plaintiffs appealed to the Court of Appeals, Third Circuit, asserting three assignments of error.

On their first assignment, plaintiffs asserted that "the trial court erred in casting Delphi and Oracle in judgment for penalties and attorney's fees despite no contractual basis for any such obligation." Plaintiffs urged that they should not be held responsible under LA. REV. STAT. ANN. § 31:139 since the statute "only allows for a *lessee* to be cast with penalties and attorney's fees," and Exchange was the only assignee of the leases.

⁵³ Article 139 of the Louisiana Mineral Code states that, "If the lessee pays the royalties due in response to the required notice, the remedy of dissolution shall be unavailable unless it be found that the original failure to pay was fraudulent. The court may award as damages double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney's fee, provided the original failure to pay royalties was either fraudulent or willful and without reasonable grounds. In all other cases, such as mere oversight or neglect, damages shall be limited to interest on the royalties computed from the date due, and a reasonable attorney's fee if such interest is not paid within thirty days of written demand therefor."

The court rejected this argument, and affirmed the trial court's judgment that Exchange "was the *alter ego* of both Delphi and Oracle," and "it is legally correct that Delphi and Oracle, when treated as a single business enterprise with Exchange, can be found liable *in solido* with Exchange for penalties and attorney's fees."

On their second assignment of error, defendants argued that the trial court erred in holding that their filing a petition for concursus to deposit funds in the registry of the court in response to plaintiff's demand was unreasonable.

The court also rejected this argument. Pursuant to LA. REV. STAT. ANN. § 31:139, "a trial court merely had to find that the [plaintiffs'] actions in delaying payment of royalties to their owners were 'either fraudulent or willful and without reasonable grounds.'" The court stated that "[i]t is certain that appellants knew they had to pay someone, and it is clear that they chose not to do so until prompted" by defendants' demand letters.

On plaintiffs' final assignment of error, they asserted that "the trial court erred in awarding an unreasonable amount of attorney's fees under Louisiana law."

The court also rejected this argument, stating that "the amount of attorney's fees rests largely within the discretion of the trier of fact and should not be disturbed unless unreasonable or manifestly erroneous." Since the statute's award of attorney's fees is penal in nature, the court found that the trial court's award was not "unreasonable or manifestly erroneous."

The court of appeal affirmed the trial court's judgment.

Comments

On a first read, the case seems a bit extreme in that it holds parties not owning an interesting a mineral lease as responsible for a breach by the lessee owning the lease. However, if viewed as a case on the vicarious responsibility of a business entity, the case might be justified.⁵⁴

⁵⁴ In *Green v. Champion Insurance Co.*, 577 So.2d 249 (La.App. 1st Cir.), writ denied 580 So.2d 668 (1991), the Court of Appeal, First Circuit, discussed and applied the "single business enterprise" theory to disregard the identities of a group of separate corporations. It listed eighteen factors to be considered, but cautioned that the list was illustrative and not intended as an exhaustive list of relevant factors; no one factor was dispositive of the issue.

No Finding of Mutual Error in Confection of Mineral Lease

Hall Ponderosa, LLC v. Petrohawk Properties, L.P., 2011-1056 (La.App. 3rd Cir. 4/4/12); 90 So.3d 512, reh'g denied, (5/23/12)

On June 10, 2008, managers of Hall Ponderosa, began negotiations with Petrohawk to enter into a mineral lease over land owned by Hall Ponderosa.⁵⁵ During negotiations, Petrohawk's representative, Heard, stated that "he ignored all property in Section 13 . . . [and] focused his attentions [sic] on Section 14." Further, defendant also testified that, during negotiations, Petrohawk "was not aware that [plaintiff] owned any property in Section 13."

A mineral lease was executed on June 25, 2008.⁵⁶ The property description attached to the lease failed to mention any property situated in Section 13. Following execution of the lease, the parties exchanged several e-mails "cleaning up" certain provisions and clauses, but never including Section 13.

Some time after the signing of the lease, plaintiffs conducted a survey on the two tracts of land. The surveyor found that the Section 13 tract actually contained 144.55 acres rather than 30 acres as plaintiff originally thought.

In November 2008, plaintiff's managers contacted Petrohawk, stating that "they had unleased property in Section 13 on which they expected to receive lease offers." Petrohawk declined an offer to acquire a mineral lease on the land in Section 13.

In March 2009, plaintiff sent a letter to Petrohawk stating that the Section 13 tract was erroneously omitted from the lease and that the lease needed to be amended so as to include it. Plaintiff also claimed that it was entitled to the same bonus for the Section 13 tract as was paid for the Section 14

⁵⁵ Hall Ponderosa, LLC "owns two pieces of property in Red River Parish that are subjects of the instant litigation. One tract is in Section 14 and is known as Stella Plantation, and the other is located in Section 13 and is known as the Town Dump."

⁵⁶ Although the lease was executed on June 25, 2008, testimony revealed that the lease was actually signed on June 27, 2008. Sections 13 and 14 were not contributed to Hall Ponderosa until June 26, 2008, a day before the lease was signed. At the time of signing, neither party knew the exact size of either tract, "but the managers of Hall Ponderosa believed that the Section 14 tract was about 170 acres and that the Section 13 tract was about thirty acres."

tract. After Petrohawk denied the allegations, plaintiff filed suit making the same allegations.

The trial court found that “Hall Ponderosa met its burden of proving there had been a mutual error in the construction of the lease and that each party meant to lease all of Hall Ponderosa’s property.” The court reformed the lease so that it covered the Section 13 Tract and determined that plaintiff was entitled to the same per acre lease bonus that Petrohawk had paid to the plaintiff in 2008 for the Section 14 tract.

The Court of Appeals, Third Circuit, reversed and rendered judgment in Petrohawk’s favor, stating that “[w]e find that the record is void of a reasonable factual basis for the trial court’s finding of mutual error.”

In its reasoning, the court stated, as follows:

There is absolutely nothing in the record to indicate that [Petrohawk] ever intended to lease the Section 13 property. . . . [Plaintiff’s managers] also testified that there was no specific conversation, email or letter between [plaintiff] and Petrohawk that would indicate that Hall Ponderosa wanted the lease to include both Section 13 and 14.

The court further stated that, “[e]ven if Hall Ponderosa had stated that it wanted to lease its property to Heard, Heard, who was only working on the Section 14 property, would not have had any way of knowing what Hall Ponderosa meant by ‘all of its property’ when drawing up the lease,” since plaintiff’s managers never mentioned ownership of Section 13 tract during lease negotiations.

When the trial judge asked the managers of Hall Ponderosa why they failed to include the Section 13 tract in the lease, one manager “testified that he did not read the lease before signing it. [The other manager] testified that he signed the lease even though the property description for Section 13 was not attached.”

The court cited the failure of one of the managers to read the document, and the negligence of the other manager in signing a lease he knew did not conform to the parties’ intent, as support for the court’s holding that plaintiff failed to prove mutual error by clear and convincing evidence.

Thus, the court of appeals reversed the trial court’s judgment ordering reformation of the lease.

Comments

Hall Ponderosa has sought review of the court's decision by the Supreme Court.

Lessor's Royalty Share Responsible for Proportionate
Part of Post-Production Costs

***Culpepper v. EOG Resources, Inc.*, 47,154-CA (La.App. 2nd Cir. 5/16/12); 92 So.3d 1141**

Plaintiffs were successors to the lessors under a 1985 mineral lease held by defendant. The plaintiffs' lease provided for a royalty on all natural gas produced by defendant, to be computed "at the mouth of the well."

The mineral lease made reference to an attached rider, which was not physically attached to the document when filed into evidence.

From the time defendant obtained the lease, defendant had been producing natural gas from the wells. The cost of transportation of the gas to purchasers had been deducted from gross revenue in computing the "value at the mouth of the well" in determining the royalty due to the plaintiffs.

The plaintiffs filed suit seeking an "accounting . . . insofar as the transportation deduction is concerned." The trial court found that the transportation costs were not properly deductible from gross revenues in computing a lessor's royalty payment, and that the lease was ambiguous because the referenced rider was not attached.

The appellate court reviewed the issue of whether the lease was clear as to whether the language "computed at the mouth of the well" contemplated a deduction for transportation costs of the gas from the well to the purchaser.

The appellate court first cited to its decision in *Merritt v. Southwestern Electric Power Co.*,⁵⁷ in which the court recognized that the law of Louisiana allows deduction of post-production costs when the royalty payment is determined "at the mouth of the well." In that case, the court held that "compression costs are an example of such post-production costs," finding that there is no value at the wellhead until the gas is marketed and transported to the purchaser.

Applying the same reasoning, the Court of Appeals, Second Circuit, found that transportation costs, like compression costs, were also post-production costs that are properly deductible from a lessor's royalty share.

The appellate court further cited Article 80 of the Mineral Code, which states that, "unless expressly qualified by the parties, a royalty is a right to

⁵⁷ 499 So.2d 210 (La.App. 2nd Cir. 1986).

share in gross production *free of mining or drilling and production costs.*⁵⁸ Regarding *post-production* costs, the comments to that article explain that the lessor shares ratably in such costs unless the parties provide otherwise. The appellate court found that the parties did not “provide otherwise,” and, thus, the trial court erred in holding that the transportation costs were not proper deductions in computing the lessors’ royalty “at the mouth of the well.”

The appellate court determined that the lease was “clear and unambiguous,” and that “the computation of a royalty ‘at the well’ has been long-held by our courts to include deductions for post-production costs.” Thus, the trial court’s judgment was reversed.

Comments

The decision is obviously correct and completely consistent with the Second Circuit’s prior decision in *Merritt*.

However, the reference to Article 80 seems misplaced as it concerns a mineral royalty which is a different type of mineral right than a mineral lease, and the functional differences between the two do not justify reliance on that article in the context of a lessor-lessee relationship.

⁵⁸ LA. REV. STAT. ANN. § 31:80 (emphasis added).

B. The Mineral Servitude:

Ownership of Mineral Servitude After Sale of Land

***Sheridan v. Cassel*, 2011-162 (La.App. 3rd Cir. 6/8/11); 70 So.3d 89**

Plaintiff filed a petitory action against defendant claiming to be “the true and lawful owner of all mineral rights under 3.27 acres lying in . . . Sabine Parish.”

According to plaintiff, defendant conveyed “80 acres, more or less,” including these mineral rights to his sister, Gertrude C. Ray, in a 1969 cash sale. In 1980, after his sister’s death, defendant conveyed to plaintiff all of his “right, title, claim and interest, real and personal, in and to the Estate of Gertrude C. Ray . . . including . . . all movables and immovables in the State of Louisiana.” Plaintiff argues that the 1980 conveyance included the mineral rights lying under the 3.27 acres of property.

Defendant argues that he is the owner of the mineral rights lying under the 3.27 acres. According to defendant, “the 3.27 acres of mineral rights at issue were specifically reserved by him when the surface was taken by the Sabine River Authority in June of 1966.” Further, defendant argues that this reservation created an imprescriptible mineral servitude over the 3.27 acres in favor of defendant. When defendant sold the 80 acres to his sister in 1969, defendant argued that the sale did not include his interest in the mineral rights over the 3.27 acres and, thus, he never lost ownership of the rights.

Affirming the trial court’s decision, the Court of Appeals, Third Circuit, held in favor of plaintiff. The court accepted plaintiff’s argument that defendant sold all of his rights to Ray in 1969, holding that “since [defendant] did not reserve minerals in the 1969 deed, he must have conveyed the mineral rights to the 3.27 acres of surface interests that he did not own.” Thus, the court of appeals affirmed the trial court’s judgment.

Comments

One Judge dissented, asserting that the reservation in the 1966 conveyance to the Sabine River Authority, “created a new and distinct mineral servitude over a particularly described tract of land which [defendant] never conveyed to Ray’s estate, nor to anyone else, which still belongs to him.”

In support of this argument, the dissenting judge stated, “The Louisiana Supreme Court has held that servitudes, such as the right to mine minerals, when extending over separate tracts of land, constitute distinct servitudes and therefore held the exercise of the right over one tract will not preserve the right over the other distinct tract.”⁵⁹

⁵⁹ Citing *Lee v. Giauque*, 154 La. 491, 97 So. 669 (1923).

C. Rights of Unleased Mineral Owner:

Attorney's Fees Not Recoverable if Lease Never Existed

***Adams v. JPD Energy, Inc.*, 46,869 (La.App. 2nd Cir. 2/29/12); 87 So.3d 161, writ denied, 2012-C-0728 (La. 5/18/12); 89 So.3d 1194**

Plaintiffs, landowners of a seven-acre tract of land in an area overlying the Haynesville Shale, executed a mineral lease in 2008 in favor of defendants, covering the tract. As previously reported, the Court of Appeals, Second Circuit, affirmed the trial court's judgment, which rescinded the mineral lease based upon mutual error, finding that the contract was null since there was "no meeting of the minds" as to the agreed upon royalty.⁶⁰

Subsequently, the plaintiffs filed a motion with the trial court to award attorney's fees pursuant to LA. REV. STAT. ANN. §§ 31:206 and 31:207. The trial court awarded attorney's fees to the plaintiffs, with a deduction for the lease bonus, which the plaintiffs had received under the nullified lease.

JPD appealed the award of attorney's fees, arguing that, "since La. R.S. 31:206 and 31:207 apply only where a valid mineral lease was extinguished / expired," the statutes are not applicable in this case. More specifically, JPD asserted that "no valid lease was ever formed."

The Court of Appeals, Second Circuit, reversed the trial court's judgment and denied plaintiffs' request for attorney's fees. In its reasoning, the court stated that, after reviewing the two statutes, the statutes "apply only to instances in which a mineral right has been extinguished . . . This court did not extinguish a mineral right. Rather, this court declared the mineral lease null, which means it was deemed to have never existed."

⁶⁰ *Adams v. JPD Energy, Inc.*, 45,420 (La.App. 2nd Cir. 8/11/10); 46 So.3d 751, writ denied, 2010-2052 (La. 11/12/10); 49 So.3d 892.

Comments

Louisiana law has long characterized an award of attorney's fees as being penal in nature. As such, the court must strictly construe the statute or contract allegedly forming the basis for this penal award, and grant same only in cases which are clear and free from doubt.⁶¹

Construing Article 207 of the Mineral Code strictly, it is clear that, in order to recover attorney's fees for a failure to record a release of an expired or extinguished mineral right, that right must have existed in the first instance. In this case, the court determined that the mineral lease never existed by reason of error (no "meeting of the minds") and, hence, it could not have been considered as having extinguished if it never existed.

⁶¹ *Cracco v. Barras*, 520 So.2d 371, 372 (La. 1988); *Braswell v. Morris*, 275 So.2d 189, 194 (La.App. 2nd Cir. 1973); *Louisiana Power & Light Company v. Crescent Properties Company, Inc.*, 273 So.2d 48, 50 (La.App. 4th Cir. 1973); *Dubroc v. W. T. Grant*, 591 F.2d 299, 300 (5th Cir. 1979) ("Third and most important, we are mindful that in Louisiana the 'imposition of attorney's fees is penal in nature, is not favored and should not be imposed except in cases which are clear and free from doubt.'").

Contra Non Valentem Applies to Claim of Unleased Mineral Owner

Wells v. Zadeck, 2011-1232 (La. 3/30/12); 89 So.3d 1145

The Louisiana Supreme Court considered the issue of whether the doctrine of *contra non valentem* applied to suspend the ten year liberative prescriptive period applicable to an action by the mineral interest owners against the operator of a unit well who has failed to pay the owners their share of proceeds for mineral production.⁶²

In 1954, the plaintiff's mother executed a mineral lease over her one-half (1/2) interest in the property, the result of which was a non-producing dry hole; the lease was released in 1958.⁶³

In 1961, the landowners of the other one-half (1/2) of the property, executed a mineral lease with defendants' predecessor-in-interest, which resulted in a producing well that continuously produced until 2007. The plaintiff's mother never knew of the production nor received proceeds attributable thereto.

In 2002, upon his mother's death, the plaintiff inherited an undivided one-fourth (1/4) interest in a mineral servitude. Plaintiff also did not know of the fact that a well was producing. Only when a landman contacted the plaintiff in 2008 about the ongoing production did the plaintiff become aware of the long history of production.

⁶² See, e.g., *Rajnowski v. St. Patrick's Hosp.*, 564 So.2d 671, 674 (La. 1990). (“*Contra non valentem* is a judicially created exception to the general rule of prescription and is based on the civilian doctrine of *contra non valentem agere nulla currit praescriptio*. [citation omitted.] The doctrine applies in four general situations: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.”); *Marin v. Exxon Mobil Corp.*, 2009-2368 (La. 10/19/10); 48 So.3d 234; *Corsey v. State, Through Dept. of Corr.*, 375 So.2d 1319 (La. 1979).

⁶³ One dissenting judge and the Court of Appeals, Second Circuit, used Mrs. Well's 1954 grant of this mineral lease as evidence that Mrs. Wells was “someone who was familiar with the exploration, leasing, and drilling processes as a result of her one-time execution of a mineral lease.”

The plaintiff filed suit against defendants, who allegedly conducted exploration and production activities, for failure to tender proceeds from production to him or to his mother. The defendants filed a peremptory exception of prescription arguing that the plaintiff's claim prescribed in 2004, ten years from defendants' cessation of involvement with production in 1994.

The plaintiff argued that, because he had no knowledge of production, through no fault of his own, prescription should be suspended based on the doctrine of *contra non valentem*. Rejecting this argument and “[r]elying on LSA-C.C. art. 3499, the trial court found this to be a personal action subject to a liberative prescription period of ten years. The court granted Zadeck’s Exception of Prescription and dismissed Wells’ claim against Zadeck.”

The Court of Appeals, Second Circuit, affirmed the trial court, holding that *contra non valentem* did not apply to suspend the ten year liberative prescriptive period because the plaintiff’s mother made no attempt to ascertain whether the well was producing and her fault passes to the plaintiff.

The Supreme Court granted plaintiff’s writ application, and stated that whether the doctrine of *contra non valentem* applies depends upon “the reasonableness of the plaintiff’s action or inaction in light of the education, intelligence, and the nature of the defendant’s conduct.”

The Supreme Court further held that the lower courts “clearly failed to follow the blueprint set forth in *Marin*” by failing to examine the reasonableness of plaintiff’s actions in light of the circumstances.

Rejecting the lower courts’ judgments, the court stated, as follows:

Taking into consideration Mrs. Wells’ education, intelligence, and the defendant’s conduct, the conclusion of the lower courts that Mrs. Wells’ inaction was unreasonable and her ignorance of a potential claim was attributable to her own neglect is not supported by the record. Moreover, we agree with the conclusion in *Amoco*⁶⁴ that there is nothing in the jurisprudence requiring the owner of a mineral servitude to continuously check the property records to determine

⁶⁴ *Amoco Production Company v. Texaco, Inc.*, 02-240 (La.App. 3rd Cir. 1/29/03); 838 So.2d 821, writ denied, 03-1104 (La. 6/6/03); 845 So.2d 1096, “the doctrine of *contra non valentem* halts the running of prescription when the plaintiff was indeed prevented from filing its claim under one of the four categories listed [in *Marin*].”

if new unitized wells are producing from the servitude owner's property.

Thus, the Supreme Court held that "the equitable nature of the circumstances in each individual case determine the applicability of the doctrine." Further, under *Marin*, the record did support a finding that *contra non valentem* should apply in this case.

Comments

The decision reflects a very tolerant approach to the application of the doctrine of *contra non valentem* which essentially becomes very fact-intensive as to the reasonableness of the claimant's lack of knowledge of the existence of the claim. Matters such as the education, experience and general sophistication of the claimant become relevant to the issue of whether prescription is abated.

D. Claims for Remediation:

Recovery Available in a “Legacy Lawsuit” not Limited to “Feasible Plan”

State of Louisiana and the Vermilion Parish School Board v. The Louisiana Land and Exploration Company, 2010-1341 (La.App. 3rd Cir. 2/1/12); 85 So.3d 158, reh’g denied, (3/21/12)

The State of Louisiana and Vermilion Parish School Board (collectively, “School Board”) sought remediation of a polluted section of property in Vermilion Parish owned by the State and managed by the Vermilion Parish School Board.

Defendants argued that the School Board’s remediation claims should be limited to the amount needed to fund the “feasible plan” required by Act No. 312 of 2006, specifically LA. REV. STAT. ANN. § 30:29. Defendants also argued that “Act 312 acts as a substantive cap on remediation damages resulting from a tort or the implied restoration obligation of a mineral lease.” The trial court agreed with defendants and granted partial summary judgment in favor of defendants.

Plaintiffs appealed the grant of partial summary judgment, arguing that the trial court erred in limiting remediation damages to the amount required to implement the “feasible plan” as mandated by Act No. 312. The Court of Appeals, Third Circuit, agreed with plaintiffs.

In its reasoning, the court turned to Section H of LA. REV. STAT. ANN. § 30:29 which provides, as follows:

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.

The court stated that the clear language of the statute “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 court reversed defendants’ partial summary judgment.

Comments

This case is not final as the Supreme Court has granted writs and all proceedings in the trial court have been stayed pending that application.

“Subsequent Purchaser Doctrine”

***Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation*, 2010-2267 (La. 10/25/11); 79 So.3d 246**

The plaintiff, Eagle Pipe, operated a pipe yard in Lafayette Parish. It sued a number of oil companies, trucking companies and other parties which, over the years, had introduced pipe to that yard. Plaintiff “asserted that radioactive scale known by the acronym TENORM⁶⁵ was removed from the tubing or pipes during [a prior lessee’s] cleaning process and was deposited onto the surface of the pipe yard, contaminating the soil where Eagle Pipe now conducts its business.”

“All of the defendants filed, or joined in, the peremptory exception of no right of action, arguing Eagle Pipe had no right to assert a claim for damage to the property which occurred before Eagle Pipe was its owner. After a hearing on the exceptions, the trial court ruled, *inter alia*, that the defendants’ exceptions of no right of action be sustained, dismissing Eagle Pipe’s claims with prejudice.”

“Thereafter, the plaintiff filed an appeal with the Fourth Circuit Court of Appeal. On original hearing, a three-judge panel affirmed the trial court’s ruling on the exception of no right of action by a two-to-one vote. On rehearing before a five-judge panel, the court of appeal majority reversed the judgment of the district court with respect to its ruling on the exception of no right of action.”⁶⁶ Writs were granted.

The author of the majority opinion stated the issue, as follows:

We granted writs to determine whether a subsequent purchaser of property has the right to sue a third party for non-apparent property damages inflicted before the sale in the absence of the assignment of or subrogation to that right.

A deeply divided Supreme Court held that the “subsequent purchaser doctrine” operated to deny a right of action to the plaintiff.

Plaintiff strongly urged the court to recognize a limitation on the doctrine where the defects were non-apparent. The court declined to impose that limitation on the “subsequent purchaser doctrine,” holding, as follows:

⁶⁵ “Technologically Enhanced Naturally Occurring Radioactive Materials.”

⁶⁶ *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 2009-0298 (La.App. 4th Cir. 2/10/10); 47 So.3d 428.

After review, we find the fundamental principles of Louisiana property law compel the conclusion that such a right of action is not permitted under the law. Instead, the subsequent purchaser has the right to seek rescission of the sale, reduction of the purchase price, or other legal remedies.

Comments

As noted, this case is not a case involving a mineral lease; the plaintiff operated a surface lease and sought damages for contamination caused by radioactive material deposited on the property by the defendants.

In footnote 80, the Supreme Court stated the following, to-wit:

Moreover, because not factually relevant, we express no opinion as to the applicability of our holding to fact situations involving mineral leases or obligations arising out of the Mineral Code.

Because the court chose to limit its decision in this manner, it remains to be seen how the court will address the “subsequent purchaser doctrine” in cases involving mineral leases.

The decision was strongly divided. Written by Justice Clark, dissents were entered by Justice Johnson, Justice Weimer and Justice *ad hoc* Lobrano (sitting for Justice Knoll, recused), and concurrences were written by Justices Guidry and Victory.

A bill in the 2012 Louisiana Legislature would have legislatively overruled the decision in the *Eagle Pipe* case, but House Bill No. 862 was not enacted.

E. Civil Procedure:

Cannot File Reconventional Demand in a Concursus Proceeding

***McLean v. Majestic Mortuary Services, Inc.*, 11-1166 (5th Cir. 5/22/12); 2012 WL 1867614⁶⁷**

In last year's presentation, we covered the decision in *Cimarex Energy Co. v. Mauboules*.⁶⁸ In that case, the Supreme Court held that the operator had no duty to "definitively determine whether the [landowners] had any chance of success in pursuing its claim," and that the operator did not violate the "clean hands doctrine" because it "had more than a theoretical concern that the [landowners] would make a claim to the royalty proceeds."

While this is a non-oil and gas case, it does provide further guidance with respect to the proper procedure applicable to a concursus proceeding – a special proceeding often employed in the oil and gas industry and practice.

In particular, at issue in *McLean* was whether a defendant in a concursus proceeding could file a reconventional demand against the petitioner in the concursus. The court reviewed the issue, as follows:

There is little case law on the issue of whether a defendant in a concursus proceeding may file a reconventional demand against a plaintiff in concursus. In *Amoco Production Co. v. Carruth*, 457 So.2d 797 (La.App. 1 Cir.1984), the court noted, "The question of whether reconventional demands are prohibited in concursus proceedings remains unanswered in the jurisprudence." *Id.*, 457 So.2d at 799.

In *Amoco Production Co.*, the trial court on its own motion raised and maintained an exception of no cause of action regarding the reconventional demand. The court of appeal reversed on the ground that the proper procedural vehicle was an exception of improper cumulation of actions. The court declined to reach the merits of such an exception or to state

⁶⁷ This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

⁶⁸ 2009-1170, 2009-1180, 2009-1194 (La. 4/9/10); 40 So.3d 931.

whether the court could bring it itself. *Id.*, 457 So.2d at 799.

That case suggests that a defendant in concursus may not bring a reconventional demand against a plaintiff in concursus if the reconventional demand asserts other claims, even if they arise out of the same transaction that produced a disputed amount of money. For example, in *Mary Adams and Associates v. Rosenblat*, 539 So.2d 860 (La.App. 5 Cir.1989), this Court held that the maximum amount awarded in a concursus proceeding could not exceed the amount deposited in court, and therefore attorney's fees could not be awarded in addition to that amount. *Id.*, 539 So.2d at 863-864.

Comments

If *McLean* is determined to be good law, a defendant in a concursus proceeding cannot file a reconventional demand against the plaintiff. This is not uncommon in the oil and gas practice where a royalty owner joined as an adverse party deems it appropriate to sue the oil company contending some fault on its part.

The court's reliance on the *Carruth* case indicates that the proper procedural vehicle to object to the filing of a reconventional demand in a concursus proceeding is the dilatory exception raising the objection of improper cumulation of actions. In that regard, it is provided that the "dilatory exception shall be pleaded prior to or in the answer,"⁶⁹ and that "[a]ll objections which may be raised through the dilatory exception are waived unless pleaded therein."⁷⁰

69 LA. CODE CIV. PROC. ART. 928A.

70 LA. CODE CIV. PROC. ART. 926B.

F. “Public Records Doctrine”:

Vendees’ Claim for Minerals Rejected

***Spillman v. Gasco, Inc.*, 47,085 (La.App. 2nd Cir. 5/16/12); 2012 WL 1698093**⁷¹

In 2001, plaintiffs purchased from defendants a residential lot in DeSoto Parish. The deed recited that the sale was with “full guarantee of title” and also “[s]ubject to any restrictions, easements and servitudes of record.” The deed did not make reference to oil, gas and minerals.

After the sale, plaintiffs learned that, in 1999, a prior owner of the subdivision containing their lot sold the entire tract to defendants, with a reservation of the tract’s mineral rights.

Plaintiffs filed suit in 2010 alleging that, when they purchased the lot, “they were unaware that Gasco did not own the minerals . . . The Spillmans sought judgment enforcing the warranty deed by ordering the defendants to convey the minerals to them. In the alternative, they demanded monetary damages equal to the value of the minerals” under their lot.

In response, defendants filed a motion for summary judgment arguing that the language in the deed stated that the sale was “subject to any restrictions, easements and servitudes of record,” and the 1999 reservation was contained in the public records. Thus, under the “public records doctrine,” the plaintiffs had no claim.

In opposition to defendants’ motion, the plaintiffs stated that, “because the seller did not ‘clearly express the extent of his obligations arising from the contract,’ any ambiguity or obscurity must be resolved against the seller. La. C.C. art. 2474.” The trial court rendered judgment in favor of defendants without giving any written reasons for judgment, which dismissed the plaintiffs’ suit.

Plaintiffs appealed the summary judgment to the Court of Appeals, Second Circuit. On appeal, the court stated that the “subject to any restrictions, easements and servitudes of record” clause was “neither ambiguous nor obscure, and it expressly limited the seller’s warranty, while the purchaser was charged to go to the public records to find if any nonapparent servitudes are of record.”

⁷¹ This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

The court further stated that “the declaration in the seller’s deed, which states that the conveyance is ‘subject to any restrictions, easements and servitudes of record,’ meets the declaration requirements of articles 2474, 2475, 2500 and 2503 regarding the mineral servitude encumbering the property.” Thus, the court affirmed the trial court’s judgment.

Comments

The decision seems correct.

G. Other:

Landman Entitled to Compensation as His Work is
Not the Unauthorized Practice of Law

***Collins v. Godchaux*, 2011-966 (La.App. 3rd Cir. 3/14/12); 86 So.3d 831, writ denied, 2012-0835 (La. 7/2/12); 92 So.3d 344**

The plaintiff, an independent landman, brought this action against the defendants, landowners, seeking to compel payment of royalty interest due under a Mineral Consulting Agreement (“MCA”).

The parties entered into a series of MCAs over a ten-year period, beginning in 1994, which all set forth that the plaintiff would receive “no remuneration unless his efforts resulted in some profit” to the defendants. The plaintiff worked on a contingency fee basis, and would receive a royalty interest and percentage of any cash payments received.

In 2004, the defendants entered into a settlement with the lessees of certain tracts in Vermilion Parish, resulting in five new mineral leases and an amendment of a 1952 mineral lease, which resulted in “significant increases in royalties payable on certain production.”

The plaintiff filed suit contending that, under the terms of the MCA, he was entitled to a two (2%) per cent overriding royalty interest in all of the new leases and amendments.

The defendants resisted the plaintiff’s demand by arguing that the MCA should be declared null and void on the grounds that it was unenforceable because the actions contemplated to be taken by the plaintiff constituted the unauthorized practice of law, and that the plaintiff was not a lawyer.

The trial court granted the defendants’ motion for summary judgment, which asserted that the plaintiff engaged in the unauthorized practice of law.

In reviewing the grant of summary judgment, the appellate court determined that the plaintiff did not engage in the unauthorized practice of law. Ultimately, the court found unpersuasive the defendants’ examples of plaintiff’s supposed acts of practicing law.

The court determined that the acts of writing a memo suggesting that it was time to hire an attorney; asking for photographs and mentioning prescription in a letter, and payment on a contingency basis, were not exclusive to lawyers. Thus, the court acknowledged that prior case law clearly recognized

duties historically performed by landmen as exempted from the definition of the practice of law.⁷²

Comments

None.

⁷² See *Placid Oil Co. v. Taylor*, 306 So.2d 664 (La. 1975) (“[S]ervices performed by removing clouds from titles, such a locating heirs or having adverse claimants sign quitclaims prepared by lawyers, amount by themselves to the practice of law, so as to exclude non-lawyers from the useful functions historically performed by landmen.”); *Crawford v. Deshotels*, 359 So.2d 118, at FN1 (La. 1978) (Defining “landman” as “an employee of an oil company whose primary duties are the management of the company’s relations with its landowners. Such duties include the securing of oil and gas leases, lease amendments, pooling and unitization agreements and instruments necessary for curing title defects from landowners.”).

IV. FEDERAL JURISPRUDENCE

Mineral Leases Upheld under Doctrine of “Judicial Control”

***Walker v. Chesapeake Louisiana, L.P.*, 440 Fed.Appx., 2011 WL 3444162 (5th Cir. 2011)**⁷³

The Walker family granted six (6) mineral leases to Chesapeake. In the aggregate, the leases covered 524.448 acres in Caddo Parish. Each mineral lease contained special provisions, among which were the following, to-wit:

- (a) A provision that, with the exception of an identified portion of the leased premises, the lessee shall conduct no operations on the leased premises;
- (b) A provision that, if the lessee acquires any seismic permit within a mile of the perimeter of the leased premises, the lessee must include the leased premises in a seismic shoot; and
- (c) A provision that the lessee must provide the lessor with certain well and other data, subject to the execution by the lessors of a confidentiality agreement.

Lessors filed suit against the lessee for dissolution of the mineral leases based upon allegations that lessee had breached these provisions. Importantly, the lessors did not seek damages, only dissolution of the leases.

The plaintiffs alleged that Chesapeake breached the “no surface operations” clause because its surveyor traversed a tract of leased land with a four-wheeler. Plaintiffs admitted that no damage was caused by this traversal.

Next, plaintiffs alleged, with respect to the seismic provision, that lessee “acquired seismic permits on lands within one mile of the Leased Premises, but has failed or refused to negotiate in good faith with plaintiffs and surrounding mineral owners concerning inclusion of the Leased Premises and surrounding acreage and/or to provide fully imaged 3-D seismic coverage of the Leased Premises as required by paragraph 22 of the Leases.”

⁷³ In the interest of full disclosure, your presenter represented the defendant in this case.

Finally, plaintiffs averred that the defendant had “failed to provide to any of the plaintiffs any “well information” as required by” the leases.

The defendant filed a motion for summary judgment contending that it had substantially performed under the leases. In the alternative, Chesapeake argued that the breaches, if any, did not justify dissolution of the leases pursuant to the “doctrine of judicial control.”

The trial judge granted the defendant’s motion, saying:

In sum, this Court has discretion to determine whether the harsh remedy of lease cancellation is an available remedy for breach of the mineral leases in question. Under the circumstances of this case, this Court concludes even if the Court were to assume Chesapeake breached the lease provisions as alleged by plaintiffs, the factual circumstances of this case – on their face – do not demonstrate such substantial harm and injury to the plaintiffs that this Court would exercise its discretion to dissolved or cancel the subject leases.

On appeal to the United States Court of Appeal, Fifth Circuit, that court noted that its “sole issue is thus whether the district court abused its discretion by refusing to declare a dissolution.” It further stated, as follows:

Louisiana jurisprudence does not favor lease cancellation. . . . The doctrine of judicial control is a tool used to block the remedy of lease cancellation under certain circumstances.

* * *

[J]udicial control requires that a lessee’s ‘dereliction of duty must be of a substantial nature and cause injury to the lessor.’

The court then reviewed the record as to each of the three (3) alleged breaches and found that the district court had not abused its discretion by finding that the breach, even if assumed, was not so substantial as to justify the harsh remedy of lease cancellation. The district court’s judgment was affirmed.

Comment

No comment.

Unleased Mineral Owner not Entitled to Remedies Available to a Lessor

***Adams v. Chesapeake Operating Inc.*, 11-01504 (W.D. La. 12/20/11); 2011 WL 6370512⁷⁴**

Plaintiff owns an undivided one-third interest in a section of property located in DeSoto Parish. This property is “located in a drilling and production unit authorized by the Commissioner of Conservation,” and the unit is being produced by a well operated by defendant. Plaintiff’s property is not subject to a mineral lease.

Plaintiff filed suit claiming that he is owed “production payments” and “a penalty up to twice that amount and interest from date due, as well as reasonable attorney’s fees.” Plaintiff asserted that his unleased interest constituted a “production payment” governed by Articles 212.21 through 212.23 of the Mineral Code.

Defendant filed a Motion for Partial Summary Judgment seeking to dismiss plaintiff’s claims on the basis that an unleased landowner is not entitled to recover “double the amount of royalties, legal interest, and attorney’s fees on that sum from date due, and reasonable attorney’s fees.”

Defendant argued that, since plaintiff’s interest in the land is unleased, he “does not come within the purview of the above listed statutes as he is not a royalty owner or entitled to a ‘production payment.’”

In response, plaintiff argued that payments owed to an “unleased mineral owner” should be classified as “another type of production payment.”

The court held that, since plaintiff never entered into a mineral lease or purchased a production payment, LA. REV. STAT. ANN. § 31:212.21-.23 was not applicable to plaintiff’s claim. Further, the court stated that “[w]hat is clear from a reading of all of the applicable legislation is that at a minimum, La. R.S. 31:212.21-.23 requires either a mineral lease or the purchase of a mineral production payment.”

The court particularly noted the title to the Act, which added this article to the Mineral Code, observing that it made reference to “the purchaser of a mineral production payment,” which the plaintiff was not.

Defendant’s motion for partial summary judgment was granted.

⁷⁴ In the interest of full disclosure, your presenter represented the defendant in this case.

Comments

Because your presenter represented the defendant in this case, perhaps prudence dictates that he withhold comment, except to say that, a reading of the involved articles of the Mineral Code clearly indicate that the remedies afforded to a lessor under a mineral lease as against his lessee, are not available to an unleased mineral owner since the operator of the unit well is, self-evidently, not the lessee of the unleased mineral owner.



From the SelectedWorks of Beau James Brock

July 2009

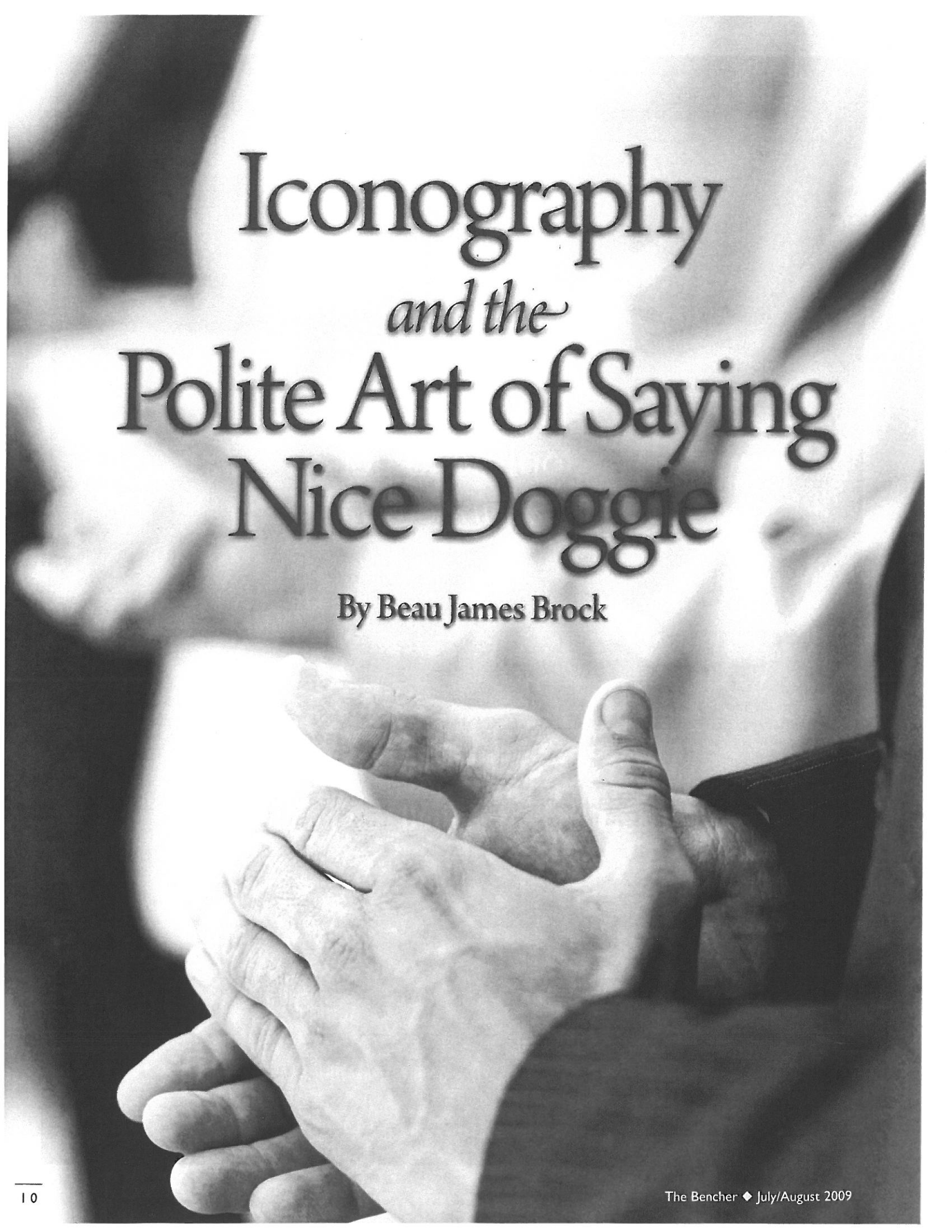
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Iconography
and the
Polite Art of Saying
Nice Doggie

By Beau James Brock

Barbra Streisand had it wrong, practicing attorneys are the luckiest people in the world! We have an opportunity every morning to do God's work on earth, to serve our fellow man, especially those in need.

Recently, I accompanied a good friend to the hospital, and waited (im)patiently for him to return from the operating room where he was being attended to by a young cardiologist. My friend "lovingly" referred to him as Doogie Howser and his life was literally in his hands. Complications were observed in my friend's case and the young doctor had the foresight to delay going forward until a specialist was available to perform the requisite operation. Dr. Doogie described the specialist to me in the following manner saying, "if my dad had to have this surgery, I would want Dr. 'X' to perform it."

It gave me comfort that this brash young doctor was capable of knowing his limits, and at the same time knew exactly how to communicate, with empathy, in a moment of personal crisis. He was professional and almost against type as a surgeon in showing a warm bed-side manner to me. In a moment of introspection, it wasn't just his message that was important, but the manner in which I heard it that shaped the communication. Doctors, specifically surgeons, are iconic figures in our society. Cold-steeled instruments in the hands of cold-hearted cutters, that in order to effectively do their jobs meticulously and without emotion, must figuratively shave off a layer of their own humanity. This is more than a stereotype and lies deep in the depths of our culture's mythology of literature and film.

Just as surgeons are trapped by their own iconography, so are attorneys. Will Rogers said, "diplomacy is the art of saying 'nice doggie' until you can find a rock." As an American humorist, he might have said the same thing about the practice of law and how it is adjudged in our society. We were taught in law school the professional ideal of meeting in the arena as lions, but outside of it to conduct ourselves with decorum and civility. Some in our society balk at this practice as artificial and consider those that conduct themselves accordingly as weak and even contemptuous. However, these same folks certainly would admonish "little Johnny" if he were to refuse to participate in pre-game prayer at midfield or shake hands with his opponent afterward.

It is our American ethic of self-discipline that compels us to always attempt to comport ourselves as professionals in the practice of law. It is this bit of granite chipped off every monument lifted to our forefathers that forever rests inside our souls and exudes our daily efforts, not to conform, but to elevate our system by conscious acts of public servitude. The Duke of Wellington famously said the Battle of Waterloo was won on the playing fields of Eton.

Similarly, even though our ancestors may have been kicked out of every decent country in the world, our abiding faith in our maker and the brotherhood of man enables us to grow up into men and women, endowed with the lessons of our own kindergarten communities, into similar paladins of justice. Thus, in the midst of crisis, one in which you are responsible not for yourself, but for another as their only counsel, and the others that come after that may be impacted by your efforts, you will give good account, your character hewn from our cultural base which has already braced you for the storm.

We internally lack for nothing in our ability to meet the ethical challenges and countless encounters that test our courage in choosing to avoid the temptation of the dark side of our nature. Does every attorney fail, at times? Yes. Are we given another opportunity to choose again? Yes. Can we make the right choice, then? Yes. Once you become a litigator, I think you always consider yourself a litigator. One of my enduring memories was a jury instruction about reasonable doubt in which the Judge reminded the jury "all human endeavor falls short of perfection." Whether you are a "Super Lawyer," AV rated, or merely a young practicing huckster trying to pay the bills, and learning how to finance your first "big" case, you will never achieve

It is our American ethic of self-discipline that compels us to always attempt to comport ourselves as professionals in the practice of law.

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Iconography continued from page 11.

perfection in your *practice* of law, but you should never quit trying to realize the ideal of professionalism, not through your own prism, but through the eyes of your care—your client, your neighbors, your community, your colleagues.

Every opportunity for attorneys to move out of the abyss of shysterism, however, seems to be shattered regularly by public images of unprofessionalism and downright criminality. In the most watched film of last year, the shining beacon of hope for law and order in Gotham is consumed by revenge converting blind justice into blind luck. There, it was not the maniacal anarchist who was the tragic character, but the lawyer who failed to persevere after being elevated in the plot as both the city's messiah and Batman's martyr.

Just like Dr. Doogie above spoke of the specialist who would be operating on my friend, we should all strive to be named by our colleagues in a moment of need.

What better compliment than to be an attorney who other attorneys call by name to assist them when a fire bursts out of control on them. If we ascribe to attempt to reach the pinnacle of professionalism in our daily lives, we will succeed more and more each day. These ripples of success on the pond of our community spread far, sometimes without acute result, but without which our system cannot continue, and despite its flaws, to paraphrase Lincoln, is still "the last best hope of earth" knowing fully God will bless us for our efforts. ♦

Beau James Brock practices environmental law and policy in his position of Assistant to the Secretary at the Louisiana Department of Environmental Quality. He is a member of the Louisiana State Bar Association, Baton Rouge Bar Association, Dean Henry George McMahon American Inn of Court and Aquinas League.

Ethics Rules continued from page 13.

in conduct intended to disrupt a tribunal." Rule 3.5 Comment [4] states that a lawyer's function is to provide "evidence and argument" so that a case may be legally decided. The Comment goes on to state that "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."

Respect for the court is also covered in the **ABA Standards for Criminal Justice**. Standard 3-5.2 (prosecution standards) and 4-7.1 (defense standards) state that as officers of the court, lawyers should "support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge..."

The *Commentary* for both of these sections cites the United States Supreme Court in explaining that lawyers are permitted to argue their respective

positions, but in the face of an adverse ruling by the court, a lawyer may not resist the ruling or insult the court, his or her only remedy is to preserve the issue for appeal. [Citing *Sacher v. United States* (1952) 343 U.S. 1, 9.]

Conclusion

While lawyers can and should vigorously represent their clients in court, they are not permitted to do so at the expense of disobeying or disrespecting the court. Knowledge of the applicable ethical and legal rules governing the proper relationships between lawyers and judges will permit the savvy lawyer to maintain the interests and reputation of their clients, as well as themselves. ♦

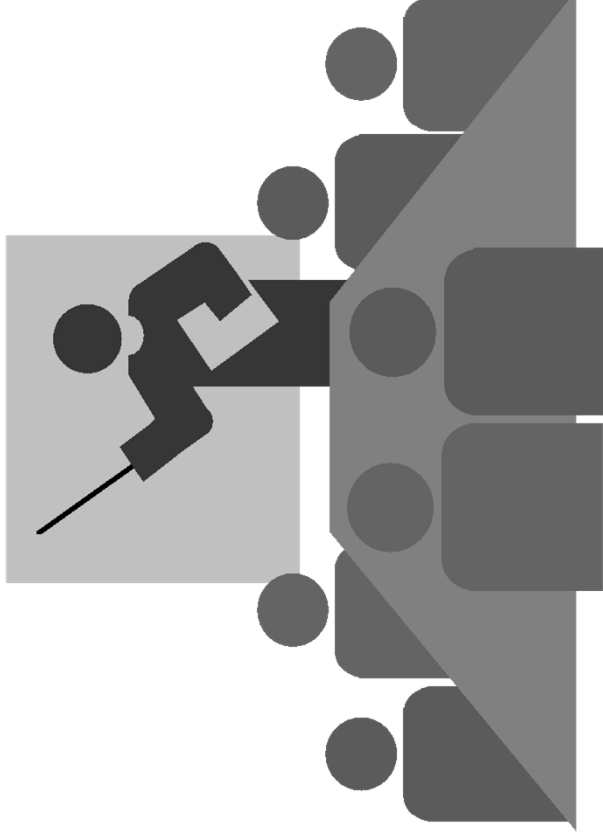
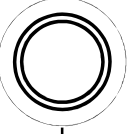
Disclaimer: the information in this column is intended to be informational only and does not constitute legal advice. Please shepardize all case law before using.

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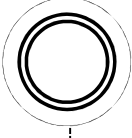


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Professionalism and the Public

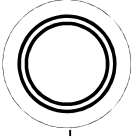


Myths, the public and you

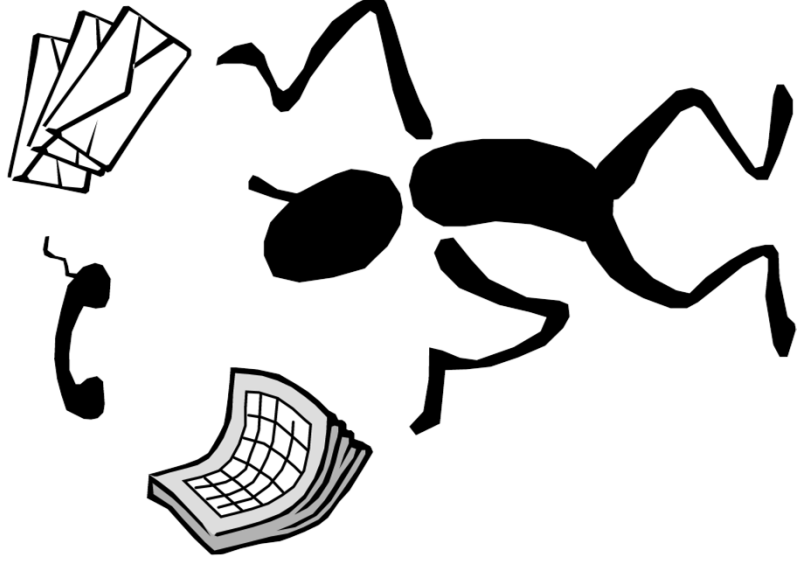


- Paul Newman.
 - Refuses “the deal.”
- Atticus Finch.
 - Overcame race.
- Clarence Darrow.
 - It is the guilty man that needs me.
- Professional organizations to provide expertise above politics.
- Confidential settlements.
- Johnny Cochrane.
 - Exploited race.
- Indigent w/o counsel.
 - Everyone pays.
- It’s another PAC. Mable.

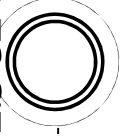
Reality Check



- Trial by Ordeal.
- Asked to juggle ethics with advocacy
 - Is it a balance or have we forgotten that life has absolutes
- What the public reads - never good.



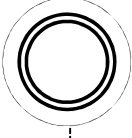
The Causes of Popular Dissatisfaction with the Administration of Justice



- Popular lack of interest in justice, which makes jury service a bore & the vindication of right and law secondary to the trouble and expense.

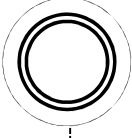


Causes of Dissatisfaction...



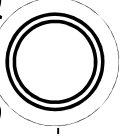
- The strain put upon law in that it has today to do the work of morals also;
- the putting of our courts into politics;
- the effect of transition to a period of legislation;
- the making the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee;
- and public ignorance of the real workings of courts due to ignorant and sensational reports in the press.
- *Pound, Lecture to the ABA, 1906.*

Aquinas, Pound, and Shortess, oh my...

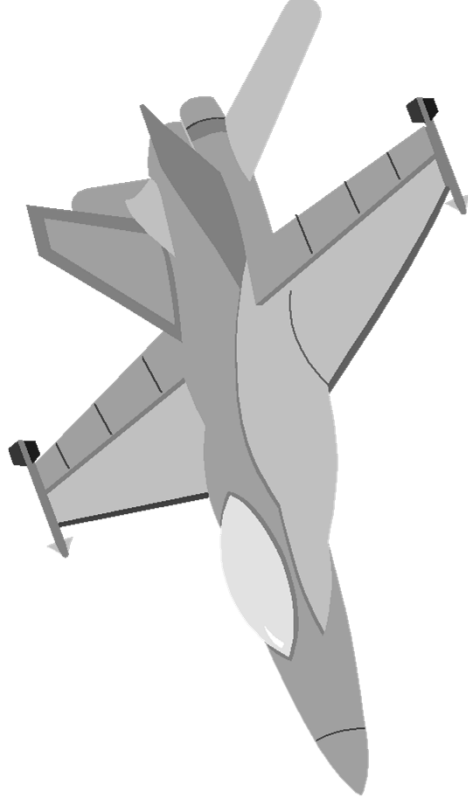


- Now, the end of law is the *common good* [not framed for individual cases]... Wherefore law should take account of many things, as to persons, activities and times because the community of the state is composed of many persons and its good procured by many actions, nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another. *Aquinas*.
- In 1797, out of 550 pending writs of error, 543 were shams or vexatious contrivances for delay. [English Chancery]. *Pound*.
- The individual attorney... can be a most effective force for positive change. This is done by consciously applying the codes of conduct to each act performed each day in the practice. [T]his person then becomes a role model for all those who come into contact with that person. *Shortess*.

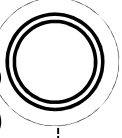
In Missile Lock by the Public...



- Tort “Reform.”
- Victims’ Rights.
- Appointment of Judges.
- Mandatory minimum sentences.
- Federal criminalization of walking and chewing gum.



Possible Countermeasures

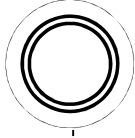


- Volunteerism.
- Pro Bono.
- Publicity through our professional groups.
- Be above *grist for the mill* issues which serve to divide us –
Ripples...

- Encourage alternative sentencing via donations



Local Wisdom



- Professional organizations should bridge the differing sections of the Bar rather than divide it.
- We are in this thing together and (most of us) do not view each other as adversaries as much as counselors to adversaries



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**RECENT LEGISLATIVE & JURISPRUDENTIAL DEVELOPMENTS
pertaining to**

THE LAW OF PROPERTY, SALES, & LEASES

August 2011 - August 2012

by

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I Recent legislative developments

There is only one worth mentioning, and it is in the field of “property”: Act 739 (HB 468 - Rep. Abrahamson). In this act, the legislature amended several of the Civil Code articles that pertain to the “legal servitude” of “right of passage” for “enclosed estates” (enclaves). The new law adds to the existing right of passage for transport purposes a new, parallel right of “passage” for utilities access purposes. In other words, the new law enables the owner of an estate that is “landlocked” in the sense that it lacks access to “utilities” (defined to include electricity, water, sewer, gas, telephone, cable television, etc.) to obtain a legal servitude of passage for utility services conduits over neighboring property. The law seems to have been made in reaction against *Perdue v. Cruse*, 09-1446 (La. App. 3 Cir. 6/2/10), 2010 WL 2178543, in which the court ruled that existing law provides no such “utility access” right.

II. Recent jurisprudential developments

A. Property

1. Things: classifications

a. Public v. private

1) Classification of things as public or private

a) Navigable waterways

Spanish Lake Wildlife Refuge & Botanical Garden, Inc. v. Parish of Ascension ex rel Martinez,

Facts: Plaintiffs filed “inverse condemnation” action against Ascension and Iberville Parishes for their decisions to open and close floodgates, which alternately drained and flooded

Alligator Bayou.

Plaintiffs run a lucrative swamp tour business in Alligator Bayou that suffered when Ascension Parish opened floodgates in 2009, causing the Bayou to drain. The Parish claims that opening these gates was intended to meet a public need: saving the landowners on Spanish Lake Basin from losing their property to flooding. Later in 2009, however, the water began to take another course, and Alligator Bayou was flooded from its normal 4 foot level up to 9 feet.

Plaintiffs amended the suit to reflect the flooding damages, and moved for partial summary judgment on the sole issue of whether the actions of the parishes constitute a “taking,” or inverse condemnation. The parishes also moved for partial summary judgment on the same issue, claiming that the plaintiff had no property right in a navigable water way because it is a public thing.

The trial court granted the parishes’ motion and denied plaintiffs’. Plaintiffs’ appeal, assigning as error: (1) failure to recognize the legal impact of the physical damage and occupation caused by the parishes’ flooding, (2) incorrect conclusion that a riparian land owner does not have property rights vis-à-vis a public waterway, and (3) incorrect conclusion that the plaintiff’s riparian right to access the bayou has not been damaged because the swamp tour facilities can be accessed by road.

Result: Affirmed.

Reasoning: A. *Standard for “inverse condemnation”*

An inverse condemnation can be established by analyzing the following three prongs: (1) whether the court can identify a recognized species of private property right, (2) whether the property has been damaged in a constitutional sense, and (3) whether the damage has been for a public purpose. *State Through Department of Transportation and Development v. Chambers Investment Co., Inc.*, 595 So.2d 598 (La. 1992).

B. *Property Right in Ability to Operate Swamp Tour*

The court explained that while individuals have rights to conduct business on property that they own, that right does not extend beyond that property. Moreover, in the past, courts have defined property as a capital investment itself, not the right to use the capital investment in the most profitable manner. *Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Commission*, 97-1367 (La. 5/19/98), 715 So.2d 387. Plaintiffs don’t own Alligator Bayou and their land, facility, and barge are still accessible. Therefore, the court finds, plaintiffs’ use of their land to run the swamp tour business was not a “proprietary right” under the *Chambers* analysis.

C. *Landowner’s Riparian Right as a Property Right*

Riparian rights are property rights themselves, so they meet the first prong of *Chambers*. However, because the plaintiffs can still access the bayou and it is still navigable, the riparian right is intact. The second prong of *Chambers*, therefore, has not been met.

D. *Property Right in Alligator Bayou*

The court finds that Alligator Bayou is a navigable waterway, and is therefore also public. Therefore, plaintiffs have no private property interest in beyond the banks it owns. The first prong of *Chambers* is not met under this theory either.

E. *Conclusion*

Therefore, because there is no property right under any theory presented by plaintiffs, and no material question of fact, the appellate court affirms the partial summary judgment for the defendants.

b) Canals

Brown v. Francis, 2012 WL 1799178

Facts: This case arises from a dispute over the boundary between two adjacent properties, and the canal that runs between them. The tract of land encompassing both properties was once owned by Mario and Edith Ferratas. Ms. Brown's ancestor-in-title purchased the property, which did not include the Baldwin Canal, in 1959. The Francis brothers' parents purchased the property in 1965. After purchasing, the Francises strung a cable across and posted a "no trespassing" sign at the mouth of the Baldwin Canal.

Ms. Brown executed a purchase agreement with James Nance to sell her property on October 15, 2009. Just before the sale, Felix Francis told Mr. Nance, who was planning to build a boat dock in the canal, that the canal was entirely within their property, that Ms. Brown did not have right to access, and that Mr. Nance would not have any right to access, either. Ms. Brown then commissioned a survey which showed the property line running within the bed of the Baldwin Canal, with the entire western bank of the canal within Ms. Brown's property. The Francis brothers commissioned a survey which was in agreement with Ms. Brown's.

When attempts to amicably resolve the dispute over access failed, Ms. Brown sought declaratory judgment that, in accordance with the surveys, the entire western bank of the canal was within her property and that she and any successor-in-interest would have full access rights to the entire canal, as well as the right to dock boats on the western bank. Afterwards, she filed a motion for summary judgment.

The motion for summary judgment was denied. The trial court also found that the Baldwin Canal was a private canal and therefore its owner could enjoin the public from its use, and that Ms. Brown was not entitled to a natural servitude under La. Civil Code Article 657 because Baldwin Canal was not "running water."

Ms. Brown appealed.

Result: Affirmed.

Rationale: Ms. Brown argued that the Baldwin Canal is undisputedly navigable, and that her property encompasses the western bank and three to five feet of the canal bed. She further asserted that the ability of an owner of a private canal to enjoin its use is "severely limited" and does not extend to the ability to enjoin its use by another owner. The appellate court found the cases in support of Ms. Brown's arguments distinguishable from the instant case. The record established that the canal was privately constructed, and its undisputed navigability does not provide Ms. Brown with right of access over any portion of the canal owned by the defendants.

The court also found no error in the ruling on Ms. Brown's other arguments. She and the Francis brothers were not co-owners in indivision, owning the same thing: the

record established that they each owned separate and distinct adjacent properties. Finally, La. Civil Code Article 657 did not apply, as Baldwin Canal did not fall under the definition of running waters.

2) Effects of “public” nature: insusceptibility of possession

b. State-owned property: effects; insusceptibility of acquisitive prescription

Vermillion Parish School Board v. ConocoPhillips Co., 11-999 (La. App. 3 Cir. 2/1/12); 83 So. 3d 1234

Facts: Plaintiff, individually and on behalf of the school children of Vermillion Parish and on behalf of the State of Louisiana, filed three separate suits against various different defendants concerning four groups of mineral leases: the Unocal and LL & E leases in suit one, the Amerada Hess leases in suit two, and the ConocoPhillips leases in suit three. In all three suits, plaintiff alleged underpayment of royalties derived from these leases. VPSB had entered into these leases, which were on Section 16 property owned by the State of Louisiana, under authority granted to it by the State to enter into mineral leases. In all three cases, the defendants filed exceptions of prescription alleging that the action to recover royalties was subject to the three-year prescriptive period found in La. Civ. Code art. 3494.

The trial court in the first suit found that the mineral rights at issue were severed from the land and vested in the VPSB, with VPSB seeking royalties pursuant to contractual rights. The trial court stated that the State was not a party to the mineral leases and that the VPSB was a separate body with the sole power to enter into the mineral lease, with the power to sue and be sued. Thus, the court granted the exception of prescription, finding that the three-year prescriptive period was applicable because only the State would have been immune from prescription (as prescription does not run against the State under the Louisiana Constitution). The second trial court also found that the three-year prescriptive period was applicable, and granted the defendant's exception of prescription. In the third case, VPSB entered into a consent judgment with the ConocoPhillips lease defendants, agreeing not to oppose the exception of prescription, but reserving all rights of appeal, in order to place the action in the same procedural posture for appeal as the other two. VPSB then appealed, requesting that the cases be consolidated without opposition.

On appeal VPSB argued that the revenues from the mineral leases were derived from Section 16 lands, which are state-owned properties, making the three-year prescription period of Art. 3494(5) inapplicable. That article provides that an action for recovery of underpayment of royalties is subject to a three-year prescriptive period unless the payment, rent, or royalties are derived from state-owned properties. As VPSB argued that they entered into the lease on behalf of the state, they asserted that the Constitutional

prohibition on prescription running against the state applied, and therefore prescription had not run.

Result: Reversed and Remanded

Rationale: The court of appeal looked to three main issues: (i) who owned the Section 16 lands; (ii) who owned the minerals of the Section 16 lands; and (iii) whether the state was a party to the proceedings.

The court of appeal first looked to who owned the Section 16 lands at issue. They looked to the history of ownership of Section 16 lands, which were originally set aside by the United States Congress in 1806, and dedicated for the use of public education. Title over these lands passed to the State of Louisiana in 1812 when Louisiana was admitted to the Union. The court recognized the trust doctrine over Section 16 lands in Louisiana, and recognized that Section 16 lands are held in by Louisiana in trust for the benefit of school children. They also recognized that management over these trust lands is vested by the State in the local school boards. Therefore, the court of appeal found that the true owner of the Section 16 lands was the State of Louisiana, and that the State had merely vested management of these trust lands in the local school boards, like the VPSB. In support of this conclusion, the court of appeal also looked to statutes which granted specific authority to the school boards, like La. R.S. § 41:961 (authority to recover damages for trespass to the Section 16 lands) and La. R.S. § 30:151-58 (authority to grant mineral leases on Section 16 lands). The court found that such a granting of authority would be unnecessary if the school boards owned the land. Rather, these grants of authority support the fact that the State is the true owner of the land (41:961 in fact has the clause "title to which is still in the state).

Determining that the state was the true owner of the Section 16 lands, the court of appeal next looked to ownership of the minerals within Section 16 lands. On this issue, defendants asserted that VPSB was given the exclusive right to lease Section 16 lands and, thus, only VPSB had the capacity to sue to enforce the contractual rights under the Section 16 lands leased so they could not assert the State's constitutional immunity. The court of appeal agreed that a state agency is a distinct legal entity from the state for purposes of constitutional immunity, and therefore not included within the ambit of the immunity. However, the court also noted that, under the Louisiana Constitution of 1921, Article 4 § 2 and the Constitution of 1974, Article 9 § 4(A), the State cannot alienate the mineral rights it owns. Therefore, the State was still the true owner of the minerals. The court also noted a jurisprudential rule established as a corollary to the constitutional prohibition against the alienation of state-owned minerals: prescription does not run against state-owned minerals rights. Seemingly, this rule was codified in La. Const. art. 9, § 4(B) which read that lands and mineral interests of the state, of a school board, or of a levee district shall not be lost by prescription.

The court of appeal, here, also noted that school boards were given the authority to grant mineral leases in 1922. This merely gave the school boards specific power to grant mineral leases in addition to their general administrative authority over Section 16 lands. The State still retained ownership of the minerals contained in the Section 16 lands.

Finally, the court found that VPSB had brought the claim on behalf of the State as the State's agent with authority to enter into mineral leases on behalf of the State. VPSB made no claims that it owned the Section 16 lands at issue. As the immunity from prescription of Art. 3495(5) clearly applies to state-owned properties, the court of appeal found that VPSB's claims to underpaid royalties had not prescribed.

2. Possession

a. Elements / prerequisites of possession: *corpus*, acts sufficient for

b. Effects of possession: acquisitive prescription

1) Requirements for acquisitive prescription

a) Common requirements

b) Requirements unique to various forms of acquisitive prescription

1] Unabridged acquisitive prescription (30 years)

a] Satisfaction of the delay requirement in general

Duplantis v. Bergeron, 10-2244 (La. App. 1 Cir. 10/5/11); 2011 WL 4613014

Facts: Plaintiffs owned several lots in a subdivision which was bordered to the north by property owned by defendant. When defendants purchased their lot in 1994 they had a survey conducted. Based on this survey, they constructed a chain-link fence along the southern boundary in January of 1995. One of the plaintiffs purchased two lots in 2004, another purchased one lot in 2005 (these were the only two plaintiffs to appear at trial). When the second plaintiff purchased their lot, they hired someone to conduct a survey. This survey indicated that the defendants' chain-link fence encroached onto the property of the plaintiff, prompting the plaintiffs, collectively, to file this action in December of 2005 seeking to have the court judicially fix the boundary. Defendants filed a reconventional demand alleging that they had possessed the disputed land for more than one year prior to the plaintiffs' action and that the filing of the lawsuit and a plat prepared by the second plaintiff's surveyor amounted to an interruption of their possession. The defendants also requested that the court appoint a surveyor to fix and mark the boundary. Pursuant to a consent judgment, the court appointed a surveyor. Based on his research, the court surveyor determined that the "original line" set for the boundary (as set by an earlier

survey and followed by a 1965 survey and the second plaintiff's surveyor) was in error. Nevertheless, the trial court determined that, although the defendants' title included the disputed area, the plaintiffs had proven ownership by acquisitive prescription of thirty years. Therefore, the court set the boundary according to the "original line." Defendants appealed.

Result: Reversed and Rendered

Rationale: The court of appeal noted the method of fixing boundaries as set by La. Civ. Code arts. 792-94. Under the articles, the boundaries are to be fixed according to the ownership of the parties if possible. If both parties rely on titles only, the boundary is to be fixed according to these titles. If the titles have a common author, preference is to be given to the more ancient title. However, the boundary can also be fixed according to acquisitive prescription if proven by a party.

The evidence presented at trial showed that both parties held title to the contested property. The defendants had proven their chain of title back to 1906, which the court of appeal found to be a more ancient and better title. Because the defendants had an ancient and better title, and more ancient possession, the court of appeal looked to see if plaintiffs could prove thirty year acquisitive prescription. The court of appeal determined that plaintiffs would also have to prove corporeal possession of the property in dispute because any constructive possession would not defeat the more ancient possession of defendants. Also, because plaintiffs did not purchase their respective properties until 2004 and 2005, they would have to tack to their ancestors in title.

On review of the evidence, the court of appeal noted that there was no testimony of any physical acts performed on the properties by either plaintiffs or their ancestor in title until the plaintiffs purchased the property. In fact, the vendor of the lots had stated that he never developed or inhabited the property. One of the plaintiffs had lived across the street from the lots for 29 years, and testified that she could not recall anyone being on the lots, that they were wooded and undeveloped. The plaintiffs seemed to rely on the existence of an old barbed-wire fence which served as the boundary between the properties in the past. However, no evidence was provided regarding the location of that fence. Therefore, the court concluded that the evidence was insufficient to prove that either plaintiffs or their ancestor in title ever took corporeal possession of the property until well after the defendants had established their corporeal possession, under their title, with the chain-link fence. Thus, the court concluded that the defendants were owners of the disputed property under better title than that of plaintiffs.

For argument sake, the court also noted that, even if plaintiffs had acquired ownership by means of thirty year acquisitive prescription before the defendants purchased their property, the defendants would still own the property by virtue of ten year acquisitive prescription as they had possessed the disputed tract by acts of corporeal possession (building the fence in January 1995), under their just title, and in good faith, for over ten years before the suit was filed (December 2005). Therefore, the court fixed the boundary according to the ownership established by the defendants.

b] Satisfaction of the delay requirement through “boundary tacking”

Jackson v. Herring, 46, 870 (La. App. 2 Cir. 1/25/12), 86 So.3d 9

Facts: The case arose out of a suit that the appellant, Everlee Jackson, brought against the appellees, Billy and Edith Herring (“the Herrings”), concerning a boundary dispute over a small piece of property in DeSoto Parish.

In her April 22, 2009 petition, labeled “Petitory Action with Request for Declaratory Relief,” Ms. Jackson asserted that she was the owner of Lot 14, the disputed property. She requested that the court order a survey to ascertain the limits of her property and prayed for a judgment ordering the Herrings to remove a fence the Herrings placed around her property, and all other general and equitable relief.

At trial, Ms. Jackson testified that she purchased Lot 14 from Jesse Ford, her 101 year-old aunt. She related that her Aunt Jesse had purchased it from her Aunt Jesse’s aunt, Ruby Ford, and introduced into evidence a Sheriff’s Sale deed dated August 22, 1984 showing Aunt Jesse’s purchase of Lot 14 from the succession of Ruby. Ms. Jackson introduced the cash sale deed evidence showing Ruby’s purchase of Lot 14 from Myrtis Porter. She also introduced a cash sale warranty deed from 1890, when her great-great grandfather purchased the property. Ms. Jackson testified that she believed the property was Lot 14 and had memories of visiting the red house on the property when she was a child. She periodically checked the house, had the bathroom remodeled, and paid bills on the property until two years prior to the suit, when the Herrings erected a fence around the property in 2008 and posted a “no trespassing” sign on the property. Ms. Jackson also presented the testimony of a land surveyor who performed a boundary survey in 2005, who based his survey on a fence on the property that had been there for a long time.

The Herrings claimed that the property at issue is part of a 28-acre tract of land that they purchased in 1994. Mr. Herring testified at trial that he obtained a preliminary title opinion from an attorney verifying that the sellers had good and valid title but no survey was done. The title opinion states that in the absence of a survey, no determination could be made as to whether there was any adverse possession, boundary dispute, or other defect of title affecting the property. Mr. Herring testified that he never saw anyone living in the red house and that while he had seen another fence around the property, he neither knew who had erected the fence nor did he know how long it had been there. Mr. Herring presented testimony of a land surveyor who surveyed the 28 acres and the deeds. He noted that the original map from 1890 was off by 66 feet, and that the red house was not on Lot 14.

The trial court found for the Herrings, holding that the red house was not located on Lot 14 but on Lot 15, which the Herrings owned. It held that Ms. Jackson did not acquire ownership through acquisitive prescription due to a lack of a just title, she did not acquire the property in ten years. They also concluded that she did not acquire the property by thirty-year prescription because there was a lack of a juridical link, viewing their possession as unconnected acts of trespass.

Ms. Jackson appealed.

Result: Reversed and remanded.

Rationale: 1. *Just Title*

Ms. Jackson asserted that the trial court erred in finding that her chain of title was unbroken. The appellate found that the trial court did not err in finding that Ms. Jackson did not have proper title and that the red house is on Lot 15, the Herrings' property.

2. *Acquisitive Prescription of 10 years*

Ms. Jackson asserted that the trial court erred in finding that she did not acquire ownership of the property through acquisitive prescription of ten years. The appellate court cited Civil Code article 3745 in stating that possession of immovable property for ten years in good faith and under just title is required to obtain ownership. Citing *Cockerham v. Cockerham*, 44,578 (La. App. 2d Cir. 8/19/09), 16 So.3d 1264, the court noted that article 3745 allows a person to own property when she purchases immovable property by deed translative of title with a reasonable belief that he is acquiring valid title to the property and maintains peaceable possession for 10 years without disturbance by the true owner. Because Ms. Jackson's deed to Lot 14 did not cover the entirety of the property, she does not have just title and thus the court could not claim acquisitive prescription of 10 years.

3. *Acquisitive Prescription of 30 years*

Finally, the appellate court reviewed the trial court's ruling on Ms. Jackson's lack of acquisitive prescription of 30 years. Ms. Jackson did not raise the issue on appeal but the Second Circuit found a party should be granted relief if entitled under the pleadings and evidence. La. C.C.P. art. 862. The court "shall render any judgment which is just, legal, and proper upon the record on appeal." La. C.C.P. art. 2164.

One may acquire ownership by acquisitive prescription of 30 years without just title or good faith possession but possession extends only to that which has been actually possessed. Possession is transferable by universal or particular title, and the possession is tacked to the transferee if there has been no interruption of possession. "If a party and his ancestors in title possessed for 30 years without interruption and within visible bounds more land than their title called for, the boundary shall be fixed along these bounds. La. C.C. art. 794.

Despite the plaintiff labeling the suit a petitory action and requesting declaratory relief, the Second Circuit found that her request for a survey to ascertain the property limits, due to the defendants placement of a fence, was really a boundary action. In a boundary action, an owner or one who possesses may demand the boundary be fixed between contiguous lands. La. C.C. arts. 785. Petitory actions and boundary actions are mutually complementary, not exclusive, because both seek a judicial determination of ownership.

The Second Circuit found the evidence showed the plaintiff and her ancestors had possessed more land than their title, in visible bounds, for over thirty years. The court found persuasive the plaintiff's testimony about spending her childhood at the home.

The Second Circuit found the trial court erred and misunderstood the decision in *Brown v. Wood*. The trial court found that *Brown* required a juridical link, which described the property subject to the boundary dispute, to tack possession. However, in

Brown, the Second Circuit drew a distinction between tacking of possession for a boundary action, La. C.C. art. 794, and that of the general prescriptive articles, La. C.C. arts. 3441 and 3442. Under Article 794, “one may utilize tacking to prescribe beyond title on adjacent property to the extent of visible boundaries.” Articles 3441 and 3442 state “tacking may be utilized to prescribe *only to the extent of title*.” In *Loutré Land & Timber*, the court explained that under Article 794, “the deed that forms the juridical link need not include the particular property to which the possessor claims prescriptive title in order to tack onto the possession of his ancestor in title.” If the possession occurs for over 30 years without interruption and within visible bounds then the boundary is fixed along those visible bounds,

The Second Circuit reversed the trial court because they overlooked the distinction in *Brown* and the plaintiff’s evidence proving lot 14 is an adjacent property. The evidence proved the plaintiff and her ancestors had uninterrupted possession for over 30 years. “Ms. Jackson’s title, which includes the strip north of the highway, provides the juridical link needed to utilize tacking under La C.C. art. 794 to that which is possessed beyond title and within visible bounds.”

2] Abridged acquisitive prescription (10 years)

a] Satisfaction of the delay requirement

Nelsen v. Cox, 2012 WL 2154253, 2011-0062 (La. App. 1 Cir. 6/13/12)

Facts: The case arose out of a property dispute in Tangipahoa Parish between the plaintiffs, Henry Burton Nelson (the Heirs), represented by the executor of the estate, Shirley Nelsen, and the defendants, Bruce Cox, Tangipahoa Development, L.L.C., and Lonesome Properties, L.L.C.

The plaintiff claimed the heirs were the record owners of the property as evidenced by an Amended Judgment of Possession signed on June 24, 2009, filed in the conveyance records of the “Succession of Henry Burton Nelsen”. The plaintiff also contended that the defendant caused two documents to be recorded in the conveyance records that put “cloud” on their title. The first document is a quitclaim deed from March 12, 2007 where Elvira Simmons conveyed the property to Tangipahoa Development. The second document is a cash sale on March 27, 2007 where Tangipahoa conveyed the property to Lonesome properties.

The defendants answered the petition and asserted the defenses of good faith possession, a peremptory exception raising the objection of prescription, and later filed a reconventional demand asserting they had physically possessed the property since March 27, 2007. The defendants argued that they acquired the property in a valid conveyance from Elvira who acquired full ownership of the property pursuant to a valid judgment of possession on April 11, 1989 as part of the succession of her husband, Henry Burton

Nelsen. The defendants also claimed they had legal possession of the property by more than ten years good faith possession, under Article 3473, and thirty years possession, under Article 3486. To reach these numbers, the defendants tacked on the possession of Elvira and Henry Burton Nelsen.

The trial court granted the plaintiff's motion for summary judgment and confirmed and quieted the title recognizing the heirs as the rightful owner.

Result: Affirmed.

Rationale: The court found that despite the petition being labeled a "quiet title", the allegations and prayer for relief seeking that the heirs be declared the "sole and only owners in perfect ownership" was a petitory action. In a petitory action, the plaintiff bears the burden of proving they acquired ownership from a previous owner. Under Article 3653, when the title is traced to a common author, the common author is presumed to be the previous owner. In this case, the court found Henry Burton Nelsen was the common author-in-title and all the plaintiff had to do was show an unbroken chain of transfers, from Henry Nelsen, to establish title.

1. *The Plaintiff established the title to the land:* The plaintiffs established title through two documents. First, the Amended Judgment of Possession, from June of 2009, which declared the plaintiffs the owners of Henry Nelsen's property. Second, the March 12, 1942 act of sale where Robert Reid sold the property to Henry Nelsen who, at the time, was *single*. The defendant's can't prove good title because Elvira never had an ownership interest because the 1989 succession only transferred property acquired "during their marriage".

2. *The defendant cannot prove 10 year acquisitive prescription:* The defendant cannot prove 10-year acquisitive prescription because they cannot show they had just title and were in good faith *or* there were ten years of continuous peaceful possession of the property. The court found persuasive the plaintiffs evidence of communication between the plaintiff and defendants in March of 2006 where the defendant indicated the property was "subject to a possible claim of ownership in the name of... Henry Nelsen." This evidenced the defendants were not acting in good faith.

3. *The defendants cannot establish thirty year prescription:* The defendant's cannot establish thirty year prescription because it would require the tacking of both Elvira and Henry Nelsen, the common author-in-title.

Duplantis v. Bergeron, 10-2244 (La. App. 1 Cir. 10/5/11); 2011 WL 4613014
See supra under "Unabridged acquisitive prescription".

Jackson v. Herring, 46, 870 (La. App. 2 Cir. 1/25/12), 86 So.3d 9
See supra under "Unabridged acquisitive prescription."

b] Just title: act translative of ownership

Jackson v. Herring, 46, 870 (La. App. 2 Cir. 1/25/12), 86 So.3d 9
See supra under “Unabridged acquisitive prescription.”

Nelsen v. Cox, 2012 WL 2154253, 2011-0062 (La. App. 1 Cir. 6/13/12)
See supra under “Abridged acquisitive prescription.”

3. Principal real rights

a. Ownership: modified forms of ownership: co-ownership

Horton v. Browne, 47,253 (La. App. 2 Cir. 6/29/12); 2012 WL 2478274
See infra under “Extinction of servitudes . . . By confusion.”

b. Servitudes

1) Predial servitudes

a) Natural servitudes: drain

Richland Parish Police Jury v. Debnam, No. 47,159 (La.App. 2 Cir. 4/18/12); 2012 WL 1316996

Facts: Defendants owned 120 acres bordered by a parish road. A creek ran through the land. The defendants constructed a dam on the creek.

In 2006, the Police Jury filed suit to force the defendants to remove the then-existing dam, alleging that it flooded a parish maintained roadway. The trial court ruled in favor of the Police Jury and the dam was removed. The appellate court reversed, finding that there was insufficient evidence to determine that the flooding was caused solely by the existence of the defendant’s dam. The court further found that there were actually multiple causes of the flooding, which included the actions of the Police Jury, itself. Following the Louisiana Supreme Court’s denial of writs, the defendants rebuilt the dam.

Through the years following the 2006 suit, the parish improved the drainage system.

In 2011, the Parish Police Jury and multiple adjoining landowners filed suit for injunctive relief seeking to force the defendants to remove the rebuilt dam, alleging that it caused flooding to their properties and that it interfered with the natural flow of the creek. In response, defendants filed an exception of *res judicata*. Plaintiffs amended their petition to demand a preliminary injunction. After a full evidentiary hearing, the trial court denied all exceptions and granted plaintiffs’ preliminary injunction, ordering the removal of the rebuilt dam and prohibiting them from building any new obstructions on the creek. Defendants’ motion for appeal and request for a stay was denied. Defendants then filed an application for a writ to stay removal of the obstructions, which was granted.

Result: Affirmed the denial of defendants' exception of res judicata and the granting of the plaintiffs' preliminary injunction. Remand to trial court for the fixing of security.

Rationale: Injunction -- The defendants argued that the plaintiffs failed to show that irreparable injury, which is a loss that cannot be adequately compensated in monetary damages, will result if the dam remains. They argued that plaintiffs' petition demands money damages, which indicates that the harm can be adequately valued. Thus, the harm is not irreparable.

An injunction shall issue when irreparable injury may result to the applicant or where otherwise specified by law. La. C.C.P art. 3663 is a specific provision that allows an injunction to protect a servitude. For an injunction to issue under this article, there is no requirement of a showing of irreparable injury.

Generally, an injunction shall issue only in prohibitory form, which restrains the disturbance. However, a mandatory injunction, which compels the removal of an obstruction, may issue when defendant obstructs plaintiff in enjoyment of a real right. The right of drain is a real right of servitude. When the owner of the servient estate obstructs the right of drain, the remedy is a mandatory injunction, compelling the removal of the obstruction.

A prohibitory preliminary injunction is used to keep the status quo until trial and may be granted upon the applicant's prima facie showing of entitlement. For a mandatory preliminary injunction to issue, the applicant must show entitlement to it by a preponderance of the evidence. The trial court has great discretion whether to grant a preliminary injunction and its decision will not be overturned absent manifest error.

A full evidentiary hearing was held, where testimony was heard and evidence presented, which was enough to show by a preponderance of the evidence that it was the dam that slowed the flow of water through the creek and interfered with the plaintiffs' natural servitude of drain and that the plaintiffs were entitled to the injunction. Thus, the issuance of the preliminary injunction was not manifest error.

Res judicata -- Defendants argued that plaintiffs were not entitled to the relief sought, as their claim was barred by the doctrine of res judicata. The court explained that the nature of the servitude of drain does not lend itself to the res judicata bar because factual circumstances change. Where in a prior suit, the plaintiff failed to prove that the then-existing factual circumstances entitled him to an injunction, he is not barred from seeking to prove he is entitled to an injunction for a later-existing obstruction.

Carnaggio v. Cambre, 85 So. 2d 631, 11-552 (La. App. 5 Cir. 12/13/11)

Facts: This case arose out of Carnaggio, claiming that he, as the dominant estate owner, acquired a servitude of passage on the servient estate owner's property through thirty year acquisitive prescription. Cambre, the servient estate owner, filed a reconventional demand against Carnaggio for damages Carnaggio caused when he flooded Cambre's property by covering the drainage ditches on both sides of his property.

Through property conveyances stemming back to 1963, plaintiff-Carnaggio's property became surround by defendant-Cambre's property on the west, north and east. Mrs. Cambre's

homestead was situated on the east of Mr. Carnaggio's property. Both parties' property faced the Mississippi River to the south.

Plaintiff filed a petition for damages and injunctive relief claiming Mrs. Cambre blocked the drainage of his sewerage onto her property. Plaintiff alleged that he had acquired a servitude of passage on Mrs. Cambre's property where his sewerage drained from his property onto hers.

The trial court granted Mrs. Cambre's Motion for Summary Judgment finding that Carnaggio "did not have a natural servitude for sewerage, sewerage effluent or sewerage discharge onto or over Mrs. Cambre's property. The court, however, denied the motion regarding Mrs. Cambre's claim that Eric had not acquired a servitude of passage through the use of acquisitive prescription." *Id.* at 10. The case proceeded to trial. Both sides put on numerous witnesses who had varying testimonies.

The Trial Court granted a judgment for general damages of \$20,000 to Mrs. Cambre, and ordered Mr. Eric Carnaggio to install the necessary equipment to prevent overflow onto Mrs. Cambre's property. Mr. Carnaggio filed a Motion for New Trial. It was denied.

Appeal ensued.

Result: Affirmed.

Rationale: *1. Carnaggio Changed the Natural Flow of Water* - Eric Carnaggio changed the flow of the water by "filling in ditches on the northwest and northeast corners of his property and by installing a manmade pipe in its place." The appellate court affirmed the trial court's finding regarding this issue. Louisiana Civil Code article 656 provides that the owner of the servient estate may not do anything to prevent the flow of water. However, the owner of the dominant estate may not do anything to render the servitude more burdensome. The evidence supported the finding that plaintiff made the servitude more burdensome and changed the natural flow of water when he built up his land and filled in the ditches.

2. Carnaggio's Drainage Servitude Not Recognized –Both of the parties possessed just title to their respective land. See LSA C.C. art. 742. Mr. Carnaggio was aware that his sewerage drained onto someone else's property. The burden of proving 30 year acquisitive prescription is by a preponderance of the evidence, and the trial court's finding regarding the BOP will not be overturned by the appellate court unless there has been an abuse of discretion. Mr. Carnaggio failed to prove by a preponderance of evidence his intent to possess as owner and that his possession was continuous and uninterrupted, peaceable, public and unequivocal. Mr. Carnaggio's witnesses' testimonies did not meet his burden of proof, and the trial court accepted as true that Mr. Carnaggio's sewerage did not always drain flowing in a northwesterly direction, so the drainage servitude by acquisitive prescription could not be established.

3. Natural Drainage and Topographic System of St. James Parish – Mr. Carnaggio did not complain of, or establish, that there was a problem with the natural drainage on his land, so the trial court was proper in not addressing this issue.

4. \$20,000 Damages – The appellate court did not overturn the lower court's damages awarded because the record did not clearly reveal that the trier of fact abused its discretion in making its award. *Coco v. Winston Indus., Inc.*, 341 So.2d 332, 335 (La. 1976).

b) Legal servitudes: enclave (landlocked estate)

Allen v. Cotton, 2012 WL 1521217, 2011-1354 (La. App. 3 Cir. 5/2/12)

Facts: Plaintiff filed action seeking a right of passage across defendant's property located in LaSalle Parish. The trial court found that plaintiff's property had become enclosed through a "voluntary alienation or partition." LSA C.C. art 694. As such, plaintiff was entitled to request a gratuitous point of passage across the property on which passage was previously exercised. The trial court found that the Cotton property was not the property on which passage was previously exercised. The court held, "Ms. Allen had no right of passage across the Cotton property, reasoning that the existence of a gratuitous right of passage is mandatory in nature, and no right of predial servitude should be judicially decreed." *Id.* at 1. The trial court suggested that Ms. Allen may have a gratuitous right of passage on the property to her east, where the passage was previously exercised.

Allen appeals.

Result: Affirmed.

Rationale: The appellate court found that LSA C.C. art. 694 applied in this case. "In the case of a partition, or a voluntary alienation of an estate or of a part thereof, if property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road, and even if the act of alienation or partition does not mention a servitude of passage." LSA C.C. art. 694. But a neighbor is not required to provide passage to the owner of an estate that became enclosed by the voluntary act or omission of its owner. LSA C.C. art. 693. Even if that right is not available to the seller of a voluntarily enclosed property, the purchaser has a right to demand gratuitous passage. *Spotsville v. Herbert & Murrell, Inc.*, 97-188 (La. App. 3 Cir. 6/18/97), 698 So. 2d 31.

Ms. Allen clearly did not cause the enclosure of her property. Although the passage through the Cotton property would be preferable to Ms. Allen, the law provides that she must request gratuitous passage on the land on which passage was previously exercised. The Gore property, not the Cotton property, contained the last access to Ms. Allen's land. Her right is to request gratuitous passage from Gore. (see dicta). Trial Court's holding is affirmed.

b) Conventional servitudes

1] Creation of servitude

1026 Conti Condominiums, LLC v. 1025 Bienville, LLC, 84 So.3d 778 (2012)

Facts: This case arose from a dispute over the right of use of an alley and courtyard located between two businesses' properties.

In its December 23, 2009 suit, Conti sought to enjoin Bienville from interfering with Conti's right to use a certain alley and courtyard that are accessible from both

properties. Conti alleged that it had acquired its property from Bruno on June 2, 2006 in a cash sale that included the right to use of the adjoining alley and courtyard, owned by Bruno at the time, and that this deed was recorded in Orleans Parish Conveyance Records on June 15, 2006. A week later, Bruno sold the alley and courtyard, and remaining property in the area, to Bienville. For three years, Bienville and Conti used the alley and courtyard for access, parking, and storage of construction materials and collection of debris while the construction of their projects progressed. Conti's petition further alleged that in March 2009, Bienville removed all materials from the alley and courtyard, striped the courtyard for parking, and erected signs prohibiting its use by Conti or others. Conti asserted that its deed from Bruno had established a predial servitude in favor of its property as the dominant estate, over the alley and courtyard as the servient estate, owned by Bienville. Conti sought a preliminary injunction enjoining Bienville's continued interference with Conti's servitude and a declaratory judgment confirming Conti's legal, non-exclusive right to use the alley and courtyard.

At an evidentiary hearing on May 11, 2010, the district court granted the preliminary injunction, and ordered Bienville to remove all signs and obstructions prohibiting Conti's use of the alley and courtyard, designated as Lot AA.

On March 9, 2011, Conti filed a motion for summary judgment seeking declaration of the existence, extent, and type of servitude granted. Conti argued that the existence and location were clearly established in the deed, and the parties' intent as to type could be established by looking at the parties' use of it from 2006 to 2009. Bienville opposed the summary judgment arguing that there was a genuine issue of material fact as to the existence of the servitude because 1) the language of the deed "granting" it was too vague, and 2) Conti's use during the three years was pursuant to Bienville's express permission. Alternatively, it argued that assuming the existence, there was still genuine issue of material fact regarding whether the servitude included the right to park in the courtyard.

On April 28, 2011, the trial court granted Conti's motion for summary judgment from the bench. On May 13, 2011, the trial court issued a written judgment acknowledging a predial servitude of "access, passage and parking" on Bienville's alley and courtyard for Conti's benefit as the dominant estate. Bienville appealed.

Result: Reversed and remanded.

Rationale: Summary judgments being reviewed de novo, the reviewing court must determine if there is any genuine issue of material fact.

1. Existence – On the issue of the existence of the servitude, Bienville argued that the language of the deed is too vague. Upon reviewing the documents submitted by Conti and Bruno, the court disagreed.

Bienville alternatively argued that Mr. Bruno's affidavit and testimony at the preliminary injunction stated that he did not intend to create the servitude. The appellate court ruled that the trial court correctly disregarded this evidence on the basis of La. Civil Code Article 1848 (testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act) and 2442 (an act of sale of immovable property becomes effective against third parties—such as Bienville—when the act is filed for registry).

2. *Type and Scope* – Conti argued the trial court was correct to apply La. Civil Code Article 749 (“If the title is silent as to the extent and manner of use of the servitude, the intention of the parties is to be determined in the light of its purpose.”) and rely on the use of the alley and courtyard to park construction vehicles and supply trucks. Bienville argued that Mr. Bruno’s affidavit, stating that he “did not intend to grant Conti... any right of use to park vehicles in Lot AA” directly conflicts with Conti’s evidence and therefore presents a genuine issue of material fact. Bienville also argued that the parties’ use during construction could not accurately reflect the parties’ intent towards the lot once construction was finished.

The reviewing court found that Mr. Bruno’s affidavit demonstrates the existence of a genuine issue of material fact as to the scope of the servitude granted to Conti. This genuine issue of material fact precludes summary judgment.

2] Effects of servitude: extent of manner of use; relocation

Coleman v. Booker, 2012 WL 2120881 (La. App. 2 Cir. 6/13/2012)

Facts: Dominant estate owners brought this action against servient estate owner to resume use of old right of way or, alternatively, seeking damages to repair the new right of way.

The Colemans had a "Right of Way Grant" executed between the Coleman's ancestor and Booker in 1983 for the sum of \$25. The right of way provided for a right of way for ingress and egress within 90 feet of the property line of the servient estate (Booker) for the benefit of the dominant estate (Coleman). Coleman built a road on the servient estate to access Donaldson Road from the dominant estate. The road was used for 25 years. Coleman performed all maintenance on the road.

In 2008 Booker's son notified Coleman that Booker wanted to relocate the right-of-way to another area within 90 feet of the property line in accordance with the 1983 servitude instrument. Coleman agreed to the relocation of the "new driveway" on the condition that it did not make his use less convenient.

In accordance with their agreement Booker, the servient estate owner, hired a professional in July 2008 to install the new driveway. Booker later hired a professional builder and rock hauler to complete construction on the new driveway. The new driveway was complete by July 2009. Coleman complained of the quality of construction of the new driveway to Booker's son, but he was informed that no more work would be done on the new driveway. Coleman had Greg Dumas level the new driveway with his tractor. Shortly thereafter, Coleman began using the new driveway.

Eventually the plaintiffs filed a lawsuit against Booker for declaratory judgment, injunctive relief and damages. Mrs. Booker filed an answer to the lawsuit and a reconventional demand. The parties stipulated before trial that resumed use of the old driveway was not an option and the issue before the court was whether the construction of the new driveway was adequate for reasonable use.

The trial court found that the new driveway was not of the same quality as the old driveway, and the cost of repair to the new driveway was \$21,446,30. Plaintiffs were assessed with 25% fault in causing damage to the new driveway. The trial court ordered the defendants to pay the plaintiffs the remaining \$26,084.

Result: Affirmed in part; reversed in part.

Rationale: 1. Servient estate owner was not obliged to build a new driveway to exact specifications desired by dominant estate owners. The law provides that the owner of a servient estate may do nothing to diminish or make more inconvenient the use of the servitude. If the original location has become more burdensome for the owner of the servient estate, or prevents him from making useful improvement, he may provide another "equally convenient location for the exercise of the servitude" that the owner of the dominant estate is bound to accept. All expenses of relocation are born by the owner of the servient estate. LSA C.C. art. 748. The term "equally convenient" applies to the location of the servitude. Meaning that the location of the servitude has to be as suitable for its purpose as the previous location of the servitude. *Brian v. Bowlus*, 399 So.2d 545 (La. 1981). The servient estate owner may be required to keep his estate in suitable condition for the dominant estate's exercise of its servitude. LSA C.C. art. 651. The dominant estate has the right to make at his expense all the works that are necessary for the use and preservation of the servitude. LSA C.C. art. 744.

The predial servitude agreement did not contemplate the quality of the driveway, as the plaintiffs here tried to argue that the defendant owed the dominant estate owner a certain quality that would not lead to less convenient use. The issue is whether the location of the new driveway was equally convenient for use by the dominant estate owner as the old driveway. The plaintiffs misunderstood this area of law and thought that the quality of the new driveway had to be equal to the quality of the original, old driveway.

The only way in which the relocation of the right of way was less convenient than the old right of way was by placing fencing along the side of the new driveway and placing two T-posts at the intersection of the new driveway and Donaldson Road. The fencing and new location caused inconvenience to Mr. Coleman because he could not properly perform maintenance on the new driveway, the T-posts and sharp turn into the new driveway made it difficult to enter or exit onto Donaldson Road with a gooseneck trailer.

The appellate court ordered that the defendant remove the fence along the right of way and T-posts along Donaldson Road, providing an access path of not less than 30 feet in width for the dominant estate owner's exercise of their servitude. These changes will make the new driveway as convenient as the old driveway, meeting the defendant's duty for plaintiffs to exercise their servitude of passage.

The trial court erred in holding the defendant liable for the costs of repairing perceived inadequacies of the new driveway. Accordingly, the trial court's award of damages to the plaintiff is reversed.

See supra under “Creation of servitude”.

3] Termination of servitude: by confusion

Horton v. Browne, 47,253 (La. App. 2 Cir. 6/29/12); 2012 WL 2478274

Facts: In 1997 plaintiffs' mother executed a donation inter vivos wherein she divided her 40 acre tract into three tracts. Each one of the plaintiffs received ownership of a particular tract. In the same instrument, each sibling received an undivided one-third interest in the minerals under the entire 40 acres with fractional ownership. On November 14, 2002, one of the siblings conveyed her acreage to her brother. On November 21, 2003, the remaining two sibling-property owners conveyed the entire 40 acres to Ms. Lazarus, reserving all mineral rights. On December 28, 2004 Ms. Lazarus conveyed her rights in the property to defendant. All parties in this suit executed a mineral lease in 2005, but no wells were spudded until March 2010. Plaintiffs sought a declaratory judgment recognizing them as owners of the mineral rights to the property. Defendant reconvened, seeking a judgment declaring plaintiff's mineral servitude prescribed for 10 years nonuse in 2007.

The trial court ruled that the 1997 donation created a single servitude which was not extinguished or modified before February 25, 2007, when it prescribed. At the time of prescription, defendant was the sole owner of the property. Additionally, the trial court ruled that confusion did not occur when the donation was made. Plaintiffs appealed, asserting that the trial court erred (i) in concluding that the 1997 donation from plaintiff's mother conveyed to them a valid mineral servitude and (ii) in the event a valid mineral servitude was conveyed, in holding that confusion did not occur between each donee's fractional mineral interest and their surface ownership.

Result: Affirmed

Rationale: Plaintiffs alleged that the 1997 donation was an invalid division of a mineral servitude as it did not meet any of the exception set forth in La. R.S. 31:63-71. Specifically, plaintiffs asserted that the donation did not meet R.S. 31:66 because the "owners" of several contiguous tracts did not exist at the time of creation of a purported single servitude. Therefore, plaintiffs assert that the alleged mineral servitude donation was void ab initio, and the true date from which the prescriptive period began to run was November 21, 2003 when they reserved the mineral interest in the sale to Ms. Lazarus. The trial court looked to the language of the donation instrument to find the true intent of the parties. The instrument employed the language "further" for the donation of the undivided one-third interest in the mineral rights. Therefore, the trial court found, and the court of appeal agreed, that, though contained in the same instrument, the donation of the land and the donation of the mineral rights were separate and distinct donations. As such, the court of appeal upheld the trial court's decision that a valid mineral servitude was created by the 1997 donation. By agreeing to the terms of the conveyance, each plaintiff intended to be subject to a mineral servitude in favor of the others.

The plaintiffs next contended that, if a valid mineral servitude was created, it was extinguished by confusion. The plaintiffs reasoned that their undivided one-third interests corresponded to their ownership of one of the three surface tracts (although the tracts were of different size. Thus, the plaintiff concluded that even if prescription began to run as to two-thirds of their mineral interest, the prescriptive period of their one-third interest did not begin to run until the sale to Lazarus in 2003 as confusion had devolved the one-third interest back to the owner of the surface tracts, dissolving the mineral servitudes. The court of appeal, however, found that confusion only occurs under La. Civ. Code art. 765 when the dominant and servient estates are acquired in their entirety by the same person. Confusion does not occur when the landowner only acquires a fractional interest in the mineral servitude. Because the plaintiffs' rights in the two estates were unequal, no confusion occurred. Therefore, no new mineral servitude was created upon the conveyance to Lazarus in 2003 and the plaintiff's mineral servitude prescribed for non-use in 2007.

2) Personal servitudes

a) Usufruct

Barnes v. Cloud, 46,685 (La. App. 2 Cir. 12/14/11); 82 So. 3d 463

Facts: Plaintiff and her husband bought a lot and built a house thereon in 1994. Once the house was built, they executed a deed transferring the property to their son and daughter in law, defendants in this case, for \$1,500. The price on the property was not actually paid, though, and the property was transferred "in trust" to protect it from possible financial issues arising from plaintiff's husband's alcohol and gambling addictions. According to both plaintiff and her son, there was no intention to permanently transfer the property. Plaintiff continuously lived in the house, paid the property taxes, maintained the property, and made beneficial improvements to the property after the purported transfer. In 2004, defendants divorced, and Julia, plaintiff's now ex-daughter in law, sought to have the property included in the division of community property.

In 2008, plaintiff filed this suit against both her son and ex-daughter in law, requesting that the court either transfer the property back to her or to allow her full use and/or usufruct. Alternatively, plaintiff sought reimbursement of \$116,468 which she had paid for property taxes and improvements. Plaintiff alleged she was entitled to retain possession of the property until she was reimbursed. Plaintiff also filed a notice of lis pendens specifically identifying the property. Julia filed an answer and reconventional demand seeking \$75,000 in fair market rental value for a fifteen year period, \$67,500 for the filing of a frivolous action, and also requesting that plaintiff be evicted. In response, plaintiff dropped her demand to set aside a court-ordered sale of the property and transfer the property back to her, replacing that demand with a request that the court recognize her right to dwell in the house as a condition to the "trust agreement." Plaintiff also alleged that Julia unlawfully tried to evict her and interfered in a contract that would have

allowed plaintiff to stay in the house until the legal issues were resolved; she also requested mental anguish damages.

The trial court awarded plaintiff \$58,211.50 in reimbursement, but assessed her with rent in the amount of \$32,400 which offset her award, resulting in a total of \$25,811.50 that plaintiff was to receive. A motion for new trial was filed by plaintiff in which she sought additional damages and reconsideration of the rental payments assessed against her. The motion was denied in part and granted in part, resulting in additional damages of \$953.82 being awarded to plaintiff. That same day, Julia's motion to evict was granted. A petition of mandamus filed by defendants was also granted, ordering that the notice of lis pendens be cancelled from the mortgage records. Both plaintiff and Julia filed motions for devolutive appeals, but Julia dismissed her appeal. Plaintiff appealed (i) the trial court's award of rent to defendants; and (ii) the trial court's eviction of plaintiff before she had been fully reimbursed.

Result: Affirmed in Part, Amended in Part, and as Amended, Affirmed.

Rationale: The court of appeal first noted that, although the parties and trial court had treated the action as one between possessor and owners, it was more properly analyzed under the rules applicable to personal servitudes. With regard to plaintiff's first assignment of error, then, the court of appeal found that usufructuaries do not pay rent to naked owners. Therefore, the court amended the trial court's judgment so as to delete the offset awarded to defendants for "rent."

Plaintiff's second assignment of error was that she should not have been evicted before fully reimbursed. Under La. Civ. Code art. 627, a usufructuary can retain possession of the property until reimbursed for all expenses and advances for which she has recourse against the owners or their heirs. The only amount for which plaintiff, as usufructuary, would have had recourse would have been extraordinary repairs and extraordinary charges. The court of appeal found that the list of charges for which plaintiff was granted reimbursement contained no extraordinary repairs, and only one extraordinary charge which was a \$7,621 payment for a parish paving lien. However, defendants had already paid plaintiff \$11,453.82 of the amount they owed her, so the only amount for which plaintiff would have had recourse had been covered. Therefore, the court of appeal upheld the trial court's determination that plaintiff had no right of retention.

b) Habitation

Gonsoulin v. Pontiff, 74 So.3d 809 (2011)

Facts: This case arises from a dispute over the existence of a document establishing existence of a right of habitation, and the underlying cause of the habitation obligation.

In June 1992, Michelle Pontiff and her husband purchased a house in Youngsville, Louisiana. By the end of the year, they could no longer afford it, so they executed a dation en paiement in favor of Michelle's mother, Gwen Gonsoulin, on December 22, 1992. Mrs. Pontiff continued to live in the house, even after she divorced her husband.

In April 2010, Gonsoulin served a notice of eviction on Pontiff through a justice of the peace court. Pontiff filed an exception, answer, and reconventional demand alleging that the amount in dispute exceeded subject matter jurisdiction of that court, and the case was removed to the Fifteenth JDC. She argued that Gonsoulin had granted a right of habitation in favor of Pontiff which entitled her to use the home until her death. Gonsoulin claimed she never executed the document.

At trial, Pontiff admitted that she could not produce the document granting the right of habitation. She claimed her mother had executed two documents, but both had been lost or destroyed. She resorted to La. Civil Code Article 1832, whereby she could prove through testimony or presumption as to the document only because they had been destroyed, lost, or stolen.

The trial court found that Pontiff proved that Gonsoulin had executed the document, but that the cause—establishing the limited right of habitation for the purpose of receiving a homestead exemption on the property—was illicit, and therefore the document a nullity.

Result: Affirmed.

Rationale: Pontiff alleged three trial court errors:

1. The court erred in when it held that granting a Homestead Exemption was unconstitutional and unlawful. La. Civil Code Article 1966 provides that an obligation cannot exist without a lawful cause. The testimony of the assessor of Lafayette Parish and an employee in his office made clear that the effect of filing this document was to exempt the property from property taxes. As owner of the land, Gonsoulin was not entitled to claim a homestead exemption in the property. The reviewing court agreed that the trial court did not err in this finding

2. The court erred in failing to find an alternate true cause under Civil Code Articles 1970 and 1967, which was valid and lawful. The effect of the “right of use of habitation” was not found to be a legitimate cause, because the purpose of the document was to exempt the house from property taxes, not find someone else to pay them.

3. The court erred in finding a limited Right of Habitation, as a matter of law, when no limitation exists in the forms provided by the Tax Assessor’s Office. No trial court error was found here, either. As the document had been destroyed, forms used by the assessor’s office served as a replacement. These forms clearly stated that “the right of use of habitation” is granted “allowing him to claim Homestead Exemption.”

3) Building restrictions

Bayou Terrace Estates Home Owners Ass'n, Inc. v. Stuntz, No. 2011-1886, --- So.3d ----, 2012 WL 2786079 (La.App. 1 Cir. 7/10/12)

Facts: Bayou Terrace Estates is a subdivision for which the Bayou Terrace Estates Home Owners Association, Inc. was created pursuant to the Louisiana Homeowners Association Act, La. R.S. 9:1141.1–1141.9, to manage and regulate the residential planned community. An

Association restriction prohibited the commercial use of lots contained in the subdivision. The restriction did not prohibit a personal office from being located inside the residence.

Plaintiff operated an “art studio” out of her home. She provided art lessons and painting parties and was paid for her services. Additionally, the amount she charged included amounts for supplies.

In 2010, the Association filed a petition for injunctive relief against the defendant, a homeowner in the subdivision, to enforce the building restriction against commercial use.

Following the hearing for permanent injunctive relief, the trial court ruled in favor of the Association, holding that the art lessons the defendant provided in her home was commercial and immediately enjoined her from operating it from her home. Defendant appealed from judgment granting the permanent injunctive relief.

Result: Affirmed the issuance of the permanent injunction.

Rationale: Building restrictions are charges imposed in pursuance of a general plan governing building standards, specified uses, and improvements. They may impose affirmative duties that are reasonable and necessary for the maintenance of the general plan on the owners of immovable property. Doubt as to the existence, validity, or extent of a restriction is resolved in favor of unrestricted use. However, the provisions of the Louisiana Homeowners Association Act, La. R.S. 9:1141.1, *et seq.*, supercede the Civil Code articles on building restrictions in the event of a conflict and provide that building restrictions regulated by a homeowners association shall be liberally construed to give effect to the restriction’s purpose and intent when the existence, validity, or extent is doubted.

The term “personal office” was not defined or described in the Association restrictions. Consequently, the court undertook a review of the jurisprudence interpreting similar restrictions. The court concluded that the jurisprudence revealed that administrative or managerial activities, or even insubstantial provision of services in the home, have been found not to violate the intent of such provisions. However, the defendant’s actions of providing art lessons in her home were clearly more analogous to those cases in which the activities of the homeowners were found to be in violation of “residential use only” restrictions.

Lafargue v. Barron, No. 2011-1221 (La. App. 1 Cir. 2/10/12); 2012 WL 602173

Facts: Mr. and Mrs. Barron built an addition to their home that violated the subdivision's restrictions, which required that no building on any lot be any nearer to the side property line than 5 feet. The addition was 3 feet, 6 inches from the side property line. The Barrons' son, Sean S. Barron, also named as a defendant, lived in the house but was not the owner of the home at the time suit was filed. Sean Barron minored in college in construction management and "ran the project" on the addition. The son applied for and received a variance to reduce the 8 foot side yard setback to 3 feet. However, this variance did not affect the requirements of the subdivision Residents Association, which required that the Board of Directors approve the construction. The defendants failed to

submit any plans to the Board. In preparing for the project, the son applied for all the necessary city and parish permits. However, on each of the permits that were approved it was indicated that the issuance of the permit did not release the owner from any private restrictions that may be attached to the property. The defendants received several additional letters connected with permitting notifying them of same. Subsequently, the Residents Association sent a letter informing the defendants that the subdivision restrictions prevail over a city-parish variance and departing from the restrictions without Board approval may result in legal action.

The plaintiff lived next door to the Barron home on the side where the addition was built. In 2010, the plaintiff filed a petition for declaratory judgment and mandatory injunction to enforce building restrictions. After a trial on the merits, the trial court ruled in favor of the plaintiff, finding that the defendants were in violation of the subdivision's restrictions prohibiting any building closer to a side property line than 5 feet. The trial court ordered the defendants to remove the constructions to a position that was in compliance with the subdivision's restrictions. Defendants appealed.

Result: Affirmed.

Rationale: Defendants relied on La. C.C. art. 670, providing that when a landowner, in good faith, constructs a building that encroaches on an adjacent estate, the court may allow the construction to remain if the owner of that adjacent estate does not complain within reasonable time after he knew or should have known of the encroachment, or complains only after the construction is substantially completed. However, this case was not an encroachment case. It was a case concerning a building restriction.

Building restrictions are real rights and incorporeal immovables, which are charges imposed by the landowner of an immovable in pursuance of a general plan governing building standards, specified uses, and improvements. Because they are likened to predial servitudes, the rules governing predial servitudes are applied, to the extent such rules are compatible with the nature of building restrictions. Building restrictions may be enforced by mandatory and prohibitory injunctions.

The law provided a harsh remedy in this case. The defendants had an obligation to comply with subdivision restrictions and failed to do so, despite the numerous warnings they had received that the issuance of permits did not relieve them of their obligation to comply with private restrictions attached to the property.

4. Real actions

a. Relationship between possessory action & petitory action

Rodessa Oil and Land Co. v. Perkins, 47,378 (La. App. 2 Cir. 8/8/12); 2012 WL 3192784

Facts: Plaintiff and defendant owned contiguous tracts of land in Caddo Parish. At dispute in this case were 4.69 acres of land. Defendant's property was bound on the west and the south by two roads, and on the north and east by a barbed wire fence. The disputed land was south and west of the barbed wire fence, on defendant's side of the fence, as such the

defendant claimed it was part of his property. Plaintiff owned the land to the north and east side of defendant's property. In May 2008 plaintiff filed a petition to fix the boundary between the parties, asserting that the fence was maintained by defendant on plaintiff's property and defendant refused to remove it. Defendant answered, asserting that the fence had been in place and maintained in the same location for in excess of 30 years. Defendant also reconvened with his own possessory action, alleging that he and his ancestors in title had physically, openly, corporeally, and notoriously exercised continuous possession of the property, within the boundary lines marked by the fence, for more than 30 years. Plaintiff then filed an amended petition, acknowledging the possession of defendant and alleging ownership of the tract. Plaintiff therefore converted the action into a petitory action. Defendant never alleged ownership in his pleadings, but did claim ownership in his answers to interrogatories. In those answers, defendant asserted that his ancestors in title had openly, notoriously, and corporeally possessed the tract in excess of fifty years. He also listed potential witnesses who had knowledge that the fence had existed as far back as 1942, though he was not sure of the exact dates.

Plaintiff filed a motion for summary judgment, alleging that it had record title good against the world and that defendant had not asserted ownership of the disputed tract. Plaintiff attached all documents necessary to establish an unbroken chain of title back to the United States. Defendant opposed plaintiff's motion, claiming possession of the property and that there were genuine issues of material fact as to possession and ownership of the tract. In support, plaintiff attached affidavits asserting that the fence has been in place for more than 40 years and that he and his ancestors in title had openly and notoriously possessed and owned the tract bounded by the fence in excess of 40 years. The trial court granted plaintiff's motion for summary judgment, noting that the plaintiff in a petitory action must prove that he acquired ownership from a previous owner and that he has better title than the defendant. The trial court concluded that plaintiff had established this ownership by proving title good against the world. Further, the trial court found that there was no issue of material fact because defendant did not assert an ownership interest in the disputed land. The trial court thus found that plaintiff showed a valid and better title. Defendant appealed.

Result: Reversed and Remanded

Rationale: On appeal, defendant contended that the trial court erred in granting plaintiff's motion for summary judgment, as material issues of fact existed regarding ownership and possession of the tract. Plaintiff maintained that there were no issues of material fact because defendant had not prayed for recognition of his ownership, therefore his possessory action could not be construed as a petitory action. Further, plaintiff claimed that defendant's discovery response and attachments to his opposition of the motion did not qualify as pleadings. As such, defendant did not plead ownership, and defendant even asserted that he was not claiming ownership at the hearing on the motion.

The court of appeal noted the requirements for possessory and petitory actions, and how they work together. They further noted the requirements for acquisitive prescription, and that ownership of immovable property under record title may be eclipsed and superseded by ownership acquired under prescriptive title. The court then looked through various cases demonstrating that Louisiana is a fact pleading jurisdiction:

where the facts pled are sufficient to give adequate notice of the claim or special defense to the opposing party, it is not necessary to specifically label the claim or special defense as such. Further, where facts alleged are proved, the party may be granted any relief to which he is entitled under the facts pled and the evidence. Thus, the court looked to the facts pled by defendant and found that, though he should have used the specific term “acquisitive prescription” in his answers to petitions, he did state that he and his ancestors in title possessed the property at issue within boundaries for more than thirty years. He also did state that he claimed ownership by acquisitive prescription, and asserted facts that tended to support that claim, in his answers to interrogatories. Therefore, the court of appeal found that summary judgment was inappropriate as there was a disputed issue of a material fact.

Reynolds v. Brown, 11-525 (La. App. 5 Cir. 12/28/11); 84 So. 3d 655

Facts: Plaintiff’s mother purchased a tract of land on July 18, 1983. That same day she sold a portion of that tract to plaintiff (referred to as Parcel B) and retained ownership of the remainder (referred to as Parcel C). When her mother died, plaintiff and her three sisters each acquired an undivided ¼ interest in Parcel C as well as the trailer located thereon. In 2005, after her mother’s death plaintiff and her sisters sold the trailer, but not the land, to defendant, plaintiff’s uncle. In 1982, defendant began to build a structure next to the trailer for family parties with the mother’s permission. The structure was completed in 1992. In 2008, plaintiff filed a Petition for Eviction and Removal of Structure against defendant. This was the first request by defendant for removal of the structure. The trial court found that plaintiff’s petition was more akin to a petitory action than a possessory action, and that plaintiff did not meet all of the elements necessary to maintain a petitory action. Therefore, the trial court denied plaintiff’s petition. Plaintiff appealed, alleging that the trial court erred (i) in considering plaintiff’s action as a petitory action and in applying the burden of proof necessary in a petitory action (ii) in failing to find plaintiff’s title sufficient and in failing to rule that the improvements on her property were hers as a matter of law; and (iii) in holding that the defendant could not be evicted in the absence of a lessor/lessee relationship.

Result: Affirmed

Rationale: The court of appeal noted that Louisiana is a fact pleading state that values substance over form and “does not require the use of magical titles or terminology” for validly pleading an action. The courts must look to the facts alleged to discover what, if any, relief is available to the parties. Plaintiff contended that her action was a possessory action, and claimed that she was in possession of the property by virtue of having paid the taxes on the property for 27 years, along with acquiring title in 1983. The court of appeal noted, and the plaintiff conceded, that the defendant was in corporeal possession of the property. Further, the court of appeal noted that constructive possession cannot prevail over adverse corporeal possession. Because the facts as pled were that the plaintiff was the owner of certain property and the defendant possessed that property, and that the plaintiff as owner wanted for that possession to be discontinued, the court of appeal found

that the facts as pled supported a petitory rather than possessory action. The only evidence presented by plaintiff to show title was the act of sale by which she acquired title in 1983. As such, the court found the evidence insufficient to meet the burden of a petitory action when the defendant is in possession, i.e. title good against the world.

The court of appeal also found that plaintiff could not maintain an eviction proceeding. The court noted that, in an eviction proceeding, the petitioner must make a prima facie showing of title to the property, prove that defendant is an occupant as defined in La. Code Civ. P. art. 4704, and show that the purpose of the occupancy has ceased. The court found that plaintiff had not sufficiently proved title. Therefore, she had not born the burden of proof necessary to evict defendant.

Dorsey v. McKay, 74 So.3d 737, 10-919 (La.App. 5 Cir. 8/30/11)

Facts: This case involves a dispute over ownership of a property. Harry Dorsey brought an eviction proceeding in Justice of the Peace court against Anthony McKay, who was living in a trailer on the tract. McKay filed various pleadings, including a reconventional demand in which he claimed possession of the tract. He also moved to have the case transferred to district court, and this motion was granted. Subsequently, an intervention was filed by various people claiming that they were in possession of the property and were being disturbed by Harry Dorsey. Mr. Dorsey did not answer Mr. McKay's reconventional demand, but did answer the intervention, in which he asserted title in himself. The matter, however, was tried as a possessory action and the judgment awarded possession of the tract to Anthony McKay. Harry Dorsey appealed.

Result: Vacated and remanded.

Rationale: La. C.C.Pro. Art. 3657 provides as follows: "When, except as provided in Article 3661(1)-(3), the defendant in a possessory action asserts title in himself, in the alternative or otherwise, he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in the possessory action." The court notes that none of the exceptions in Art. 3661 apply here.

Mr. Dorsey's defect of failing to file an answer before proceeding to trial may have been waived by his appearance and participation in the trial, but the court is of the opinion that the matter should have been tried as a petitory action. The case was remanded to district court so Dorsey could have the opportunity to try the matter as a petitory action against McKay and the intervenors.

b. Possessory action: possession at the time of the disturbance

Pumpkin Mobile Home Park, LLC v. Harrison, Not Reported in So.3d, 2012 WL 992114, 2011-1293 (La. App. 1 Cir. 3/23/12)

Facts: The case arose out of a possessory action filed by the plaintiff, Pumpkin Mobile Home Park, LLC, against the defendants, Frank Harrison, Phyllis Underwood Harrison, and

Punkin Park, Inc.

On October 15, 2008 the defendants conveyed a twenty-eight acre tract of immovable property, through an act of cash sale. After two transfers, the plaintiff acquired the tract of land by an act of sale with mortgage on September 30, 2009. Each transfer of the property contained the same description included in the original act of sale by the defendants. The disputed property in this suit was not described in any of the property descriptions of the twenty-eight acre tract.

In November of 2009, the defendants sold other tracts of immovable property to Terry Stewart. The property description in the act of sale contained the disputed property.

On May 6, 2010 the plaintiff filed the possessory action and claimed it owned the disputed property even though it was never included in the property description. The plaintiff asserted it was “understood” by the defendants that the sale included the disputed property and its omission from the act of sale was an error. The plaintiff alleged the November 2009 sale by the defendants disturbed its peaceful possession of the disputed property.

The defendants answered the suit and filed peremptory exceptions of no right of action, no cause of action, and non-joinder of indispensable properties. The trial court overruled the exception of no cause of action and non-joinder but sustained the no right of action and dismissed the Harrisons from the suit with prejudice. The plaintiff appealed.

Result: The Court affirmed the Trial Court’s decision.

Rationale: The plaintiff asserts that even if it’s not the record owner of the property, it’s acquired a real right through peaceful possession of the property for more than one year.

No right of action is a procedural device used to terminate a suit brought by a person who has no legally recognized right to enforce the right asserted. Louisiana Code of Civil Procedure article 3665 provides that a possessory action is “one brought by the possessor of immovable property or of a real right therein to be maintained in his possession of the property of enjoyment of the right when he has been disturbed...”. A possessory action has four requirements. First, the possession of the property must occur at the time of the disturbance. Second, one must have quit and uninterrupted possession of the property by the plaintiff “*for more than a year immediately prior to the disturbance*” unless evicted by force or fraud. Third, it must be a disturbance in fact or law and, fourth, the possessory action must be filed within one year of the disturbance. La. C.C.P. art. 3658.

The appellate court found the plaintiff had no right of action because the plaintiff obtained the property in September of 2009 and the dispute arose less than two months later. The plaintiff asserted he could tack his possession onto his ancestors in title. However, the appellate court rejected this argument because under Louisiana Civil Code Articles 3441 and 3442, “tacking is allowed for prescriptive purposes only with respect to property that is included and described in the juridical link between the current possessor and his ancestor in title.” In this case, the 2009 act of sale to the plaintiff did not include or describe the property. Thus, the plaintiff can not tack on its possession and does not have a right of action.

Martin v. Fidelity Nat. Title Ins. Co., Court No. 09- 4195, 2011 WL 4478431 (E.D. La. Sept. 26, 2011)

Facts: Plaintiff alleged a defect in title to his property (the Martin property). Nill acquired a parcel of property which included the Martin property in 1959. In 2001, Hickory Glade Inc., a Louisiana corporation created by attorney Magee, conveyed by quitclaim deed any interest it had in the Nill property to defendant Magee in exchange for ten dollars. Plaintiffs argued that Hickory Glade had no ownership interest in the Nill Property at that time.

In 2002, Magee filed a petition for declaratory judgment against the Nills, their spouses, heirs, successors and assigns, on the grounds that he had possessed the property for over one year if the Nills did not file a petitory action asserting any adverse claims within thirty days. The court appointed a curator to represent the absent owners, the Nills. Default judgment was granted in favor of Magee. Plaintiffs allege that the curator did not contact Nill's heirs.

In 2005, Magee donated an interest in the portion of the Nill Property containing the Martin property to the Great Commission Foundation of Campus Crusade for Christ, Inc. Later in 2005, Magee and the Great Commission sold that parcel to Coate LLC with full warranty of title. Also in 2005, Coate, represented by Magee, filed a petition for declaratory judgment and to quiet title against the Nills requesting that the court recognize its right to possess the property. Coate asserted that it examined the public records and found the earlier declaratory judgment, and identified it as a disturbance in law. The same curator was appointed to represent the absent Nills. The state court granted default judgment to Coate in 2005.

Coate built homes on and sold individual lots. In 2005, Coate sold the Martin property to the Grazianis with full warranty of title. Then, in 2007, the Grazianis sold the property to the Martins with full warranty of title. On the date of the sale, the Martins obtained title insurance on the property.

In 2008, as the Martins prepared to sell the property, they were informed by purchaser's closing agent that there was a problem with the title and it could not be sold. They still possessed the property. The Martins made a claim against their title insurance policy. In 2009, the Martins sued the insurer, alleging that it did not pay any part of the claim, in breach of the policy and Louisiana penalty statutes. The insurer filed a third-party complaint against Magee, the Great Commission Foundation of Campus Crusade for Christ, Coate Homes and related entities, James Coate, and the Grazianis, alleging that to the extent it is liable to plaintiffs under the policy, the third-party defendants are liable to it for breach of the warranties of title and against eviction. The Grazianis, who sold the property to the Martins, then filed a cross-claim against the other third-party defendants on the same grounds. Third-party defendants moved for summary judgment on the claims against them.

Result: Summary judgment denied.

Rationale: When determining ownership of property in an action for a declaratory judgment, judgment is rendered for the party who is entitled to possession unless the adverse party proves that he has acquired ownership from a previous owner or by acquisitive

prescription. Neither Magee nor the Coate LLC would have been entitled to possession nor could they have proven that they acquired ownership from a previous owner. To succeed on a possessory action, an alleged possessor must show that: (1) he had possession at the time the disturbance occurred; (2) he and his ancestors in title had such possession quietly and without interruption for more than a year immediately before the disturbance, unless evicted by force or fraud; (3) a disturbance in fact or law; and (4) the possessory action was instituted within a year of the disturbance. A disturbance in law is "the execution, recordation, registry, or continuing existence of record of any instrument which asserts or implies a right of ownership." In this case, the alleged disturbance was the recorded title of Nill, which predated any possessory interest of Magee or the Coate entity. Accordingly, neither Magee nor Coate LLC had possession at the time the alleged disturbance occurred and cannot succeed in a possessory action.

c. Petitory action

1) Nature & qualification

Nelsen v. Cox, 2012 WL 2154253, 2011-0062 (La. App. 1 Cir. 6/13/12)
See supra under "Abridged acquisitive prescription".

2) Burden of proof: perfect title (title good against the world)

Reynolds v. Brown, 11-525 (La. App. 5 Cir. 12/28/11); 84 So. 3d 655
See supra under heading "Relation between possessory & petitory actions".

d. Boundary action: location of boundary

Bourgeois, et al. v. Linden Interest, 84 So.3d 715 (La. App. 3 Cir. 2/1/2012)

Facts: Two adjacent landowners dispute the boundary line between their properties and the ownership of a road that each landowner uses to access their land. The property descriptions of the two tracts listed the center of the existing road and a canal as the boundary between the tracts but the plats depict the boundary as a straight line.

The owners of West Linden Plantation and East Linden Plantation dispute their common boundary. West Linden claims that the boundary is supposed to be a canal and centerline of a road that separated the two tracts in accordance with the property descriptions for each tract. East Linden contends that the boundary is supposed to be a straight line between two points (A2 and Y) as depicted on the plats drawn by Kramer. West Linden filed the petition for boundary action.

A bench trial resulted in a finding that the boundary was a straight line as depicted on the plat, rather than the canal and centerline of road as alleged by plaintiff. This

judgment was in favor of East Linden. The trial court also found that the existing road was owned by a group of owners (dependent on the boundary it fixed) and its use and maintenance was a predial servitude of each tract.

Plaintiff, West Linden, appealed.

Result: Reversed.

Rationale: *1. Failure to Rule Based on the Intent of the Parties to the Original Partition*

Agreement – A boundary is the line of separation between contiguous lands. The boundary marker can be a natural or artificial object that marks on the ground the line of separation of contiguous lands. LSA C.C. art. 784. The Louisiana Supreme Court in *Hurst v. Ricard*, 514 So.2d 14, 17 (La. 1987) reinforced that the primary purpose in fixing a boundary is to determine and implement the intention of the parties

The trial court applied the rule established in *Lamson Petroleum Corp. v. Hallwood Petroleum, Inc.*, 00-695 (La. App. 3 Cir. 1/31/01), 8224 So.2d 1194 that the plat or survey prevails over a property description when the two are conflicting. This court in *Lamson Petroleum Corp.* also stated that the general rule does not apply when the plat or survey is obviously wrong. *Id.* at 1204.

On review of record in its entirety, the appellate court found that the language in the property description is clear – the boundary line is to be fixed between A2 and Y along a canal and middle of the road that runs between the two tracts. The record indicates that Kramer drew the plat for the 1951 partition. The plat contradicts the property descriptions. This presents a conflict in the record.

The record in its entirety indicates that the plat is wrong in its depiction of the boundary in dispute. Kramer's report clearly stated that the intention of the parties was to have the centerline of the road, regardless of alignment, mark the property line between West Linden and East Linden. Kramer, the plat's creator, explicitly stated that the straight line depicted was not authorized or surveyed when it was drawn.

After a review of the record, the appellate court found that the trial court was manifestly erroneous in choosing the plat created by Kramer to set the boundary lines between West and East Linden. The boundary is fixed "along a canal and the center line of a road dividing West Linden and East Linden Plantations" according to the property descriptions. *Bourgeois v. Linden Interest*, 84 So.3d 715, 721. It was clearly the intention of the parties of the 1951 partition to fix the boundary along the canal and centerline of the road, not the straight line drawn by Kramer in the plat. Kramer's report clearly evidences the intent of the parties, and is not controverted by any credible evidence in the record.

"We note that this result is also harmonious with the jurisprudential guide for determining a boundary. A canal is either a natural or artificial monument. A road is an artificial monument. According to the value assigned when fixing a boundary, both warrant more value than a straight line between A2 and Y, which is a course, or acreage, which is a quantity." *Id.* at 721.

2. West Linden not Recognized as Owners of Property by Acquisitive Prescription – West Linden argues that it physically possessed all of the land west of and up to the road since 1951, as owners, unequivocally, and within visible boundaries. The appellate court recognized that West Linden owned this land (see 1, above) so this point is moot.

3. Joint Ownership of Road Separating East and West Linden – The trial court did not find that the owners of East and West Linden jointly owned the road. The four corners doctrine is applicable and clearly sets out the parties' intent to own and maintain the road jointly. LSA C.C. art. 2046. *Hebert v. Ins. Ctr., Inc.*, 97-298, p.5 (la. App. 3 Cir. 1/7/98), 706 So.2d 1007, 1011, writ denied, 98-353 (La.3/27/98), 716 So.2d 888. The trial court's finding that paragraph 19 of the 1951 partition created a predial servitude for both East and West Linden is dependent on the fact that the boundary is a straight line (A2 to Y). Since the appellate court overturned the trial court's finding regarding the boundary line, the trial court's finding that a predial servitude exists on the road is also overturned.

Rodessa Oil and Land Co. v. Perkins, 47,378 (La. App. 2 Cir. 8/8/12); 2012 WL 3192784
See supra under heading “Relation between possessory & petitory actions”.

5. Tax sales

Quantum Resources Management, L.L.C. v. Pirate Lake Oil Corp., 11-813 (La. App. 5 Cir. 5/31/12); 2012 WL 1957794

Facts: Plaintiff in this case brought a concursus proceeding against four groups of defendants who plaintiff identified through the public records as possibly having ownership interests in certain lots that formed a part of a unit. Plaintiff was the unit operator and the unit contained two producing wells. Plaintiff sought to determine the proper parties to whom they should pay production from these wells. One group of defendants, called the “Mayronne and Handlin-Jones Groups,” filed a motion for summary judgment, arguing that another group, called the “Zodiac Group,” had no right, title, or interest in one of the lots at issue (Lot 4) because Zodiac’s ancestor in title had acquired the lot through an invalid tax sale. Specifically, the first group alleged that the 1925 tax sale by which Zodiac’s ancestor in title acquired the property was an absolute nullity because (i) the tax assessment was in the name of a person who never actually owned the property and (ii) because there was no evidence that the sheriff gave notice of the tax sale to the record owner, violating constitutional due process notice requirement under *Mennonite v. Adams*. A review of the public records revealed that the record owner at the time of the tax sale was John S. Wells (from whom the first group acquired their interest in the property by sale). However, due to an error in the description of the lot in the Jefferson Parish Tax Assessment Rolls for 1924, the property was described as assessed to Eric T. White. When Mr. White did not pay his taxes in 1924 (as he was not the record owner), the property was sold at tax sale to Zodiac’s ancestor in title, with no notice being given to the record owner Wells.

The Zodiac Group acknowledged that White never owned the property, and did not challenge that notice of the tax sale was never given to the record owner. However, Zodiac asserted that, under *Gulotta v. Cutshaw*, the lack of notice was only a relative nullity and that relative nullity was cured by the five-year preemptive period found in the Louisiana Constitutions. The first group countered, arguing that *Gulotta* had been effectively

overruled by *Mennonite*, at least regarding tax sales with the constitutional deficiency of lack of notice to the record owner of the property subject to the tax sale. The trial court ruled in favor of the first group, granting its motion for summary judgment against Zodiac and dismissing Zodiac's claims of ownership over the lot with prejudice. Zodiac appealed, arguing that the trial court erred in finding that no material issues of fact existed and in failing to find that the attack of the tax sale was preempted under the Louisiana Constitution as per the Louisiana Supreme Court's holding in *Gulotta*.

Result: Affirmed

Rationale: The court of appeal noted the United States Supreme Court's ruling in *Mennonite* that a tax sale without notice to a person with a legally protected property interest in the property is a violation of the Due Process Clause of the 14th Amendment of the United States Constitution, thereby rendering such a sale an absolute nullity. *Gulotta*, which was decided before *Mennonite*, held that such a lack of notice was only a relative nullity that was subject to the five-year preemptive period of the Louisiana Constitution. Thus, the court of appeal found that *Mennonite* has overruled that part of *Gulotta*'s holding relative to this sort of deficiency. Under *Mennonite*, a tax sale of real property that lacks adequate notice does not meet the constitutional and jurisprudential requirements of due process and is an absolute nullity. Such an absolute nullity can be collaterally attacked at any time, and is not cured by the constitutional preemptive period.

The Zodiac Group also raised the issue of the "reasonable steps" doctrine noted by the United States Supreme Court in *Jones v. Flowers*. Under that doctrine, the Court held that due process does not require actual notice, but merely notice reasonably calculated under the circumstances to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections. Thus, when notice is mailed to the owner and is returned undelivered, the government must take additional reasonable steps to provide notice to the owner before taking the owner's property. The Zodiac Group asserted that this doctrine excused the sheriff from ascertaining the identity of the record owner because notice was provided to the assessed owner, or at least excused the sheriff from doing anything more than providing notice of the tax sale to the assessed owner. However, the court of appeal found that this doctrine applied to notifying the record owner. Because the record owner was not notified in this case in any way of the pending tax sale in this case, the court of appeal found *Jones* distinguishable and that *Jones* did not excuse the sheriff from at least taking reasonable steps to ascertain and attempt to give notice of the pending tax sale to the record owner.

B. Sales

1. Contracts preliminary to sale

a. Option to purchase: effects

Sanchez v. Bladel, 2011 WL 6088753 (La.App. 3 Cir.), 2011-788 (La.App. 3 Cir. 12/7/11)

Facts: Having decided they wished to sell a house and lot they owned in Glenmora, Louisiana, the Sanchezes hired Bladel Homes, LLC, as their agent. Shortly thereafter, Mr. Bladel presented Ms. Sanchez with several documents for signature. Specifically, Bladel drafted, and requested Ms. Sanchez sign, an “Option to Purchase” the Glenmora property for \$65,000.00. Bladel informed Ms. Sanchez that the “Option to Purchase” was a standard form he used when he surveyed potential properties. Ms. Sanchez signed a document entitled “Home Information Sheet” as well as a “Contract to Buy and Sell.” Ms. Sanchez testified that the “Contract to Buy and Sell” was blank when she signed it, and Bladel filled in the blanks later. Eventually Bladel, having found a buyer for the Glenmora property, had the buyer sign the “Contract to Buy and Sell” and, thereafter, closed the sale. The completed Buy/Sell Contract listed the purchase price of the Glenmora property as \$97,000.00. Ms. Sanchez testified that Bladel never informed her that he had located a buyer for the Glenmora property or that the sales price for the property was \$97,000.00. Moreover, she testified that she only learned about the closing on the Glenmora property after the fact.

Later, after the Sanchezes learned that Bladel did not have a real estate license, they sued Bladel for damages, return of unlawful real estate commissions, and attorney fees. Specifically, the Sanchezes argued that by marketing their home for sale and by selling them another home, Bladel engaged in real estate activity without a license and unlawfully received commissions as a result of those transactions.

One of Bladel’s defenses was based on the “option to purchase” contract that Ms. Sanchez had executed in Bladel’s favor. According to Bladel, this contract gave Bladel an “interest” in the property, such that Bladel was not required to have a real estate license in order to sell it.

The trial court agreed with the Sanchezes and awarded them \$17,500.00 in damages and \$4,500.00 in attorney fees. Bladel appealed.

Result: Affirmed.

Rationale: Bladel argues that the trial court erred by refusing to acknowledge that Bladel held a property interest in the Glenmora property. It asserts that because it had a property interest, it was free to market and sell the property without holding a real estate license. Bladel bases its ownership interest in the Glenmora property on the Option to Purchase executed by Ms. Sanchez. In support of this argument, Bladel relies on *State, Dep’t of Transp. and Dev. v. Jacob*, 483 So.2d 592 (La.1986) and *Cleremont Terrace Homeowner's Ass’n v. United States*, 146 Cal.App.3d 398 (1983). Neither of these cases supports Bladel's position before this court. An individual is permitted to sell his own property without holding a real estate license. La.R.S. 37:1438. Indeed, *Jacob* does not stand for the position that an option to purchase imparts an ownership interest; rather, it asserts that a leaseholder with an unrecorded lease has the right to intervene in an expropriation matter. *Jacob*, 483 So.2d 592. Moreover, *Cleremont Terrace* is a California case which we are neither bound nor inclined to follow.

We are more concerned with Louisiana law, which clearly states that “an option to purchase does not transfer title or vest the holder of the option with rights of ownership.” *E.P. Dobson, Inc. v. Perritt*, 566 So.2d 657, 660 (La.App. 2 Cir.1990). “Until the option to purchase is exercised, the grantee has no enforceable rights as owner.” *Id.*

Here, nothing in the record indicates that the Option to Purchase the Glenmora property was exercised. Because the Option was not exercised, Bladel never gained an ownership interest in the Glenmora property. Thus, Bladel needed a real estate license to market and sell the property. Bladel admitted that it does not possess a real estate license.

b. Contract to sell (purchase agreement)

1) Interpretation: time of closing

Anny v. Babin, --- So.3d ----, 2012 WL 3101789 (La.App. 5 Cir.), 12-164 (La.App. 5 Cir. 7/31/12)

Facts: On March 15, 2011, plaintiff, Randy Anny, as purchaser, and defendant, Michael O. Babin, as trustee and administrator of the Babin Family Trust and the Bobbie Lee Burns Babin Revocable Trust (collectively, the “Trusts”), as seller, entered into a Purchase Agreement for riparian property (also commonly known as “batture” property) located along the left descending bank of the Mississippi River in St. James Parish, Louisiana. At the time the Purchase Agreement was entered into, the property in question was subject to a Batture Lease Agreement between the Trusts, as lessor, and Consolidated Grain & Barge, Inc. (“CGB”), as lessee. The Lease Agreement contained a right of first refusal in favor of CGB, granting unto it the right to purchase all or part of the subject property from the Trusts on the same terms and conditions as may be offered to the Trusts from a bona fide third party purchaser. The Lease Agreement provided that in the event such an offer was made to the Trusts, then the Trusts were required “to extend to [CGB] the right to meet said bona fide offer of purchase under the same terms and conditions thereof, which right shall continue exclusively for a period of thirty (30) days from the transmittal in writing from [the Trusts] to [CGB] of said offer, in its entirety.” The Lease Agreement further provided that until otherwise directed in writing by the other, all notices and demands permitted or required thereunder shall be validly and sufficiently given and made by certified mail, postage prepaid, to the addresses of the parties set forth in the Lease Agreement.

On March 16, 2011, in an attempt to comply with the above-mentioned notice requirements contained in the Lease Agreement, Mr. Babin sent an email to CGB notifying it of the execution of the Purchase Agreement with Mr. Anny. A purported copy of the Purchase Agreement was attached to the email.

CGB exercised its right of first refusal under the Lease Agreement on April 18, 2011, and purchased the subject property from the Trusts by Act of Cash Sale executed on April 27, 2011.

On July 18, 2011, Mr. Anny filed the instant suit against Mr. Babin, individually and as trustee and administrator of the Trusts, seeking damages against Mr. Babin allegedly resulting from Mr. Babin's alleged breach of the Purchase Agreement. The gist of Mr. Anny's claim was that CGB failed to exercise its right of first refusal in a timely manner, as a result of which Ms. Babin remained obligated to go through with the Purchase Agreement and, therefore, to sell the property to him. Ms. Babin filed a motion

for summary judgment. The lower court granted the motion. Mr. Anny appealed.

Result: Affirmed.

Rationale: On appeal, Mr. Anny contends that discovery was needed to determine whether CGB exercised its right of first refusal in a timely manner. He argues that in the Purchase Agreement, it was contemplated that the closing was required to take place within thirty days of the date notice of the Purchase Agreement was given to CGB, and that the Purchase Agreement contemplated that “immediate” notice would be given to CGB. He concludes that since the Cash Sale from the Trusts to CGB was not passed until April 27, 2011, CGB must not have exercised its right of first refusal timely, thus rendering Mr. Babin in default of the terms of the Purchase Agreement.

Our review of the four corners of both the Purchase Agreement and the Lease Agreement shows that Mr. Anny's characterization of the notice requirements in the two contracts is incorrect. The Purchase Agreement establishes that the closing date of the sale between the Trusts and Mr. Anny was not required to take place within thirty days of the date notice of the Purchase Agreement was given to CGB, as claimed by Mr. Anny, but rather was to take place “not less than” thirty days from the date Mr. Babin provided the required notice of the Purchase Agreement to CGB, and within fifteen days after the expiration of this initial 30–day waiting period, provided that CGB did not exercise its right of first refusal. Nor did the Purchase Agreement contain any specific amount of time within which notice of the pending offer of sale was required to be transmitted by the Trusts to CGB.

Mr. Babin's Statement of Uncontested Facts shows that CGB received actual notice of Mr. Anny's offer of purchase within 24 hours of the signing of the Purchase Agreement by an email from Mr. Babin that contained an incomplete copy of the Purchase Agreement. Mr. Babin thereafter emailed CGB the entirety of the Purchase Agreement on March 24, 2011, nine days after its signing. Though this second notice to CGB again occurred by email, which did not comply with the formal notice requirements of the Lease Agreement, CGB obviously waived this requirement (as was its prerogative), and on April 18, 2011, within thirty days from the March 24 notice, exercised its right of first refusal to purchase the property, which was therefore timely under the Lease Agreement.

Mr. Anny's opposition to the Motion for Summary Judgment clearly falls short of showing that any genuine issue of material fact remained as to how and when CGB received notice of the Purchase Agreement, and likewise clearly falls short of contesting the date that CGB exercised its right of first refusal as reported by Mr. Babin in his Statement of Uncontested Facts.

2) Nonperformance (breach)

Harris v. James, 2012 WL 1580517 (La.App. 1 Cir.), 2011-1533 (La.App. 1 Cir. 5/4/12)

Facts: This cause of action arises from a failed “Louisiana Residential Agreement to Buy or Sell” (purchase agreement) entered into by Mr. Harris and Mr. James. Mr. Harris agreed to sell and Mr. James agreed to buy a home located at 17513 West Muirfield Drive in Baton

Rouge, Louisiana for the price of \$595,000.00. The purchase agreement provided for the closing to take place on or before September 8, 2008 and was conditioned upon the ability of Mr. James to borrow, with the property as security for the loan, 80% of the sales price by a fixed rate mortgage loan or loans.

Thereafter, two extensions of the closing date were mutually agreed to in writing, wherein the closing date was extended first to September 12, 2008 and then to September 19, 2008. On September 19, 2008 Mr. James presented to Mr. Harris an addendum to the purchase agreement, wherein he requested an additional two-week extension of the closing date, the opportunity to re-inspect the property for possible damage caused by Hurricanes Gustav and Ike, and to condition the agreement on his ability to secure 95% financing at a rate not to exceed 6.75% interest. Mr. Harris rejected the offer.

On November 25, 2008, Mr. Harris filed suit against Mr. James in the 19th JDC, demanding damages for breach of the purchase agreement.

A bench trial was held on April 19, 2011. At the close of the evidence, the trial court rendered judgment in favor of Mr. Harris concluding that the contract required Mr. James to “make application for and seek to obtain financing of 80 percent of the sales price” and that “[t]hat was never done.” The trial court awarded Mr. Harris damages in the amount of \$58,900.00, as stipulated by the purchase agreement. The court also awarded Mr. Harris attorney's fees in the amount of \$14,725.00, and costs in the amount of \$1,060.00.

Mr. James appealed.

Result: Affirmed.

Rationale: 1. Existence of duty to make good faith effort to apply for 80% loan. – Mr. James alleges that the trial court erred in its interpretation of the purchase agreement contract. Specifically, Mr. James argues that the trial court was clearly wrong in finding that the language of the agreement required him to apply for and seek an 80% loan.

A stipulation in a contract to sell that makes a sale conditioned upon a purchaser's ability to obtain a stipulated loan to finance the purchase, imposes a duty on the purchaser to make a good faith effort to obtain that loan.

The contract unambiguously states that: Mr. Harris will sell his home to Mr. James for the price of \$595,000; that the sale is conditioned on the ability of Mr. James to secure 80% financing; and that Mr. James warrants that he has all other funds necessary to complete the sale, including the down payment. Thus, we cannot hold that the trial court was incorrect in concluding that the purchase agreement required Mr. James to make a good faith effort to obtain an 80% loan.

2. Breach of duty to make good faith effort to apply for 80% loan. – Mr. James argues that the trial court was clearly wrong in finding that he did not make a good faith, timely effort to secure a loan. However, we note that, as stated above, the terms of the purchase agreement require that Mr. James not only make an effort to secure a loan, but that he make an effort to secure an 80% loan with his warrant that he had the funds for the 20% down payment available.

Only if Mr. James's failure to apply for or secure the loan is through no fault of his own will the financing contingency cause the contract to be null and void. While Mr. James testified “I told her [the bank loan officer], make the loan happen,” he does not

dispute that he never specifically instructed Ms. Lawrence to seek, and in fact did not know that he was required to seek, an 80% loan as stated in the agreement. There is a substantial basis in the record for the trial court's finding that Mr. James did not make application for and seek to get financing for the type of loan stipulated in the agreement.

8701 Oak Street, LLC v. Higginbotham, 89 So.3d 1248, 2011-1510 (La.App. 4 Cir. 4/11/12)

Facts: This case involves a purchase agreement between the parties concerning the property bearing municipal address 8701 Oak Street (the Property), owned by the Appellants. On February 24, 2005, a purchase agreement was executed between the Appellee, Marino Investments, LLC, as purchaser, and Mr. Johnson, as seller, for the Property, for the price of \$200,000. The purchase agreement included the provisions regarding the Appellee's testing for contaminants on the Property.

The closing of the sale of the property was scheduled for June 14, 2005; however, the sale was not completed on that day as scheduled. On October 7, 2007, the Appellants agreed to sell the Property to Marino Investments, LLC, in the amount of \$225,000. The parties entered into an oral compromise agreement in open court.

However, the Appellee failed to honor its obligation as agreed to between the parties. Thereafter, the Appellants filed a Motion to Enforce Settlement Agreement in the Civil District Court of Orleans Parish, which was granted on December 10, 2008. The Appellee launched an unsuccessful appeal and writ application.

Thereafter the Appellants again were unable to enforce the sale due to the failure of the Appellee to cooperate. On March 23, 2010, the Appellants filed a second Motion to Enforce Settlement Agreement in the district court, which was granted on October 8, 2010.

The parties thereafter proceeded to the closing of the sale, and scheduled a closing date of January 31, 2011, to sign the purchase agreements. However, in the interim, the Appellee requested an inspection of the premises on January 11, 2011, which was agreed to by the Appellants. After the inspection, the Appellee requested further cleanup of the premises by the Appellants, who completed the cleanup on January 12, 2011.

As previously agreed to by the parties, they were to meet at 1:30 p.m. on January 31, 2011, to complete the sale. However, earlier that day, the Appellants received information from the Appellee informing them that upon another inspection of the Property premises that morning, the Appellee discovered "new oil" and "new environmental contamination" on the premises, and further, that the electrical wiring of the premises was damaged. The Appellee alleged that the Appellants had caused these damages and therefore, requested of the Appellants to oversee and pay for the cost of the repairs and cleanup. The Appellee further informed the Appellants that the Appellee would be entitled to a reduction in the sale price if the Appellants failed to oversee and pay for the costs of removing the newly found "environmental contamination". With this new information and allegations, the Appellants informed the Appellee that they would not oversee the costs for the cleanup, nor would they agree to the new contractual terms proposed by the Appellee. The Appellants failed to show up for the closing of sale of the property due to the unsolved allegations made by the Appellees earlier that day.

Appellee then sued Appellants, seeking a declaratory judgment that, due to Appellants' failure to show up for the closing, the purchase agreement had been "nullified". Appellee followed up with a motion for summary judgment. The trial court denied that motion, finding that there were "disputed issues of material fact" concerning whether, under the circumstances, Appellants were within their rights to appear at the closing.

Result: Affirmed.

Rationale: The purchase agreement provided for the Appellee to inspect and test the property for contaminants and defects within ninety (90) days of the agreement. Further in 2007, the oral compromise agreement provided for the Appellee to conduct all inspections and the like of the Property within five (5) business days from December 28, 2007. However, the Appellee's new allegations on January 31, 2011, concerning the faulty wiring and new found contaminations came long after the allotted time for inspections. The Appellee sought numerous inspections, one as late as January 11, 2011, to which the Appellants complied with and cleaned up the Property as requested. One could reasonably conclude that the Appellee was making allegations to prevent the closure of the sale of the Property.

The Appellants failed to sign the contract since the Appellee sought to create a cost for the Appellants. The parties provided the court with affidavits which required the court to inquire as to whether the Appellants were justified in their failure to appear for the signing of the contract; and whether their failure was based on their assumption that, contingent upon the conversation with the Appellee, the Appellee was presenting them with a counter offer and new contract terms, which were not previously discussed and agreed upon. Here, the court granted a summary judgment based solely on contradicting affidavits. The statements contained in the affidavits provided genuine issues of material fact upon which reasonable persons could disagree.

The Appellants persuasively argue that the affidavits submitted to the district court contained information and issues of subjective facts of intent, knowledge, motive, and good faith, which needed to be resolved by the district court. Summary judgment is rarely an appropriate determination based upon subjective facts such as intent, motive, malice, knowledge or good faith; therefore, summary judgment was not appropriate in this matter.

Here, the Appellee formed a new company and transferred all rights owned in the Property to this company, though both companies were owned and operated by the same individual and entity, Mr. Marino. The Appellee failed to obtain the consent of the Appellants in transferring the interest owned in the Property to the newly formed company. Further, the Appellee filed suit seeking a contract, which the Appellants had complied with for four (4) years, to be deemed null and void without justifiable reasons. Knowledge of the facts proves that the Appellants had complied with the terms of the compromise agreement since its inception. It is, in fact, the Appellee who has sought on numerous occasions to have the sale of the Property abandoned.

The Appellee claims that it was ready to proceed with the sale by previously transferring a portion of the sale amount to the bank account of the Appellants. However, this argument is flawed. The Appellee sought to cause the Appellants to incur more costs. The Appellee had, for four (4) years, failed to finalize the sale of the Property, and once again, was trying to sabotage the sale, which it succeeded in doing. It is contradictory to

find that the Appellants would not appear at the final signing of the sale agreement which they had sought to have enforced for over four (4) years.

Powell v. J & R Enterprises-Shreveport, LLC, 91 So.3d 1185, 47,013 (La.App. 2 Cir. 4/11/12)

Facts: On April 3, 2008, the parties executed a Louisiana Residential Agreement to Buy or Sell (“contract”) in which Powell agreed to sell and J & R agreed to purchase Powell's cabin for the consideration of \$16,000. In advance of the proposed closing, Powell, for whatever reason, failed to provide to J & R a property disclosure document as required by La. R.S. 9:3198, which provides in pertinent part “[i]f the property disclosure document is delivered to the purchaser after the purchaser makes an offer, the purchaser may terminate any resulting real estate contract or withdraw the offer no later than seventy-two hours.” When the time for the closing arrived, J&R refused to go through with the deal (apparently because they had since discovered several alleged “redhibitory defects” in the cabin).

Powell then sued J&R for specific performance of the purchase agreement. The trial judge agreed with Powell that, inasmuch as the purchase had contained a waiver of the warranty against redihibitory defects, the discovery by J&R of such defects did not excuse J&R from completing the sale. But the trial judge found a different basis on which to rule for J&R. Relying§ 3198, the trial judge noted that the requirement of providing a property disclosure document is mandatory and is not waived by any language in the contract. The trial judge concluded, therefore, that Powell was not entitled to specific performance of the contract.

Result: Affirmed.

Rationale: It is undisputed that Powell failed to provide J & R with a property disclosure document as required by The Louisiana Residential Property Disclosure Act, La. R.S. 9:3198(B).The issue on appeal is what is the effect of such failure of a seller of real estate to comply with the mandatory requirement of the statute.

The policy behind the statute is to protect purchasers and to encourage full disclosure by sellers of known conditions of immovable property. If there were no consequence to the seller's failure to provide the property disclosure document, then the purchaser would be bound by the offer, but not afforded the seller's knowledge of the current condition of the property. If so, whether or not to comply with the mandatory requirement of the statute to disclose the known current condition of the property would be at the seller's whim. This surely was not the intent of the legislature. Rather, we conclude that the intended consequence of the seller's failure to provide the property disclosure document is the purchaser's continued right to terminate the contract or withdraw the offer until such disclosure is made or in accordance with the terms of the contract.

3) Remedies for nonperformance

Hertz Corp. v. R & R Properties, L.L.C., 83 So.3d 205, 11-50 (La.App. 5 Cir. 12/28/11)

Facts: On September 4, 1996, Hertz, as lessee, and R & R, as lessor, entered into a 20-year lease, with an option to purchase, of property located on Airline Drive. By letter dated July 24, 2007, Hertz informed R & R of its intent to purchase the property. Almost two months later, on September 20, 2007, R & R notified Hertz that it accepted its offer to purchase.

Discussions between the attorneys for the respective parties then took place, with a view to setting up a closing. The attorney for Hertz demanded, among other things, that R&R produce documentation showing that mortgages which R&R had once placed on the property had since been cancelled. Apparently, while the mortgages on the property had been paid off, R & R had not caused them to be marked cancelled with the Clerk of Court. The encumbrances still had not been cancelled by December 4, 2007, the date closing was scheduled. Because of R & R's failure to cancel the encumbrances, Ms. Davis–Allison did not have the purchase price of \$750,000.00 wired to the closing agent. She then attempted to reset the closing for December 6th, but was informed by Mr. Holmes that R & R considered Hertz in breach of the contract and therefore it could no longer exercise its option to purchase. R & R also stated that it was no longer interested in selling the property.

After R & R informed Hertz that it was not obligated to sell the property, Hertz instituted this suit, seeking specific performance of its purchase agreement with R&R. After trial on the merits, the court granted judgment in favor of Hertz, finding that it was entitled to specific performance to compel the sale of the property. The court ordered that R & R either cancel or have cancelled the defects to its title. The court also found that Hertz was entitled to credit for rents paid, and to attorney's fees and costs.

R&R appealed.

Result: Affirmed.

Rationale: 1. Specific performance. – R & R argues that the trial court erred in finding that Hertz was entitled to specific performance. It contends that Hertz was in breach of its obligations by failing to deliver the purchase price to the escrow agent on the date the sale was to take place. It further contends that R & R itself was not in breach, because it stood ready to deliver the originals needed to cancel the **7 encumbrances in the mortgage office, despite the fact that it did not provide those documents to Hertz or its escrow agent, nor did it cause the encumbrances to be cancelled, although this was to be a closing by mail and R & R had been requested to cancel these encumbrances prior to closing.

R & R relies on sales articles in the obligations portion of the Louisiana Civil Code, and specifically that provision that states that the “seller may refuse to deliver the thing sold until the buyer tenders payment of the price.” Also the codal article states that “the obligor of one may not be put in default unless the obligor of the other has performed or is ready to perform his own obligation.” LSA–C.C. art. 1993.

However, Hertz's right of specific performance does not arise from statutory law, but from the contract between the parties. The contract states that Hertz is entitled to specific performance if R & R fails to perform its obligations. LSA–C.C. art. 1993 does not modify this provision, but just sets forth the rights of the parties in the absence of any agreement. The contract does not require Hertz to tender payment where R & R has not performed. In this case, the trial court correctly found that under the facts of this case, R & R was in breach of its obligation and therefore Hertz was entitled to specific performance.

2. *Credit for rent.* – R & R alleges that the trial court erred in giving Hertz credit for the rental payments that it made during the course of litigation. It cites to language in the Option that states that “The purchase price for the Premises is \$750,000.00. Prior lease payments shall not be credited to the purchase price.” However, under the circumstance of this case, the amount of damages suffered by Hertz as a result of R & R's failure to close is equal to the lease payments it was obligated to make because R & R did not sell the property as provided in the contract. The option in the lease contract provided that Hertz would be awarded damages in the event of R & R's default. Had R & R cleared title to facilitate the closing, title to the property would have passed to Hertz, and Hertz would not have made rental payments under the lease from the scheduled date of closing, December 4, 2007.

Brandner v. Staf-Rath, L.L.C., --- So.3d ----, 2012 WL 1957585 (La.App. 5 Cir.), 12-62 (La.App. 5 Cir. 5/31/12)

Note: The court of appeal affirmed an award of attorney fees in the amount of \$56,500 in favor of the buyer and against the seller for the latter's default in fulfilling a purchase agreement.

4) Cancellation

White v. Strange, 80 So.3d 1189, 2011-523 (La.App. 3 Cir. 12/21/11)

Facts: The Whites, as sellers, entered into a purchase agreement with the Stranges, as buyers, of immovable property located in Pineville, Louisiana. Leading up to the closing, the property was inspected twice. The inspections revealed defects in the premises so serious that on December 9, 2008, the Stranges sent to Sikes, their real estate agent, an e-mail asserting they wished to terminate the contract and declare the contract null and void. Sikes asserted she forwarded a copy of the e-mail to English, real estate agent for the Whites, but English denied ever receiving the e-mail. (There had been a previous incident acknowledged by both Sikes and English, involving an e-mail that was sent by Sikes that English could not open.)

Sometime later, the Whites responded that they would repair or remedy the complaint. Despite this offer to remedy the complaint, the Stranges did not proceed with the closing.

The Whites filed suit against the Stranges for damages suffered, alleging they defaulted on an agreement to purchase the property. The matter went to trial. The Stranges argued their December 9, 2008 e-mail to Sikes constituted a “writing” sufficient to legally terminate the buy and sell agreement. The trial court rejected this argument. Judgment was rendered in favor of the Whites, and awarding damages in the amount of \$22,320.00, a forfeit of the \$4,000.00 deposit and \$7,500.00 in attorney fees.

The Stranges appealed.

Result: Affirmed.

Rationale: As they did below, the Stranges argue the Louisiana Uniform Electronic Transactions Act, La.R.S. 9:2601–2620, is applicable and allows for the use of an e-mail to validly terminate the buy and sell agreement in this case. Under the facts of this case, we do not agree.

Though the record establishes that the parties did regularly communicate by *fax*, the conduct of the parties did not give any indication that the Whites or English did or would agree to the use of a forwarded email as the means of canceling the Agreement to Buy and Sell.

The court also questions whether cancelling a buy-sell agreement is a situation where it would be appropriate to apply the “Act.” This is a real estate transaction and there was testimony from all concerned that realtors are required to use certain contract forms, including the Property Inspection Response forms. In fact, Sikes testified that her Broker instructed her to complete and send the inspection report on the 15th. Thus, while electronic transmissions other than a fax may be convenient for those negotiating the details of everyday business, it would appear that the Louisiana Real Estate Commission believes that certain significant actions should be in a certain form.

Finally, English’s claim that he never received Sikes’s e-mail message is plausible. English’s behavior confirms that she expected the closing to go through. English admitted that Sikes had told her – orally – that the Stranges wanted to terminate the contract. But English claimed she simply believed that Sikes told her that a negotiation tactic and that, because she did not receive any termination notice in writing, the threat was not serious.

c. Right of first refusal

Mang v. Heisler Properties, L.L.C., 2011-867 (La. App. 5 Cir. 5/22/12); 2012 WL 1868018

Facts: Lessee (plaintiff) brought action against lessor’s successors and others seeking specific performance of a right of first refusal clause contained in the lease. In 1991, Winning Legends, Inc., (“Legends”) with plaintiff as sole shareholder, assumed a lease of property owned by two brothers. In 1993, one of the brothers died and his wife became owner of an undivided one-half interest in the property. In 2000, the wife filed for bankruptcy and in 2003 her property, including the undivided one-half interest, was seized and sold at public auction to the Succession of William C. Garrett (“Garrett Succession”). The lease, however, survived foreclosure because Legends had filed the lease in the public records prior to the sale. The second brother died in 2003, and his succession sold some of his property, including his undivided one-half interest, to the first brother’s wife, who subsequently sold this property to Heisler Properties, L.L.C. (“Heisler”). In 2005, Legends and plaintiff sold their business to Raymond Townsend allegedly through three agreements. The first, executed November 7, listed Legends as the seller and Townsend as the buyer of the business. Second, an “attachment” to the sale, also dated November 7, purported to reserve the right of first refusal and options to purchase under the lease to the plaintiff. Third, a document dated December 10, showed plaintiff, acting as president of Legends, selling all of the assets of Legends to Townsend.

In August of 2005, Legends filed suit, alleging breach of contract and seeking specific performance to enforce the right of first refusal clause in the lease, which stated in pertinent part that the lessor “shall make no offer to sell nor accept an offer to buy, or make a sale of the said property to any third persons during the terms of the lease” without first giving lessee the chance to purchase the property on the same terms. Garrett Succession and Heisler raised an exception of no right of action, alleging that plaintiff and Legends had assigned the lease to Townsend in December of 2005. In response, Legends and plaintiff filed a motion to substitute proper party-plaintiff, asserting that plaintiff had reserved all rights of first refusal in the sale of the business. The executrix of the second brother’s succession also filed an exception of no cause of action on the grounds that a clause contained in the lease excluded a transfer or sale of property to heirs from the right of first refusal clause.

The trial court granted the exception of no cause of action filed by the executrix based on the exclusion in the lease. The trial court also granted the exceptions of no right of action. Thereafter, Garrett Succession filed a motion for summary judgment on the claims against it, which was granted by the trial court. Plaintiff appealed.

Result: Affirmed

Rationale: The court of appeal noted the trial court’s consideration of all three purported sales agreements and found that the first agreement, the sale of November 7, divested Legends of its right of first refusal to Townsend. The attachment that followed after the sale, which purported to reserve the right of first refusal to plaintiff as an individual, did not have Legends’ approval. Therefore, the trial court found it to be invalid. The court of appeal found this reasoning persuasive, and noted that, when Legends sold its business and transferred its lease to Townsend on November 7, the right of first refusal passed to Townsend and plaintiff, as an individual, could not reserve the right. Further, when plaintiff substituted himself as the proper party-plaintiff the lessee with the right of first refusal, Legends, was no longer a party to the action, even if it had not already sold its interest in the lease, which it had. Therefore, the court of appeal found that the plaintiff had no right of action for specific performance regarding the right of first refusal clause in the lease.

Regarding the motion for summary judgment filed by Garrett Succession, the court of appeal upheld the decision of the trial court. The court of appeal found that, because the property was seized in bankruptcy and sold at a public auction, the owner (lessor) neither made an offer to sell nor accepted an offer to buy, as required for the right of first refusal to become operative. Because this was an involuntary sale the right of first refusal clause was not triggered, and the court of appeal found the motion for summary judgment warranted.

Anny v. Babin, --- So.3d ----, 2012 WL 3101789 (La.App. 5 Cir.), 12-164 (La.App. 5 Cir. 7/31/12)
See supra under “Contract to sell (purchase agreement) . . . Interpretation: timing”.

2. Contracts of sale

a. Prerequisites to sale

b. Effects of sale

1) Transfer of ownership: as against third parties: the “public records doctrine”

Biggs v. Hatter, 91 So.3d 1148, 46,910 (La.App. 2 Cir. 4/11/12)

Facts: Shortly after Isaac Hatter, Sr., a California domiciliary, died, his son, Isaac, Jr., opened his succession here in Louisiana, where Isaac, Sr., had owned valuable, mineral-rich immovable property. Though Isaac, Sr., had made a will – one in which he had left this immovable property to Isaac, Jr., and Isaac, Sr.’s siblings equally –, Isaac, Jr., represented that Isaac, Sr., (1) had died intestate and (2) that he, Isaac, Jr., and his sister, Carolyn – as Isaac, Sr.’s only children, were entitled to be put into possession of the immovable property. The judgment of possession was granted. Isaac Jr. and Carolyn sold their interest in the property to Lewis Louisiana Properties, LLC (LLP) on October 23, 2006, for approximately \$90,000.

On July 11, 2007, Isaac, Sr.’s sister, Pearl, on behalf of the succession of Isaac Sr., filed a petition for ancillary probate of a testament probated in another state. The court in Claiborne Parish ordered that Pearl be confirmed as the testamentary executrix after complying with the requirements provided by law.

Shortly thereafter, on July 30, 2007, Pearl filed the initial pleading in this case as executrix of her brother's estate, concerning the immovable property at issue here. She asserted a petitory action and sought to annul the judgment of possession, to cancel the judgment of possession from the conveyance records, to cancel the cash sale deed, and to collect damages. This pleading alleged that the judgment of possession was obtained by fraud and ill practices.

On April 15, 2008, LLP filed an answer to the petitory action, claiming that it was an innocent third party that relied on the public records and is the rightful owner of the disputed property. Later, LLP had filed a motion for summary judgment, claiming that the public record doctrine protected LLP from unfiled documents such as the will in this case which the intervenors assert was probated in California. Pearl and Isaac, Sr.’s other siblings then filed a corss-motion for summary judgment, asserting that LLP's arguments regarding the public records doctrine are not applicable to succession proceedings. The trial court denied both motions.

Pearl and Isaac, Sr.’s other siblings appealed.

Result: Reversed.

Rationale: The public records doctrine is founded upon our public policy and social purpose of assuring the stability of land titles. *Camel v. Waller*, 526 So.2d 1086 (La.1988). The doctrine does not create rights in a positive sense, but rather has the negative effect of denying the effectiveness of certain rights unless they are recorded. It is essentially a

negative doctrine. Third persons are not allowed to rely on what is contained in the public records but can instead rely on the absence from the public record of those interests that are required to be recorded. Simply put, an instrument in writing affecting immovable property which is not recorded is null and void except between the parties.

However, there are exceptions to the public records doctrine. One of those exceptions is inheritance rights. It has been consistently held in the jurisprudence that the law of registry is inapplicable where the ownership of, or claim affecting, immovable property has been acquired by inheritance and title has become vested by operation of law. The courts have recognized a right to property obtained through a succession even where that interest was omitted from a judgment of possession that was filed in the public records and relied upon by a third party.

In this case, LLP argues that the Pearl and the other siblings of Isaac, Sr., failed to file their California judgment in the public records in Claiborne Parish prior to the purchase of the land by LLP, and therefore, under the public records doctrine, LLP is entitled to rely on the absence of that filing. As outlined above, inheritance rights vested by operation of law are an exception to the public records doctrine. Therefore, the public records doctrine does not operate to preserve any rights to this property that LLP claims to have acquired from Isaac Jr. and Carolyn through their fraudulently obtained judgment of possession.

2) Creation of rights & duties

a) Duties of the seller

1] Warranty against eviction (of peaceable possession)

Spillman v. Gasco, Inc., --- So.3d ----, 2012 WL 1698093 (La.App. 2 Cir.), 47,085 (La.App. 2 Cir. 5/16/12)

Facts: In April 2001, the Spillmans bought Lot 19, Deer Park Estates, a subdivision of DeSoto Parish, from Gasco Inc. They signed a credit sale deed reciting that the sale was with “full guarantee of title.” The credit sale deed also stated, “Subject to any restrictions, easements and servitudes of record.” The credit sale deed made no reference to oil, gas and minerals; the Spillmans later averred via affidavit that nobody told them at the time that their purchase excluded the minerals. The subdivision in which Lot 19 was located is within the Haynesville Shale zone.

Sometime in 2010 (presumably after trying to grant a mineral lease), the Spillmans learned that in July 1999, Frank Scott Moran, a prior owner of the subdivision, had sold the entire tract to Gasco Inc. by credit sale deed that expressly excluded the minerals from the sale; in November 1999, Moran had executed a sale and assignment of all oil, gas and other minerals under the tract to FSM, Inc. (FSM); and in February 2001, FSM had executed a sale and assignments of the minerals back to Moran. All these documents were

filed in the conveyance records of DeSoto Parish before the Spillmans bought Lot 19.

The Spillmans filed this suit in June 2010 against Gasco, FSM and Moran. As to Gasco, the Spillmans' seller, the suit was, in essence, a "call in warranty", in particular, the warranty against eviction and of peaceable possession. Gasco filed a motion for summary judgment, contending that the "subject to" language included in the deed had effectively removed the mineral servitudes from the scope of the warranty. The trial court granted Gasco's motion.

Result: Affirmed.

Rationale: One of the seller's obligations is to warrant the buyer's peaceful possession against claims of third persons, both as to title to the thing sold and as to charges thereon not expressly declared at the time of sale. La. C.C. arts 2475 and 2500.] Article 2500 defines the scope of the seller's warranty against eviction, which includes the buyer's loss of the whole or a part of the land sold because of a third person's right that existed at the time of the sale. The warranty also covers encumbrances on the land that were not declared at the time of sale, with the exception of apparent servitudes and natural and legal nonapparent servitudes. Absent a clearly visible sign, such as a drilling operation or wellhead sitting on the property, a mineral servitude is generally considered a nonapparent servitude.

The plaintiffs contend that the declaration or stipulation of non-warranty in the instant deed does not declare the existence of a mineral servitude burdening Lot 19. They contend that a buyer of a subdivision lot would not conclude from the clause "subject to any restrictions, easements, and servitudes of record" was a reference to anything other than a servitude for utilities or streets or the like. At best, the clause is obscure and ambiguous, which must be interpreted against the seller.

While the "subject to" clause in the deed does not inform the purchaser of any actual "restrictions, easements, or servitudes of record" that may encumber the property, we conclude, nevertheless, that the clause is neither ambiguous nor obscure, and it expressly limited the seller's warranty, while the purchaser was charged to go to the public records to find if any nonapparent servitudes are of record. The clear purpose of the stipulation of non-warranty was to expressly notify the purchaser that there may be such encumbrances recorded in the conveyance records that limit the seller's warranty of ownership and possession of the described Lot 19. Although this clause requires the plaintiff to search the public records to find out what he has and what he has not purchased, which is contrary to the rule stated in *Richmond*, supra, we know of no reason or policy why a purchaser cannot agree to such limitation or modification in the Act of Sale. La. C.C. art. 2503. We therefore conclude that the declaration in the seller's deed, which states that the conveyance is "subject to any restrictions, easements and servitudes of record," meets the declaration requirements of articles 2474, 2475, 2500 and 2503 regarding the mineral servitude encumbering the property.

For these reasons, we conclude that the "subject to" language in the act of sale (deed) in this case did what La. C.C. art. 2500 and other relevant Civil Code articles require to exclude nonapparent servitudes, including mineral servitudes, to defeat this action for breach of the warranty against partial eviction. Accordingly, this assignment is without merit.

2] Warranty against redhibitory defects

a] Redhibitory defects, qualification as

1} Defect must render thing useless, inconvenient, etc.

Smith v. Cappaert Manufactured Housing, Inc., 89 So.3d 1234, 2011-1464 (La.App. 3 Cir. 4/10/12)

Facts: The case arose out of the sales of two mobile homes, both of them manufactured by Cappaert Manufactured Housing. One was sold to the St. Romains in 1998; the other, to the St. Romains in 2003.

In their January 31, 2005 petition for personal injury damages and rescission of the sale, the plaintiffs' main complaint centered around the fact that mold and mildew had become a major problem inside the homes. The mold and mildew complaints related primarily to problems with a vinyl wall covering on the living-space side of each home's walls. When the air conditioning system cooled the home's interior, the hot and humid air that entered the wall cavities from the outside would condense as it passed against the cooled vinyl wall. The moisture that condensed in the wall cavities sustained the growth of mold and mildew. However, the plaintiffs did not assert that the mold and mildew problems were caused solely from the use of the vinyl wall covering on the inside of the walls. They also suggested that other manufacturing defects existed which allowed an excess of moist outside air to come into the wall cavities. These included leaky air conditioning ductwork, which created a negative pressure in the house, pulling in more moist outside air; and that there existed a lack of return air pathways.

A bench trial resulted in a judgment granting the Thronsons and the St. Romains rescission of the sale of their homes and awarding them finance charges, judicial interest, and attorney fees.

Cappaert appealed.

Result: Affirmed as amended.

Rationale: 1. Liability. – Cappaert argues in this assignment of error that the trial court erred when it gave little weight to the testimony of its expert witnesses (Harold Lloyd Mouser, Michael Zieman, and John Stephen Verett) and instead relied on the plaintiffs' expert witnesses (Bobby Parks and Sammy James Hoover) in reaching its factual findings. Cappaert bases this argument on the assertion that Mr. Parks' testimony was “unreliable.”

In its written reasons for judgment, the trial court made these specific findings: “The Court carefully listened to all witnesses and makes the following observations. The most credible witnesses, besides the plaintiffs who seemed very genuine in their stress and depression from living in such deplorable homes was Sammy James Hoover, the Deputy State Fire Marshall who at the time of these complaints was the compliance officer and handled consumer complaints for the State and Robert Parks, who was hired by the Louisiana Manufactured Housing Commission to examine several of the homes made by

Cappaert and report his findings as to the complaints received and problems, if any, that he observed. The Court gave less weight to the testimony of Harold Lloyd Mouser, who had worked for Cappaert and other manufacturers since 1976 and Steven Verret [sic]. The testimony of Mr. Verret [sic] was obviously biased, not supported by other evidence and his conclusions, without ever observing either of these two homes, [were] not believable.”

We find no manifest error in the trial court's reliance on the plaintiffs' experts rather than Cappaert's experts, and there is no merit in this assignment of error.

2. *Sanction. – a. Interest.* – Cappaert asserts that by awarding the plaintiffs the return of the contractual interest they had paid in connection with financing the homes and judicial interest on the expenses associated with the sale, which included that contractual interest, the trial court gave the plaintiffs a double recovery. In making its argument, Cappaert cites this court's opinion in *Aucoin v. Southern Quality Homes*, 06–979 (La.App. 3 Cir. 2/28/07), 953 So.2d 856, *aff'd in part, rev'd in part*, *124707–1014 (La.2/26/08), 984 So.2d 685. In *Aucoin*, however, this court was affirming the trial court's decision not to award both the actual interest paid and judicial interest and cited no cases in support of its decision. The supreme court did not address this issue in its subsequent opinion. We decline to follow this court's decision in *Aucoin*

When a court grants redhibition of a sale, the contractual interest expended in financing the sale is considered both a recoverable expense occasioned by the sale, La.Civ.Code art. 2531, and an expense incurred for the preservation of the thing, La.Civ.Code art. 2535. Accordingly, the trial court did not err in ordering judicial interest from the date that suit was filed on the expenses occasioned by the sales and financing of the homes, which includes the contractual interest they paid due to financing the sales.

b. Credit for use. – Cappaert asserts that the trial court should have reduced the plaintiffs' awards and given it the benefit of a credit for use, since the plaintiffs continued to live in and/or rent their homes from the time of purchase through trial.

Louisiana Civil Code Article 2545 provides that a seller who knows that the item sold has a defect “may be allowed credit” for the buyer's use of the thing or the fruits it might have yielded.

Cappaert presented no evidence concerning the value of the St. Romains' use of the property. Given the lack of evidence, we find no abuse of discretion in the trial court's denial of a use credit to Cappaert.

With regard to the Thronsons, the evidence establishes that they moved from their home in the summer of 2004, and they began renting it to Mr. Thronson's brother for \$329.97 per month. At the time of the May 3, 2011 trial, Mr. Thronson's brother and his family were still living there. We conclude that the trial court did not abuse its discretion in denying Cappaert a credit for the Thronsons' use of the home through the summer of 2004, but that it did abuse its discretion in failing to award Cappaert a credit for the income the Thronsons received from renting their home thereafter. Accordingly, we amend the trial court's judgment to grant Cappaert a credit of \$329.97 per month for the six years and ten months that Mr. Thronson's brother rented the Thronsons' home.

4/11/12)

Facts: After deciding to go into the scrap metal business, Carter talked with Burton Schieffler, a salesman with Scott Equipment, about his need for a scrap handler machine. Mr. Schieffler told Mr. Carter about a Volvo excavator that Scott had purchased from Volvo in 2006 and had previously rented to another company for 15 months for use as an excavator. He informed Mr. Carter that the excavator could be converted to a scrap handler. Scott purchased a cab, boom, grapple, and magnet from other suppliers and installed them on the excavator, converting it into a scrap handler. This work took several months. Mr. Carter purchased the machine from Scott for \$273,457.87, plus tax. FN1 The machine was delivered to Mr. Carter's scrap yard in Homer, Louisiana, on April 10, 2008.

Problems developed with the scrap handler almost immediately. The machine felt unstable to operators and sometimes the tracks came off. The pins on the grapple frequently broke, the air conditioning in the cab did not work properly, the turn motor to the grapple blew seals and lost hydraulic fluid. There were electrical problems affecting the generator and magnet. The machine developed difficulties with the engine which eventually necessitated its replacement. Scott came out to the scrap yard on numerous occasions to fix the machine, but the problems persisted.

On June 15, 2009, Carter filed suit against Scott and Volvo Construction Equipment North America, Inc., claiming that the scrap handler had redhibitory vices and demanding a return of the purchase price, attorney fees, and all other necessary and equitable relief. Carter alleged that Scott and Volvo knew or should have known that the equipment was defective at the time of delivery and sale.

Following a trial on the claims against Scott, the lower court ruled in favor of Carter and against Scott, finding that the machine had redhibitory defects and ordering the rescission of the sale of the scrap handler. The court determined that the problems with the machine were the result of Scott's conversion, not as a result of Volvo's manufacture of the excavator. The trial court found, that because of the conversion work done by Scott, it was the manufacturer of the scrap handler and was deemed to know that the machine had a redhibitory defect. Scott was ordered to pay Carter \$320,094.60, together with attorney fees, court costs, and interest and Carter was ordered to return the scrap handler to Scott. Scott was given a credit for the use of the machine by Carter in the amount of \$17,366.

Result: Affirmed (as to the issues addressed in this digest).

Rationale: Liability. – In this matter, there was extensive testimony and evidence concerning the conversion of the Volvo excavator into a scrap handler, its sale to Carter, and the problems that arose after the conversion. While Scott denied the existence of redhibitory defects, the record shows that the machine underwent an extensive conversion, done by Scott, and that Scott's personnel were integral in configuring the machine, finding necessary parts and installing those components. The scrap handler had problems almost immediately upon delivery including broken pins in the grapple, air-conditioning problems, hydraulic leaks, low voltage to the magnet, problems with the tracks, and complaints of instability. There was testimony that these problems were persistent and prevented Carter from being able to depend upon the machine for its intended use and purpose as a scrap handler.

Scott argues that it should have been given a larger credit for Carter's use of the

scrap handler. It cites deposition testimony of Mr. Carter that the plaintiff used the scrap handler three to five hours per day up until the installation of the second engine. At that point, Carter made a decision not to use the machine. Scott contends this decision was not because of operational problems. Scott also points out that on several occasions when its technicians went to the scrap yard to service the machine, they had to wait for the operator to finish using it. Scott also claims that the service records show that on most occasions, there was no mechanical reason for the scrap handler not to be operating and it was operational and able to perform.

Sanction: attorney fees. – In this matter, the record shows that Carter informed Scott that it was seeking a scrap handler. Scott owned the Volvo excavator and proposed a conversion of the machine to a scrap handler. The cab, boom, magnet, and grapple were purchased by Scott from various suppliers and were installed by Scott onto the machine. The conversion took approximately two months. These facts support the trial court's finding that Scott was a manufacturer of the scrap handler, that the machine had redhibitory defects, and that Scott was liable to Carter for attorney fees.

Carter's attorneys submitted an affidavit showing that four attorneys and a paralegal from the law firm worked on the case. The affidavit outlined the rates and the number of hours worked. The attorneys pointed out that the case involved 10 depositions, multiple hearings, and a three-day bench trial. The attorney fees totaled \$90,579.50. In this matter, there is no showing that this fee is excessive.

Orr v. Jones, --- So.3d ----, 2012 WL 1957736 (La.App. 5 Cir.), 11-1085 (La.App. 5 Cir. 5/31/12)

Facts: Mr. Orr, out to buy his first house, closed a sale with the Joneses. At the time of the purchase, Lynn Gauthreaux, dual agent for Mr. Orr and the Joneses, gave Mr. Orr a Property Disclosure Document, signed by the Joneses, that indicated there were no defects regarding the foundation of the home.

The home Mr. Orr purchased from the Joneses was about fifty years old. In 1991, Robert Anderson, a structural engineer, conducted an inspection of the property and found a “crack running through the center of the slab.” At that time, Mr. Anderson “did not feel that this is a major problem which is unable to be solved.” He recommended the crack be sealed by the injection of epoxy and indicated that he “would expect the slab to have more strength at the location of this discontinuity than any place else in the slab.” Mr. Anderson estimated that the crack was there since the slab was poured about fifty years ago, and stated that, upon repair, he “would not anticipate any further difficulties with the slab as being probable in consideration of its age.” Attached to the report is a sketch that shows a crack across the slab. The record also contains a contract between the owners of the home at that time and Southern Coating & Waterproofing, Incorporated, dated June 5, 1991, for the repairs recommended by Mr. Anderson.

The Joneses purchased the home in 2003 and were made aware of the cracked slab and the repairs. At that time, the Joneses hired Mr. Chris Savoie to conduct an inspection on the home that noted the crack in the slab. Mr. Savoie indicated that the crack was not a serious problem and just needed to be sealed at the edges of the slab to prevent termite

invasion. The suggested repair was done, and the edges of the crack were sealed with an overlay of concrete. Based on this inspection and the belief that the slab was repaired, the Joneses purchased the home.

While the Joneses lived in the home, they decided to replace the flooring and, during that process, the slab was exposed. At that time, they observed that the crack in the slab was repaired as represented when they purchased the home. When they decided to put the home on the market in 2005, the Joneses, believing that the problem had been fixed, said nothing about it in the disclosure statement.

Shortly after moving into the home, Mr. Orr began renovations to the home. When he knocked down a wall and pulled up the flooring, he discovered the crack in the slab.

On August 8, 2006, Mr. Orr brought an action for redhibition, fraud, and conspiracy against the sellers and realtors for failure to disclose the cracked slab. The trial court ruled for the Joneses.

In 2008, while the suit was still pending, Mr. Orr and his family moved into a new home in 2008 and rented the house to another family for \$1,300 per month. Mr. Orr testified that he incurred certain plumbing repair expenses that, in his opinion, were attributable to the cracked slab, but he did not offer any professional opinion regarding the issue.

Result: Affirmed.

Rationale: Before a plaintiff can bring an action in redhibition, he must allege one of the basic elements of the action, that is, that the house is either absolutely useless for its intended purpose or its use is so inconvenient or imperfect that, judged by the reasonable person standard, had he known of the defect, he would never have purchased it. Upon review of the record, we do not find that Mr. Orr met that burden of proof on his action in redhibition.

His testimony was that he purchased the home in 2005 and discovered the cracked slab shortly afterward when he was renovating. He completed the renovations without doing any repairs on the slab. He and his family lived in the house until October 2008, and, after a few months, they rented the home to another family for \$1,300 a month. At the time of trial, in 2011, the home was still rented out. We do not find this meets the requirements of La. C.C. 2520.

Cazaubon v. Cycle Sport, LLC, 79 So.3d 1063, 2011-0289 (La.App. 1 Cir. 11/9/11)

Facts: Plaintiff, Eric Cazaubon, purchased a 2006 Kawasaki ZX1400 from Cycle Sport, LLC on September 30, 2006. On April 17, 2007, Mr. Cazaubon brought the bike back to Cycle Sport, complaining of an engine rattle. He had owned another bike just like this one that made a similar noise and had been repaired by Cycle Sport under the warranty. Based upon this experience, he believed he knew what the problem was (some “play” in one of the engine rods) and which parts needed to be changed to correct the problem. Months passed, and still the motorcycle was not repaired. When the mechanics at Cycle Sport finally turned their attention to the motorcycle, they discovered that the frame was cracked.

Mr. Cazaubon then filed suit in redhibition against Cycle Sport and Kawasaki

Motors Corporation, U.S.A., the manufacturer of the motorcycle. Mr. Cazaubon requested a reduction in the sale price, or a rescission of the sale.

In its defense, Cycle Sport contended that when Mr. Cazaubon returned the motorcycle for repairs, it had been modified and used for purposes which voided the warranty. Based upon this, Cycle Sport advised Mr. Cazaubon that no repairs could be made until he guaranteed payment for the repairs. Since he refused to do so, the motorcycle was not repaired. Further, Cycle Sport alleged that since all needed repairs were a result of plaintiff's modification and unauthorized use of the motorcycle, they did not exist at the time of the sale and thus are not redhibitory defects.

After a bench trial, the trial court found that the motorcycle had a defective engine and defective frame which rendered its use so inconvenient that Mr. Cazaubon would not have purchased it had he known of the defects, thereby entitling Mr. Cazaubon to a rescission of the sale. Accordingly, the trial court rendered judgment in favor of Mr. Cazaubon and against Cycle Sport and Kawasaki in solido in the amounts of \$10,500.00 (the purchase price of the motorcycle) and \$2,508.00 (the cost of preserving the motorcycle) and against Kawasaki in the amount of \$7,500.00 (attorney's fees).

Cycle Sport and Kawasaki appealed.

Result: Reversed.

Rationale: Although a trial court's finding of fact may not be set aside in the absence of manifest error or unless it is clearly wrong, we find the trial court's conclusion that the engine was defective, based on the evidence before it, to be clearly wrong. There was no evidence offered to prove that anything was ever actually wrong with the engine. Cycle Sport and D & L Power Sports both examined the engine and found nothing wrong. Mr. Cazaubon did not have a mechanic examine the bike. The only evidence he presented was his own testimony that he looked at the bike with the service manager (who did not testify) and knew what was wrong. Finally, Mr. Cazaubon testified at trial that he did not know if there was anything wrong with the bike's engine. Based upon this, we find that Mr. Cazaubon failed to carry his burden of proof that the bike was defective, and the court was clearly wrong in concluding that the bike had a defective engine.

The trial court also concluded that the motorcycle frame was defective. It is unclear from the testimony presented at trial when or why the frame cracked on the bike. However, because they could not say for sure what caused the cracking, Kawasaki supplied a brand new frame at no cost, and Cycle Sport replaced the cracked frame with the brand new frame at no cost to Mr. Cazaubon. At the time this suit was filed, the bike had a brand new frame. No evidence was presented that there was any problem with this new frame. Therefore, it is unclear on what basis the court concluded that the frame on the bike was a redhibitory defect. The evidence presented at trial simply does not support the conclusion that the frame is defective. Therefore, the court's conclusion that the frame is defective is clearly wrong.

2} Defects must exist at time of delivery

St. Paul Fire & Marine Ins. Co. v. Caterpillar, Inc., 2012 WL 892216 (W.D.La.), Civil Action No. 3:11–CV–00816 (Mar. 14, 2012)

Facts: This case arises out of a June 1, 2010 fire, in a 2004 Caterpillar Model 836G Landfill Compactor, serial number BRL00424 (hereinafter “the Compactor”). At the time of the fire, the Compactor was in use at the Union Parish Landfill in Farmerville, Louisiana.FN2 The Compactor was originally purchased from Louisiana Machinery in 2003, by the Union Parish Police Jury. At the time of the fire, the Compactor (which had caught on fire before!) was approximately seven years old and had been in service for over 10,000 hours.

After the fire, the Police Jury’s insurers, having been subrogated to the Police Jury’s rights against Caterpillar, brought a suit under the LPLA and redhibition law against Caterpillar, seeking damages as well as attorney fees. The plaintiffs allege that the fire was caused by a defect in the starter motor solenoid assembly. Plaintiffs further contend that this defective starter motor solenoid was included in the starter motor installed by Louisiana Machinery in 2005, in response to a notice issued by Caterpillar under its Product Improvement Program. Therefore, it is uncontested that the allegedly defective starter solenoid was not an original part of the Compactor. Instead, the plaintiffs argue that the starter motor assembly was provided by Caterpillar in conjunction with a recall of its own part.

Caterpillar responded with a motion for partial summary judgment summary judgment, seeking dismissal of the redhibition claim. Caterpillar argues that there is insufficient evidence to show: (a) that either of the named plaintiffs in this case have standing to assert a redhibition claim, as neither party was the buyer of the Compactor; and (b) that the Compactor at issue was defective at the time of its manufacture almost seven years prior to the fire.

Result: Motion granted.

Rationale: To make out a prima facie case of redhibition, the plaintiffs must show that a non-apparent defect existed at the time of the sale. See La. Civ.Code articles 2520 and 2530. It is uncontested that the allegedly defective starter solenoid was not an original part of the Compactor. Instead, the plaintiffs argue that the starter motor assembly was provided by Caterpillar in conjunction with a recall of its own part, and therefore, it constitutes “a continuation of the warranty of redhibition on the original sale of the compactor.” However, the plaintiffs’ argument necessarily requires that the Court ignore key facts, which emphasize the disconnect between the facts of this case and the extent of the warranty against redhibitory defects. At the time of the fire, the Compactor was approximately seven years old and had been in service for over 10,000 hours. The Compactor had previous fire experience and an extensive history of service and repair work, including a rebuild of the transmission, torque converter and engine in the fall of 2008. Given these facts, there is no conceivable way that any alleged defects in this Compactor can be said to result from its original manufacture.

Although the plaintiffs freely admit that there is no precedent to support their position, they ask this Court to find that a manufacturer who provides a redhibitorily defective replacement part, long after the original delivery of the product, may still be held liable for the entire product in redhibition. The plaintiffs’ argument clearly goes against the

plain language of the Louisiana Civil Code and its jurisprudential progeny. We therefore decline to extend the law of redhibition to include such a recovery.

Bonnette v. Ford Motor Co., 88 So.3d 1164, 2011-1274 (La.App. 3 Cir. 3/7/12)

Facts: On December 7, 2007, Huey and Margaret Bonnette, purchased a pre-owned 2007 Ford Freestyle from Marler Ford for \$19,200.00 plus tax, title and licence. The vehicle had 26,670 miles at the time of purchase. The vehicle was originally purchased from Ford by Hertz Car Rental on June 10, 2006. It was used by Hertz as a rental car during which it accumulated 18,619 miles.

Plaintiffs first began to notice a different, unpleasant smell in the car. After complaints by the Plaintiffs, Marler had the vehicle detailed at RJ's Car Wash in January, 2008. According to Plaintiffs, upon getting the vehicle back from RJ's, there was a significant amount of water on the floorboard of the vehicle. Huey Bonnette testified he assumed RJ's had simply left the moon roof open during the car wash.

After that a continuous pattern of recurring water leaks appeared. Plaintiffs testified during normal use of the vehicle, they experienced continual water leaks which led to dripping in the vehicle's interior. Plaintiffs stated the leaks were so significant, that they were forced to put a towel on the seat and a plastic bag on the driver's legs. Plaintiffs also stated water accumulated in the spare tire well near the hatchback of the vehicle. Plaintiffs testified they were forced to get a replacement vehicle for Margaret Bonnette because the mildew odor prevented her from driving the vehicle.

Several attempts at repairs were made. Eventually, Danny Webb, the owner of Marler, told Plaintiffs the water leaks could not be fixed and they should consider contacting an attorney.

Plaintiffs did so and on February 9, 2009 filed suit against Ford and Marler for redhibition in the Pineville City Court, seeking return of the purchase price, all expenses surrounding the sale, judicial interest, and attorney fees. In support of their claim, the Plaintiffs introduced a "Technical Service Bulletin" (TSB) which had been issued by Ford to its dealer on July 3, 2006, which documented a moon roof drain routing problem with the 2007 Ford Freestyle. Ford countered with testimony of Ford Field Service Engineer, Chris Furnas, who maintained there were no problems or defects in the vehicle that caused leaks. It was hypothesized that the leaking problems were likely caused by pine needles and other debris clogging various drains in the vehicle. Mr. Furnas also maintained if there were inherent problems with the vehicle due to defects in its manufacture, the problems would have begun before the vehicle was sold to Plaintiffs. Ford maintained there were no previous leaking problems with the vehicle prior to the sale to Plaintiffs. The trial court ruled for the Plaintiffs.

Ford appealed.

Result: Affirmed.

Rationale: On appeal, a trial court's determination as to the existence of a redhibitory defect is factual in nature and will not be reversed absent manifest error.

Ford contends the Plaintiffs did not meet their burden of proving a defect existed in

the car at the time of its manufacture. It argues the leaking problems were caused by Plaintiffs' failure to perform routine maintenance to remove debris which clogged the drain tubes. Ford attempts to buttress this hypothesis by stating the record "established the vehicle did not have a leak problem when it was owned and operated by Hertz Rental Car and Marler Ford and when it went through numerous inspections." We find Ford failed to introduce any evidence to support this alleged fact.

As to Ford's argument that it was Plaintiffs' lack of maintenance on the drains that led to the leaks, it is clear that leaking problems continued even after several repair attempts were made. It would be ridiculous to suggest that any repair attempt, particularly one that involved a disassembly of the front area of the vehicle, would not involve removal of any debris found clogging the drains. However, even after the numerous repair attempts, leaking problems continued to manifest themselves with the vehicle. This perhaps explains the lower court's apparent dismissal of Ford's argument that the leaks were caused by pine needles and debris clogging the drains. It cannot reasonably be expected that the owner of the vehicle is required to continually perform maintenance to simply open the moon roof.

Moreover, the TSB produced at trial supported Plaintiffs' assertion that the leaking problems were the result of a manufacturing defect in the Ford Freestyle. The TSB, produced on July 3, 2006, titled "Water Leak—Roof Opening Panel", indicated there were problems with the moon roof drain system leaking on certain Ford vehicles, including the 2007 Ford Freestyle. It specifically provided that "[c]urrent rear drain tube routing may not be adequate to handle water when vehicle is parked with the front of the vehicle on a slight incline." This TSB, at a minimum, lends support to the lower court's finding of a defect in the design of the Ford Freestyle's drain routing, such that it rendered use of the vehicle "inconvenient and imperfect."

Ford also argued that any defect in the manufacture of the vehicle would have manifested itself prior to Plaintiffs' purchase, and the record established no such leaking problems occurred when the vehicle was owned and used by Hertz and Marler. Although Ford relies on its self-serving assertion that no leaking problems with the vehicle occurred when it was owned by Hertz and Marler, there was no evidence in the record supporting this assertion.

Rodriguez v. Chrysler Group LLC, 76 So.3d 1279, 2011-524 (La.App. 3 Cir. 11/2/11)

Facts: On July 7, 2006, Plaintiff purchased a 2006 Dodge 3500 Quad Cab pickup truck from Acadiana Dodge in Lafayette, Louisiana. The new truck had six miles on the odometer at the time of purchase. The truck had a "Basic Limited Warranty" which lasted "for [thirty-six] months ... or for 36,000 miles on the odometer," and the truck's motor "was covered by the Cummins Diesel Engine Limited Warranty for up to [five] years or 100,000 miles on the odometer, whichever comes first." Plaintiff began using the truck in his welding business.

Just shy of two years later, Plaintiff, complaining that the engine had developed a "knocking noise", turned the truck into a dealership in Gainesville, Florida. Plaintiff, citing the warranty, demanded that Chrysler effect repairs. Ultimately Chrysler refused to

do so, alleging that the Plaintiff had installed a “performance enhancing” device on the truck that voided the warranty.

On June 27, 2008, Plaintiff filed a Suit for Redhibition and Damages against Chrysler, claiming that the truck contained redhibitory defects and that he was entitled to the return of the purchase price, damages, and attorney fees. Chrysler answered the suit, alleging that Plaintiff was “not entitled to recovery in this cause because the problems about which he complains were the result of [his] misuse, abuse, improper maintenance, and/or violation of the instructions set forth in the owners' manual provided to [him] at the time of sale.” Following a bench trial, the trial court found for Chrysler.

Result: Affirmed.

Rationale: The trial court did not err in ruling that Plaintiff failed to prove the existence of a redhibitory defect.

Plaintiff's expert, Kent Rodriguez, testified that he personally repaired Plaintiff's truck after Chrysler refused. It was his opinion that the truck's engine did not fail because of the performance-enhancing device. According to Plaintiff's expert, the truck's engine was defective.

Chrysler presented the testimony of two individuals, both of whom were accepted by the trial court as experts: Stephen J. Harris, an ASE Certified Master Mechanic in diesel engines; and, Steve Huen, an expert in Cummins diesel engines and a Chrysler Technical Representative. Mr. Harris was the mechanic at Gainesville Dodge who first inspected Plaintiff's truck after it experienced engine failure in May of 2008. According to Mr. Harris, he observed evidence of the use of a performance-enhancing device. Mr. Harris opined that the engine failed due to the use of a performance-enhancing device.

Similarly, Mr. Huen explained that he concluded that the use of a performance-enhancing device caused the engine failure in Plaintiff's truck. He testified that the performance-enhancing device caused the turbocharger to malfunction. He, like Mr. Harris, opined that the engine over-fueled, resulting in its failure, because of the performance-enhancing device.

Given the totality of the evidence, the trial court was free to accept the version of events presented by Chrysler and discount Plaintiff's evidence. The trial court made determinations of credibility and chose between competing views of what led to the engine malfunction at issue herein—whether it was a defect in the engine or the use of a performance enhancing device which led to the engine's failure. “Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong.” From our thorough review of the record, we find that the evidence supports the trial court's judgment.

b] Remedies for breach of the redhibitory warranty

1} Against sellers in general

Jones v. Winnebago Industries, Inc., --- So.3d ----, 2012 WL 1699733 (La.App. 2 Cir.), 47,137 (La.App. 2 Cir. 5/16/12)

Facts: Plaintiffs, Loren and Stephanie Jones, RV enthusiasts, purchased a new 2008 Winnebago Destination RV from Stevens RV Center in Lafayette, Louisiana, on February 28, 2008. The purchase price for the 2008 Destination was \$189,667.60 after a \$10,000 rebate.

On March 3, 2008, within three days of its purchase, the RV was returned to Stevens RV after plaintiffs attempted to take the motor home to Memphis but were unable to reach their destination due to several problems. First, the locking latch mechanism on the fuel door fell off, causing the fuel door to flap against the motor home. Also, water poured into the RV as plaintiffs encountered snow on the interstate. Both repairs were made and covered by the Winnebago warranty.

Between March 3 and April 28, 2008, a number of other defects were identified and repairs were made by Stevens RV. In particular, were the first of a continuing series of problems with the slide-outs on the RV. Repairs to the slide-out were covered by Winnebago's warranty. Numerous other problems were also addressed during this month and a half following plaintiffs' purchase of the RV.

Plaintiffs filed suit against Stevens RV Center and Winnebago Industries, Inc. A jury trial was held from February 22–25, 2011. The jury rendered a verdict in favor of plaintiffs, awarding them the return of the purchase price of the Winnebago (\$189,667.50), together with interest (\$35,320) and insurance (\$4,800) payments made. The amount of attorney fees to be awarded to plaintiffs was addressed by the parties post-trial. The trial court found that plaintiffs were entitled to an attorney's fee of 35% of the gross amount awarded by the jury, \$80,425. A judgment rescinding the sale of the 2008 Winnebago Destination and awarding the above amounts, together with legal interest and costs, was signed on April 15, 2011, and filed on April 21, 2011. The trial court rejected plaintiffs' request for nonpecuniary damages.

Both Winnebago and plaintiffs appealed.

Result: Affirmed.

Rationale: 1. *Was the redhibitory defect sufficiently serious to merit an award of rescission instead of quanti minoris.* – In the present case, there is no manifest error in the jury's determination that the recreational vehicle manufactured by defendant Winnebago had major as well as numerous minor redhibitory defects. The jury was presented with very significant evidence of defects that existed at the time the RV was purchased by plaintiffs. In fact, the evidence and the testimony established that the only possible source/cause of the defects was the RV's manufacturer, Winnebago. The first post-sale work order was prepared on March 3, 2008, within three days of plaintiffs' purchase of the motor home. The first slide-out problems were reported by plaintiffs within one month of the RV's purchase, on April 3, 2008. Expert testimony established that the slide-out was improperly installed by Winnebago, which led to the repeated problems plaintiffs had with the slide-out, including the significant leaks, the bed frame being ripped from the floor, a number of broken gear teeth, and torn wipe seals. As noted by the trial court, “It is obvious from the[ir] verdict that the jury reasonably concluded that no one would have bought this motor home, given its numerous defects, for any price.”

2. *Were the damages awarded to plaintiffs, including a full refund with interest and attorney fees, excessive.* – The law clearly provides for exactly the remedy awarded by the jury in this case: return of the purchase price, together with reimbursement for interest payments made and insurance premiums paid. Furthermore, the attorney's fee awarded by the trial court is reasonable and does not constitute an abuse of the lower court's discretion; it is supported by detailed affidavits setting forth the type of work performed and increments of time spent by plaintiffs' counsel on this case.

3. *Should the plaintiffs have been awarded nonpecuniary damages.* – In the instant case, the Winnebago plaintiffs purchased from the dealer was neither custom-built nor specifically designed. While plaintiffs did have a valid nonpecuniary interest, to spend quality time with their children (and family and friends) traveling, camping and enjoying outdoor activities, it can be argued that most if not all purchasers of RVs have the same or similar interests. This does not change the fact that the primary purpose of the purchase of a recreational vehicle is transportation/recreational travel. Although a close call, we cannot find clear error in the trial court's determination that plaintiffs failed to establish their entitlement to nonpecuniary damages under La. C.C. art. 1998.

Mouret v. Belmont Homes, Inc., 91 So.3d 592, 2012-55 (La.App. 3 Cir. 5/30/12)

Facts: On August 23, 2002, Jason Mouret purchased a mobile home manufactured by Belmont Homes, Inc. from Jim Tatman's Mobile Homes. When plaintiffs refinanced the mobile home in July of 2007 in order to construct a carport, their contractor informed them that the home's roof decking was rotten. Plaintiffs contacted Tatman's about the roof problems, but they were advised that it could not help them and that they needed to get in touch with Belmont, the home's manufacturer. Upon contacting Belmont, plaintiffs were told that only the roofing shingles were warranted and that the roof itself was the responsibility of the homeowner.

Plaintiffs then brought suit against Belmont and Tatman's, alleging that their home was "defective as manufactured and unsuitable for its intended purpose." They sought rescission of the sale; return of the purchase price, all expenses, and finance charges; damages; and attorney fees.

Pursuant to a provision in the act of sale, the case was then referred to arbitration. The arbitrator in this matter rendered his decision in a very detailed four-page document issued on June 7, 2011. After painstakingly discussing the alleged and actual problems that plaintiffs claimed to have existed with the mobile homes' roof, siding, and walls, including their claims that their home had negative pressure and moisture intrusion, the arbitrator awarded plaintiffs a fifteen percent reduction in the purchase price or \$8,843.85 (\$58,959.00 x 15%). Plaintiffs were awarded one-third of their experts' bill, or \$10,991.01, as an expert fee. Considering the substantial effort, time, and expenses incurred by plaintiffs' counsel in pursuing their claim and the ultimate result obtained, the arbitrator awarded plaintiffs an attorney fee in the amount of \$10,000.00. Because he determined that there was no evidence that Tatman's was guilty of any fault, the arbitrator cast only Cavalier in judgment.

Plaintiffs requested that the trial court vacate the arbitrator's award. The trial court refused.

Plaintiffs appealed.

Result: Affirmed.

Rationale: Plaintiffs contend that the arbitrator “clearly committed manifest error of the law” and “imperfectly used his power to apply the law to the facts” in that he essentially found that their mobile home's roof contained a redhibitory defect that caused it to be a “disaster,” yet he failed to award plaintiffs the remedy of rescission even though Jason testified that he would not have bought the mobile home had he known of the problems with its roof.

In light of the conflicting evidence presented to him, we find that the arbitrator rendered a “fair and honest” award. The law on redhibition provides that a reduction in the purchase price is a valid remedy to plaintiffs who succeed in proving a redhibitory defect. While plaintiffs are not satisfied with the outcome of the arbitration that they voluntarily participated in, they failed to allege and prove any of the statutory or jurisprudential grounds for vacating the arbitration award. Given the extremely narrow scope of review afforded a trial court when reviewing an arbitration award, we cannot say that the trial court erred in refusing to vacate the arbitration award rendered in this matter.

Janke v. Babcock Co., Inc., 2012 WL 1499292 (E.D.La.), Civil Action No. 12–513 (April 27, 2012)

See *infra* under “Remedies . . . Against bad faith sellers in particular”.

Smith v. Cappaert Manufactured Housing, Inc., 89 So.3d 1234, 2011-1464 (La.App. 3 Cir. 4/10/12)

See *supra* under “Redhibitory defects, qualification as”.

2} Against bad faith sellers in particular

Aucoin v. Stafford, 2011 WL 6754085 (La.App. 1 Cir.), 2011-0927 (La.App. 1 Cir. 12/21/11)

Facts: The Staffords agreed to purchase a house located in Denham Springs, Louisiana from Aucoin, for a price of \$135,000.00. Aucoin gave the Staffords the keys to the house on June 18, 2009, so that they could begin renovations they wanted to make before moving into the house. Specifically, they informed Aucoin that they intended to remove all of the carpet, vinyl and laminate flooring in the house, which they considered to be in unacceptably poor condition. Since they were buying the house, Aucoin raised no objection. The Staffords proceeded to remove the flooring and baseboards, causing holes in some of the sheetrock walls in the process. They then sanded the underlying concrete slab to smooth it, since they intended to replace the flooring over time as they could afford to do so. The Staffords also partially removed the wallpaper in one of the bedrooms

preparatory to repainting that room.

As they were remodeling, the Staffords discovered several problems in the house that concerned them, including an area of rot and possible mold where the flooring was removed. Additionally, they also discovered a home inspection report in the laundry room that had been prepared for Aucoin's daughter two years earlier when he purchased the house for her. Due to information they read in the report, as well as the problems they had discovered, the Staffords decided that they wished to rescind their agreement with Aucoin. After informing Aucoin of this, the Staffords moved out.

Aucoin then demanded that the Staffords pay damages for the condition in which they left the house, specifically including the removal of the flooring, baseboards, and wallpaper, as well as for lost rentals since he claimed he could have rented the house if it had not been in that condition.

When the Staffords refused to meet his demands, Aucoin filed suit for damages against them in the City Court of Denham Springs. The Staffords answered the suit, alleging that Aucoin fraudulently induced them to enter the agreement concerning the house by making materially false statements as to its condition and by failing to disclose numerous existing defects in the house of which he knew or should have known.

The trial court rendered judgment in favor of Aucoin. In its written reasons for judgment, the court concluded that, although the Staffords discovered numerous defects in the house, they were of such a nature that they would have still purchased the house, but for a lesser price, if they had known of them. However, the court noted that the Staffords chose not to seek a reduction in price, but instead to cancel their agreement with Aucoin. The court further found that Aucoin agreed to the rescission of the agreement, since he took no action to enforce it. Relying on La. C.C. arts. 2532 and 2555, the court concluded that, upon rescission of the agreement, the Staffords became liable to Aucoin for damages in failing to maintain the property as a "prudent administrator." The court determined that an award of \$2,000.00 was appropriate for repairs to return the house to its former condition.

The Staffords appealed.

Result: Affirmed.

Rationale: The Staffords failed to establish their claim for damages under CC art. 2545. Under that article, a bad faith seller who fails to disclose a known defect or who intentionally misrepresents the quality of the thing sold is liable for expenses occasioned by the sale, damages, and attorney fees. Thus, in order to recover under this article, the seller must be guilty of fraud or bad faith. However, in the instant case, although the Staffords strenuously argued in the proceedings below that Mr. Aucoin was a bad-faith seller who was guilty of fraud and intentional misrepresentations that estopped him from claiming damages, the trial court obviously rejected these defenses.

Both the existence of fraud and whether or not a seller is in bad faith are questions of fact subject to the manifest error standard of review. In this case, the Staffords' contentions regarding Mr. Aucoin's alleged fraud and bad faith are largely based on their contention that he was aware of numerous defects in the house as a result of the 2007 inspection report that was prepared for his daughter when he bought the house for her. They claim that although Mr. Aucoin told them there had been an inspection and that he

would provide them with a copy of the report, he never did so. The Staffords allege that instead Mr. Aucoin intentionally failed to disclose the defects identified in the report and fraudulently misrepresented both that he had addressed the major problems noted therein and that the remaining issues were merely cosmetic in nature.

At trial Mr. Aucoin initially denied seeing the inspection report, but later testified that he realized he had seen portions of the report that his daughter had e-mailed to him. He further testified that he took care of the major problems identified in the inspection report by having the roof, air conditioner, and water heater replaced, but that he considered the remaining items noted in the report to be cosmetic in nature.

We cannot find that the trial court erred or abused its discretion in its obvious acceptance of Mr. Aucoin's testimony regarding the inspection report. Since he allowed his daughter to move into the house, common sense adds credence to his claim that he considered the majority of the issues raised in the inspection report not to present safety issues and to be cosmetic.

Janke v. Babcock Co., Inc., 2012 WL 1499292 (E.D.La.), Civil Action No. 12–513 (April 27, 2012)

Facts: Plaintiff Sally Janke, a Louisiana domiciliary, suffered personal injury when a wooden step ladder broke. She purchased the ladder from defendant Harry's Hardware, Inc.; the ladder was manufactured by Defendant Bauer Corporation.

On May 13, 2011, Janke and her husband filed suit in state court, seeking relief under state products liability law and the state law of redhibition.

Bauer, a “diverse” defendant, removed the case to federal court, alleging that the “non-diverse” defendant, Harry’s, had been “fraudulently joined” to defeat diversity jurisdiction. In support of his position, Bauer asserted that since the Court's prior order of remand, discovery in state court has shown that the plaintiffs have no possibility of recovery against non-diverse defendant Harry's. Namely, the plaintiffs returned the ladder on the day following the accident. The Jankes already having received a return of the purchase price, Bauer argues, there is no basis for Harry's liability under the law of redhibition. Thus, Bauer argues that Harry's was fraudulently joined and the Court has subject matter jurisdiction.

Result: Removal permitted.

Rationale: The Court finds that there is no possibility that the plaintiffs would recover against Harry's in state court under the law of redhibition.

A seller who did not know of the defect in the thing sold (a *good-faith* seller) is bound to return the purchase price, with interest, and to reimburse the buyer for reasonable expenses occasioned by the sale and expenses incurred for preservation of the thing. LA. CIV.CODE art. 2531. The plaintiffs concede that they have received a return of the purchase price of the ladder. The affidavit of Lampard, Harry’s office manager, and the plaintiffs' concession demonstrate that there is no possibility that the plaintiffs could recover a return of the purchase price in this case. There is no possibility that they could recover interest or expenses against Harry's, either. It is true that the plaintiff in a

redhibition action is entitled to interest from the date of the tender or formal notice of the cancellation of the sale. But the plaintiffs here canceled the sale on the same day they received the refund, and thus no legal interest accrued. The plaintiffs have not alleged the existence of any expenses occasioned by the sale or made to preserve the ladder. Thus, there is no possibility of recovery against Harry's as a good-faith seller.

Nor is there a possibility of recovery against Harry's under the claim that it is a *bad-faith* seller-that it "knew of the hidden defect and failed to declare its quality," and is therefore liable for attorney's fees under Civil Code article 2545. The plaintiffs argue that whether Harry's had knowledge of the defect is a factual issue. However, Lampard avers in his affidavit that when ladders of the type at issue are delivered to a Harry's store, the "ladders are already assembled and ready to be placed on the floor of the retail location ."Lampard states that Harry's employees "do not assemble, inspect for any hidden defect, or alter in any way any of the ladders....". This evidence establishes that Harry's had no knowledge of the defect in the ladder that injured Ms. Janke, and therefore there is no possibility of recovery under Civil Code article 2545 for damages or attorney's fees. The plaintiffs do not submit any summary judgment-type evidence to rebut Lampard's affidavit. Additionally, although article 2545 provides that a seller is deemed to know of the defect when he is a manufacturer of the thing sold, LA. CIV.CODE art. 2545, the complaint does not allege that Harry's manufactured the ladder.

Health Educ. and Welfare Federal Credit Union v. Peoples State Bank, 83 So.3d 1055, 2011-672 (La.App. 3 Cir. 12/7/11)

Facts: Peoples State Bank sold a mobile banking unit to Health Education and Welfare Federal Credit Union (HEW). Not long after HEW began using it, the automated teller machine that was a part of it failed.

HEW then sued Peoples in redhibition, seeking a return or reduction of the purchase price and various damages, including attorney fees. Finding for HEW, the court. HEW \$13,308.00 to replace the failed ATM and \$53,000 in attorney fees.

Result: Affirmed.

Rationale: The main argument made by PSB is that the amount awarded as attorney's fees should be completely driven by the amount finally awarded on the substantive claim, \$13,308.00.

An award of attorney fees in redhibition need not be so driven. The Court finds that PSB, in large part, is the cause for delaying resolution of this matter and for the amount of attorney's fees and costs necessitated and ultimately expended in this litigation.

HEW purchased a mobile banking unit (MBU) from PSB. The ATM machine built in the MBU was not the product advertised, and the ATM that was there, was inoperable and irreparable. PSB personnel had all of the information it needed to make this determination at the time of the sale.

HEW was forced to hire an attorney to represent its interests. PSB has paid no extra attorney's fees, as it was represented by in-house counsel. As the result of the diligent efforts of HEW and its retained counsel, PSB was urgently advised of the problems and the defect at issue even before the suit was filed, and before any significant fees and costs

were incurred.

HEW could have successfully urged a claim for return of the purchase price of \$115,000.00, because the MBU was clearly not fit for its intended use without a working (or repairable) ATM. HEW was faced with a dilemma when PSB refused to make good on its sale. At that point, in addition to the costs associated with the sale itself, HEW had invested additional money preparing the MBU for HEW's use, i.e. having it custom painted with its logo, and other installation expenses. In addition, HEW could not afford to buy a new MBU. HEW could have pursued its claim for the return of the purchase price, all costs relating to sale, and all of the expenses involved in preparing the MBU for HEW's use. However, when PSB refused to make good on the sale, in an effort to mitigate its losses, HEW personnel searched diligently to find a replacement for the defective ATM. It was not a simple feat, as there were extreme space limitations and most companies could not provide such a product. HEW finally found a company that could provide a replacement and it made the purchase.

PSB was offered the opportunity to simply pay for the replacement, however PSB would not respond at all to any of HEW's proposals or attempts to settle the case. On several occasions throughout the litigation, PSB specifically requested that HEW prepare and submit to them settlement proposals. Each time PSB requested it, HEW did so; it made the proposal and provided the factual and legal argument supporting its proposal. This was confirmed at the January status conference, when counsel for PSB reported that no answer had been made to HEW in regard to any of its settlement proposals. The Court strongly encouraged PSB to participate in efforts to settle this litigation. It is clear that at each step in this process, PSB has been aware of the facts sufficient to know that the ATM was not the product advertised and that the ATM was defective, inoperable and irreparable. Instead, PSB chose to forego actively pursuing a settlement and instead relied on its chances at trial. HEW was forced to continue to incur attorney's fees and costs.

Carter Enterprises, LLC v. Scott Equipment Co., LLC 91 So.3d 1134, 46,862 (La.App. 2 Cir. 4/11/12)

See supra under “Redhibitory defects, qualification as”.

Jones v. Winnebago Industries, Inc., --- So.3d ----, 2012 WL 1699733 (La.App. 2 Cir.), 47,137 (La.App. 2 Cir. 5/16/12)

See supra under “Remedies . . . Against sellers in general”.

**c] Waiver of redhibitory warranty:
unavailability to bad faith seller**

Laporte v. Roussel, 2012 WL 1550490 (La.App. 1 Cir.), 2011-1560 (La.App. 1 Cir. 5/2/12)

Facts: Steven and Michele Laporte purchased a home from Ted and Lisa Roussel on June 26,

2009. The act of sale contained a clause in which the Laportes purported to waive their redhibitory warranty owed to them by the Roussels.

According to the Laportes, two days prior to the sale, they had the home inspected by Warren Virgets, doing business as OSA Inspections, and the inspection did not reveal any defects in the home. Shortly after moving into the home, however, the Laportes noticed that the in-ground pool was leaking water, that the house had a crack in the sheetrock of one of the bathrooms and cracks in the sheetrock of the walls of two bedrooms that were immediately adjacent to the bathroom. Another crack, extending from the top of the bathroom window down to and through the foundation of the home was also discovered on the exterior of the home. The Laportes also discovered that a tree on the property that extended over a neighboring property was rotten.

On November 20, 2009, the Laportes filed a redhibition action against the Roussels. Alleging that the Roussels “were aware of all of the above listed defects, but knowingly and intentionally failed to disclose them”, the Laportes contended that the waiver of the redhibitory warranty was ineffective. The Roussels responded with a motion for summary judgment, asserting that they were not aware of any defects in the property, and thus, the waiver of warranties contained in the sales contract was enforceable and relieved them of any liability. The trial court granted the Roussels’ motion.

The Laportes appealed.

Result: Affirmed.

Rationale: In opposition to the motion for summary judgment, the Laportes offered a certified copy of the property disclosure document completed by the Roussels, in which none of the defects the Laportes later discovered are mentioned in the document. The Laportes also offered the affidavit of their next door neighbor, Darrell Saltamachia, who had resided in the home next door to the property for 20 years. In his affidavit, Mr. Saltamachia stated that while the Roussels lived in the home next door, he observed that they “used their pool on an almost daily basis during the Spring, Summer and Fall;” that the Roussels “had to add water to their pool;” and “that within a few months prior to the sale to [the Laportes], [the Roussels] had interior construction work done to their home” as “he observed carpenters coming in and out” of the Roussels' home during that time.

Finally, in addition to their own affidavit attesting to the defects they had discovered in the home shortly after moving in, the Laportes also offered the affidavit of Spencer Maxcy, a licensed residential home inspector. In his affidavit, Mr. Maxcy stated that he performed an inspection of the Laporte's home in December 23, 2009, which revealed “signs of structural failure throughout the left side of the home.” He further stated that all of the defects he observed appeared to be caulked, sealed, or painted and that the painting, sealing, and caulking “appeared to be relatively new, less than a few years old.”

It is the Laportes' contention that the foregoing evidence creates a genuine issue of material fact that should have precluded summary judgment in this matter. We disagree.

The circumstantial evidence offered by the Laportes may have been sufficient to create a genuine issue of material fact regarding the Roussels' knowledge of the defects discovered in the property if this was the only evidence presented. However, because the evidence offered is not sufficient to refute the affirmative showing made by the Roussels, there is no genuine issue of material fact demonstrated. The Roussels expressly state that

they had no knowledge of the defects identified in the structure of the home, and as for the defects in the pool and tree, they declared that such were evident and easily discoverable. Whereas Mr. Saltamachia's observation of carpenters working at the home prior to the sale only indicates some type of work was performed in the home, he did not identify exactly what kind of work was performed or where in the home the work was performed. So alone, Mr. Saltamachia's affidavit does not conflict with that of the Roussels. Likewise, Mr. Maxcy's statement that the painting, sealing, and caulking of the cracks identified in the home was "less than a few years old" clearly extends beyond the time period identified by Mr. Saltamachia as to when he observed carpenters working on the home.

As for the leaks from the pool and the damaged tree, these problems were "evident" and, for that reason, should have been discovered by the Laportes.

Dissent (Kuhn): An otherwise effective exclusion or limitation of the warranty is ineffective if the seller commits fraud upon the buyer. Thus, although the warranty against redhibitory defects may be excluded or limited, a seller cannot contract against his own fraud and relieve himself of liability to fraudulently induced buyers.

In my view, the plaintiffs presented sufficient evidence to raise a genuine issue of material fact regarding the defendants' knowledge of the alleged defects in the swimming pool and the rotten tree. The majority opinion initially seems to acknowledge this fact when it states that "[t]he circumstantial evidence offered by the [plaintiffs] may have been sufficient to create a genuine issue of material fact regarding the [defendants'] knowledge of the defects discovered in the property if this was the only evidence presented." However, the majority opinion then continues on to state that plaintiffs' circumstantial evidence was insufficient to refute the affirmative showing made by the defendants. Thus, in reaching its decision, it appears the majority weighed the evidence presented by the defendants against the opposing evidence presented by the plaintiffs.

Lirette v. Ledet, 2012 WL 1345354 (La.App. 1 Cir.), 2011-1060 (La.App. 1 Cir. 4/17/12)

Facts: In March 2006, Ms. Ledet purchased the property at issue located at 871 School Street, Houma, Louisiana, from Steve McCoy. Her intent was for her brother, Stephen Duet, to "fix it up and [they] were going to resell it, try to start a business of flipping houses." Mr. Duet lived in the house while the work was being done, and Ms. Ledet would go on weekends to help out. Approximately six months later in August 2006, Ms. Ledet, as owner/agent, listed the property for sale with Century 21.

Pursuant to an "Act Of Cash Sale Without Warranty," dated November 3, 2006, Ms. Lirette purchased the property from Ms. Ledet for \$130,000.00. The act of sale contained a "waiver of warranty" clause that included, among other things, the following language: "Buyer takes the Property 'AS IS' and 'WHERE IS'"; "All implied warranties with respect to the Property, including those related to merchantability or fitness for a particular purpose, are hereby disclaimed by Seller and expressly waived [by] the Purchaser(s)"; "Without limiting the generality of the foregoing, Seller does not warrant that the Property is free from redhibitory or latent defects or vices. Purchaser(s) hereby expressly waives all rights in redhibition"; "Purchaser(s) hereby releases Seller from any

liability for redhibitory or latent defects or vices under Louisiana Civil Code Article 2520 (1870) through 2548 (1870).”

According to Ms. Lirette, about a month after the sale, she and her husband began experiencing problems with the home. Ms. Lirette claimed the paint began to peel off the walls, revealing holes in the walls and ceilings that had been patched and covered with paint by Ms. Ledet. She also alleged the finish on the wood floors started to peel off. Ms. Lirette further claimed there were leaks in the roof and a bucket in the attic that had been covered up with insulation. Finally, Ms. Lirette alleged that a short time after the sale, she learned that the central air conditioning unit was severely damaged and could not be fixed.

On March 20, 2007, Ms. Lirette and her husband, Steven M. Harker, filed suit against Ms. Ledet and Century 21, alleging that Ms. Ledet was aware of the defects in the home and failed to disclose them prior to the sale, thereby voiding the waiver of warranty. The Lirettes sought return of the purchase price with interest and rescission of the sale, reduction of the purchase price, reimbursement of the reasonable expense occasioned by the sale and those incurred for the preservation of the things, and other damages.

After a bench trial, the lower court ruled for the defendants. The court found that Ms. Lirette did not meet her burden of proving that Ms. Ledet committed acts of fraud or was in bad faith in hiding defects, if any, in the property.

Result: Affirmed.

Rationale: As set forth in the November 3, 2006 “Act Of Cash Sale Without Warranty,” the parties clearly agreed to exclude the warranty against redhibitory defects and intended that the sale of the property be “AS IS” and “WHERE IS.” The trial court made a credibility call and chose to believe Ms. Ledet's testimony that she had no knowledge of any defects in the house when she sold it to Ms. Lirette. This credibility call was reasonable in the light of the fact that Ms. Ledet, as a “flipper” of the house, never went to see it herself and Mr. McCoy, who “fixed up” the house and lived in it, testified that he had no knowledge of the problems of which Ms. Lirette, testimony that was never contradicted. The trial court found that Ms. Lirette had not met her burden of proving bad faith or fraud by Ms. Ledet in any respect.

d] Prescription

Delaney v. Amite Homes, Inc., 2012 WL 2155255 (La.App. 1 Cir.), 2011-2323 (La.App. 1 Cir. 6/13/12)

Facts: On May 21, 2008 Philip Delaney purchased a 2007 Patriot mobile home, for \$78,000, from Amite Homes, Inc. (Amite Homes). During delivery of the mobile home, the “tongue” was broken, allegedly causing extensive damage to the mobile home.

On January 26, 2009 Mr. Delaney filed suit against Amite Homes, alleging the mobile home was delivered to him unfit for its intended use, and he would not have purchased it had he known of the defects. He further alleged that the mobile home's defects were not known or apparent to him when he purchased it and that Amite Homes

was provided an opportunity to repair the mobile home. Mr. Delaney sought redhibition of the mobile home, return of the sales price, damages, attorney fees, interest, and all costs of suit.

Amite Homes filed an exception of no right of action, asserting that Mr. Delaney was not entitled to bring an action in redhibition, since at the time the suit was filed he was no longer the owner of the mobile home.

Following a March 28, 2011 hearing on Amite Homes' exception of no right of action, judgment was signed on April 11, 2011, granting the exception and dismissing the suit with prejudice.

On April 6, 2011, counsel for Delaney, evidently anticipating the trial court's ruling on the exception of no cause of action, filed an amended petition, substituting "Diane Delaney" for "Philip Delaney" as plaintiff. In support of the amendment, it was alleged that Philip had bought the mobile home for Diane and had "gifted" it to her.

On May 5, 2011 Amite Homes filed an exception of prescription as to the plaintiff's second amending petition, which had substituted Dianne Delaney as the plaintiff in the case. Amite Homes argued that since the petition of Philip Delaney was previously dismissed, on the trial court's finding that he had no right to bring the suit in redhibition, Dianne Delaney's claim, filed via the April 6, 2011 second amended petition, had prescribed as it was filed more than one year after the May 2008 sale of the mobile home.

The lower court granted the exception of prescription.

Diane Delaney appealed.

Result: Reversed.

Rationale: The prescriptive period for a redhibition action is one year from the day the defect is known by the buyer. LSA-C.C. art. 2534. The mobile home at issue in this case was purchased on May 21, 2008, and the defects were apparent on the date of delivery, which occurred on or about May 29, 2008. The amending petition, substituting Dianne Delaney as plaintiff, was filed more than one year later, on April 6, 2011.

However, "[p]rescription is interrupted ... when the obligee commences action against the obligor, in a court of competent jurisdiction and venue." LSA-C.C. art. 3462. Further, "[t]he filing of suit in a court of competent jurisdiction and venue interrupts any kind of prescription as to the causes of action therein sued upon, provided the plaintiff is a proper party plaintiff and the defendant is a proper party defendant." LSA-C.C. art. 3462, 1982 Revision Comment (b).

When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading. LSA-C.C.P. art. 1153. An amendment adding or substituting a plaintiff should be allowed to relate back if: (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; (4) the defendant will not be prejudiced in preparing and conducting his defense.

In this case, the amended claim of Dianne Delaney clearly arose out of the same

conduct, transaction, or occurrence set forth in the original petition filed by Philip Delaney. Further, the depositions of Dianne and Philip Delaney were taken on August 9, 2010, placing the defendants on notice at that time that Dianne Delaney had a financial interest in the mobile home. Nor have the defendants shown any way in which they were prejudiced by the substitution of Dianne as the party plaintiff in April 2011.

Thus, the only remaining issue is whether Philip Delaney was a proper party plaintiff at the time he filed the original petition, so that prescription was interrupted, making Dianne's April 6, 2011 petition timely.

The testimonial evidence of Philip and Dianne Delaney in this case did not exclude the possibility that Philip Delaney had some ownership interest in the Amite Homes mobile home at the time this suit was filed. He testified that he provided the "major portion" of the funds for the purchase price of the home. And while Philip's intent to make a gift of the mobile home to Dianne was evident in his testimony, no evidence has been presented to establish that the donation has actually been accomplished. Further, the bill of sale clearly names Philip Delaney as a buyer. Therefore, the evidence established that Philip Delaney was a buyer, who had a right to bring this suit for redhibition.

e] Exclusion of redhibitory warranty under the NHA

Binning v. Boudin, 2011 WL 6779597 (La.App. 1 Cir.), 2011-1091 (La.App. 1 Cir. 12/21/11)

Ledbetter v. Homes by Paige, L.L.C., --- So.3d ----, 2012 WL 982391 (La.App. 1 Cir.), 2011-0005 (La.App. 1 Cir. 3/23/12)

Spence v. Cassano, 2011 WL 5419710 (La.App. 1 Cir.), 2011-0649 (La.App. 1 Cir. 11/9/11)

b) Duties of the buyer: payment of the price

C. Leases

1. Nature of lease: distinction from other kinds of contracts

Bayou Fleet Partnership v. Phillip Family, LLC., 2011-924 (La. App. 5 Cir. 3/27/12); 2012 WL 1020781

Facts: The plaintiff (lessor) and defendant (lessee) entered into a contract entitled Lease Agreement in December of 1999. The term of the lease was for sixty (60) months, beginning in February 2000 and continuing through January 2005. Under the lease, the monthly rental was \$4,500.00 per month. At the time the document was executed, defendant paid the plaintiff a lump sum of \$100,000.00. Under the terms of the contract,

the lump sum was in consideration for the granting of an option to purchase at any time during the term of the agreement pursuant to a Schedule of Purchase Option Dates and Amounts attached to the agreement. The Schedule listed the monthly rental payments and the amount necessary to purchase the property for each month through February 2005. In November of 2004, defendant's agent, Phillips, approached plaintiff's managing partner, Durant, requesting to extend the terms of the lease. Durant denied this request but told Phillips that if he wanted to exercise the option to purchase he needed to do so prior to the expiration of the existing lease. Defendant did not exercise its option to purchase prior to the expiration date on the lease. In late February, defendant sent a rental payment to plaintiff for the month of March, which was returned un-negotiated, and plaintiff asked to retake possession of the property as the lease had expired. Phillips subsequently asked for additional time to execute the option to purchase, which Durant agreed to subject to certain specified conditions, namely the granting of a right and/or servitude to plaintiff to fleet its vessels along the riverfront in addition to the purchase of the property. Defendant did not accept the proposed agreement but instead scheduled a real estate closing which plaintiff did not attend.

Plaintiff then filed a petition for declaratory judgment seeking a declaration that the lease had expired and that the option to purchase had not been exercised within the lease term. Plaintiff further requested an order for the defendant to cease activities on the land and to immediately vacate the property. Defendant answered and filed a reconventional demand asserting claims of breach of contract, unjust enrichment, detrimental reliance, and in the alternative, breach of bond for deed contract. Defendant sought delivery of title to the property on the basis that the agreement was a contract to sell real property in which the purchase price was to be paid in installments and the seller, after payment of a stipulated sum, agreed to deliver the title to the buyer which constituted a bond for deed contract. Plaintiff filed a motion for summary judgment, which was granted by the trial court along with attorney's fees and costs as stipulated in the contract.

Result: Affirmed

Rationale: The court of appeal reviewed the trial court's judgment for manifest error, and found that the trial judge was not manifestly erroneous in light of the evidence presented. Though the defendant's agent claimed there was an oral agreement expressing an intent to execute a bond for deed contract, the terms of the contract and the testimony of plaintiff's agent were to the contrary. Defendant's agent claimed the verbal agreement provided a purchase price of \$500,000.00, but acknowledged that it would have taken almost nine years of monthly rental payments to reach that amount. By the terms of the contract, the \$100,000 was in consideration of the option to purchase. The contract was also consistent in its use of the terms "lease," "tenant," "rental payments," and "option to purchase" or "option." Further, under the contract there was no sales price listed, no indication that full payment had to be made within the five year term, no indication that payment would be made in installments, and no indication that the installments would have been long enough to pay for the total price of the property. Thus, the court of appeal found that it was within the discretion of the trial court to find that the agreement was a lease with an option to purchase, and not a bond for deed agreement.

Defendant also appealed the judgment on attorney's fees. The lease stated in

pertinent part that attorney's fees plus all costs and expenses were to be paid to the prevailing party "in the event of litigation to enforce the rights or obligations" of the parties under the lease. Defendant argued that this clause only applied to failure to pay rent. However, the court of appeal found that the provision applied in this instance because plaintiff sought a declaratory judgment to declare its rights under the lease and retain possession of the property. The court of appeal found that this could fall under enforcing rights of the parties, and the prevailing party was therefore entitled to attorney's fees and costs.

2. Effects of lease: rights and duties of the parties

a. Lessor's duties

1) Warranties

a) Warranty of peaceable possession

Sheets Family Partners – Louisiana, Ltd., v. Inner City Refuge Economic Development Corp., 47,156 (La. App. 2 Cir. 6/20/12); 2012 WL 2327996

Facts: The American School of Business in Shreveport – owned by America's Business School, Inc. ("ABS") with the immovable property on which the school operated being owned by America's Properties, Inc. ("AP"), both of which had the same sole shareholder – was sold by ABS to the defendant on July 30, 2007. In February of 2008, AP transferred all its authorized and outstanding stock to Brandon Group International, LLC ("Brandon Group"), a corporation established to acquire property for the defendant. The plaintiff had a mortgage over the immovable property on which the school operated. On April 3, 2008, the plaintiff entered into a lease with the defendant under which the defendant agreed to lease the school property for 6 months. The lease noted that the mortgage was currently in default and the plaintiff was in the process of reacquiring the property. The defendant paid its May and June rentals, but then was allegedly informed by ABS's agent in July that the sale of the business was not going to happen and there was no need for them to return to the school (ABS's agent denied that this occurred). Thereafter, defendant ceased paying rent and no representative of the defendant returned to the school. The plaintiff allegedly reacquired the immovable property sometime in 2009 or 2010 by dation en paiement (though no copy of the dation was submitted into evidence). On July 11, 2008, plaintiff sent defendant a demand letter seeking payment of the July rent or acceleration of the remaining balance on the lease through an acceleration clause. When no further payment was made, plaintiff filed suit, seeking the July and August lease payments. Defendant answered the suit and raised the affirmative defense of plaintiff's breach of the lease, resulting from the interruption of defendant's peaceful possession of the property when they were allegedly informed that the sale was not going to happen in July 2008 (they treated this as an eviction). The trial court found in favor of the defendant, rejecting the

plaintiff's claim for unpaid rent and finding that the plaintiff had the burden of proof and failed to meet it on the grounds that (i) they believed the defendants were constructively dispossessed and disturbed of their peaceful possession of the leased premises by the actions of ABS's agent; (ii) the plaintiff did not even own the property at the time it was leased; and (iii) it would be inequitable to rule against the defendant as they had paid a total of \$49,330.00 and had received little in return. Plaintiff appealed.

Result: Reversed and Rendered

Rationale: The court of appeal first noted that, in substance, the lease also involved aspects of a forbearance agreement, making the contract somewhat innominate and not merely a lease. Regardless, the court found that the lease was binding. However, the court found the defendant's assertions that ABS's agent prevented its possession and continued operation of the school to be insufficient to nullify its obligations to the plaintiff under the lease. Regardless of any statements, the court noted that the assets of the school had already been transferred to the defendant at that time, and control and ownership had been conveyed to the defendants before the alleged eviction statements of ABS's agent. The court found no showing that ABS somehow retained legal control or ownership over the property, such that any of the alleged statements would have had teeth, nor was there evidence that the alleged statements actually occurred. Most importantly, the court found no evidence that the plaintiff acted through either ABS's agent or ABS and AP's sole shareholder to dispossess the defendant of its occupancy rights to the property. Therefore, the court of appeal found that the plaintiff had not breached the lease, reversed the decision of the district court, and granted the plaintiff's claim for remaining rents under the lease.

b) Warranty against defects in the leased premises

Wells v. Norris, 46,458 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1165

Facts: Plaintiff leased a house from defendant in December of 2000 where he lived with his wife and three children. On July 1, 2001, the house caught on fire resulting in the death of one of plaintiff's children and injury to the other two. Plaintiff brought this suit claiming that defendant was strictly liable for the wrongful death and other damages sustained by him and his family.

Under the terms of the lease, plaintiff was to keep and maintain the house in good and sanitary condition and repair. Plaintiff indicated that several of the electrical outlets in the walls were not operational when he and his family moved into the house. The family used several extension cords to provide power to the areas that did not have properly functioning outlets. The investigating fire officer also noted that the setup of the fuse box, using mostly 30 amp fuses, indicated an overload. Further, a penny had been placed below one of the fuses to prevent the system from tripping. Several fuses were on the floor, indicating that someone had changed them out. The officer determined that the fire appeared to have started where an additional air conditioner had been placed in the home and powered by an extension cord. He theorized that there was an overload by the air conditioner and the altered fuse box would not let the system trip. As a result, the system

began heating up until a fire ignited.

The trial court, issuing no oral or written reasons, awarded the plaintiff \$207,572.79 in damages. Defendant appealed.

Result: Affirmed

Rationale: Defendant argued that he was not strictly liable because plaintiff had waived the warranty against vices and defects imposed by La. Civ. Code art. 2696. Specifically, relying on La. R.S. 9:3221, defendant argued that the clause in the lease requiring plaintiff to maintain the house in good repair amounted to an unequivocal waiver of any warranty against vices and defects imposed on the lessor, as the lessee had assumed responsibility for the condition of the leased premises. Plaintiff maintained that there was no clear or unambiguous language in the lease that provided an express waiver of warranty, as required by La. Civ. Code art. 2699, therefore defendant was strictly liable. The court of appeal agreed with the plaintiff, finding that the specific clause did not equate to an assumption of responsibility for the condition of the leased premises as contemplated by 9:3221. Further, the court of appeal found that no language existed anywhere in the lease that would amount to a clear and unambiguous waiver of the lessor's warranty against vices and defects imposed by Art. 2696.

2) Liability for damages causes by loss/destructionm of the leased premises

Schroth v. Estate of Samuel, 2011-1385 (La. App. 4 Cir. 4/18/12); 90 So. 3d 1209

Facts: Plaintiffs entered into a commercial lease with the Martha Samuel in October 2003. It was the understanding of the parties that plaintiffs would renovate the interior and Samuel would be responsible for major maintenance such as the roof and painting of the exterior. Under the lease plaintiffs accepted the premises in their existing condition and assumed responsibility for the condition of the leased premises. Lessor was responsible for a couple alterations (repair of bathtub leaks and maintain a/c in working order) and major maintenance – like the roof and overall paint – while lessee was responsible for routine maintenance. Further, under the lease, the parties agreed that neither would be liable to the other for loss arising out of damage to or destruction of the leased premises “when such loss is caused by any of the perils which are or could be included within or are insured against by a standard form fire insurance with extended coverage,” each party waiving any such claim whether or not caused by negligence. The parties also contemplated in the lease that the rental be fixed so that each party could provide its own insurance at its own expense.

In August of 2005, the rental property was damaged by Hurricane Katrina, requiring repairs to the roof. The lessor passed away shortly thereafter, leaving her daughters in control. In September of 2006, plaintiff filed suit seeking damages arising out of the lease agreement. Plaintiff's contended (i) that the damage sustained by Hurricane Katrina was more extensive due to the lessor's failure to maintain the roof; (ii) the failure to repair the property was in violation of the lease agreement and the defendants were

liable for resulting damage; and (iii) the defendants were liable for the damage and destruction of their property caused by the work crew that defendants allegedly hired to repair the hurricane damage.

The defendants moved for summary judgment, asserting that the plaintiffs would not be able to meet their burden of proof at trial to show that defendants were liable for damages allegedly sustained by plaintiffs. The trial court granted the motion in part, leaving only the question of whether defendants' failure to maintain the roof was the cause-in-fact of the damages. The defendants later filed a second motion for summary judgment, arguing that the plaintiffs did not present any evidence to show that the roof on the building was in need of repair prior to Hurricane Katrina. The trial court granted the defendants' second motion for summary judgment. Plaintiffs appealed.

Result: Affirmed

Rationale: Based on the evidence presented, the court of appeal found Hurricane Katrina to be the sole cause of plaintiffs' damages. Under the terms of the lease, the lessor would not be held liable for any losses arising out of damage to or destruction of the property when the loss was caused by anything which could have been included in a standard form fire insurance policy with extended coverage. Under the governing insurance law in Louisiana, standard fire insurance contracts can be drafted to include additional coverages and perils. Further, neither plaintiff had any insurance which should have covered the loss. Therefore, the lessor was not liable to plaintiff for the damages claimed by plaintiffs and caused by Hurricane Katrina. The court of appeal also determined that the plaintiffs failed to provide evidence (i) that identified the vandals as the defendants' work crew; or (ii) that they would be able to meet their burden of proof at trial regarding whether the roof on the building was defective or in need of repair prior to Hurricane Katrina. The court of appeal, thus, found that no genuine issue of material fact existed and defendants were entitled to summary judgment.

Halum v. Tedesco, 11-0818 (La. App. 4 Cir. 11/30/11); 2011 WL 5995832

Facts: On May 14, 2007, plaintiffs purchased a piece of property from defendants, the Tedescos, on which there was a non-operational gas station. The property remained subject to a lease by co-defendant Exxon at the time of purchase. Because there was a lease still in effect, the parties added an addendum to the lease to protect the plaintiffs from certain kinds of damages resulting from the operation of the gas station by Exxon. The lease was to terminate, and plaintiffs were to take possession of the property, on September 10, 2007. In August 2007, unknown third parties gained access to the roof of the gas station and removed the copper component parts of the air conditioning unit. On May 13, 2008, plaintiffs filed suit against both groups of defendants, alleging that the property had suffered \$56,000 in damages due to the theft and corresponding roof damage as a result of defendants' negligence.

The defendants filed an unopposed exception of no right of action which dismissed all plaintiffs except the LLC which acquired the property. Plaintiff filed two motions for partial summary judgment arguing that (i) Exxon was liable for the damage because the

lease was still in effect and (ii) the Tedescos were liable because they had agreed to indemnify the plaintiff from financial remediation caused by the lessees and were therefore responsible for all damages that occurred to the property prior to the plaintiff's entry into possession. Exxon filed its own motion for summary judgment, asserting that as a matter of law it owed no duty to the plaintiff to protect against unforeseeable criminal acts of unknown persons and, thus, was not liable for the damages suffered by plaintiff. The trial court denied both of plaintiff's motions for partial summary judgment and granted Exxon's motion for summary judgment, dismissing Exxon from the action with prejudice. Plaintiff appealed the denial of both of its motions and the granting of Exxon's motion.

Result: Affirmed

Rationale: With regard to plaintiff's motion for partial summary judgment against Exxon, the court of appeal upheld the trial court's dismissal. The lease contained an "as is, where is" clause with waiver of claims of redhibition, and one of plaintiff's agents had inspected the property prior to purchase. Therefore, Exxon was not liable to plaintiff for pre-existing interior damage. Further, the court of appeal found that Exxon did not participate or consent to the theft of the copper. As such, under La. Civ. Code. Art. 2687, Exxon was not liable to plaintiff for the damage cause by the unknown third parties.

Turning to plaintiff's motion for partial summary judgment against the Tedescos, the court of appeal also upheld the trial court's dismissal. The court of appeal looked at the language of the addendum in which plaintiff alleged the vendors had agreed to indemnify the plaintiff from financial remediation caused by the lessees and were therefore responsible for any and all damages that occurred to the property prior to the plaintiff's entry into possession. The court of appeal, however, found the addendum to address only potential liability for environmental damage as a result of the gas station and underground tanks. Therefore, the addendum addressed possible environmental damage and remediation resulting from the use of the property as a service station, not a generic indemnification of all damages which might occur while the lease agreement remained in force, so the Tedescos were not liable for the damage alleged.

Finally, with regard to Exxon's motion for summary judgment, the court of appeal also upheld the trial court's judgment granting the motion. The court of appeal found that Exxon, as lessee, owed no duty to the plaintiff to protect against unforeseeable criminal acts of unknown persons, and was therefore not liable. In opposition of the summary judgment, the plaintiff alleged that it was unknown who committed the act of vandalism and whether or not the perpetrators had Exxon's permission to be on the property. However, the plaintiff submitted no evidence in support of this allegation. Thus, plaintiff did not carry its burden to establish a that a genuine issue of material fact existed such that summary judgment would not have been appropriate.

Certified Cleaning & Restoration, Inc. v. Lafayette Ins. Co., 2010-948 (La. App. 5 Cir. 5/31/12); 2012 WL 1957557

See *infra* under "Repair obligations as between lessor and lessee".

b. Lessee's duties: to use the thing as a prudent administrator and in accordance with the purpose for which it was leases

Ohm Lounge, L.L.C. v. Royal St. Charles Hotel, L.L.C., 10-1303 (La. App. 4 Cir. 9/21/11); 75 So. 3d 471

Facts: On January 23, 2007, plaintiff (as lessor) entered into a lease agreement with defendant to lease approximately 800 square feet of commercial space situated immediately adjacent to the lobby on the first floor of defendant's hotel. Plaintiff opened for business as a lounge in late 2007, but began operating the business as a night club. Throughout its operation as a night club, defendant received numerous complaints from hotel guests about loud noise. On July 24, 2008, defendant cause plaintiff to be served with a five-day notice to vacate the premises. In response, plaintiff filed this suit seeking a declaratory judgment, specific performance, and damages. Defendant reconvened, seeking eviction based upon plaintiff's default of the lease by playing excessively loud music and creating a public nuisance.

Numerous employees testified at trial regarding the numerous noise complaints received and guests complaining about their inability to sleep due to excessively loud noise coming from the Ohm Lounge. The employees also testified as to the difficulty they experienced in performing their job functions, such as checking guests in and out of the hotel, taking reservations over the phone, inability to hear the telephone ring, and generally being unable to converse at the front desk due to the loud noise. Several employees also testified that they would ask the staff of Ohm to lower the volume of the music, and, on occasion, they would lower the volume, only to steadily increase the volume again. Defendant's general manager also testified to the complaints of loud noise she would receive nearly every weekend between 3:00 a.m. and 5:00 a.m. She also introduced numerous emails and other correspondence spanning from June 2008 through February 2009 in which she expressed the representatives of plaintiff the disruptive and adverse effect the untenable noise was having on the hotel's operation and on its guests. The record reflected that these emails and correspondence were largely ignored by plaintiff's management.

Plaintiff, on the other hand, put on testimony to support its allegations that defendant knew what it was getting into when it executed the lease and that its business operations were consistent with the hotel's vision as stated at the time the lease was executed. Plaintiff contended that it complied with each request to turn the music down, but that defendant had not notified plaintiff of many of the complaints cited by defendant in the eviction hearing. Further, plaintiff contended that, upon receiving a noise complaint, a representative of the lounge would personally meet with the complaining guest and, if necessary, pay for the hotel guests room.

After trial, the trial court determined that plaintiff had breached the lease, and granted defendant's Motion for Eviction. Plaintiff appealed asserting (i) that the trial court erred in finding that Ohm Lounge conducted its business in such a way as to create a nuisance or annoyance to defendant in violation of the lease; and (ii) the trial court failed to address the cure provision in the Lease.

Result: Affirmed

Rationale: With regard to plaintiff's first assignment of error, the court of appeal found the record replete with evidence concerning the excessively loud music emanating from the bar that continuously disrupted the business operation of the hotel. Additionally, the court of appeal noted that the trial court had made credibility determinations and, based on these credibility determinations and the "glut" of complaints received from the hotel guests and hotel employees spanning over many months, the court of appeal found no manifest error in the trial court's finding that plaintiff had breached the lease.

With regard to plaintiff's second assignment of error, the court of appeal noted the language of the lease regarding cure which provided the lessee with ten days after notice of lessee's failure to comply with the lease within which to cure the failure. However, the clause also provide that, if two such failures occurred within any twelve-month period, and if lessor gave lessee notice of the failure on each occasion, then an "Event of Default" would occur immediately without notice or opportunity to cure. The court of appeal noted that the hotel repeatedly notified plaintiff of the numerous complaints, with no efforts made by plaintiff to eradicate the problem. The court also noted that plaintiff put on no evidence showing any concrete efforts it made to promptly alleviate or eradicate the nuisance it created at the hotel. The only efforts even close were plaintiff's paying for a guest's hotel room and momentarily reducing the level of music, only to turn it back up, neither of which the court of appeal found to constitute a "cure." The only cure required of plaintiff, the court of appeal determined, was to reduce the volume of music to a reasonable level that was mutually acceptable to both parties during all hours of operation, which plaintiff chose not to do. Therefore, because multiple notifications of failures by plaintiff to perform its obligations under the lease were given by defendant to plaintiff within a twelve-month span, the court of appeal found that the hotel was not required to afford plaintiff the opportunity to cure under the specific terms of the lease.

800 Canal Street Limited Partnership v. Storyville District New Orleans, L.L.C., 10-0942 (La. App. 4 Cir. 9/21/11); 75 So. 3d 958

Facts: Plaintiff, as sub-lessor, entered into a sublease with defendant on January 26, 1998. Under the terms of the sublease, the leased property was only to be used as an entertainment lounge and restaurant of "quality and character similar to of consistent with that of the Hotel" housed in the same building. The sublease also prohibited any form of "adult oriented entertainment," "striptease," or "burlesque-style" entertainment. Defendant further subleased the property to Jazz Parlor, LLC and How at the Moon New Orleans, LLC. After Hurricane Katrina, Howl at the Moon was converted into The Bourbon Cowboy Bar and Saloon. After an unsuccessful attempt to reacquire the lease from Storyville in September of 2009, plaintiff attempted to evict Storyville and the subtenants. On October 7, 2009, plaintiff sent a first notice of default to Storyville, alleging that women had exposed their breasts in the leased premises while riding a mechanical bull therein in violation of the lease. They also alleged that the bar was not of the same character and quality of the adjoining hotel and that the conduct may be burlesque activity that may have

been violative of state and local laws. Plaintiff also alleged that the bull itself was violative of the lease. On December 8, 2009, plaintiff filed a petition for eviction on the grounds that the conduct on the leased premises was violative of the lease. Storyville filed a separate petition seeking declaratory and injunctive relief against plaintiff in an effort to stop the eviction action. To Storyville's action, plaintiff filed an exception of lis pendens which was maintained. After trial, the trial court issued a ruling denying plaintiff's petition for eviction, but ordered the removal of the mechanical bull as it was in violation of the Comprehensive Zoning Ordinance of the City of New Orleans and a violation of the sublease agreement. The trial court gave Storyville 30 days to cure the violation. Both parties filed cross-motions for attorney's fees based upon lease provisions which provide such to successful litigants, but the trial court denied both motions. Both parties appealed.

Result: Affirmed in Part and Reversed in Part

Rationale: Plaintiff appealed the trial court's determination that the leased property was of the same quality as the hotel, though it did not rise to the level of luxury of the hotel, and was thus not in breach of the sublease. The court of appeal noted that the trial court viewed photographic evidence and visited both the hotel and the bar, and the trial court's oral reasons for judgment concerning the visits were very detailed. Therefore, the court of appeal found no manifest error in the trial court's findings.

Plaintiff also appealed the trial court's decision that the indecent and lewd activity did not violate the section of the lease concerning prohibitions on burlesque-type, striptease, and adult entertainment acts. Particularly, the plaintiff appealed the trial court's finding that the provision was to prevent the operation of a strip club. The court of appeal noted that the trial court reviewed video surveillance, listened to testimony, viewed photographs, and personally visited the hotel and bar. Therefore, the court of appeal found that the trial court's factual determination based upon a reasonable interpretation of the lease and actual evidence was not clearly wrong or manifestly erroneous. Further, the court of appeal noted that the lease provided the tenant with a thirty day period to cure any alleged defaults, and that the trial court found that if Storyville had engaged in such violations, they had been cured.

Plaintiff also appealed the rejection of its demands for attorney's fees, which it was entitled to under the lease in the event that it was successful in establishing a breach. The plaintiff noted the trial court's determination that the presence of the mechanical bull was a breach of the sublease agreement. However, the court of appeal found that, under the lease, plaintiff was entitled to give Storyville notice of any alleged breach and the opportunity to cure the violation, which it did not. Even if it had, Storyville had cured the violation through the removal of the mechanical bull within thirty days after the trial court's judgment. The court of appeal found that no breach occurs when action is remedied within a curative period. Therefore, plaintiff was not entitled to any attorney's fees as it had not prevailed on establishing a breach by Storyville.

Storyville also appealed the trial court's order that the mechanical bull be removed as it was in violation of city ordinances. The court of appeal noted that the trial court does have original jurisdiction to review determinations made by the Board of Zoning Adjustments. However, zoning violations may not be considered by a trial court as a matter of original jurisdiction. As no formal zoning proceedings had occurred, the court of

appeal found the trial court had erred in finding that the mechanical bull constituted a zoning violation and in ordering its removal from the premises.

Storyville also appealed the rejection of its motion for attorney's fees given plaintiff was unsuccessful in its attempts to evict Storyville. However, under the lease, Storyville was entitled to attorney's fees if it brought suit for breach of the lease and breach was established (same requirement as plaintiff). As the trial court had dismissed Storyville's claim for disturbance of its peaceful possession on the grounds of *lis pendens*, no adverse judgment was rendered against plaintiff. Therefore, the court of appeal found no error in the trial court's refusal to grant attorney's fees to Storyville.

Finally, the court of appeal upheld the dismissal of Storyville's petition for declaratory judgment through the granting of plaintiff's exception of *lis pendens*, as the requirements for the exception under La. Code Civ. P. art. 531 were met.

c. Repair obligations as between lessor and lessee

Certified Cleaning & Restoration, Inc. v. Lafayette Ins. Co., 2010-948 (La. App. 5 Cir. 5/31/12); 2012 WL 1957557

Facts: Plaintiff, a cleaning company hired by subtenant, brought suit against landlord (Doucet), landlord's liability insurer (Lafayette Ins.), tenant (Turf Club), subtenant (The Edge), and roofer to recover an unpaid balance due for cleaning up fire damage to a building allegedly caused by the roofer. Subtenant crossclaimed against landlord for damages resulting from the fire and subtenant's insurer (Underwriters) sought to recover the amount paid to subtenant under its insurance policy for loss caused by the fire from landlord. Under the terms of the lease, the landlord was responsible for maintaining the roof and was obligated to repair the premises in the event the premises were damaged by fire, as well as to maintain fire insurance on improvements in and on the premises (except removable installations). Subtenant, assuming the obligations of the tenant/lessee under the lease, was required to maintain general liability insurance covering property damages to the leased premises. The lease also contained a waiver/subrogation clause which stated that neither party would be liable to the other for the loss arising out of damage to or destruction of the leased premises when such loss was caused by anything covered by a standard form of fire insurance. All such claims for any and all loss, however caused, were waived under the clause, whether or not the damage was caused by the negligence of either lessor or lessee, or any of their agents, servants, or employees. Further, under the clause, insurance carriers involved were not entitled to subrogation under any circumstances against any party to the lease.

The trial court found, first, that plaintiff was legally subrogated to subtenant's contract rights against the landlord and landlord's insurer, for performance of landlord's obligation under the lease to maintain the roof and to repair fire, smoke, and water damages. Thus, the trial court awarded plaintiff \$45,992.59 for unpaid cleaning services, and found landlord and landlord's insurer to be liable in *solido* with subtenant for the amount. Second, the trial court found that subtenant's insurer was subrogated to the rights

of subtenant for the amount subtenant's insurer paid under its insurance policy issued to subtenant for loss caused by the fire. Because landlord was required to maintain the roof, promptly make any repairs due to fire, and to maintain fire insurance on the property under the terms of the lease, and because landlord's insurance policy covered the damages paid by subtenant's insurer to subtenant, the trial court found that landlord and landlord's insurance company were liable to subtenant's insurance company for \$47,775.17 (representing the amount paid by subtenant's insurer to subtenant). Finally, the trial court found the landlord liable to subtenant in the amount of \$90,680.48 for property damage it suffered as a result of the fire and which was not paid by its insurer.

Result: Affirmed in Part; Reversed in Part; Vacated in Part, and Remanded

Rationale: First, regarding the claim of the plaintiff, the court of appeal found that the waiver clause of the lease did not relieve the landlord of his obligation to repair the fire damaged property. Further, subtenant's voluntary action of hiring plaintiff to remediate the damage did not constitute a waiver of the right to have landlord repair the fire damaged property. The court found that, under the waiver clause, the parties agreed to waive any losses each would suffer as a result of damage to the property, not to waive the landlord's responsibility to repair the premises. Thus, they affirmed the trial court's judgment finding the landlord and landlord's insurer liable in solido with subtenant to the plaintiff for \$45,992.59.

Second, regarding subtenant's insurer's claim against landlord for the amount it paid to subtenant for the loss of contents and improvements, the court of appeal found that, under the mutual waiver clause, subtenant had agreed to waive any claim against landlord for losses it suffered as a result of damage or destruction of the leased premises. The court of appeal found that the amount which subtenant's insurer was trying to recover from landlord fell under this waiver clause, precluding subtenant's insurer from recovering from landlord through subrogation. Therefore, the court of appeal reversed the trial court's judgment granting subtenant's insurer \$47,775.17.

Finally, the court of appeal addressed the \$90,680.48 awarded to subtenant for property damage it suffered which was not covered by its insurance policy. However, the court of appeal determined that landlord was only liable to subtenant for the cost of structural repairs. For any losses of personal property and profits subtenant suffered due to the fire, subtenant had waived its right to claim such losses under the lease. Because the trial court had not specified how it got to the number, nor what losses were included, the court of appeal vacated the trial court's judgment and remanded the matter to the trial court to determine if any of the claimed losses were related to building repairs, for which the landlord would be responsible.

2. Termination of lease

a. Grounds for termination

720 Harrison, LLC v. TEC Realtors, Inc., 11-1123 (La. App. 4 Cir. 1/18/12); 82 So. 3d 1269

Facts: Plaintiff (lessor) entered into a commercial lease with defendant (lessee) on September 10, 2007. On November 19, 2008, defendant sent plaintiff a letter terminating the lease agreement. In the letter, defendant expressed concerns about the removal of a concrete pylon from the property, upon which defendant wanted to place its own business sign. Defendant stated that the use of the pylon was a major factor in its decision to lease the building. However, plaintiff testified that, after Hurricane Katrina, new building codes were adopted in the City of New Orleans which required that the yet unconstructed building be repositioned on the lot, requiring the removal of the pylon. Plaintiff testified that she had informed defendant of the situation and defendant replied that it would not be a problem. On February 12, 2009, plaintiff filed suit against defendant for breach of lease. Plaintiff filed a motion for summary judgment, which was granted by the trial court. Defendant appealed asserting that (i) the trial court erred in finding that none of the terms allegedly agreed upon and listed in the November 19 termination letter were a valid basis for termination under the September 10 lease, and that it should have been allowed to introduce parol evidence to prove valid termination; (ii) the trial court erred in not allowing parol evidence to prove the true intent of the parties; and (iii) the enforcement of the lease would lead to absurd results.

Result: Affirmed

Rationale: With regard to the defendant's first assignment of error, the defendant wanted to introduce parol evidence to prove that the removal of the pylon was a valid basis for its termination of the lease. However, the trial court found, and the court of appeal agreed, that the lease was unambiguous with regards to the pylon. The only contingency contained in the lease dealt with the lessee obtaining approval for its signage per their specification from the lessor and the City of New Orleans. Under the terms of the lease, lessee only had the right to use the pylon. The trial court found, and the court of appeal also agreed, that, under La. Civ. Code art. 1848, parol evidence is allowed if it is alleged that a subsequent and valid oral agreement modified the written act. However, in the case at bar, the letter of intent which defendant sought to introduce was written months before the signing of the lease. Further, the lease also contained a provision that the lease agreement was the entire understanding between the parties, superseding and voiding any prior proposals, letter, and agreements. Therefore, it should not be allowed into evidence.

With regard to its second assignment of error, the defendant contested that the building was not constructed timely, and parol evidence should have been allowed to prove the true intent of the parties. The trial court found that the lease as written did not lead to absurd results. Further, the lease was drafted by the defendant, and under the rules of contract interpretation, any doubt is to be interpreted against the party who furnished the text. The court of appeal found no error in the trial courts denial of parol evidence.

The defendant also contended that the lease was not to commence until two weeks after the lessee's receipt of copies of the certificates of occupancy issued by the City and the keys to the premises. Thus, the lease had not commenced. However, under the terms of the lease, the court of appeal found that the lease was to become effective between the lessor and lessee upon full execution of the lease documents. Finally, defendant contended that the lease entitled "Building Occupancy" would lead to absurd results

While the court of appeal agreed that the clauses cited were fraught with indefinite

terms, the court once again noted that defendant had prepared the lease, and thus the lease must be interpreted in favor of plaintiff. The court also noted that defendant's argument that it had the right to terminate the lease because plaintiff had breached the occupancy clause was premature at best, as the building had not yet been completed when defendant sought to terminate the lease.

b. Wrongful (& rightful) eviction

Platinum City, L.L.C. v. Boudreaux, 11-559 (La. App. 3 Cir. 11/23/11); 81 So. 3d 780

Facts: Defendant leased a commercial building to plaintiff in Lake Charles for use as a night club. The term of the lease was from November 2, 2006 until December 31, 2007 at a monthly rate of \$4,000, with a 10% penalty for late payments. Plaintiff also had an option to renew the lease for an additional year on the condition that plaintiff was not in default of the terms of the lease. In January 2008, after expiration of the original lease, the parties entered into a new lease agreement for one year, on the same terms as the original lease, despite the fact that plaintiff had not made rental payment for December 2007. Plaintiff gave defendant a check for \$8,000, representing the December and January rental payments, but told defendant that he did not yet have the funds to honor the check though he soon would. Defendant went to deposit the check on January 20, 2008, but the bank returned it to him marked "nonsufficient funds." Thereafter, on January 29, defendant faxed plaintiff a letter containing a notice of termination of the lease for nonpayment of rent and a demand to surrender possession of the property. On January 30, defendant caused plaintiff to be cited with a Five Day Notice from the Lake Charles City Court, though plaintiff denied being served. Despite receiving the notice, plaintiff continued possession of the property and operated the nightclub until March 4, 2008, when defendant terminated plaintiff's access to the property by changing the locks. In response, plaintiff filed this suit alleging (i) breach of contract due to the property's failure to be in "good condition" as warranted in the lease agreement and (ii) wrongful eviction resulting in the loss of equipment and lost profits. Defendant reconvened with a demand for the payment of rent and late penalties. Defendant also raised an exception of no right of action against Platinum City, as the LLC was no longer an entity. The trial court granted the exception but allowed its sole shareholder, Jermaine Williams, to substitute himself as plaintiff.

The trial court entered judgment dismissing all claims against defendant, finding that defendant had not failed to deliver the premises in good condition and that defendant had not wrongfully evicted plaintiff. The judgment awarded defendant \$5,200 for late rental payments and fees, and \$12,725 in attorney's fees, plus all costs to be paid by plaintiff. Plaintiff appealed, asserting that the trial court had erred by not finding that defendant's actions constituted wrongful eviction.

Result: Reversed in Part, Amended in Part, Affirmed in Part, and Rendered

Rationale: First, the court of appeal found that the trial court had erred in determining that the plaintiff was not wrongfully evicted. Though the defendant did provide adequate notice to vacate to the plaintiff through his January 29 fax, when plaintiff failed to vacate defendant

was required to resort to judicial process and obtain a judgment of eviction before he could legally terminate plaintiff's possession under La. Code Civ. P. art. 4731. Because defendant terminated plaintiff's possession by changing the locks before he resorted to judicial process in order to obtain a judgment of eviction, the court of appeal found that defendant had wrongfully evicted plaintiff. However, the court of appeal also found that plaintiff had not proven any damages resulting from the wrongful eviction with any degree of specificity. As such, the court concluded that plaintiff was not entitled to any damages for wrongful eviction.

The court of appeal upheld the trial court's award of \$5,200 to defendant, finding that the amount represented rent for February and late fees for December, January, and February. However, the court of appeal amended the award to defendant of \$12,725 in attorney's fees, finding that he was only entitled to that portion of the attorney's fees which related to the recovery of rent, which the court found to be \$1,750. The court found that defendant was not entitled to recover that portion of the attorney's fees which related to the defense of plaintiff's wrongful eviction claim, as defendant had in fact wrongfully evicted plaintiff. Finally, the court of appeal found that plaintiff was not entitled to an award of attorney's fees for the wrongful eviction claim because plaintiff had represented himself as a pro se lawyer in the action and attorney's representing themselves are not entitled to attorney's fees under Louisiana law.

Poydras Center, LLC v. Intradel Corporation, 11-0978 (La. App. 4 Cir. 12/7/11); 81 So. 3d 80

Facts: By written contract of lease dated January 10, 2005, defendant leased a suite and four parking places from plaintiff. The initial term was from March 1, 2005 through December 31, 2010 for the suite and for two parking spaces, the other two parking spaces having a month-to-month term under the lease. Under the terms of the lease, the agreement could only be modified by a written agreement signed by both landlord and tenant. A written amendment to the lease, signed by both parties, was entered into on November 8, 2010, extending the lease until January 31, 2016. A formal written notice to vacate, dated February 24, 2011, was served allegedly by Lessor's counsel on Intradel, directing defendant to vacate two parking spaces, though no evidence was in the record that this notice was served on defendant. A subsequent letter, dated February 25, 2011, notified defendant that plaintiff was electing to terminate the two month-to-month parking permits effective March 31, 2011. A formal notice to vacate of February 25 was attached to this letter. Defendant protested the eviction letters. Despite the termination of the two spaces, plaintiff's parking garage operator billed defendant for four spaces, which defendant paid. However, by letter of March 31, 2011, plaintiff acknowledged this error and returned the overpayment of rent, also attaching a new formal notice to vacate.

Plaintiff filed a rule to show cause for eviction, attaching the original lease, the first amendment to the lease, and the February 24 notice to vacate. Defendant answered, attaching both the February 25 letter and notice to vacate and the March 31 letter and notice to vacate. No other evidence was received by the court at the hearing on the rule to show cause. The court denied the eviction of defendant from the two parking permits and

plaintiff appealed.

Result: Reversed and Rendered

Rationale: The court of appeal determined that the lease was clear and unambiguous, needing no further interpretation. The court of appeal also noted that any emails between the parties, which were not signed, did not constitute amendments to the lease, and further, that because the lease was clear and unambiguous regarding requirements for amendments to the lease, they could not be introduced as parol evidence that subsequent agreements had been entered into to modify the lease. The court of appeal found that the undisputed evidence (the attachments by each party) clearly demonstrated that the requirements of La. Code. Civ. P. art. 4701, et seq. had been complied with, and that the lease clearly described two of the parking permits as having a month-to-month term. Therefore, the court reversed the judgment of the trial court denying plaintiff possession of the two parking permits and failing to evict defendant from those two permits. The court of appeal rendered judgment in favor of plaintiff and against defendant, evicting defendant from the two month-to-month parking permits. Defendant also raised an argument regarding failure for cause and error as to the month-to-month term of the parking, however, the court of appeal noted that those issues could not be entertained on a rule to show cause, but rather should be addressed in an ordinary proceeding.

Interstate Realty Management Co. v. Price, 11-1131 (La. App. 4 Cir. 3/7/12); 86 So. 3d 798

Facts: Defendants leased an apartment from plaintiff (as the management company for the complex). The three defendants were listed as the only authorized tenants of the leased premises, and, under the lease, no one else was supposed to reside at the apartment. Also, under the terms of the lease, residents had an obligation (i) to assure that no person under the residents' control engaged in any criminal activity that threatened the health, safety or right to peaceful enjoyment of the residents; (ii) to refrain from, and to cause guests or members of the households to cooperate with and to refrain from acting or speaking in an abusive manner towards neighbors or the Site Manager's staff; and (iii) to ensure that guests of the members of the household refrained from any criminal activity (the lease stated that the guest, or "covered person," did not have to be arrested or convicted, and the standard of proof used for criminal conviction did not have to be satisfied). Defendants allowed Oneal and Leroy Price, two grandsons, to live at the leased premises, in contravention of the lease. Both were suspected of engaging in drug transactions and other criminal activity.

On December 5, 2010, both were at the leased premises when a drive-by shooting occurred, resulting in a gunshot wound to Leroy's leg and property damage to the complex. On December 7, a "Notice of Infraction" was issued to Ora Price regarding the shooting. The Notice cited lease provisions that had been violated and set a mandatory hearing with the site manager for December 10. At the meeting, plaintiff asserted that the defendants were combative with the office manager, and they were asked to leave the office. On January 4, the district manager issued a 30-day Notice of Termination of Lease/Notice to Vacate, notifying the defendants that the lease would terminate effective February 4. The lease also advised defendants that the Notice to Vacate could be discussed within seven

days, but plaintiffs claimed defendants did not request a meeting (while defendants maintain that they did make a request). Plaintiff did not file a Rule to Evict until May 20, which was granted on June 16.

The trial court noted the various obligations of defendant under the lease which were violated. The trial court also found that defendants had submitted no credible evidence to support their contention that they were not afforded a formal grievance hearing before the Notice to Vacate was issued. The trial court also found that both Leroy and Oneal actually lived at the residence - over defendant's contentions that they were not members of the "family composition" nor a guest - based on the evidence that Oneal had listed the residence as his address on his Louisiana Identification Card and Leroy had listed the residence as his address on both an NOPD police report and an incident report from the security company. With regard to the specific language of the contract regarding criminal activity, the trial court referenced the testimony of the president of the security company, a former NOPD officer, who testified that he regularly encountered Leroy and Oneal near the leased premises at all hours day and night; they regularly permitted a daily stream of vehicles and unknown persons onto the leased property at all hours; there were ongoing inquiries by the NOPD into suspected criminal activity regarding both; that on one occasion in particular Oneal had fled after being stopped by the NOPD at the leased premises, had backed his vehicle into a security vehicle, and was subsequently arrested and serving jail time as a result of the incident. Oneal also had a prior drug arrest. Based on this evidence, the trial court concluded that Oneal and Leroy's unauthorized occupancy and activities in the apartment complex threatened the health, safety and right to peaceful enjoyment of the premises by the residents in violation of the lease agreement, and granted the Rule to Evict. Defendants appealed.

Result: Affirmed

Rationale: With regard to defendants' contentions that the grievance procedures were not complied with and that no formal or informal hearing was held, despite a request, the court of appeal found that proper notice and opportunity to be heard prior to the initiation of the eviction proceedings were given based on the 30 day Notice of Termination/Notice to Vacate, the seven day window to discuss the notice, and the fact that eviction proceedings were not initiated until May 20, over five months after notice. This was well beyond the five day requirement of La. Code. C. Proc. art. 4702. The court of appeal also found sufficient evidence for the trial court to find that defendants violated numerous terms of the lease agreement. Thus, the court of appeal found that the trial court has not erred.

Defendants also asserted that they were entitled to a suspensive appeal. However, the court of appeal found that they did not answer the Rule for Possession under oath and sign it personally, as required by La. Code. C. Proc. 4735 to suspensively appeal a judgment of eviction. Therefore, the court of appeal found they were not entitled to a suspensive appeal.

Hart v. Masur Dean, 47,012 (La. App. 2 Cir. 3/7/12); 90 So. 3d 30

Facts: Plaintiff rented an apartment from defendant on a month-to-month basis beginning in October of 2009. On November 19, plaintiff received a letter from defendant notifying her

that complaints had been received about plaintiff's children playing on the stairs while waiting for the bus, which was prohibited in the lease. Complaints were also received that more children were living in the apartment than listed on the lease application (which listed 3), which was another violation of the lease. At a subsequent meeting, defendant told the plaintiff she had to vacate the apartment. On December 2, the Monroe City Marshall delivered an eviction notice to defendant, directing her and the other occupants to vacate the premises in five days, failure to vacate resulting in eviction proceedings. Amicable attempts were made by both parties to resolve the dispute, including a proposed settlement date January 6.

On January 11 a rule of eviction was filed, and the hearing on the matter occurred on January 19, at which plaintiff failed to appear, resulting in a judgment of eviction. Plaintiff vacated the property on January 19. Plaintiff did not appeal that judgment, but filed suit on February 25 against defendant's property manager, seeking damages resulting from a credit report of the eviction, \$2,000 in pain and suffering because plaintiff could allegedly not rent another apartment due to the credit report and because plaintiff was required to pay child support to her mother (who obtained custody over 6 of plaintiff's 8 children when she was not able to find housing). Additionally, plaintiff sought moving expenses and a return of her deposit. Defendant filed a reconventional demand, stating that plaintiff had failed to pay rent for December 2009 and January 2010, totaling \$1,170.00, and asking for \$125 for costs of the eviction suit and \$249.69 for attorney's fees. The trial court denied plaintiff's claims for damages, noting that a proper eviction was signed on January 19 and no proof was offered that any damages were sustained. The court also observed that, although unfortunate, it was within the rights of the lessor to make the negative report on plaintiff's credit. The trial court was silent on defendant's reconventional demand. Plaintiff appealed.

Result: Affirmed

Rationale: The court of appeal found that any complaints by plaintiff about alleged defects in the eviction proceedings were barred by the judgment of eviction, which plaintiff did not appeal. However, the court examined the merits and found that the eviction procedure was proper, as plaintiff violated the lease by having more children in the apartment than listed on the lease applications (plaintiff claimed defendants offered no proof of this, but admitted in her own testimony that she had four children living with her as opposed to the three listed), and by not paying rent for the month of January while continuing to occupy the premises. Proper notice was given by the Monroe City Marshall and adequate time passed before eviction proceedings took place.

In considering the deposit, the court found that, by the terms of the lease, plaintiff was not entitled to recover the deposit which was only refundable if tenant occupied the apartment for a full twelve months, which she did not. Plaintiff's complaint about the credit report stating that she owed rent money for the entire month of January was also addressed by the lease which stated that rent would not be prorated in the tenant vacated the apartment during the month. Finally, with regard to damages suffered from wrongful eviction or pain and suffering, the court found that plaintiff offered no evidence to support her assertions of moving expenses, and her pain and suffering seemed to consist primarily of anger at having to pay child support to her mother. Therefore, the court found the trial

court to be correct in its judgment rejecting plaintiff's claims for damages in toto.

Horacek v. Watson, 11-1345 (La. App. 3 Cir. 3/7/12); 86 So. 3d 766

Facts: Plaintiff entered into a six month lease with defendant for an apartment in October of 2001. In the spring of 2002 her apartment was burglarized. Thereafter plaintiff began to stay with her boyfriend. In May 2002, plaintiff claimed she informed defendant that she would be vacating the apartment in June of 2002. Plaintiff also claimed that they had agreed that her deposit would be credited towards prorated rent, though defendant claimed no such agreement was made. Plaintiff claimed that during the month of June she had regularly gone back to the apartment to pack boxes and to turn the lights on and off. On June 18, plaintiff claimed she returned to the apartment with her boyfriend and friends to move her belonging, but the locks had been changed and all of her belonging has been removed from the apartment with the exception of some small items in black plastic bags. Plaintiff called the police. According to the police report, defendant told the investigating officer that she had been unable to contact the plaintiff so she had the house cleared and locks changed. Defendant, however, claimed that she had only spoken to plaintiff about rent on one occasion, and was thereafter unable to reach her. On June 13, defendant posted a letter concerning non-payment of rent on the front door and delivered the letter to plaintiff's place of employment. The letter directed plaintiff to vacate the premises by June 15 and, if plaintiff did not do so, defendant would consider the apartment abandoned. Defendant claimed she had gone to the apartment on June 17 with two others. All three testified that the apartment was virtually empty of all furniture and was full of trash, namely dirty diapers and used condoms all over the floor. Defendant claimed they gathered up and threw out the trash, and placed any items that appeared to be personal items in black trash bags. Defendant also denied that she changed the locks until June 21.

Defendant filed an eviction suit on June 24 and a judgment of eviction was entered on July 9 when plaintiff failed to appear. Thereafter, plaintiff filed suit seeking damages for wrongful eviction, breach of contract, and wrongful seizure of property. Defendants filed a reconventional demand seeking damages for unpaid rent, late fees, damage to an air conditioning unit and refrigerator, and cleaning fees. The trial court found that defendant had wrongfully evicted plaintiff because the defendant did not give plaintiff the required proper notice, having failed to wait five days after notice was given before taking possession of the rental property. The trial court also found that plaintiff did not meet her burden of proof with regard to damages, and denied plaintiff's request. The trial court also denied defendant's reconventional demand. Plaintiff appealed asserting that the trial court erred in refusing to award damages for wrongful eviction. Defendant appealed asserting that the trial court erred in ruling that the landlord must wait five days after notice was given before taking possession of the property, alleging that the plaintiff had abandoned the property.

Result: Affirmed

Rationale: With regard to plaintiff's appeal, the court of appeal reviewed the record and found that the only evidence plaintiff presented were plaintiff's testimony, a list of the alleged missing items, and a video of her apartment as it existed before the robbery. The trial court

found this insufficient to meet her burden of proof with regard to the items that had allegedly been wrongfully seized and the court of appeals found this to not be manifestly erroneous in light of the fact that plaintiff's testimony was contradicted by the testimony offered by defendant and two of defendant's witnesses. The court also found that it was not legal error for the trial court to reference the "uncalled witness" rule in her reasons for judgment, as the uncalled witness rule did not form a part of the trial court's judgment. The judgment simply stated that plaintiff had failed to prove damages and therefore plaintiff's claim for damages was denied.

With regard to the defendant's appeal, the court of appeal found no error in the trial court's finding that the abandonment provision for notice under La. Code Civ. P. art. 4731(B) because, though the defendant claimed she thought the apartment was abandoned, at the time she began the eviction process and sent plaintiff the notice, she assumed that plaintiff's belongings were still in the apartment. The court noted that, though defendant might have correctly concluded that the property had been abandoned, she did not have a "reasonable belief" that the premises had been abandoned as required by C.C.P. art. 4731(B). Therefore, the abandonment rule for notice did not apply, and defendant was required to allow plaintiff not less than five days from the date of delivery of the written notice to vacate before taking possession of the leased premises, which defendant did not (notice was provide June 13, demanding plaintiff to vacate by June 15, the apartment was cleaned out June 17, and the locks were changed on or before June 18).

2012
RECENT DEVELOPMENTS IN
SECURITY DEVICES

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SELECTED HIGHLIGHTS OF THE 2012 LEGISLATIVE SESSION

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**By Michael H. Rubin
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(A highly selective and non-comprehensive overview of the more than 870 Acts of the 2012 Louisiana Legislature)

A DEBIT CAN'T GET YOU CREDIT

Act 175 amends provisions of R.S. 27:65 to prohibit the use of debit cards when you engage in gaming.

ABANDONED PROPERTIES

Act 692 adds R.S. 9:5396 *et seq.*, a series of comprehensive statutes about who has the responsibility for maintaining, entering into, and dealing with abandoned property.

- It covers lenders and loan servicers.
- It allows maintenance costs to be added to the secured amount (apparently even in the absence of a contractual provision to that effect).
- There are special rules on abandoned residential property.
- Prior notice must be given to the owner.
- If a public entity does the work, it can record an affidavit that operates as a lien. It has first rank (equal to a laborer's lien under the Private Works Act).

ACTING WITHIN 21 YEARS IS NOT REALLY SLOW

Act 125 repeals R.S. 9:2448, which had allowed a testator to name an attorney for the succession who could not be discharged except for certain reasons.

The statute had been declared unconstitutional by *Succession of Wallace*, 574 So.2d 348 (La.1991).

ALIENS ON THE LOOSE

Act 142 amends R.S. 38:22.10 (which had been adopted in 2011) concerning E*Verifying employment. Previously, the act required E*Verification of every employee on any "public contract work." The amendment limits the application of this to contracts for the "erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity."

- *NOTE:* the act applies to property "used" by a public entity even if there is no ownership or lease.

ANNUITIES

Act 258 (a Law Institute bill) completely reworks the “rents and annuities” articles of the Civil Code (C.C. art. 2778 *et seq.*). Those articles had been unchanged since 1870. Major changes include:

- The “rent” articles (C.C. 2778-2791) have been completely repealed. These were articles defining the rent of land and distinguishing it from the rent of money. This should not be a problem, because the entire “rent and lease” provisions of the Civil Code (C.C. arts. 2675 *et seq.*) had been completely reworked in 2004 via another Law Institute bill.
- Under the Act, the revised articles now focus solely on annuities (which had been the focus of old articles 2793-2800).
- Annuities may exist for an uncertain amount of time (C.C. art. 2778); however, if the annuitant is a juridical person, the annuity must be for a fixed period of time - - otherwise, it is invalid (C.C. art. 2782).
- Rights under annuities are heritable and assignable (C.C. art. 2783).
- There cannot be “class annuities” (such as “all my children born or to be born”) – annuitants must be a natural person or “in utero at the time of the formation of the annuity contract” (C.C. art. 2786). However, you can always create a juridical person as the annuitant as long as the annuity is for a fixed period of time (C.C. art. 2782).
- The annuity and its income stream are incorporeals; arrearage actions are subject to a three-year prescriptive period (*see* Comments to C.C. art. 2778).
- On the other hand, an annuity contract for transferring an immovable is a real right and the annuity payments are a real right (C.C. art. 2787). This can serve as an alternative to a reverse mortgage. This type of contract cannot exceed 30 years (C.C. art. 2790).
- Annuities involving immovables must be “recorded” in the conveyance (not mortgage) records (C.C. art. 2788).

APPEALS AND JUDGMENTS – ELECTRONIC NOTICE

Act 290 amends provisions of the C.C.P. and Children’s Code to allow electronic notices of judgment to start the appellate period running. It also applies to notices from appellate courts to start the time for filing rehearings and writs.

- *Moral:* Read your emails, or your appeal, rehearing, or writ period may run.

APPRAISALS

Act 429 makes a number of amendments to R.S. 37 concerning real estate appraisals. Among the new provisions:

- The appraisal must include the “amount of the appraiser’s fee.”
- Appraisers must have a minimum \$20,000 bond.
- A floor on minimum payments to appraisers; appraisal management companies must pay appraisers “at a rate that is customary and reasonable for appraisals being performed in the market area.”

BANKING: I'M EXPOSED - - CLOSE THE DOOR

- EXPOSURE: LOANS TO ONE BORROWER

Act 30 amends R.S. 6:415 in a number of respects.

- Caps amount of an unsecured loan that can be made to any one borrower.
- Defines a loan which is “fully secured” by a deposit account.
- Expands the definition of items subject to this act from drafts and letters of credit to “credit exposure arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction” between the lending bank and the borrower.

- EXPOSURE – THIRD PARTY SERVICE PROVIDERS DOING EVALUATION AND ASSESSMENTS

Act 35 amends R.S. 9:284.1 to expand shields to evidence admissibility from banking self-assessments, self correction, *etc.* The Act adds “third party service providers” to the protection previously given only to work done by internal personnel, outside attorneys, and accountants.

BANKING: POWERS OF ATTORNEY

Act 323 amends R.S. 6:356 to permit federally insured financial institutions to accept powers of attorney for deposit accounts, C.D.s, all other funds on deposit, and safety deposit boxes.

BARGAIN HUNTING

Act 168 creates R.S. 44:67.1 *et seq.* requiring 5 business days internet notice before any public entity can enter into any “collective bargaining agreement.”

BELIEF NOT NEEDED: ONLY SUSPICION

Act 201 amends R.S. 22:1926 concerning insurance fraud to expand the situations when reporting must occur. Now the reporter does not need a “belief” that a fraudulent “claim” has been made. Under the amendment, reporting is required if one “suspects that a fraudulent insurance act will be, is being or has been committed.”

NOTE:

- This reporting requirement applies “to any person or entity”; the reporting requirements are not limited to those in the insurance business.
- Not amended was R.S. 22:1928, which grants civil immunity to anyone doing the reporting.

BIFOCALS MAY BE REQUIRED FOR READING THE TRANSCRIPT

Act 171 amends C.C.P. art. 2128 and adds C.C.P. art. 2128.1 to permit deposition testimony in a trial transcript to be done by attaching the deposition transcript with no more than 4 reduced deposition pages on each physical page.

BUS DRIVERS AND TRUCK DRIVERS SHOULDN'T TEXT

Act 203 adds to the list of “serious traffic violations” that impact commercial drivers’ licenses “texting while driving.”

CEASE AND DESIST

Act 319 amends R.S. 22:18 to permit the Commissioner of Insurance to issue cease and desist orders.

CERTIFIED DISTINCTION? I GUARANTEE IT.

Act 178 amends R.S. 9:2743 on mortgage certificates and whether the certificate must list those whose identities have been distinguished. Previously, all the Clerk had to do was to be satisfied that the “instruments are in fact not those of the person in whose name the certificate was sought.”

- Now, however, the Clerk cannot eliminate names from the mortgage certificate unless an attorney *personally guarantees* that the two people are different.
- The change defines the kind of “satisfactory evidence” upon which the Clerk may rely as an attorney’s affidavit listing specific information (defined in the statute), a warranty that the title has been searched, and that the “affiant agrees to be personally liable to and indemnify the recorder and any person relying upon the affidavit for any damages they may suffer if the affidavit contains materially false or incorrect information”
- *Query*: Do you really want to give that affidavit?

CHILDREN’S CODE, CHILD SUPPORT, AND RELATED MATTERS

- Act 64 (Child Support)
- Act 66 (Child Support)

CLASS ACTIONS

- EXPERTS
 - Act 115 amends C.C.P. art. 592 to expressly provide that (a) expert testimony may be introduced at class action certification hearings, and that (b) the rules of expert discovery under C.C.P. art. 1425(F) apply to this.
 - NOTE: This means that the *Daubert/Foret* challenge must be filed at least 60 days before the class cert. hearing.
- VENUE AND FORUM NON CONVENIENS FOR CLASS ACTIONS (see the discussion on Venue, below)

CONSOLIDATED ACTIONS FOR TRIAL

Act 194 amends C.C.P. art. 1561 on consolidating two or more matters for trial. Previously, consolidation required the consent of all parties if a trial date had been set. Now, consolidation can occur “upon a finding that consolidation is in the interest of justice” even if there is not consent by all parties.

CONSOLIDATED? I THINK NOT

Act 474 unwinds the previously-passed rules consolidating the New Orleans judiciary into the 41st Judicial District.²

CORPORATIONS ARE PEOPLE TOO, AREN'T THEY?

- JUDICIAL REVIEW OF REMOVAL. Act 791 amends R.S. 12:1701 to permit a person to get judicial review if he believes his name was improperly removed from any document filed with the Secretary of State
- SERVICE OF PROCESS. Act 521 allows appointment of a “juridical person” to make service of process through their agents and employees.
 - *Query*: Is this the start of a new business model?
 - *Answer*: Perhaps; see Act 741 (discussed below, under “Service”), amending C.C.P. art. 1313, which allows (essentially) service of any matter by “commercial courier.” Apparently you can now serve anything that has to be mailed through Federal Express, UPS, or any commercial carrier.

COSTS, INDIGENTS, AND JUDGMENTS

Act 741 amends C.C.P. art. 5188 to allow a party to obtain a final entry of judgment even if the party condemned to pay costs is an “indigent” who has failed to pay the costs.

COUNTERLETTERS

Act 277, a Law Institute bill, amends C.C. art. 1848 *et seq.* concerning counterletters, clarifying the rule in the text (and the Comments) that unrecorded counterletters regarding immovable property have no effect on third parties, whether or not they are in good faith. The Act also contains other clarifications.

NOTE: The Act does not alter R.S. 14:133,³ which essentially makes it a crime to record a counterletter.

² The preamble to the Act states, in part:

“(B) Subsequent Acts of the legislature extended the effective date of certain aspects of the consolidation to December 31, 2014. Despite the efforts made to accomplish the consolidation and reorganization, the complexity of the issues involved prevented such a reorganization. Therefore, it is the intent of this legislature that the Forty-First Judicial District Court shall not come into existence and existing structures of the Orleans Parish judiciary system relative to the Civil District Court, Criminal District Court, and Juvenile Court prior to Act 621 of the 2006 Regular Session of the Legislature and subsequent Acts of the legislature should remain in effect.”

³ R.S. 14:133: Filing or maintaining false public records (emphasis supplied):

A. Filing false public records is the filing or depositing for record in any public office or with any public official, or the maintaining as required by law, regulation, or rule, with knowledge of its falsity, of any of the following:

- (1) Any forged document.
- (2) Any wrongfully altered document.
- (3) Any document containing a false statement or false representation of a material fact.

* * *

CRIME DOESN'T PAY IN RETIREMENT

Act 479 creates provisions in R.S. 11 barring retirement benefits (and allowing recoupment of some benefits) from those public servants who have been convicted of a "public corruption crime."

DISCOVERY:

- LIMITATIONS INVOLVING THE LEGISLATURE

Act 519 amends provisions of R.S. 13 which protect members of the legislature from compelled discovery.

- The new Act also protects any "former member" of the legislature.
- "Strict compliance" with these statutes is required under the new Act.

- STAYING DISCOVERY AT THE REQUEST OF THE D.A.

Act 664 adds C.C.P. art. 1426.1 to permit the D.A. to get a stay of discovery in civil cases if there is a related criminal case. A contradictory hearing must be held before the stay is put into effect.

DOCUMENT DESTRUCTION BY CLERKS OF COURT

Act 101 amends R.S. 13:917 and other provisions in Title 13 and 44 (which permits Clerks of Court to destroy documents after 10 years, including "tort suits," "suits on promissory notes," and "suits on unsecured notes") to require permission of the State Archivist before doing the destruction.

- *QUERY:*

- What are creditors to do when they reinscribe a judicial mortgage but the underlying suit record has been destroyed?
- What are debtors to do when they claim that they are not the same person listed in the reinscribed judicial mortgage but the suit record has been destroyed?
- As a public policy matter, should any public suit record be destroyed without requiring some kind of backup, electronic or otherwise?
 - Should the State Archivist now refuse to allow destruction without backup? Does the statute give the State Archivist that authority?

DON'T PRETEND YOU'RE THE STATE OR A STATE AGENCY

Act 272 adds R.S. 51:391 to prohibit non-governmental organization from sending out deceptive solicitations that look like they came from the State or a state agency. In addition, there's a mandatory disclosure warning that must be included.

- *Query:* The statute talks about the "identity of the mailer." Does it apply to electronic communications?

C.(1) Whoever commits the crime of filing false public records shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars, or both. * * *

ENVIRONMENTAL MANAGEMENT ORDERS

Act 754 adds C.C.P. art. 1552 and 1563 concerning “environmental management orders” and for a limited admission of liability in environmental damage suits. There are also rules on access to the property and testing.

EVICTION: CAP ON DAMAGES

Act 19 amends C.C.P. art. 2379 on evictions of buyers of property under a writ of fieri facias. It continues the claim that the buyer has against the seller for eviction, but it caps the buyer’s claim against the seizing creditor to “the value received by the seizing creditor from the sheriff’s sale . . .”

- *Query:*
 - Does this apply only to purchasers of record?
 - What if the creditor credit-bid the property and received nothing?
 - Does this apply only if a third-party buys the property and the creditor gets cash? If so, does the third-party purchaser escape liability and the seizing creditor gets the blame, subject to the damage cap?

EVIDENCE: EXCLUSIONS FROM ADMISSIBILITY EXPANDED

Act 158 amends C.E. art. 803 to add to evidence that is inadmissible criminal parole violation information consisting of “the notification of administrative sanctions form which records the administrative sanctions proceedings conducted pursuant to Code of Criminal Procedure Art. 899.1 or R.S. 15:584.7.”

EXECUTORY PROCESS, TRANSFEREES, AND NON-NEGOTIABLE INSTRUMENTS

Act 400 amends R.S. 9:4422 to permit transferees, assignees, and pledgees to conduct executory process on mortgages secured by a promissory note, “whether negotiable or not.” No authentic evidence of the transfer is needed.

EXPROPRIATION

Act 702 amends many provisions of R.S. 19:2 concerning expropriation by government bodies. The changes include:

- Specific rules on the amount of the offer that must be made prior to beginning proceedings.
- Beefed-up rules on the requirement of good faith negotiations.
- Specific prior-notice requirements, including the legal basis for the expropriation and “a statement by the entity of considerations for the proposed route or area to be acquired.”

FAX FILINGS

Act 826 amends R.S. 13:850 to increase from 5 to 7 days the time you have to file original documents with the clerk if you have fax-filed.

FIERI FACIAS

Act 127 amends C.C.P. 2724 to provide that notice rules that apply to writs of fieri facias also apply to sales of property under the writ of seizure and sale.

FRACKING

Act 812 amends R.S. 30:4 to allow the Commissioner of Conservation to create rules about fracking and disclosures relating to fracking.

GETTING A STAY FROM THE U.S. SUPREME COURT

Act 741, amending C.C.P. art. 2166, cures a gap in the law by giving a party 5 days to seek writs from the U.S. Supreme Court if the Louisiana Supreme Court has denied writs and a stay. The way this works is that a judgment of an intermediate Louisiana appellate court does not become final until five days after the La. Supreme Court denies writs.

GRADE THAT BEAUTIFIED ARBORIST

Act 163 makes licensed arborists exempt from getting separate licenses for grading, landscaping, and “beautification.”

INDEMNITIES IN CONSTRUCTION CONTRACTS

Act 684 amends R.S. 9:2780 concerning when indemnities are and are not permitted in construction contracts.

INFLATION IS HERE!

BANKING: Act 29 amends provisions of R.S. 6:243 to require appraisals (when a healthy bank takes over a failed bank) of property worth more than \$250,000 (the old limit was \$100,000).

COURT COSTS. Act 337, amending provisions of R.S. 13, raises from \$15 to \$30 court costs in New Orleans Municipal Court imposed on “every defendant who is convicted after trial or pleads guilty or forfeits his bond”

HOME IMPROVEMENT FRAUD: Act 219 increases the minimum repair cost that it takes to trigger “home improvement fraud.” One trigger of the minimum repair cost used to be \$300; now it is \$500.

PRESTIGE LICENSE PLATES. Act 18 increases the maximum gross vehicle weight of a truck eligible for prestige license plates from 10 tons to 16 tons.

SCRAP VEHICLES: Act 250 amends R.S. 32:717 to increase from 10 to 15 years the age of vehicles that can be dismantled without a certificate of title (upon a Commissioner’s permit)

INJUNCTIONS AGAINST FINANCIAL INSTITUTIONS IN DIVORCE CASES

Act 582 amends R.S. 9:371 to limit the effectiveness of injunctions against financial institutions. The Act limits the accounts to which the injunction may apply: accounts essentially have to be in both spouses’ names (although there are other detailed rules).

INSURANCE AND LIENHOLDERS

Act 198 amends R.S. 22:887 to require that an insurer give notice to a “lienholder” if any kind of insurance is reinstated.

Query:

- The statute used to refer only to automobile insurance reinstatement; the amendment now includes all kinds of “homeowners” policies.
- Does “lienholder” include the holder of a mortgage on the property?
- What about the holders of legal and judicial mortgages?
- Does “lienholder” include only those with a security interest in the insurance policy? Anyone with a mortgage?
- Does the insurer now have to run a title check?

INTERNET

- INTERNET PROMULGATION OF AGENCY RULES
 - Act 549 amends R.S. 49:968 of the Administrative Procedures Act to permit electronic notice of proposed agency rules changes
 - Act 725 also amends the same provision, and it allows for publication in the state register only if the agency does not maintain a website.
- INTERNET FRAUD
 - Act 540 adds F.R. 14:70.18 to create the crime of “illegal transmission of monetary funds.”
 - It includes transmitting (and attempting to transmit) illegal funds.
 - It also includes soliciting or receiving fraudulently obtained funds.
 - It specifically includes internet transmission on wired and wireless devices.

IT’S ELEMENTARY

Act 378 amends R.S. 17:236 to define “elementary school,” “middle school,” and “high school.”

IT’S NOT UNFAIR IF IT’S REPEALED

Act 78 repeals R.S. 22:1965 and 1966, which had made it an unfair trade practice for certain third-party arrangements with auto insurers involving auto repairs and glass replacement.

IT’S NOT UNFAIR TO CHARGE MORE TO OUT-OF-STATERS

Act 10 creates a two-tiered registration for fireworks’ retailers; residents pay \$100/year; non-residents pay \$800/year.

JERRY SANDUSKY

Act 380 amends Children’s Code Article 603(15) to require school coaches to report child abuse.

JUDGMENTS: WHO IS THAT JUDICIAL MORTGAGE REALLY AGAINST?

Act 20 amends C.C.P. art. 1922 to affect both creditors who file money judgments as well as those who file affidavits of distinction.

- For creditors, if the judgment does not include the date of birth and social security number, the recorder must record the judgment but can charge up to \$25 extra per debtor named in the judgment.
- For affidavits of distinction, the recorder may not charge a fee.

LEAD CHILDREN BE CHILDREN

Act 733 amends R.S. 30:2351.28 and R.S. 30:2351.1 concerning inspection of child care facilities for lead dangers.

LEGACY LAWSUITS/OILFIELD SITES

Act 779 makes comprehensive changes to R.S. 30:29 concerning legacy lawsuits and oilfield remediation. Included in the changes are:

- Any party may subpoena any “employee, contractor or representative” of the Department of Natural Resources concerning the plan for the site.
- Any defendant, within 60 days of being served in a suit, may ask for a “preliminary hearing” to see if there is “good cause for maintaining the defendant as a party . . .”
 - *Query:*
 - Is this an exception of no right of action or a motion?
 - The Act allows evidence to be introduced at the hearing and has detailed rules concerning the hearing.
 - Dismissal is without prejudice.
- Prescription on claims is “suspended” for one year “upon the mailing or physical delivery” to the DNR “of a notice of intent to investigate. There are detailed rules on what the notice must state and how it is to be given.
- There are detailed rules on plans for remediation, time limits for submitting plans, and notices.
- There are special rules on indemnification as it relates to punitive damages.⁴

LET’S GET MARRIED AND MAKE A FEDERAL CASE OUT OF IT

Act 184 amends R.S. 9:203 to permit any Louisiana federal judge to perform a marriage anywhere in the state, but the local court must adopt the appropriate rule (specified by the statute).

⁴ R.S. 30:29(L), as added by the Act, states:

If pursuant to the terms of a contract the responsible party is entitled to indemnification against punitive damages arising out of the environmental damage that is subject to the provisions of this Section, the responsible party shall waive the right to enforce the contractual right to indemnification against such punitive damages caused by the responsible party's acts or omissions if the responsible party admits responsibility for the remediation of the environmental damage under applicable regulatory standards pursuant to the provisions of the Code of Civil Procedure Article 1563. Such waiver of the right to indemnification against punitive damages shall not apply to any other claims or damages.

LLC CONVERSIONS

Act 476 creates R.S. 12:1308.3 to allow in-state LLCs to convert to out-of-state LLCs, and vice-versa.

MAY I SERVE YOU?

Act 242 amends C.C.P. art. 1314 to permit service not only on an attorney but also on his or her “secretary, receptionist, legal staff, administrative staff, or paralegal”

MOBILE HOMES/MANUFACTURED HOUSING

Act 112 is a comprehensive revision of R.S. 51:911.23 *et seq.*, the “New Manufactured and Modular Home Warranty Act.” Included in the act are:

- Minimum warranties that cannot be excluded by contract and that transfer to purchasers;
- Things outside of the implied warranties (such as fencing);
- Prescriptive and preemptive periods for claims;
- Notice by homeowners to the Commission *before suing or even before making repairs*; and
- Permission for contracts to have arbitration clauses.

MORE TRANSIT: LESS COMMERCE

Act 45 amends R.S. 51:1783’s definition of a “transit-oriented development” from one with 30% commercial development to one with only 15% commercial development.

MORTGAGE CANCELLATION

- BANKRUPTCY
 - Act 179 amends R.S. 9:5175 concerning bankruptcy sales free and clear of encumbrances. If the judgment does not expressly require cancellation of a particular lien, mortgage, or encumbrance, the act permits the bankruptcy trustee (or his attorney of record) to give an affidavit about the particular item, and then the Clerk can cancel that inscription.
 - *Query*:
 - What if the sale is out of a Chapter 11 proceeding where there is no Trustee?
 - Who pays for recording the affidavit authorizing the cancellation?
- MORTGAGE INSCRIPTION CANCELLATION: MORTGAGE CERTIFICATE
 - Act 712 (amending R.S. 13:4344.1) makes some “clean-up” changes and one substantive change in the rules regulating what to do about certain mortgages that appear on a Clerk’s mortgage certificate and whether they need to be cancelled for a sheriff’s sale to move forward (or be sold subject to them), including:
 - Clarifies a prior inconsistency; the cancellation rules apply to all mortgages, not just legal and judicial mortgages.

- Makes it clear that cancellation is not needed if a judicial mortgage shows up on a mortgage certificate but has prescribed, or if an assignment or modification of a cancelled mortgage is of record.⁵

MORTGAGE LOAN BROKERS, ORIGINATORS AND LENDERS: LICENSE

Act 199 amends R.S. 6:1083 to define when someone is “regularly engaged” as a mortgage loan originator, broker, or lender.

NOTICE OF SEIZURE:

- ON AN APPOINTED ATTORNEY:
 - Act 395 amends C.C.P. art. 2293 to require that the notice of seizure on an appointed attorney for a judgment debtor “shall be substantially similar to the form provided in R.S. 13:3852.”
- Three Notices Is All You Get.
 - Act 504 amends R.S. 13:3852 concerning how many notices of seizure a sheriff must serve. A new sentence is added to make it clear that once the sheriff has complied with the provisions, “no other notice of seizure shall be required.”
 - This Act also states that the sheriff shall not be required to give notice of “rescheduled sales dates provided he has not returned the writ to the clerk of court.”
 - *Query:* Does this last provision comply with the constitutional *Mennonite* notice requirements?⁶

OFFERS OF JUDGMENT

Act 557 amends C.C.P. art. 970 to reduce from 30 to 20 days the time before trial to serve an offer of judgment.

OH, DEER. HOW PRIMITIVE.

Act 68 creates special rules for “breech loading rifles with a caliber of .35 or larger” for deer hunting with “primitive weapons.”

ONE BIG FAMILY GETS BIGGER

Act 45 amends R.S. 51:1783 to expand the definition of “multi-family residential housing.”

- The definition used to be units from 90-175 attached dwelling units.
- The new definition expands the upper limit from 175 to 200 units.

⁵ The text of new R.S. 13:4344.1(G), added by this Act, reads:

- (1) It shall not be necessary to delete, cancel, or partially release inscriptions that may appear on a mortgage certificate ordered in connection with a judicial sale for the following:
 - (a) Any assignment, assumption, or modification of a canceled mortgage.
 - (b) Prescribed judicial mortgages which have not been reinscribed or for which no notice of pendency of action of a revival action is shown on the mortgage certificate.
- (2) The sheriff shall proceed with the judicial sale without regard to the inscriptions designated in this Subsection.

⁶ *Mennonite Board of Missions v. Richard C. Adams*, 103 S.Ct. 2706, 462 U.S. 791, 77 L.Ed.2d 180 (1983).

ORLEANS PARISH – ADJUDICATED PROPERTIES

Act 196 creates R.S.33:4720.58.1, a comprehensive statute allowing the Orleans Redevelopment Authority to purchase adjudicated properties from state entities and obtain the status of a “tax sale purchaser,” subject only to statutory and constitutional redemption rights of the prior owner.

OUTLAW QUADRAPEDS. OINK OINK.

Act 90 amends R.S. 56:116.1 to eliminate the term “feral hogs” and substitute “outlaw quadrupeds.”

PEREMPTIVE PERIODS

Act 762 makes a number of changes to the preemptive period rules of R.S. 9:2772 involving construction defect claims.

PERISH THE THOUGHT (OR THE FOOD FOR THOUGHT)

Act 423 amends R.S. 9:2799, to expand those who are not liable for problems caused by donated food. The expansion of non-liability now includes schools, churches, and civic organizations.

PAYROLL PENALTIES REDUCED

Act 151 reduces the penalties for failing to file unemployment comp. fund payroll reports. The penalty is reduced from the greater of 5% or \$25 to only \$25; and total liability is capped at \$125 rather than the greater of \$125 or 25% of the amount due in that quarter.

PLANNING AND ZONING: SHORTER INFO IN LESS TIME

Act 49 amends R.S. 33:108 and 4724 to allow:

- a summary of a plan to be submitted rather than the entire plan; and
- reduce advertisements of public hearings from 3 weeks to 10 days.

PRIVATE WORKS ACT

Acts 394 and 425 make a number of technical, clarifying, and sometimes substantive revisions to the PWA (R.S. 9:4801 *et seq.*), including:

- The time to file suit to enforce a lien now runs one year from the date *your* lien is filed (not one year from the date for filing all liens) (Act 394).
- You no longer file a notice of *lis pendens* about PWA liens; you file a notice of “pendency of action” (Act 394).
- The “no work” affidavit protects the lender even from materials delivered to the site after the date of the affidavit if the mortgage “was filed before or within four business days of filing the affidavit (Act 425, amending R.S. 4280(D) and R.S. 9:4821)).
 - NOTE: The no work affidavit still must be filed within four days after its execution - - no change in that provision (R.S. 9:4808(C)).

PROTECT THAT VET AND INCIPIENT VET!

- ASSAULT ON A SERVICE MAN OR WOMAN: Act 40 (amending R.S. 14:34 *et seq.*) makes it a crime punishable by a one year sentence without benefit of parole if there is aggravated battery on a service member and the “offender knew or should have known” that the victim was in the service.
- DRIVER’S LICENSE: Act 356 amends R.S. 32:412 to allow veterans to have the word “Veteran” imprinted on their license at no extra charge.
- SPECIAL ID CARD: Act 95 exempts vets from paying for special ID cards.

PUBLIC RECORDS:

- MORE DISCLOSURE
 - [None]
- LESS DISCLOSURE
 - Alligators. Act 267 amends R.S. 56:45 to exempt from the Public Records Law detailed information about alligator shipments
 - Court Reporters. Act 593 creates a Public Records Act exemption for certain materials of court reporters
 - Dept of Economic Development.
 - Act 57 amends R.S. 44:3.2 to protect from disclosure “proprietary or trade secret information which has been submitted to the Department . . . for economic development purposes.”
 - Act 180 repeals the “sunset provision” that would have otherwise abolished (in 2012) the confidentiality of Economic Development negotiations; now the confidentiality continues forever.
 - Email Addresses/Secretary of State. Act 835 adds R.S. 12:2.1 to require that the Secretary of State keep “confidential” the email addresses of those who have requested notice from the Secretary of certain matters – although Title 44 (the Public Records Act) was not amended in this Act.
 - Institutions of Higher Learning. Act 801 amends R.S. 44:4 to exempt from the Public Records Act certain additional records of institutes of higher learning, including “test questions, scoring keys, and other examination data.”
 - Professional Counselors. Act 460 amends R.S. 44:9 to exempt certain records of the Louisiana Licensed Professional Counselor’s Board from the Public Records Law.

RETURN RECEIPT

- NEEDED

Act 666 amends C.C.P. art. 4919 to permit service of process by certified mail, return receipt requested. This applies in Justice of the Peace Courts and in District Courts with concurrent jurisdiction.
- NOT NEEDED

Act 544 amends R.S. 9:3424 to eliminate the need to send service to the Secretary of State by certified mail “return receipt requested.” Just sending it certified now will suffice.

ROW FASTER!

Act 134 adds R.S. 49:170.17 to make the pirogue the official state boat.

SLAPP

Act 449 amends C.C.P. art. 971, the SLAPP statute.

- SLAPP is an acronym for strategic lawsuit against public participation, a suit designed to intimidate and censor critics with the threat of litigation for protected speech.
- The Act expands the time in which a special motion to strike the claim can be brought — the time is now 90 (rather than 60) days from the service of the petition.
- Even if the plaintiff files a voluntary dismissal, the Act allows the defendant to proceed with the motion to strike (which, if successful, gives the defendant the right to reasonable attorneys' fees and costs).

SERVICE OF PROCESS

- MAIL SERVICE
 - The U.S. Postal Service now has competition. Act 741 amends C.C.P. art. 1313, to allow (essentially) service of any matter by “commercial courier.” Apparently you can now serve anything that has to be mailed through Federal Express, UPS, or any commercial carrier.
- SERVICE ON THE A.G.
 - Act 770 amends R.S. 13:5107 concerning suits against the state and state agencies. Under the new provisions, service must also be made on the Attorney General within 90 days of filing suit, and the state defendant need not answer until service is also made on any defendant who is a department, board, commission, or agency head.

SERVITUDES

Act 739 amends a number of Civil Code provisions on servitudes to make the “lack of access” rules now apply to lack of access to utilities as well as lack of access to roads. There are special rules on what a dominant estate may do in such instances.

SMALL SUCCESSIONS

Act 618 amends a number of provisions of the C.C.P. concerning small successions.

SUMMARY JUDGMENTS

Acts 257 and 741 amend C.C.P. art. 966 concerning summary judgment in several ways:

- The Court can't look at the entire record on its own: “only evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion” (Act 257).

- *Moral #1*: If you're moving for summary judgment, make an express motion on the record about the evidence you're submitting.
 - *Moral #2*: If you're opposing summary judgment, make specific objections to any evidence submitted.
- If the Court grants the summary judgment motion, the Act adds to the rule that the issue that allocation of fault on that dismissed party can't be on the jury verdict form (as well as the previous rule that evidence can't be "considered in any subsequent allocation of fault," but the Court must specifically state, in the summary judgment ruling, that this provision applies (Act 257).
 - *Moral #3*: If you're the dismissed party, do you care what the judgment says about allocation after you're out of the suit?
 - *Moral #4*: If you're still in the suit as a defendant, you certainly may care. Therefore, co-defendants may want to be involved in looking at and commenting on the form of the judgment that is submitted.
- A party may request that a court supply oral or written reasons for denial of a motion for summary judgment (Act 741).

THEY CAN LEGALLY DISTURB YOUR DINNER

Act 82 adds to the list of those exempted from the telephone-solicitation prohibition non-profits "composed entirely of public safety personnel the majority of whom are state residents calling from a location within the state."

UCC 9 SECURITY INTERESTS

Act 450 (a Law Institute bill), makes a number of important, substantive changes in Louisiana's version of UCC 9 (R.S. 10:9-101 *et seq.*) to accord with the new, national changes while preserving special rules compatible with Civil Code principles. Among the changes are:

- Rules designed to allow for electronic documents and security interests in these.
- What happens (and how do you perfect) when a debtor moves to a new state and conflicts of law pertaining to which state's rules control.
- What is the proper way to have an effective security interest against a juridical person, with special rules pertaining to the "organic record" (which are essentially the documents creating and giving effect to that juridical entity against third parties in the state of its formation).
- Which secured creditor wins if the debtor has multiple drivers licenses (it's the creditor who uses the most recent license who wins).
- How to properly describe the debtor in a financing statement.
- Continuation statements.
- Special rules on how the changes created by this Act impact previously existing security interests.

VENUE

- CLASS ACTIONS
 - Act 713 adds C.C.P. art. 593.1 and .2 concerning venue for class action in a *lis pendens* situation.
 - If there are two identical classes in two Louisiana courts, the court from which a transfer is being requested (upon the defendant filing an exception of *lis pendens*) can have the matters transferred to “the district court where the transaction or occurrence occurred.”
 - If there are overlapping classes or multiple defendants or multiple transactions, the transfer is to “the district court where the first suit was brought.”
 - If there are two class action suits in different courts, and one class has been certified and other has not, the putative class action may be transferred to the district court which certified the class. This requires a contradictory motion.
 - *Note*, that in this instance, a plaintiff may move for the transfer. The test is “in the interests of justice and for good cause shown.”
 - *Query*: What is a defendant to do who is not a party in suit #1, which has been certified, but who is a party in suit #2, which is still a putative class, when this defendant wants to claim that certification is improper in suit #2 (even though the class has been certified in suit #1)?
 - Section 2 of the Act states that it is “prospective only.”
- FOREIGN CORPORATIONS AND LLCs
 - Act 126 changes the venue for suits against foreign corporations and LLC’s licensed in the state from the “primary business office” to the “principal business establishment.”
- FORUM NON CONVENIENS
 - Act 713 amends C.C.P. art. 123 on forum non conveniens. If the rule applies, the new provision states that “domicile shall be the location pursuant to [C.C.P.] Article 42 where the plaintiff would be subject to suit had he been a defendant.”

WITHHOLDING TAX FILINGS

Act 107 extensively amends R.S. 47:114 to require quarterly filings of withholding tax returns, which changes the old rules which had been triggered by the total amount of withholding in any month or quarter or year.

WHAT'S IN A NAME?

- Highways
 - “B.R. Harvey Memorial Highway” (Act 24)
- Prestige Vehicle Plates approved for:
 - “Korean Defense Service” (Act 484)
 - “Public Schools” (Act 440)
 - “Protect Our Forests” (Act 22)
 - “Save the Honeybee” (Act 246)
 - “Town of Ball 40th Anniversary” (Act 105)
- Public advertising for prestige plates approved in Act 284 (amending R.S. 47:463.2)

YOU CAN TAKE IT WITH YOU (FOR A PRICE)

Act 815 amends R.S. 13:392 and portions of Title 13 to make it clear that a judge’s office furniture is owned by the court, but that the judge at the end of his or her term may “purchase such property with nonpublic funds at a cost of the standard depreciated value of the property.”

THE CASES: JUNE 2011 – AUGUST 1, 2012

1. SURETYSHIP – COMMERCIAL SURETYSHIP - INTRODUCTION

General Note: The Louisiana Civil Code distinguishes among commercial, legal and ordinary sureties. See C.C. arts. 3041-3044 and Art. 3062. The following cases all concern commercial sureties, which include any surety on a business obligation, any surety which is a business entity, or any surety where the debtor is a business entity.

For more on commercial sureties, see Rubin, LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS (“Rubin, PRÉCIS”), Lexis/Nexis 2011, Chapters 2 and 6.

2. DOES THE CREDITOR HAVE TO SIGN THE SURETYSHIP AGREEMENT? NO.

2.1 For almost four decades, Louisiana courts have held that a valid suretyship exists if (a) there is a valid principal obligation, and (b) the suretyship itself is in writing. There is no need for the creditor to sign the suretyship agreement or to accept it. See:

2.1.a *Queen's Insurance Company of America v. Bloomenstiel*, 184 La. 1070, 168 So. 302 (1936)

2.1.b C.C. arts. 3038 and 3039.

2.2 Therefore, cases in other contexts about whether both parties have signed a document are inapplicable to surety agreements.

2.2.a Compare, for example, *United States Risk Management, LLC v. Day, U.S. Risk Management, L.L.C. v. Day*, 2011-0533 (La.App. 4 Cir. 9/28/11) (La.App. 4 Cir. Sep 28, 2011), 73 So.3d 1100, rehearing denied (Oct 24, 2011), writ den. 2011-2605 (La. 2/3/12), 79 So.3d 1030.

2.2.b Holding: Summary judgment cannot be granted on an action to enforce a restrictive covenant in an employment agreement when there are material issues of fact on whether the employee intended to be bound “unless and until an authorized representative” of his employer signed the document.

2.2.c That situation would never arise in suretyship law. C.C. art. 3039 states:

“Suretyship is established upon receipt by the creditor of the writing evidencing the surety's obligation. The

creditor's acceptance is presumed and no notice of acceptance is required.”

3. **COMMERCIAL SURETYSHIP – IN WHAT CAPACITY DID THE GUARANTOR SIGN?**

3.1 *Dror Internatational, LP v. Thundervision LLC*, 11-215 (La. App. 5 Cir. 12/13/11), 81 So.3d 182, *writ not considered*, 2012-0127 (La. 3/23/12) 84 So.3d 560

3.1.a **FACTS:**

3.1.a.(1) A printing company sued a publisher (Thundervision) and its president on an open account.

3.1.a.(2) The president of the publisher, Smith, signed an “Individual and Personal Guaranty” without any reference that he was signing it in his representative capacity.

3.1.a.(3) Smith and another person (Higgins) signed a second agreement on a second printing job, signing as “Guarantors” on the contract; no representative capacity for either of them was indicated on this form.

3.1.b **HELD:** Guarantors lose, creditor wins.

3.1.c **RATIONALE:** On summary judgment, there was no evidence that the guarantors signed in their representative capacity; they were bound personally for the debts of the company.

3.1.d **QUERY:**

3.1.d.(1) The Court stated, in *dicta* (because the court found the contracts unambiguous) that parole evidence may sometimes be used to explain a contract of suretyship.

“Contracts of suretyship are subject to the same rules of interpretation as contracts in general. Although parole evidence is inadmissible to vary the terms of a written contract, if the terms are susceptible of more than one interpretation, or there is uncertainty or ambiguity as to its provisions, or

the intent of the parties cannot be ascertained from the language employed, parole evidence is admissible to clarify the ambiguity and show the intent of the parties. In interpreting provisions of an agreement about which there exists some doubt, a court must seek the true intention of the parties, even if to do so necessitates departure from the literal meaning of the terms. *Pelican State Wholesale, Inc. v. Mays*, 44,442 (La.App. 2 Cir. 6/24/09), 15 So.3d 341, 343.”

3.1.d.(2) Although the La. Fifth Circuit cites its prior decision in *Pelican State Wholesale*, it does not cite its later opinion in *Veterans Commercial Properties, LLC v. Barry's Flooring, Inc.*, 11-6 (La.App. 5 Cir. 5/24/11), 67 So.3d 627, which had distinguished *Pelican*.

3.1.d.(3) Was *Pelican* correctly decided initially? C.C. art. 1847 states that parole evidence is “inadmissible to establish . . . a promise to pay the debt of a third person.” While C.C. art. 1848 allows parole evidence in certain circumstances,⁷ is it really applicable to change C.C. art. 1847’s absolute “no parole” rule?⁸ The Supreme Court has not yet spoken on this issue in the context of continuing guarantees.

⁷ Art. 1848. Testimonial or other evidence not admitted to disprove a writing

“Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent, or a simulation, or to prove that the written act was modified by a subsequent and valid oral agreement.”

⁸ See, for example, the Law Institute’s comments to C.C. art. 1848, emphasis supplied:

“(b) Testimonial proof may be used against a writing to show error, fraud, or duress. See *Harnischfeger Sale Corporation v. Sternberg Co.*, 179 La. 317, 154 So. 10 (1934); *Broussard v. Sudrique*, 4 La. 347 (1832). ***It may also be admitted to show that a written contract was modified by a subsequent and valid verbal agreement*** (*Succession of Burns*, 199 La. 1081, 7 So.2d 359 (1942); *Commandeur v. Russell*, 5 Mart. (N.S.) 456 (1827)); or that a contract had an unlawful cause (*Succession of Fletcher v. Découdreau*, 11 La. Ann. 59 (1856)).”

If the only issue on a guarantee is the capacity in which one signed, is that the kind of “error” that can permit admission of parole evidence in light of C.C. art’s 1847’s prohibition? Remember, the claim is not that the signer didn’t know he was signing a guarantee, only that he didn’t know he was signing it in his individual capacity. Thus, the signer is not claiming he didn’t know what the document is.

4. **COMMERCIAL SURETYSHIP – TERMINATION OF THE SURETYSHIP AGREEMENT**

4.1 There are three ways that a commercial suretyship can be extinguished: (a) release of the principal obligor; (b) release of the surety; or (c) extinction of the principal obligation. See:

4.1.a C.C. arts. 1892, 3058 *et seq.*

4.1.b Rubin, LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS (“Rubin, PRÉCIS”), Lexis/Nexis 2011, Chapter 8.

4.2 **NO RELEASE OF THE PRINCIPAL OBLIGOR OR OF THE SURETY BECAUSE OF A PURPORTED SETTLEMENT OR JUDGMENT**: *Regions Bank v. Cabinet Works, L.L.C.*, 11-748 (La. App. 5 Cir. 4/10/12), --- So.3d ----, 2012 WL 1192156.

4.2.a **FACTS**:

4.2.a.(1) Cabinet Works, LLC borrowed money from Regions Bank and signed a promissory note.

4.2.a.(2) Chad and Christopher Adams signed as continuing guarantors. The appeal concerns only Chris.

4.2.a.(3) Chris did not dispute the validity of the debt; however, he claimed that he had been released because:

(a) The guarantors had a settlement with the bank through an exchange of emails; and

(b) The Bank had released them by obtaining a judgment against the borrower, Cabinet Works.

4.2.b **RESULT**: Lender wins, guarantor loses.

4.2.c **RATIONALE**:

4.2.c.(1) The exchange of emails did not constitute a binding settlement, even though the guarantors had signed a draft of the settlement document:

“Here, the initials or other name indications on the messages here do not establish that Cohn and Bourgeois intended those to be electronic signatures for purposes of the Louisiana Uniform Electronic Transactions Act.

Despite the fact that Chris signed the draft agreement provided by counsel for Regions and obtained a certified check for the amount of \$175,000 on the same day, it is clear from the verbiage in the e-mail messages that both Regions' counsel and Chris's counsel contemplated further discussion and negotiation regarding terms of the release agreement.

Further, “evidence of ‘settlement’ consisting only of correspondence between attorneys is not sufficient to bind the parties.” *Lizama v. Williams*, 99–1040, p. 5 (La.App. 5 Cir. 3/22/00), 759 So.2d 865, 868.

It is of no moment that a party's attorney finds a negotiated settlement satisfactory; a settlement must be in writing. Nor is the requirement of a writing to effect a compromise satisfied by the signature of a party's attorney alone (unless such authorization is express under LSA–C.C. art. 2997). The general authority granted to an attorney in an attorney/client contract of employment to settle the client's case constitutes only authority to negotiate a settlement. [Footnotes omitted.]

* * *

Considering the messages between the parties, we find no error in the trial court's determination that the parties did not agree on all language of the settlement and that all terms of the settlement had not been agreed upon and some issues were still in negotiation. Although some issues raised were resolved, others were not. The

documents were not finalized by the end of the year as required in the December 16, 2008 message from Cohn to Fonte.

Further, as pointed out by the trial court, there is no showing that any initials or other “signature” on the messages from Cohn and Bourgeois were affixed with intent to sign a settlement as required by La. R.S. 9:2602. Finally, there was never a document that was signed by both the debtor and the creditor, as required by La. R.S. 6:1122.”

4.2.c.(2) The judgment against the principal obligor did not extinguish the guarantor’s obligations because (a) the creditor had reserved rights in the judgment, and (b) the guarantors had waived this defense in their guaranty agreement.

“There is no merit to this assignment because, first, the judgment against Cabinet Works specifically reserved Regions’ rights against Chris. Further, the promissory note and the continuing guaranty each contain language preserving rights against the signers of those documents regardless of actions involving other signatories. The Promissory Note states, in pertinent part:

* * *

NO IMPAIRMENT OF GUARANTOR'S OBLIGATIONS. No course of dealing between Lender and Borrower (or any other guarantor, surety or endorser of Borrower's Indebtedness), nor any failure or delay on the part of Lender to exercise any of Lender's rights and remedies under this Guaranty or any other agreement or agreements by and between Lender and Borrower (or any other guarantor, surety or endorser), shall have the effect of impairing or releasing Guarantor's obligations and liabilities to Lender, or of waiving any of Lender's rights and remedies under this

Guaranty or otherwise. Any partial exercise of rights and remedies granted to Lender shall furthermore not constitute a waiver of any of Lender's other rights and remedies; it being Guarantor's intent and agreement that Lender's rights and remedies shall be cumulative in nature. Guarantor further agrees that, should Borrower default under any of Borrower's indebtedness, any waiver or forbearance on the part of Lender to pursue Lender's available rights and remedies shall be binding upon Lender only to the extent that Lender specifically agrees to such waiver or forbearance in writing. A waiver or forbearance on the part of Lender as to one event of default shall not constitute a waiver or forbearance as to any other default.”

4.2.d QUERY: Is the mere obtaining of a judgment against a principal obligor ever an extinguishment of the debt of the sureties until such time as the judgment is satisfied in full?

4.2.e NOTE:

4.2.e.(1) The kind of waiver clause used in this case is sometimes called a “*Green Garden*” clause, because the Louisiana Supreme Court, in a case decided before the Legislature made wholesale revisions to the Civil Code’s suretyship articles in 1987 based on a recommendation of the Louisiana Law Institute.

4.2.e.(1)(i) Acts 1987, No. 409 §1.

4.2.e.(1)(ii) *First National Bank of Crowley v. Green Garden Processing Co.*, 387 So.2d 1070 (1980)

4.2.e.(2) The Louisiana Supreme Court has never addressed whether the changes to the Civil Code, including C.C. art. 1892 (also amended after the *Green Garden* case),⁹ are rules of “public policy”

⁹ C.C. art. 1892, amended in 1984, provides in pertinent part, that “[r]emission of debt granted to the principal obligor releases the sureties.”

preventing sureties from agreeing to waive certain defenses, or whether the general freedom of contract principles apply, at least to commercial and legal sureties, so that such waivers become valid.¹⁰

4.2.e.(3) While the *Cabinet Works* case does not cite *Green Garden*, its holding is in line with other intermediate Louisiana appellate courts enforcing suretyship waivers.

4.3 NO RELEASE OF SURETY SIMPLY BECAUSE HE SOLD HIS INTEREST IN THE CORPORATE DEBTOR: *The Sherwin-Williams Company v. Culotta*, 2011-1929 (La. App. 1 Cir. 2012), 2012 WL 1550589 (not designated for publication)

4.3.a FACTS:

4.3.a.(1) Frank Culotta signed a continuing guarantee for his company, Frank Culotta Contractor, Inc.

4.3.a.(2) Frank claimed he had been released from his guarantee because the creditor knew he had retired and sold his interest in the business.

4.3.a.(3) Frank also claimed he could compel arbitration because of an arbitration agreement in a contract his company did not sign.

4.3.b RESULT: Creditor wins, guarantor loses.

4.3.c RATIONALE

4.3.c.(1) A creditor's knowledge that a surety has sold his business in a company is not sufficient to terminate the suretyship, especially if there is a contract requiring written termination notice by the surety.

“Louisiana Civil Code article 3058 states that: ‘The obligations of a surety are extinguished by the different manners in which conventional obligations are extinguished ...’ Pursuant to La. C.C. art.1983, “[c]ontracts have the effect of law

¹⁰ For a more detailed discussion of this, see Rubin, “Ruminations on Suretyship,” 57 La. Law Review 565, 596 (1997).

for the parties and can be dissolved only through the consent of the parties or on grounds provided by law.” The guaranty agreement between Culotta and Sherwin-Williams does not permit revocation of the contract by any means other than written notice. It specifically provides that the continuing guaranty will remain in full force and effect until written notice of its revocation is received by Sherwin-Williams. Therefore, the fact that Sherwin-Williams may have had actual notice of the sale of Culotta's interest in FCC cannot constitute a revocation of the guaranty agreement, as such would not comply with the terms of the contract requiring written notice of revocation. *See W.H. Ward Lumber Company, Inc.*, 522 So.2d at 651.”

4.3.c.(2) A non-party to an arbitration cannot compel arbitration, especially if the arbitration clause is not a mandatory-arbitration provision.

“Unlike the present case, *Saavedra* and *Grigson* involved mandatory arbitration clauses whereby each of the signatories intended at the time that they signed the contracts that all disputes arising from or based upon those contracts would be subject to compulsory arbitration. By contrast, arbitration was not mandatory herein in the event that FCC elected not to arbitrate. In that case, the parties contemplated that Sherwin-Williams would have the right to file suit. Therefore, unlike the parties against whom arbitration was compelled in *Saavedra* and *Grigson*, Sherwin-Williams did not seek to avoid the terms of the arbitration clauses contained in the purchase orders. Instead, it was acting in accordance therewith when it filed the present suit.

Additionally, *Saavedra* involved a situation where a signatory to the contract requiring arbitration sued another signatory and several non-signatories, all of whom sought

to compel arbitration. Thus, it was not a situation like the present one where the only party seeking arbitration was a non-signatory to the contract. Furthermore, the plaintiff acknowledged that the signatory defendant and the non-signatory defendants who were seeking arbitration together formed a single business enterprise. *See Saavedra*, 8 So.3d at 764 n. 5.

Gunderson also differs from the instant case in that, while the plaintiff who was compelled to arbitrate therein did not personally sign the contracts containing the arbitration clauses, his authorized representative did so. Thus, the Third Circuit concluded that the plaintiff was bound to the arbitration clauses under accepted theories of agency and contract law, even though he did not himself sign the contracts. *See Gunderson*, 937 So.2d at 921–22. Finally, we note that, although *Lakeland* may have contained some discussion of equitable estoppel, the Fourth Circuit actually refused to compel arbitration therein. *See Lakeland*, 871 So.2d at 395.

Accordingly, since the trial court was legally correct in determining that Culotta was not entitled to compel arbitration, we find no error in the denial of Culotta's motion to stay pending arbitration.”

- 4.4 NOTE: on the issue of arbitration, also see *Wilson v. Allums*, 47,147 (La.App. 2 Cir. 6/8/12), __ So.3d ___, 2012 WL 2052131, holding that a party seeks to enjoin arbitration because of res judicata, the court has the jurisdiction and authority to hear and determine that issue.

“The question regarding whether a party waived its right to arbitrate under the terms of a contract is an issue of procedural arbitrability that should not be decided by the courts, but rather by the arbitrator. *Conagra Poultry Co. v. Collingsworth*, 30,155 (La.App.2d Cir. 1/21/98), 705 So.2d 1280.

* * *

Nonetheless, the supreme court went on to resolve the issue of waiver in that case while recognizing that its action was inconsistent with its statement waiver should be decided by the arbitrator: * * *

The issue then becomes whether *res judicata* is an issue of 'procedural arbitrability' like waiver and prematurity. This issue has not been addressed by Louisiana courts. * * *

A search of cases across the nation reveals different answers to the question of whether *res judicata* is an issue of procedural arbitrability. For example of an affirmative answer, * * *

The trial court was in a better position than an arbitrator to decide whether the earlier judgment issued by another 26th JDC judge, had *res judicata* effect. Under the circumstances of this case, we conclude that the trial court had subject matter jurisdiction to determine whether *res judicata* was a ground upon which to grant the preliminary injunction. The exception of lack of subject matter jurisdiction was properly denied.”

5. **COMMERCIAL SURETYSHIP – CAN A SURETY USE LENDER LIABILITY AS AN AFFIRMATIVE DEFENSE IF THE SURETY CANNOT USE THE CLAIM AS A RECONVENTIONAL DEMAND?**
Woodlands Development, L.L.C. v. Regions Bank, 11-264 (La. App. 5 Cir. 12/28/11), 83 So.2d 147.

5.1 FACTS:

5.1.a Guarantors of a commercial loan brought a declaratory judgment action against a lender claiming that the bank had fraudulently induced them to sign a second forbearance agreement.

5.1.b The Bank claimed that the Louisiana Credit Agreement Statute precluded any claims against it because nothing was in writing, citing R.S. 6:1122.

5.1.c The Guarantors alternative claim was that even if they didn't have a declaratory judgment action, the Bank could not get summary judgment against them because the claims that were barred by the Credit Agreement Statute could still be used as affirmative defenses.

5.2 RESULT: Guarantors lose declaratory judgment action on summary judgment but can assert their claims as an affirmative defense.

5.3 RATIONALE:

“LSA-R.S. 6:1122 expressly prohibits an action by a debtor against a creditor based on an oral credit agreement, providing that ‘[a] debtor shall not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.’ The Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery. *Jesco Construction Corp. v. Nationsbank Corp.*, 02–0057 (La.10/25/02), 830 So.2d 989. The parties do not dispute that the loan agreement and subsequent forbearance agreements are written credit agreements. The trial court found that plaintiffs did not produce any written credit agreement that purported to void plaintiffs' guarantees, either at all or under the factual scenario alleged in this case, and thus denied the claims on that basis.

Because plaintiffs have produced no written credit agreement signed by both plaintiffs and Regions purporting to release them from their continuing guarantees on the loan, their suit for a declaratory judgment was properly dismissed under LSA–R.S. 6:1122. The discovery plaintiffs sought to support their demand, depositions of bank officers, would not defeat LSA–R.S. 6:1122's requirement of a written credit agreement. Thus, we find no error in the trial court's grant of summary judgment in favor of Regions on plaintiffs' suit for a declaratory judgment.

However, as discussed below, the substance of plaintiffs' fraud allegations that served as a basis for the declaratory judgment suit have also been asserted as affirmative defenses to Regions' reconventional demand, which remains viable in the court below. * * *

As was noted above, LSA–R.S. 6:1122 is limited to a debtor's claims on a credit agreement and does not apply to a debtor's defenses to a creditor's claim on such credit agreements. In other words, R.S. 6:1122 bars plaintiffs' suit for a declaratory judgment because plaintiffs produced no written credit agreement that purported to void the continuing guarantees and release plaintiffs from liability thereon, but the statute does not apply to preclude plaintiffs' assertion of the same alleged fraudulent conduct by Regions as affirmative defenses to the reconventional demand of *Regions*. See *Whitney Nat'l Bank v. Rockwell*, 94–3049 (La.10/16/95), 661 So.2d 1325; *Bernard v. Iberia Bank*, 01–2234 (La.App. 4 Cir. 10/30/02), 832 So.2d 355.”

5.4 QUERY:

5.4.a Did the Supreme Court, in *Whitney National Bank*, really hold that claims which would be barred by the Credit Agreement Statute can still be used as affirmative defenses? The Court stated, *Whitney Nat. Bank v. Rockwell*, 94-3049 (La. 10/16/95), 661 So.2d 1325, 1332 (emphasis supplied):

Defendant essentially asserts (1) that the Bank required him to buy the lot adjacent to the business building he was purchasing; (2) that the Bank agreed to require payment only of interest during a period of time within which the lot could be sold and then to amortize the payments of principal and interest over a period of years; (3) that the

Bank accepted interest-only payments for three years; and (4) that the Bank's demanding payment in full breached the oral agreement as well as "covenants of good faith and fair dealing." Because of the limited allegations in the pleading and the affidavit, it is unnecessary in this case to pass on whether there are any exceptions to the credit agreement statute, such as fraud, misrepresentation, promissory estoppel or particularly vulnerable parties.FN6

FN6. *We decline at this time to adopt a blanket rule*, as the Second Circuit recently did in holding that the credit agreement statute precludes all actions for damages arising from oral credit agreements, regardless of the theory of recovery asserted. See *Fleming Irrigation, Inc. v. Pioneer Bank & Trust Co.*, 27,262 (La.App.2d Cir. 8/23/95), 660 So.2d 147, 1995 WL 497541. *Instead, we confine our holding to the claim before us as expressed in the reconventional demand and the affidavit in opposition to the summary judgment.*¹¹

6. LEGAL SURETYSHIP – INTRODUCTION

Legal sureties differ from commercial sureties in that legal sureties cannot be overly clever in drafting their guarantee agreements; the law will "rewrite" those agreements to conform to the minimum statutory requirements with one exception. That exception involves an incorrect amount placed in the suretyship contract. See C.C. arts. 3043, 3063 *et seq.*, and C.C.P. arts. 5123 *et seq.*

For more on legal sureties, see Rubin, LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS ("Rubin, PRÉCIS"), Lexis/Nexis 2011, Chapter 9.

¹¹ The only issue in *Whitney National Bank* was the lender's motion for a summary judgment dismissing the reconventional demand brought by the debtors.

7. TWO QUICK TAKES ON LEGAL SURETYSHIP

7.1 IS AN APPEARANCE BOND CIVIL OR CRIMINAL IN NATURE, AND WHAT RULES APPLY IN ORLEANS PARISH? *State v. Allen*, 2011-0693 (La. App. 4 Cir. 1/4/12), 83 So.3d 1160.

7.1.a RESULT: No five-member appellate court when a 3-judge court reverses by a vote of 2-1

7.1.b RATIONALE

“As stated above, we were aware before we handed down our decision on 23 November 2011 that the trial court judgment was rendered by the Criminal District Court for the Parish of Orleans to which, under La. Const. V, § 8, no five-judge panel is applicable when one judge of a three-judge court of appeal panel dissents. We noted that the trial court judgment relating to a bail bond forfeiture was civil in nature (La. R.S. 15:83), but that all matters relating to bail bonds are set forth in the Code of Criminal Procedure and its ancillaries (La. C.Cr.P. art. 311 *et seq.*) and in Orleans Parish are heard in the Criminal District Court, not Civil District Court. This irregularity flies in the face of La. Const. art. V, § 32 . . . It further conflicts with the provisions of law specifying the jurisdiction of the Civil District court (La. R.S. 13:1137 and 13:1140) and Criminal District Court (La. R.S. 13:1336). *See*, La.C.Cr.P. art. 349.5C; *see also*, La. Const. art. V, § 16.”

“The court is mindful of the problem. For example, in a juvenile matter from Orleans Parish Juvenile Court, if the court of appeal reviews the adjudication of a juvenile as delinquent and the decision is split 2–1 for reversal, no five-judge panel is convened albeit an adjudication is civil but the underlying issue is criminal in nature. That is, we read La. Const. art. V, § 8 literally and have determined that a juvenile court is not a district court for purposes of the constitutional provision.

We acknowledge the issue is not presently perfectly clear, but this explanation clarifies the current practice in this court of appeal. (Because of the split jurisdiction between civil and criminal courts in Orleans Parish that will end when the new Forty–First Judicial District Court for the Parish of Orleans comes into existence on 1 January 2015,

most problems will disappear.) Of course, the Supreme Court of Louisiana can vacate our decision of 23 November 2011 in this case and remand the matter to this court of appeal for consideration by a five-judge panel, assuming that the movers timely (within thirty days) seek writs of review of our 23 November 2011 decision.

Accordingly, it is ordered that the motion of Generio Allen and ABIC for designation of a five-member panel is denied.”

7.2 **YOU CAN’T BE BOTH AN UNDERCURATOR AND A SURETY FOR THE CURATOR.** *In re Helm*, 2011-0500 (La.App. 4 Cir. 11/2/11), 84 So.3d 601.¹²

7.2.a **RATIONALE**

“In this Part we explain why *sua sponte* we questioned the appointment of the co-undercurators. See *Merrill v. Greyhound Lines, Inc.*, 10–2827, p. 2 (La.4/29/11), 60 So.3d 600, 601. And we further explain why we vacate the appointment of Mrs. Oufnac as one of the co-undercurators and remove her be-cause of an irremediable conflict of interest arising from the duties of the office of undercurator and the obligations of a surety to the curatrix. See LA. C.C.P. ARTS. 2164 and 4568.

The office of undercurator is not that of a deputy, assistant, or adjunct to the curator. To the contrary, ‘the law clearly sets forth that it is the duty of an under-curator to act whenever he or she believes that the best interests of the interdict are contrary to the proposed action by or on behalf of the interdict.’ *Interdiction of Polmer*, 141 So.2d 696, 702 (La.App. 1st Cir.1961). ‘The legal duty to oppose any action by the interdict or the curator, which the under-curator does not believe is to the best interest of the interdict, is incumbent upon the under-curator until the interdiction is removed....’ *Id.*

An undercurator's role, like that of an undertutor, might generally be described as one of a watchdog. See *Green v. City of Shreveport*, 39,066, p. 4

¹² Appeal After Remand, *In re Helm*, 2011-0914 (La.App. 4 Cir. 12/21/11), 84 So.3d 607.

(La.App. 2 Cir. 10/27/04), 888 So.2d 314, 317 (noting that the duty of an undertutor to the minor is to ‘exercise a constant supervision or watchdog role over the acts of the tutor.’) *See also Redmond v. Davis*, 351 So.2d 1256, 1257 (La.App. 1st Cir.1977) (The relationship between an interdict and his curator is the same as that between a minor and his tutor.); *McCrary v. Sebastian*, 150 La. 459, 465 (La.1922), 90 So. 760, 762.

An undercurator must perform specific duties, including the duty to ‘[n]otify the court when he has reason to believe that the curator has failed to perform any duties imposed by law, including the duties to file necessary accounts and personal reports, and to maintain adequate security.’ LA. C.C.P. ART. 4565 B(4) (emphasis added). Of course, the curator's requirement to furnish security is for the protection of the interdict “to cover any loss or damage which may be caused by the bad administration” of the curator. Cf. LA. C.C.P. ART. 4131 A; see also LA. C.C.P. ART. 4563 A.

Here, notwithstanding an undercuratrix's general independent watchdog role of the curatrix's actions and the undercuratrix's specific duties to the court to report failings of the curatrix in the performance of her duties, our undercuratrix undertook to obligate herself as legal surety for the curatrix. Suretyship is defined as ‘an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so.’ LA. CIVIL CODE. ART.. 3035. Mrs. Oufnac's obligation is solidary, albeit conditional, with Mrs. Helm's obligation to cover any losses or damages to the interdict which may be caused by a maladministration. *See* LA. CIVIL CODE ARTS. 1794, 1798, and 3069. In the event of a judgment against the curatrix which she cannot satisfy, Mrs. Oufnac's own property is subject to seizure to satisfy the suretyship obligation she has undertaken. *See* LA. CIVIL CODE ART. 3065.

Accordingly, we reverse that part of the trial court judgment appointing Mrs. Oufnac an undercuratrix and, on our own motion, remove her from office for

the good cause that she has a substantial conflict of interest arising from the irremediable incompatibility of her responsibilities, obligations, and duties as the undercuratrix on the one hand and the curatrix's surety on the other hand. *See* LA. C.C.P. ARTS. 2164 and 4568.”

8. PRIVATE WORKS ACT – DOES UNJUST ENRICHMENT APPLY? NO.

Two cases decided in the last 12 months have held that if a claimant is entitled to assert a Private Works Act lien (under R.S. 9:4801 *et seq.*), the claimant cannot also assert an unjust enrichment claim as an alternative plea in the event the lien is held invalid.

- 8.1 *Pinegrove Electrical Supply Co., Inc. v. Cat Key Construction, Inc.*, 11-660 (La. App. 5 Cir. 2/28/12), 88 So.3d 1097.

8.1.a FACTS:

8.1.a.(1) Material supplier Pinegrove filed suit to enforce a Private Works Act Lien and, in the alternative, to enforce a claim on an open account.

8.1.a.(2) Pinegrove sold electrical fixtures to a contractor, Cat Key Construction, on an open account. When it wasn't paid, it filed suit against both Cat Key and the homeowner claiming open account, a Private Works Act Lien, and that the homeowner had been unjustly enriched.

8.1.a.(3) Pinegrove got a default judgment against the homeowner proceeding solely under the unjust enrichment theory; by that time, Cat Key (the contractor) had filed for bankruptcy protection.

8.1.a.(4) The homeowner appealed the default judgment.

8.1.b RESULT: Homeowner wins, default judgment overturned.

8.1.c RATIONALE:

8.1.c.(1) If a Private Works Act lien was available to a claimant, the claimant cannot use unjust enrichment as an alternative theory.

“Though inartfully stated, Mrs. Pujol [the horseowner] asserts that Pinegrove has other legal remedies available to it either under its open account suit against the other two defendants, Cat Key and Mr. Ford, or under the lien affidavit it filed against Mrs. Pujol’s property. Although Pinegrove presented some evidence to the effect that Cat Key and Mr. Ford had filed for bankruptcy protection, the fact that Pinegrove may ultimately prove unsuccessful in collecting from these two defendants does not mean that there is no legal remedy available to it so as to meet the criteria for a claim in unjust enrichment. As the Supreme Court said in *Carrier v. Bank of Louisiana*, 95-3058 (La. 12/13/96), 702 So.2d 648, 672 (on rehearing):

The existence of a ‘remedy’ which precludes application of unjust enrichment does not connote the ability to recoup your impoverishment by bringing an action against a solvent person. It merely connotes the ability to bring the action or seek the remedy.

Further, the Private Works Act, LSA-R.S. 9:4801 *et seq.*, gives material suppliers like Pinegrove a legal remedy against a homeowner’s property like Mrs. Pujol’s under the described circumstances of this case despite the fact that there is no privity of contract between them. *Newt Brown Contractor Inc. v. Michael Builders, Inc., supra.*

Because these other legal remedies are available to Pinegrove, it does not have a cause of action against Mrs. Pujol in unjust enrichment. Accordingly, Mrs. Pujol’s exception of no cause of action in unjust enrichment is granted, and the default judgment rendered against her on the unjust enrichment is reversed.”

8.2 *E. Smith Plumbing, Inc. v. Manuel*, 11-1277, 1278, 1279 (La. App. 3 Cir. 2012), 88 So.3d 1209.

8.2.a FACTS:

8.2.a.(1) Homeowners Cora and Joshua Manuel hired Drake Fontenot to build their home.

8.2.a.(2) Fontenot contracted with three subcontractors. Fontenot got the bills from the subcontractors and submitted them to Cora and Joshua, who paid some of them.

8.2.a.(3) Cora and Joshua, however, refused to pay some of the final bills because they believed that Fontenot had “overcharged them for his labor” and they “feared” that if they paid Fontenot, he might not pay the subcontractors.

8.2.a.(4) The subcontractors filed liens outside of the PWA lien period and then filed suit against Fontenot on an “open account.”

8.2.a.(5) Cora and Joshua filed a reconventional demand for wrongful liens and other damages.

8.2.a.(6) The trial court ruled in favor of the subcontractors and against the homeowners but also dismissed the subcontractors claims against Fontenot, the contractor.

8.2.a.(7) Only the homeowners appealed.

8.2.b RESULT: Homeowners win some and lose some.

8.2.c RATIONALE:

8.2.c.(1) Because the subcontractors had no privity of contract with the homeowners, they did not have a claim for an open account.

“[We find] that the trial court erred as a matter of law in finding that Joshua and Cora established an open account with any of the Plaintiffs. They did not. There is no signed contract between Cora and Joshua and any of the Plaintiffs. Our review of the record

reveals that Fontenot opened an account with the Plaintiffs/Subcontractors regarding the home building project for Joshua and Cora. These accounts are evidenced by the consistent billing sent to Fontenot, in his name, identifying him as ‘contractor,’ for work done on Joshua and Cora’s home. It is clear that all of the Plaintiffs/Subcontractors dealt with Fontenot on this project as the general contractor. All of the Plaintiffs had a long-standing relationship with Fontenot and relied on *his* reputation with them in establishing the accounts for this project. They had no relationship with Joshua and Cora, and it was Fontenot who chose the Plaintiffs to perform services for the construction of this house.

* * *

Plaintiffs fail to meet their burden to prove that they had an open account with Joshua and Cora. There was no meeting of the minds between the Plaintiffs and Joshua and Cora. The contract was between Fontenot and the Plaintiffs.”

8.2.c.(2) Because the subcontractors had the possibility of filing a Private Works Act lien, the fact that they forfeited the lien by filing untimely did not give them a claim for unjust enrichment.

“We also reject the notion that the Plaintiffs/Subcontractors are entitled to recover under the theory of *actio in rem verso*, or unjust enrichment. There are five elements to recovery under this theory including the ‘absence of a remedy at law.’ *Roberson*, 453 So.2d at 665 (citing *Minyard v. Curtis Products, Inc.*, 251 La. 624, 205 So.2d 422 (1967) and *G. Woodward Jackson Co., Inc. v. Crispens*, 414 So.2d 855 (La.App. 4 Cir.1982)). Quoting the learned Justice Albert Tate, the court in *Roberson* found the equitable remedy of unjust enrichment unavailable to a plaintiff despite the fact that

the defendant had been enriched at the expense of plaintiff's impoverishment. Justice Tate explained the inapplicability of this remedy as follows:

[N]o other legal remedy is practically available to the impoverished plaintiff by which the impoverishment might be or might reasonably have been avoided (this is the principle of 'subsidiarity' by which the extraordinary remedy of unjustified enrichment, not provided by the Civil Code, is regarded as unavailable where another legal remedy could have prevented the impoverishment).

Id. at 666.

The Plaintiffs/Sub-contractors here had additional legal remedies available to them including collecting on an open account against Fontenot. They also could have timely filed liens to recover from the owners of the property on which they had provided goods and services, but, as discussed below, failed to do so. They are therefore prohibited from resorting to the extraordinary remedy of unjust enrichment.

We find that the liens filed by Smith A.C. and Smith Plumbing were untimely filed. . . .”

8.2.c.(3) Yet, because Cora acknowledged that the subcontractors “deserved to be paid,” she created a civil obligation allowing them to get a judgment against her.

“Although we find the Plaintiffs cannot avail themselves of an unjust enrichment claim, we also find that Cora created a civil obligation to pay the Plaintiffs for the agreed amounts owed because she acknowledged and reaffirmed the debt, and by her own words, promised, even at trial under oath, to pay the stipulated amounts owed to Plaintiffs.

A natural obligation may serve as consideration or cause for a civil obligation. See, LSA–C.C. art. 1761; *Thomas v. Bryant*, 25,855 (La.App. 2 Cir. 6/22/94), 639 So.2d 378, 380. According to LSA–C.C. art. 1760, a natural obligation ‘arises from circumstances in which the law implies a particular moral duty to render a performance.’ However, not every moral duty will give rise to a natural obligation. See, LSA–C.C. art. 1762, comment (b). In *Thomas v. Bryant*, the court recognized that the following requirements must be satisfied in order for a moral duty to constitute a natural obligation:

- (1) The moral duty must be felt towards a particular person, not all persons in general.
- (2) The person involved feels so strongly about the moral duty that he truly feels he owes a debt.
- (3) The duty can be fulfilled through rendering a performance whose object is pecuniary.
- (4) A recognition of the obligation by the obligor must occur, either by performing the obligation or by promising to perform. This recognition brings the natural obligation into existence and makes it a civil obligation.
- (5) Fulfillment of the moral duty must not impair the public order.

Azaretta v. Manalla, 00–227 (La.App. 5 Cir. 7/25/00), 768 So.2d 179, 180. See also *Succession of Aurianne*, 219 La. 701, 53 So.2d 901, 904 (1951) which held that ‘[a] promise to pay a debt made after prescription has accrued creates a new obligation binding on the debtor.’ Further, Cora admitted the work was satisfactory. She testified that her refusal to pay the Plaintiffs was based on her dispute with Fontenot and acknowledged the Plaintiffs deserved to be paid.”

8.2.d QUERY:

- 8.2.d.(1) Does every acknowledgment by a homeowner that a subcontractor “deserves to be paid” translate into an actionable claim?
- 8.2.d.(2) C.C. art. 1762, quoted by the Court, concerns obligations in which the party being obliged to pay either (a) was originally obliged to do so but had a defense or (b) was carrying the obligations of the decedent.
- 8.2.d.(3) Since the homeowner never had an obligation to the subcontractor who fails to perfect timely a PWA lien (see R.S. 9:4823), is the court creating a *stipulation pour autri*? The court does not mention C.C. art. 1847, which states that “parol evidence is inadmissible to establish . . . a promise to pay the debt of a third person”
- 8.2.d.(4) What objection should you make if you represent a homeowner in a suit and the homeowner is asked whether the subcontractor is owed money? What questions would you ask the homeowner if you represent the subcontractor whose PWA lien was untimely?

9. PRIVATE WORKS ACT – CAN ONE WITHOUT PRIVITY WITH PROPERTY OWNER STILL HAVE A CLAIM EVEN IF THE LIEN WAS UNTIMELY? *Hawk Field Services, L.L.C. v. Mid America Underground, L.L.C.*, 47,078 (La.App. 2 Cir. 5/16/12), So.3d , 2012 WL 1698088, rehearing denied (Jun 14, 2012) rehearing denied, (La.App. 2 Cir. 6/22/12), So.3d 2012 WL

9.1 FACTS:

9.1.a Hawk Field Services hired Pioneer Pipeline to construct a pipeline; Pioneer hired subcontractors, including Rapid Pipeline, which in turn leased heavy equipment from U-Brothers.

9.1.b When U-Brothers was not paid by Rapid, it filed a lien against Hawk and the pipeline.

9.1.c A special master was appointed to deal with the liens, and the special master concluded that U-Brother's lien was untimely. U-Brothers appealed.

9.2 RESULT: Lien untimely, but U-Brothers still has a claim against the owner.

9.3 RATIONALE:

9.3.a The lien was untimely because a lessor of equipment must provide a timely notice of the lease to the property owner; U-Brothers didn't act timely.

“ . . . U Brothers argues that its failure to timely provide Hawk Field with a copy of its lease agreement with Rapid Pipeline should not invalidate U Brothers' lien. Specifically, U Brothers claims that invalidating its lien for failure to timely provide Hawk Field with a copy of the lease agreement runs contrary to the purpose of the PWA by allowing a mere technical infraction to leave a claimant unable to secure payment. U Brothers argues further that Hawk Field's March 10, 2009, letter requesting more information from U Brothers, and the fact that U Brothers' name was visible on the heavy equipment used on the project, evidence Hawk Field's *actual* notice of liability to U Brothers and thereby satisfies the notice requirement.

Louisiana R.S. 9:4802, governing which parties may enjoy the statutory privity granted by the PWA, states, in pertinent part:

‘A. The following persons have a claim against the owner and a claim against the contractor to secure payment of the following obligations arising out of the performance of work under the contract:

* * * *

(4) Lessors, for the rent of movables used at the site of the immovable and leased to the contractor or a subcontractor by written contract.

* * * *

G. (1) For the privilege under this Section to arise, the lessor of the movables ***shall deliver a copy of the lease to the owner and to the contractor not more than ten days after the movables are first placed at the site of the immovable for use in a work.***’ (Emphasis added).

The PWA grants a claimant the right to recover the costs of labor and material from a party with whom there is no contract. That right is in derogation of common rights and must be strictly construed against those to whom the right is accorded. *Metropolitan Electric Co., Inc. v. Landis Const. Co., Inc.*, 627 So.2d 144 (La.1993). Although the interpretation of the PWA is subject to strict construction, strict construction cannot be so interpreted as to permit purely technical objections to defeat the real intent of the statute. *Ragsdale v. Hoover*, 353 So.2d 1132 (La.App.2d Cir.12/22/77), *writ denied*, 355 So.2d 263 (La.1978).

Here, the trial court properly held that U Brothers' failure to provide Hawk Field with a copy of its lease agreement invalidated U Brothers' lien on the Hawk Field Pipeline. The statute makes clear that a lessor must provide the owner with a copy of the lease agreement in order for the privilege to arise. First, U Brothers' invoices show that the rented equipment was used on the Hawk Field Pipeline from November 2008 to February 2009. U Brothers did not provide Hawk Field with a copy of the lease agreement until February 11, 2009—well beyond the 10-day time limit set forth by La. R.S. 9:4802(G)(1). The purpose of providing the land owner a copy of the equipment lease is to ensure the land owner is aware that a party without direct contractual privity has a potential privilege on the owner's land. Such a requirement is not a mere technicality.”

9.3.b Even though U-Brothers had no lien, nonetheless the Court finds that it still had an unsecured claim against Hawk, the property owner.

“As its last assignment of error, U Brothers argues that even if it does not have a valid lien on the Hawk Field Pipeline, it still has a claim against Hawk Field. Specifically, U Brothers argues that because the language of La. R.S. 9:4802(G)(1) refers only to the privilege securing the owner's personal liability, failure to satisfy this additional notice requirement should affect only the privilege granted by La. R.S. 9:4802(B) and not the claim granted by La. R.S. 9:4802(A). We agree.

The PWA affords two basic rights to a subcontractor. *C & S Safety Systems, Inc. v. SSEM Corp.*, 2002–1780 (La.App. 4th Cir.03/19/03), 843 So.2d 447. First, La. R.S. 9:4802(A)(4) grants a claim against the owner and a claim against the contractor to secure payment for the rent of movables used at the site of the immovable and leased to the contractor or a subcontractor by written contract. Second, La. R.S. 9:4802(B) grants a privilege on the immovable to secure the claim granted by La. R.S. 9:4802(A). The comments to La. R.S. 9:4802 make clear that ‘the privilege given under this section is *accessory* to and only secures the personal liability of the owner imposed by Subsection A.’ (Emphasis added).

Louisiana R.S. 9:4823(A) governs the extinguishment of claims and privileges and states, in pertinent part:

‘A privilege given by R.S. 9:4801, *a claim against the owner and the privilege securing it granted by R.S. 9:4802*, or a claim against the contractor granted by R.S. 9:4802 is extinguished if:

(1) The claimant or holder of the privilege does not preserve it as required by R.S. 9:4822; or

(2) The claimant or holder of the privilege does not institute an action against the owner for the enforcement of the claim or privilege within one year after the expiration of the time given by R.S. 9:4822 for filing the statement of claim or privilege to preserve it[.]’ (Emphasis added).

Louisiana R.S. 9:4822 governs the preservation of claims and privileges and states, in pertinent part:

‘C. Those persons granted a claim and privilege by R.S. 9:4802 for work arising out of a general contract, notice of which is not filed, and other persons granted a privilege under R.S. 9:4801 or a claim and privilege under R.S. 9:4802 shall file a statement of their respective claims and privileges within sixty days after:

(1) The filing of a notice of termination of the work[.]’

A claimant who does not have a contract with the owner and who fails to file a lien or statement of claim within the time period provided by law cannot recover from the owner for services performed or materials supplied. *Newt Brown v. Michael Builders*, 569 So.2d 288 (La.App.2d Cir.10/31/90), writ denied, 572 So.2d 91 (La.1991).

Here, U Brothers timely filed a statement of its claim and lien as required by La. R.S. 9:4822, but failed to provide a copy of the lease agreement to Hawk Field as required by La. R.S. 9:4802(G)(1). While it is undisputed that the requirement of La. R.S. 9:4822 applies to the preservation of both a claim and privilege, the language of La. R.S. 9:4802(G)(1) clearly indicates that its notice requirement is only necessary to give rise to the privilege securing the claim. Any effort to include the notice requirement of La. R.S. 9:4802(G)(1) within the filing requirement of La. R.S. 9:4822 would go beyond the language of the statute. Had the Louisiana Legislature intended La. R.S. 9:4802(G)(1) to apply to both the claim and privilege, it would have included the word “claim” just as it did for La. R.S. 9:4822. Furthermore, the comments to La. R.S. 9:4802 indicate a legislative desire for the preservation of a claim absent a lien by making abundantly clear that the privilege granted by La. R.S. 9:4802(B) ‘is accessory to and only secures the personal liability of the owner imposed by Subsection A.’

The special master cited *Newt Brown* as holding that a claim and lien are extinguished by failure to comply with La. R.S. 9:4802(G)(1); however, that case is distinguishable from the present case. In *Newt Brown*, the claimant failed to satisfy the notice requirement set forth by La. R.S. 9:4822(B). The court in *Newt Brown*, never considered the effect of a claimant's failure to comply with La. R.S. 9:4802(G)(1). While we agree that both U

Brothers' claim and lien would be extinguished had it failed to file a statement of claim and lien within the time period required by La. R.S. 9:4822, here, it is undisputed that U Brothers filed its statement of claim and lien within the window set forth by La. R.S. 9:4822. Therefore, we find that the trial court erred in finding that U Brothers' claim against Hawk Field was extinguished.”

9.3.c Rehearing was denied, but see the dissent by Judges Stewart and Moore:

“MOORE, J., dissents from the denial of rehearing for the reasons assigned by Judge Stewart. STEWART, J., dissenting.

I respectfully recommend this Court grant the rehearing and reverse the majority opinion.

Both U Brothers' lien and claim are invalid under the Louisiana Private Works Act. La. R.S. 9:4802 and 9:4822, when read together, require a claimant to secure and preserve a privilege to recover under the PWA. U Brothers failed to secure the privilege, thus, there is no claim to preserve.

In the majority opinion, this Court asserts U Brothers failed to comply with the technical requirements of La. R.S. 9:4802 when it failed to timely provide Hawk Field with a copy of the lease. This failure to comply invalidated the lien, constituting a failure to secure the privilege. Although U Brothers' privilege is invalid, this Court reasoned U Brothers complied with the technical requirements of La. R.S. 9: 4822 and the claim is still valid. This is contrary to the law.

Although U Brothers did comply with the technical requirements of La. R.S. 9:4822, this statute cannot be read in isolation. La. R.S. 9:4822 limits the preservation of a privilege to ‘the person who a claim or privilege is granted by La. R.S. 9:4802.’ Since U Brothers failed to secure the privilege under La. R.S. 9:4802, there is no claim to preserve under La. R.S. 9: 4822. Without a claim to preserve, U Brothers' claim is extinguished per La. R.S. 9:4823, which provides a claim is extinguished if a claimant fails to preserve the privilege granted by La. R.S. 9:4802. U Brothers' lien is invalid and their claim extinguished.”

10. PRIVATE WORKS ACT: DEFICIENT LIEN CLAIM NOTICES

Two cases in the last twelve months involved deficient lien claim notices.

10.1 *Jefferson Door Co., Inc. v. Cragmar Const., L.L.C.*, 2011-1122 (La.App. 4 Cir. 1/25/12), 81 So.3d 1001, *writ den.* 2012-0454 (La. 4/13/12) 85 So.3d 1250.

10.1.a FACTS: Lien affidavit had detailed statement of charges for “certain materials consisting of but not limited to trim, millwork, etc.”

10.1.b HELD: Lien notice insufficient.

10.1.c RATIONALE: The Court held that, to be valid, the materials supplied had to be specifically delineated:

“In interpreting statutes granting liens and privileges for working materials furnished, courts have generally construed the statutes strictly against the claimant. *P.H.A.C. Services, Inc. v. Seaways International, Inc.*, 403 So.2d 1199, 1202 (La.1981). According to Comments 1981 to La. R.S. 9:4822(G), the purpose of filing a lien affidavit ‘is to give notice to the owner (and contractor) of the existence of the claim and to give notice to persons who may deal with the owner that a privilege is claimed on the property.... Technical defects in the notice should not defeat the claim as long as the notice is adequate to serve the purposes intended.’

* * *

The Lien Affidavit at issue contains the following language:

‘JEFFERSON DOOR COMPANY, INC., a Louisiana Corporation domiciled in the Parish of Jefferson, with mailing address of P.O. Box 220, Harvey, La. 70059 sold to CRAGMAR CONSTRUCTION, L.L.C., 3343 Metairie Rd., Suite 7, Metairie, LA 70001, certain materials consisting of but not limited to trim, millwork, etc., for the agreed remaining principal balance of \$37,623.98 and accrued service charges of \$879.36 from September 11, 2009 through December 7, 2009, for a total due of \$38,503.34, plus service charges at the rate of 18% per annum (\$18.55 per diem) from December 8, 2009, until paid in full, all expenses incurred in the collection of all monies due and reasonable attorneys' fees of not less than 25% of the entire sum due as will appear from the itemized statement of account attached hereto....’

* * *

No invoices are in fact attached to the itemized statement although the statement says they are.

* * *

After review of the record in light of Comments 1981 to La. R.S. 9:4822(G), we do not find that the Lien Affidavit fulfills the requirements of the statute, specifically to ‘reasonably itemize the elements comprising it including ... material supplied ...’. Clearly, the reference in the Lien Affidavit to ‘*certain* materials consisting of but not limited to trim, millwork, etc.’ is not the requisite reasonable itemization of materials for purposes of the statutory requirements. (Emphasis added.) Moreover, although the attached Itemized Statement of Account states that the plaintiff provided ‘various materials’ that would be ‘more particularly itemized on the attached invoices,’ the referenced invoices are not attached. In consequence, the Lien Affidavit did not meet the requisites listed in the statute.

Clearly, without the referenced invoices attached, the notice is inadequate to preserve the claim or privilege. Thus, the plaintiff's failure to fulfill the legal requirements is not a mere technical defect. Accordingly, because the lien is invalid, the exception of prematurity was properly granted in favor of the Adamses. Because no privity of contract exists between the plaintiff and the Adamses, by the virtue of the granting of the exception of prematurity, the plaintiff has no cause of action against the Adamses.”

10.2 *Sturdy Built Homes, L.L.C. v. Carl E. Woodward L.L.C.*, 2011-0881 (La.App. 4 Cir. 12/14/11), 82 So.3d 473, *writ den.*, 2012-0142 (La. 3/23/12), 85 So.3d 94.

10.2.a FACTS: Lien affidavit had neither a detailed statement of charges nor an itemization of the materials supplied.

10.2.b HELD: Lien notice insufficient.

10.2.c RATIONALE: The Court held that, to be valid, the materials supplied had to be specifically delineated:

“In 2601, L.L.C.'s summary judgment, it claimed that Notoco's lien was not properly perfected in the manner proscribed by the statute and therefore should

be extinguished. More specifically, the lien failed to set forth the nature of the obligation giving rise to the claim and there was no itemization of the materials supplied. La. R.S. 9:4822(G)(4). The trial court, relying on *Tee It Up Golf, Inc. v. Bayou State Construction*, 09–855 (La.App. 3 Cir. 2/10/10), 30 So.3d 1159, agreed that the lien had not been perfected in accordance with the requirements of the statute.

[T]he Third Circuit found that simply inserting ‘a lump sum amount cannot meet the statutory requirement to set forth the amount and nature of the claim giving rise to the privilege....’ Further, the court surmised that it was unreasonable to conclude that each property had the exact same amount of outstanding debt on materials and there was no attempt to itemize the elements comprising the amount claimed, also a requirement of the statute. Ultimately, the court affirmed the trial court's ruling ordering that the liens be cancelled.

Relying on this Court's opinion in *Hibernia National Bank v. Belleville Historic Development L.L.C.*, 01–657 (La.App. 4 Cir. 3/27/02), 815 So.2d 301, Notoco argues that, the deficiencies complained of by 2601, L.L.C. amount to mere technical violations in the drafting of the lien which do not warrant the lien being cancelled. In *Hibernia*, contractor GCI Construction, Inc. filed a claim of lien against Belleville Historic Development, L.L.C. for sums owed on a contract to provide materials and labor on a project. The lien was filed together with the contract and set forth the amount that the contractor maintained was owed and the following statement:

‘... to furnish labor material to construct twenty-one (21) condominium units at Belleville Condominiums, a project of Belleville Historic Development, L.L.C. Said work was performed as per the afore-mentioned contract.’

Id. p. 8, 815 So.2d at 306.

This Court determined that the requirements of the statute needed to be balanced with the legislative intent of the statute, stating:

‘The trial court ignored the purpose of filing a lien affidavit. The comments following R.S. 9:4822 explain at section (G) that: “... The purpose of a statement or claim of privilege is to give notice to the owner (and contractor) of the existence of the claim and to give notice to persons who may deal with the owner that a privilege is claimed on the property.... Technical defects in the notice should not defeat the claim as long as the notice is adequate to serve the purposes intended.”

Id.

Using that reasoning, this Court found that the *Hibernia* lien was sufficient to meet the mandates of La. R.S. 9:4821(G).

In the instant case, we are faced with deficiencies that are more similar to those in *Tee It Up Golf*. The pertinent part of the Notoco lien reads:

‘There is an unpaid balance of One Hundred ninety five thousand two hundred eighty and fourteen cents (\$195,280.14) Dollars, together with contractual interest per annum until paid, any assessed late fees, attorney's fees of \$150.00 plus all costs, for services rendered.’

Again, the purpose of the lien is to give notice that the claim exists, not just to the owner but also to third parties. Thus, Notoco's position that 2601, L.L.C. had sufficient notice prior to the filing of the lien, does not lessen its burden to provide specific information regarding the debt. In the *Hibernia* lien a third party could ascertain that the sum owed was for labor and materials used in the construction of 21 condominium units. In Notoco's lien, not only do they not itemize, there is not even a general description of the nature of the debt. A lump sum with no supporting description is more than a technical defect.

Accordingly, we affirm the trial court's granting of summary judgment and order to cancel lien.”

10.3 QUERY:

10.3.a Neither *Jefferson Door* nor *Sturdy Built* discussed R.S. 9:4811 (concerning a notice of contract) nor R.S. 9:4831 (concerning where to file liens).

- 10.3.a.(1) The former (R.S. 9:4811) has provisions allowing a notice to be valid (as long as there is a proper property description) even if contains an “error or omission” as long as there is no “actual prejudice.”¹³
- 10.3.a.(2) The latter (R.S. 9:4831) requires a specific property description in lien notices¹⁴ but does not contain the “error” and “prejudice” language of R.S. 9:4811.
- 10.3.a.(3) Do either of these statutes shed light on the technical requirements of lien notices?
- 10.3.a.(4) On the other hand, the case law is firm that the PWA is strictly construed against lien claimants.

10.3.b Do these cases mean that a claimant has:

- 10.3.b.(1) Attach every invoice to lien notice?
- 10.3.b.(2) Attach a detailed spreadsheet of charges?

¹³ R.S. 9:4811((B): “A notice of contract is not improperly filed because of an error in or omission from the notice in the absence of a showing of actual prejudice by a claimant or other person acquiring rights in the immovable. An error or omission of the identity of the parties or their mailing addresses or the improper identification of the immovable shall be prima facie proof of actual prejudice.”

¹⁴ R.S. 9:4831:

“A. The filing of a notice of contract, notice of termination, statement of a claim or privilege, or notice of lis pendens required or permitted to be filed under the provisions of this Part is accomplished when it is filed for registry with the recorder of mortgages of the parish in which the work is to be performed. The recorder of mortgages shall inscribe all such acts in the mortgage records.

“B. For purposes of this Part, the recorder of mortgages includes the office of the clerk of court and ex officio recorder of mortgages.

“C. Each filing made with the recorder of mortgages pursuant to this Part which contains a reference to immovable property shall contain a description of the property sufficient to clearly and permanently identify the property. A description which includes the lot and/or square and/or subdivision or township and range shall meet the requirement of this Subsection. Naming the street or mailing address without more shall not be sufficient to meet the requirements of this Subsection.”

11. SUBCONTRACTORS AND ARBITRATION

While not technically a security devices case, an interesting question of who can compel (and who can resist) arbitration has arisen in the context of a construction contract.

11.1 *Sturdy Built Homes, L.L.C. v. Carl E. Woodward L.L.C.*, , 2011-0881 (La.App. 4 Cir. 12/14/11), 82 So.3d 473, *writ den.* 2012-0142 (La. 3/23/12) 85 So.3d 94.

11.1.a FACTS:

- 11.1.a.(1) The owner of a project to construct 460 apartments contracted with CEW, a general contractor. The main contract had a clause forbidding arbitration of any “claim, dispute, or other matter in question between the parties to this agreement”
- 11.1.a.(2) CEW, the General Contractor, had a subcontract with Sturdy Built; the subcontract had a clause requiring arbitration.
- 11.1.a.(3) When a dispute arose between CEW and Sturdy Built, CEW sought to invoke arbitration and Sturdy Built resisted, claiming that the no-arbitration provision in the main contract between the owner and CEW trumped the arbitration clause in the subcontract.

11.1.b RESULT: Arbitration ordered.

11.1.c RATIONALE:

“We, like the trial court, find no merit in Sturdy Built’s argument that the subcontract must be read together with the overall project construction contract. Not only was the overall project constructions contract a separate agreement, executed by different parties, but Sturdy Built was neither a party nor a third party beneficiary to that contract. Under the clear language of the subcontract and under applicable Louisiana law, the trial court correct ruled that Sturdy Built and CEW must proceed to arbitration.”

11.2 NOTE: A different result may occur if a main contract has an arbitration clause and the subsidiary contract does not. *See, e.g.* another Fourth Circuit case decided a couple of years ago: *Regions Bank v. Weber*, 2010-1169 (La.App. 4 Cir. 12/15/10), 53 So.3d 1284

11.2.a FACTS:

- 11.2.a.(1) Jordan River Estates, LLC borrowed \$4.42 million from Regions Bank. The promissory note had an arbitration clause.
- 11.2.a.(2) Stephen Schmidt signed a “Commercial Guaranty”; it did not contain an arbitration clause.
- 11.2.a.(3) Jordan River Estates filed Chapter 11 bankruptcy and the bank sued the guarantors.
- 11.2.a.(4) The guarantor claimed that the bank had to arbitrate its collection efforts against the guarantor even though the guaranty did not have an arbitration clause.
- 11.2.a.(5) The trial court refused to stay the proceedings to allow arbitration.

11.2.b RESULT: Guarantor wins; arbitration ordered.

11.2.c RATIONALE:

- 11.2.c.(1) Both the Louisiana Arbitration Act (R.S. 9:4201 *et seq.*) and the Federal Arbitration Act (9 U.S.C. §1 *et seq.*) apply; in fact, the promissory note expressly referred to the FAA. Court should rule in favor of arbitration.
- 11.2.c.(2) It is acceptable to have an arbitration clause in one contract to which another contract relates.
- 11.2.c.(3) Equitable estoppel applies; the Bank is estopped from resisting arbitration when it placed the arbitration clause in the promissory note and the promissory note is the principal obligation for which the guaranty was given.

12. **LOUISIANA OIL WELL LIEN ACT: WORK DONE TO REMOVE A PLATFORM FOLLOWING DEPLETION OF WELL FALLS WITHIN THE SCOPE OF THE ACT. *Cutting Underwater Technologies USA, Inc. v. ENI U.S. Operating Co. et al*, 671 F.3d 512 (5th Cir. 2012)**

12.1 In a case that the U.S. Fifth Circuit said was one of “first impression,” the Court adopts in full Judge Fallon’s ruling that removal of a platform following depletion of a well falls within the scope of the La. Oil Well Lien Act (R.S. 9:4861 *et seq.*).

“Under LOWLA, a subcontractor may assert a lien over the property of an operator or lessee in order to secure “the price of his contract for operations.” La.Rev.Stat. Ann. § 9:4862(A)(1). By making available this privilege, the statute aims to ‘protect [subcontractors] from the default of those who engage them.’ *Guichard Drilling Co. v. Alpine Energy Servs., Inc.*, 657 So.2d 1307, 1312 (La.1995). As the Louisiana Supreme Court has observed, the statute reflects the ‘policy decision that the lease owners are in a far better position to ensure payment for the subcontractor’s services than is the subcontractor, and that the onus should be on the lease owners to ensure that the contractor it hires is solvent and that it actually makes payment to the subcontractor.’ *Id.* at 1313. The statute ‘clearly place[s] the risk of the contractor’s insolvency or failure to pay on those with an interest in the lease.’ *Id.* at 1312–13.

* * *

Of course, LOWLA applies only to ‘operations’ encompassed by the statute. La.Rev.Stat. Ann. § 9:4862(A)(1). Here, the critical question is whether TBS has performed such ‘operations.’ *Id.* The statute defines that term as including ‘every activity conducted by or for a lessee on a well site for the purpose of drilling, completing, testing, producing, reworking, or abandoning a well.’ *Id.* § 9:4861(4)(a)(i). In this case, TBS and Eni dispute whether the work that TBS performed falls within this definition. In particular, Eni argues that the work that TBS performed was neither done ‘for the purpose of ... abandoning a well’ nor performed ‘on a well site.’ *Id.* TBS rejects this contention. It asserts that the work it performed was done ‘for the purpose of ... abandoning a well’ and done ‘on a well site.’ *Id.* The Court will address these issues in turn.

b. Whether the work done was ‘for the purpose of ... abandoning a well’

In their briefs, Eni and TBS have presented divergent views of the statutory phrase ‘every activity ... for the purpose of ... abandoning a well.’ *Id.* As noted above, Eni argues that the process of

abandoning wells does not encompass the removal of the platform to which the wells were connected. Eni contends that once the wells are plugged and the conductors are cut, any additional work that is performed on the former site of production is not work that involves ‘abandoning a well’ within the meaning of LOWLA. TBS advances a different view of the statutory phrase. TBS notes that once the wells that are connected to a production platform are depleted, lessees are required by federal regulations to implement a number of decommissioning obligations, including plugging the wells, cutting the conductors, removing the platform, and clearing the site. TBS asserts that in light of these requirements, work done to remove a platform is in fact part and parcel of the process of abandoning the wells that were connected to the platform.

This is a close question, one that appears to be *res nova*, and both parties have presented strong arguments. The Court, however, is persuaded that TBS has the correct view of the statute.

* * *

A variety of reasons underlie the requirement that lessees remove a platform once the wells to which it is connected are depleted.

* * *

What may perhaps make the story of Platform 313-A somewhat unusual is the substantial amount of time that lapsed between the plugging of the wells and the removal of the platform that was connected to them. As noted above, the plugging of the wells took place in 1999, but it was not until 2008 that the platform was removed. The intervention of Hurricane Rita in 2005 may also distinguish the story of Platform 313-A from those of others. Neither of these, however, changes the fact that under the applicable federal regulations, the removal of a platform following the depletion of the wells that are connected to it is a typical well site activity, one that is largely inseparable from the plugging of the wells and thus, in effect, part and parcel of the process of abandoning the depleted wells.

* * *

While LOWLA may not be ‘a model of clarity,’ *Ogden Oil Co. v. Servco, Div. of Smith Int’l, Inc.*, 611 F.Supp. 572, 576 (M.D.La.1985), it is aimed at encompassing ‘all typical well site activities,’ including ‘[w]ork associated with the abandonment of wells,’ *Chicoine, supra*, at 1137. As discussed above, the applicable federal regulations that govern oil and gas operations on the OCS clearly indicate that the removal of a platform following the depletion of the wells that are connected to it is a typical well site activity that it is, in effect, part and parcel of the process of abandoning the depleted wells. In light of this regulatory scheme, it is clear that to accept Eni’s contention that LOWLA does not

encompass any work that is performed subsequent to the plugging of the wells would be to establish the sort of “artificial barrier” against which the Louisiana Supreme Court has warned. *Guichard Drilling*, 657 So.2d at 1313.

In light of the foregoing, the Court therefore concludes that work performed to remove a platform following the depletion of the wells connected to that platform constitutes work done to ‘abandon[] a well’ under LOWLA. La.Rev.Stat. Ann. § 9:4861(4)(a)(i). The application of this statutory phrase to the facts of this case is straightforward. Here, the undisputed facts show that along with several other subcontractors, TBS took part in a project to remove Platform 313–A after the wells to which it was connected had become depleted. *See, e.g.*, TBS’s Ex. D–A (Rec. Doc. No. 83–3). The Court therefore concludes that the work performed by TBS is done ‘for the purpose of ... abandoning a well’ within the meaning of LOWLA. La.Rev.Stat. Ann. § 9:4861(4)(a)(i).

* * *

In sum, the Court concludes that by providing survey and positioning services in Vermilion Block 313 in order to help remove a platform following well depletion, TBS performed ‘operations’ under LOWLA. La.Rev.Stat. An. §9:4861(4)(a). The work that it did was both ‘on a well site’ and involved ‘abandoning a well’ within the meaning of the statute. *Id.* Accordingly, the lien that it has asserted is valid and enforceable. *See id.* §9:4862(A)(1).”

13. **TAX SALES: NO DEADLINE TO ANNUL TAX SALE FOR LACK OF NOTICE. Smitko v. Gulf South Shrimp, Inc., (La. 7/2/12), So.3d , 2012 WL 2515272, 2011-2566**

13.1 **FACTS:**

13.1.a Gulf South Shrimp owned property which was subject to several mortgages, including one held by Source Bidco.

13.1.b When Gulf South Shrimp failed to pay property taxes in 2002, a tax sale was held in 2003.

13.1.c The Sheriff's office did not send notice of the tax sale to Gulf South; rather, it sent notice only to one of the creditors (Source Bidco) and also sent notice to Gulf South "c/o Source Bidco).

13.1.d Three years after the tax sale was held, the buyer (Smitko) filed suit to quiet title under former R.S. 47:2228;¹⁵ Gulf South claimed it had never received notice and Source Bidco intervened complaining about notice issues. Smitko later sold the property to Duc Dulac.

13.1.e Gulf South filed for summary judgment, claiming the tax sale was a nullity because of lack of notice. The trial court denied the summary judgment, reasoning that Gulf South's failure to file a "timely" separate proceeding to annul the sale within six months of its date, barred the action now.

13.1.f The current owner (Duc Dulac) filed for summary judgment, which was granted by the trial court and affirmed by the First Circuit because of Gulf South's failure to file a "timely" separate proceeding to annul the sale within six months of its date.

13.2 **RESULT:** Owner wins, tax sale purchaser loses, tax sale a nullity.

13.3 **RATIONALE:**

13.3.a Both *Mennonite* and the Louisiana Constitution require that an owner be given notice prior to a tax sale.

In *Mennonite Bd. of Missions v. Adams*, the Supreme Court recognized that the sale of property for nonpayment of taxes is an action affecting a property right protected by the

¹⁵ Note: The former provisions governing tax sales were repealed by Acts 2008, No. 819, §2, eff. Jan. 1, 2009 and replaced by R.S. 47:2121 *et seq.*

Due Process Clause of the Fourteenth Amendment. 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180 (1983). In *Mennonite*, the mortgagee of a property contested a tax sale that occurred after the homeowner had failed to pay her property taxes. 462 U.S. at 794, 103 S.Ct. at 2709. The mortgagee was not provided notice of the home-owner/mortgagor's delinquent payment of the taxes or the subsequent tax sale. *Id.* The Supreme Court held that 'a mortgagee possesses a substantial property interest that is significantly affected by a tax sale' and therefore 'is entitled to notice reasonably calculated to apprise him of a pending tax sale.' *Id.* at 798, 103 S.Ct. at 2711. The Supreme Court stated: 'Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.' *Id.* at 800, 103 S.Ct. at 2712. Because the mortgagee was not afforded its constitutional right to due process, the Supreme Court reversed the decision that upheld the tax sale. *Id.*

Article VII, Section 25(A) of the Louisiana Constitution of 1974 requires the tax collector to provide notice of the tax delinquency and the tax sale to all owners of record of any interest in the property. . . .”

13.3.b There is no question that no service was made on the owner, Gulf South Shrimp.

“Nevertheless, the record before us in this motion for summary judgment establishes the Sheriff did not even attempt to mail, whether by ordinary post or certified with return receipt requested, or to serve the notices of the tax delinquencies or the tax sales at Gulf South's Caillou Road address. Instead, the Sheriff mailed the notices to a Baton Rouge address never previously used by Gulf South, and thereafter resorted to publication of the tax sale as provided by the constitution. As a result, the present record establishes rather convincingly that there remain genuine issues of material fact as to whether the Sheriff provided written or printed notice to the property owner in compliance with former La. R.S. 47:2180, our own constitution, and the due process clause of the Fourteenth Amendment to the federal constitution. Accordingly, the former property owner has raised a credible claim, which the tax purchaser has not over-come on this record, that it

was denied due process of law, thereby rendering the tax sales of June 25, 2003, null and void in their entirety. *See Lewis*, 05–1192, pp. 8–9, 925 So.2d at 1177.”

13.3.c The statutory time limitation in the former statute for an owner to contest a tax sale cannot trump a constitutional right.

“We do not find the time limitation in La. R.S. 47:2228 precluded Gulf South from seeking to annul tax sales that may have already been fatally defective for want of due process. The cases relied on by Dulac Dat and the court of appeal were decided well before the Supreme Court in 1983 issued its opinion in *Mennonite*, which elevated the lack of notice in a tax sale to a due process violation rendering the tax sale null and of no effect. *See Future Trends, L.L.C. v. Armit*, 04–525 pp. 5–6 (La.App. 5 Cir. 11/16/04), 890 So.2d 13, 16, *writ denied*, 04–3082 (La.2/18/05), 896 So.2d 40. Since *Mennonite*, our court and the courts of this state have repeatedly held that the failure to give notice to a record property owner is a violation of the due process owed to the property owner and that the resulting tax sale is null and void in its entirety. Consequently, we find the failure of the Sheriff to provide notice of the tax delinquencies and tax sales to Gulf South, if proven by Gulf South, was a violation of due process that would preclude confirmation of the tax sales in favor of Dulac Dat. Accordingly, because the tax sales of June 25, 2003, were apparently of no legal force or effect, Gulf South's April 24, 2008 reconventional demand to annul the tax sales for lack of due process was timely before the trial court.”

13.4 **QUERY**: Does this mean that there can be no statutory time-limit on attacks of tax sales for lack of notice.

13.4.a See: *Orleans District Redevelopment Corp. v. Ocwen Loan Servicing, L.L.C.*, 2011-0260 (La.App. 4 Cir. 12/21/11), 83 So.3d 105, *writ den.* 2012-0175 (La. 3/23/12) 85 So.3d 96

13.4.a.(1) **HELD**: The failure to give proper *Mennonite* notice to a lender made the tax sale a nullity; the five-year prescriptive period does not apply.

“After reviewing the record, we find the evidence indicates the City failed to satisfy the notice requirements of former La. R.S. 47:2180. The evidence, clearly and convincingly, establishes that the City failed to give Firststar Bank, the

record mortgagee at the time of the tax sale, notice prior to the tax sale. The evidence also demonstrates that the City failed to provide Ms. Stafford, the record property owner, with proper notice prior to the sale.

The Louisiana Supreme Court has held that failure to provide the requisite notice of the tax sale to each co-owner of record deprives the owners of due process and renders the tax sale null and void in its entirety, with regard to all co-owners, including a co-owner who received notice of the tax sale. *See C & C Energy, L.L.C. v. Cody Investments, L.L.C.*, 2009–2160, p. 1 (La.7/6/10), 41 So.3d 1134, 1136. In view of our finding that the City failed to give Ms. Stafford and Firststar Bank the requisite notice of the tax sale, depriving them of due process, the tax sale is null and void in its entirety.

In its reasons for judgment, the trial court based its decision upholding the tax sale upon the expiration of the five-year preemptive period in La. Const. Art. VII, § 25(C), citing *Welsch v. Carmadelle*, 264 So.2d 341, 344 (La.App. 4th Cir.1972), where the Court explained that Louisiana law at that time treated a failure to provide notice of delinquency as a relative nullity that could be cured by the expiration of the five-year prescriptive period for annulling tax sales. Since that case was decided, however, the U.S. Supreme Court in *Mennonite* has held that the failure to provide notice of delinquency to an owner or mortgagee offends the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and, consequently, renders the tax sale an absolute nullity, such that neither preemption nor prescription can save the sale. And the Louisiana Supreme Court has followed *Mennonite* in *C & C Energy, L.L.C. v. Cody Investments, supra*, and *Lewis v. Succession of Johnson*, 05–1192 (La.4/4/06), 925 So.2d 1172, holding the tax sales in those cases to be absolute nullities for failure to provide the required notice of the tax sale. Therefore, we find the trial court erred in upholding the validity of the November 10, 2003 tax sale and quieting the tax title to the subject property.”

13.4.b Also see: *Quantum Resources Management, L.L.C. v. Pirate Lake Oil Corp.*, 11-813 (La.App. 5 Cir. 5/31/12), So.3d , 2012 WL 1957794.

“When a tax sale of real property does not meet the constitutional and jurisprudential criteria, including if the debtor’s due process rights were violated because of lack of adequate notice as per *Mennonite*, the preemptive period of La. Constitution Article VII, § 25(C) does not run. The tax sale is an absolute nullity that may be attacked collaterally at any time, and is not cured by the constitutionally preemptive period. . . .”

- 13.5 QUERY: Does a Bankruptcy Court has jurisdiction to deal with tax sale issues? Maybe not. See: *In re N.R. Group, L.L.C.*, 2011 WL 7444637 (Bankr.W.D.La. Dec 02, 2011), Report and Recommendation Adopted by *City of Alexandria v. Inspirational Enterprises, L.L.C.*, 2012 WL 665842 (W.D.La. Feb 29, 2012).

“The District Court posited that the rejection of the lease effectively puts the lease itself outside the bankruptcy court's jurisdiction, based on the conclusion expressly stated by the Fifth Circuit in *Austin*, that the extent of the rights of the third party lender do not fall within the ‘related to’ jurisdiction of the bankruptcy court under 11 U.S.C. § 1334(b), and should be decided in state court, rather than in the bankruptcy arena.

The District Court's concern, as well as the Fifth Circuit's observation in *Austin*, although possibly dicta, proved to be prescient. The holding of the United States Supreme Court in *Stern v. Marshall*, — U.S. —, 132 S.Ct. 2594, 180 L.Ed.2d 475 (June 23, 2011) concluded that the bankruptcy courts have no constitutional authority to issue final orders under 28 U.S.C. § 157(b)(2)(c), regarding the exercise of jurisdiction over counterclaims by the estate against persons filing claims against the estate. Without deciding the matter on remand, regarding the rejection as opposed to termination of the lease, this Court posits that the relief requested in both above-captioned adversaries raise concerns under 28 U.S.C. § 157(b)(2)(c) (*Inspirational Enterprises, LLC* filed Claim # 8 in the amount of \$28,861.86), 28 U.S.C. § 157(a) and 28 U.S.C. § 1334(b).

* * *

This court suggests that the validity of the tax sales of the real property once leased by the debtor under 11 U.S.C. § 365 may fall beyond the bankruptcy court's constitutionally permissible ‘related to’ jurisdiction, particularly after *Stern*. Although the Supreme Court did not expressly address rejection rights, the conclusion that the reasoning therein

confirms Constitutional restraints on the Bankruptcy Court's jurisdiction is inescapable with regard to 'related to' jurisdiction under 28 U.S.C. § 1334. While the dissent in *Stern* notes that the Bankruptcy Courts frequently encounter disputes between a landlord and third parties who have some relationship with the debtor and the administration of the bankruptcy estate, over which the United States District Courts have exclusive jurisdiction, such a relationship here is lacking. (See Complaint ¶ 22 'The Debtor is no longer a lessee of the property and the lease has been deemed rejected by final Order of this Court. The Debtor at no time owned the real property.' See also Complaint ¶ 52–53 'The Trustee has asserted no estate interest in or claim to the real property. The City of Alexandria shows that the property is not property of the estate and the Chapter 7 Trustee exercises no control over the immovable property and further that the lease is no longer executory.') Even if the causes of action can be cast by plaintiff as supplemental claims under 28 U.S.C. § 1367(a), over which the bankruptcy courts could exercise 'related-to' jurisdiction under the controlling 5th Circuit precedent in *TXNB Internal Case v. GPR Holdings, L.L.C.*, 483 F.3d 292 (5th Cir.2007), plaintiff has admitted in the petition as quoted above that these causes of action lack any 'implications for debtor[s] estate.' *TXNB Internal Case*, 483 F.3d. At 298. Cf. *Townsquare Media, Inc. v. Brill*, 652 F.3d 767 (7th Cir.7/21/11)(a post-*Stern* discussion of the limits on the exercise of bankruptcy court jurisdiction over supplemental causes of action). This Court cannot justify the exercise of jurisdiction in the above-captioned adversary complaints regarding state law causes of action concerning the validity of tax sales to third parties, of property already determined by the District Court to be owned by the former lessor of the debtor.

The tortuous twenty-eight year history of the hotel property culminated in a tenant seeking reorganization under Chapter 11 in the bankruptcy court. In Chapter 11, there is a presumption that a debtor may successfully reorganize, similar to the presumption that in favor of a Chapter 7 individual debtor may obtain a 'fresh start' in the form of a discharge. Here, the attempted reorganization by the City's tenant, N.R. Group, L.L.C., failed, leaving Capitol One in the unenviable position of a lender to a failed business endeavor, in a dispute with the non-debtor lessor of the property. The City, as lessor, prevailed in its effort to have

its ownership rights recognized despite a plethora of disputed transactions between the debtor as lessee, its predecessors, and the hapless lender. By analogy, the City obtained something of a fresh start. The brief sojourn of one tenant in this Court does not bestow carte blanche on the same to deal with present and future obstacles to the City's ongoing efforts to market the property.

CONCLUSION

For the reasons stated in this Report and Recommendation, this Court **RECOMMENDS** that the District Court withdraw the reference as to Adversary Proceedings 10–8030 and 11–8014. The Clerk of the Bankruptcy Court is **DIRECTED** to send this Report and Recommendation to the United States District Court forthwith.

SO ORDERED.”

14. **MORTGAGE CANCELLATION: CLERK CANNOT MAKE DETERMINATIONS OF DISPUTED FACTS. *Aberta, Inc. v. Atkins*, 2012-0061 (La. 5/25/12), 89 So.3d 1161**

14.1 Facts:

14.1.a Aug., 2003: Alberta, Inc. sold property to Wagner World, but the deed was “not properly filed and indexed.”¹⁶

14.1.b Both Alberta and Wagner World were “controlled by Scott Wolfe.”

14.1.c In August, after the sale, Wagner World put mortgages on the property in favor of Cienna Capital.

14.1.d Dec., 2008: Wolfe sold his stock in Alberta to FHH Properties.

14.1.e May, 2010, the August 2003 sale from Alberta to Wagner World is finally filed and recorded in the conveyance records.

14.1.f Alberta, now owned by FHH, filed a mandamus action to cancel the Cienna mortgages, naming the clerk of court as a defendant.

14.1.g The Fourth Circuit allowed the mandamus to proceed.

14.2 RESULT: No mandamus available if it would require the Clerk of Court to determine disputed factual issues.

“While certain statutes impose upon the recorder of mortgages the duty to cancel mortgages when the request meets specific requirements, here, in order to cancel the mortgages at issue, the recorder would have to determine that Aberta, and not Wagner World, is the owner of the property at issue. This is a disputed factual issue and involves a determination of whether Aberta, now owned by FHH, is a third party protected by the Public Records Doctrine from the sale between Aberta, then owned by Scott Wolfe, and Wagner World. This is not a condition admitted or proved to exist and imposed by law; thus, the cancellation of the Cienna Mortgages involves more than a ministerial duty. Further, mandamus may not be granted where, as here, ordinary means afford adequate relief.

¹⁶ See the Fourth Circuit’s opinion, which the Supreme Court overturned, 80 So.3d at 610.

Thus, the issuance of a writ of mandamus is inappropriate under the facts of this case.”

15. MORTGAGES: REINSCRIPTION OF A MORTGAGE IS NOT A STEP IN THE PROSECUTION OF A SUIT PREVENTING THE SUIT FROM BEING DISMISSED.

15.1 See: *Occidental Properties, Ltd. v. Zufle*, 11-77 (La.App. 5 Cir. 11/15/11) 79 So.3d 1135.

15.2 The court stated:

“In the matter before us, the issues are: *** (3) whether the reinscription of Occidental's mortgage in the parish mortgage office constitutes a step in the prosecution on the promissory note as envisioned by La. C.C.P. art. 561.

* * *

Occidental argues three things that preclude the judgment of abandonment: (1) the reinscription of the mortgage; (2) the interrogatories propounded to Brae; and (3) the pending, related actions. Occidental also asks this Court to include all divisions of a district court in the word “court” for purposes of La. C.C.P. art. 561.

Occidental reinscribed its mortgage on the property on May 20, 2008. It argues that filing shows intent to continue litigation and extends the abandonment date until May 20, 2011. Occidental offers no legal support for this argument.

The recordation of mortgages is part of the public records doctrine and has been described by the Louisiana Supreme Court as a negative doctrine because it does not create rights; but, rather, denies the effect of certain rights unless they are recorded. The primary focus of the public records doctrine is the protection of third persons against unrecorded interests. Reinscription of Occidental's mortgage merely renews the recordation and continues its effect as provided by law. However, it does not create rights. Nor does it serve as a step in the prosecution of an action on a promissory note secured by the mortgage.”

16. **PUBLIC RECORDS DOCTRINE INAPPLICABLE TO CERTAIN INHERITANCE RIGHTS.**

16.1 *Biggs v. Hatter*, 46,910 (La.App. 2 Cir. 4/11/12), __ So.3d __ 2012 WL 1192132, contains a review of this area of the law:

“The public records doctrine in this state was revised by Acts 2005, No. 169, § 1, which became effective on July 1, 2006. The sale in this matter to LLP took place on October 23, 2006, and is governed by the revised provisions. La. C.C. art. 3338 provides:

The rights and obligations established or created by the following written instruments are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title:

- (1) An instrument that transfers an immovable or establishes a real right in or over an immovable.
- (2) The lease of an immovable.
- (3) An option or right of first refusal, or a contract to buy, sell, or lease an immovable or to establish a real right in or over an immovable.
- (4) An instrument that modifies, terminates, or transfers the rights created or evidenced by the instruments described in Subparagraphs (1) through (3) of this Article.

The recordation of an instrument does not create a presumption that the instrument is valid or genuine. La. C.C. art. 3341. A third person is a person who is not a party to or personally bound by an instrument. La. C.C. art. 3343.

The public records doctrine is founded upon our public policy and social purpose of assuring the stability of land titles. *Camel v. Waller*, 526 So.2d 1086 (La.1988). The doctrine does not create rights in a positive sense, but rather has the negative effect of denying the effectiveness of certain rights unless they are recorded. It is essentially a negative doctrine. Third persons are not allowed to rely on what is contained in the public records but can instead rely on the absence from the public record of those interests that

are required to be recorded. *Camel v. Waller, supra*. Simply put, an instrument in writing affecting immovable property which is not recorded is null and void except between the parties. *Cimarex Energy Co. v. Mauboules*, 2009–1170 (La.4/9/10), 40 So.3d 931.

However, there are exceptions to the public records doctrine. One of those exceptions is inheritance rights. It has been consistently held in the jurisprudence that the law of registry is inapplicable where the ownership of, or claim affecting, immovable property has been acquired by inheritance and title has become vested by operation of law. See *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937); *Jackson v. D'Aubin*, 338 So.2d 575 (La.1976); *Crozat v. Louisiana Coastal VII, LLC*, 2001–2404 (La.App.4th Cir.9/11/02), 830 So.2d 319, *writs denied*, 2002–3100, 2002–3103 (La.2/21/03), 837 So.2d 631; *Vaughan v. Housing Authority of New Orleans*, 80 So.2d 561 (La.App.Orleans 1955); *Succession of Rosinski*, 158 So.2d 467 (La.App. 3d Cir.1963); *Knighten v. Ruffin*, 255 So.2d 388 (La.App. 1st Cir.1971), *writs denied*, 260 La. 399, 459, 256 So.2d 288, 442 (La.1972). See also William V. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tulane Law Review 491, 505 (1964–1965). The courts have recognized a right to property obtained through a succession even where that interest was omitted from a judgment of possession that was filed in the public records and relied upon by a third party. See *Crozat v. Louisiana Coastal VII, LLC, supra*. The recent revision of the registry laws does not address real and personal rights affecting immovables created by operation of law. See Michael Palestina, *Of Registry: Louisiana's Revised Public Records Doctrine*, 53 Loyola Law Review 989 (2007).

* * *

[R.S. 9:5360] allows successors of a deceased person not recognized in a judgment of possession to assert an interest in an immovable formerly owned by the deceased, against a third person who has acquired an interest in the immovable by onerous title from a person recognized as an heir or legatee of the de-ceased in the judgment of possession, or his successors. The existence of this provision demonstrates that the public records doctrine will not be a bar to claims against third person for title to immovable property where successions are involved if the action is brought within the applicable time limits.”

17. SALE WITH A RIGHT OF REDEMPTION

17.1 OVERVIEW¹⁷

17.1.a : A sale with a right of redemption is effective against third parties when recorded in the conveyance records.

17.1.b Generally, it cannot last longer than 10 years. C.C. art. 2568. The period is one of preemption, not prescription. C.C. art. 2571.

17.1.c Even though it is effective as a sale *as to third parties*, it may be treated as a mortgage *between the parties*. See, e.g., *Latiolais v. Breaux*, 154 La., 1006, 98 So. 620 (1924), and *Potts v. Spatafora*, 340 So.2d 414 (La. App. 2d Cir. 1976), and the Law Institute’s Comments to C.C. art. 2027.

17.2 The latest case on sales with a right of redemption is *Miller v. Jackson*, 2011-773 (La. App. 3 cir. 12/7/11), 80 So.3d 673, which held that, as between the parties to the document, whether it is a valid sale with a right of redemption or a simulated sale which is really a mortgage is question of fact for the trial judge:

“Louisiana Civil Code Article 1906 provides that ‘[a] contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.’*681 A simulation contract is one which ‘by mutual agreement ... does not express the true intent of the parties.’ La.Civ.Code art. 2025. A simulation contract can be one of two types: absolute and relative. ‘A simulation is absolute when the parties intend that their contract shall produce no effects between them. That simulation, therefore, can have no effects between the parties.’ La.Civ.Code art. 2026. On the other hand, ‘[a] simulation is relative when the parties intend that their contract shall produce effects between them though different from those recited in their contract.’ La.Civ.Code art. 2027. With regard to the effects of a relative simulation, it ‘produces between the parties the effects they intended if all requirements for those effects have been met.’ *Id.* The revision comments to La.Civ.Code art. 2027 note that ‘[u]nder this Article, a simulated sale with right of redemption may be a valid security contract.’ Finally, ‘[a]ny simulation, either absolute or relative, may have effects as to third persons.’ La.Civ.Code art. 2028.

¹⁷ For more on this topic, see Rubin, “THE LOUISIANA LAW OF SECURITY DEVICES: A PRÉCIS” (Lexis/Nexis 2011), Chapter 22.

The right of redemption is the seller's right to take back the property from the buyer. La.Civ.Code art. 2567. When the property at issue is an immovable, the right of redemption may not be reserved for more than ten years. La.Civ.Code art. 2568. 'If the seller does not exercise the right of redemption within the time allowed by law, the buyer becomes unconditional owner of the thing sold.' La.Civ.Code art. 2570. Although the seller is entitled to receive the property free of any encumbrances placed on it by the buyer, the rights of third parties are governed by the laws of registry. La.Civ.Code art. 2588.

The issue of whether an act is simulated is an issue of fact. *Ridgedell v. Succession of Kuyrkendall*, 98–1224 (La.App. 1 Cir. 5/19/99), 740 So.2d 173. Because a resolution of the simulation dispute depends on factual findings, this court reviews the trial court's findings for manifest error. *Pelican Outdoor Adver., Inc. v. Eugene*, 01–94 (La.App. 5 Cir. 4/24/01), 786 So.2d 184, writ denied, 01–1518 (La.8/31/01), 795 So.2d 1214.

In its reasons for judgment, the trial court concluded that the July 24, 2008 transaction occurred because Antonial 'needed quick cash and a person in whose name he could temporarily place his property until he was in a financial position to assume ownership.' The trial court concluded that the Jacksons supplied the solution to his dilemma, not by purchasing the property with nothing more than a vague right of first refusal to Antonial as asserted by Lenard, but by purchasing the property with a right of redemption provided to Antonial. The trial court found that the right of redemption was to exist for a period of five years, or until the \$15,000.00 balloon note came due at Citizens Bank. However, the trial court also found that the terms of the right of redemption included Antonial's obligation to timely pay the \$300.00 monthly payment, which it classified as partial repayment of the \$25,000.00 loan from Citizens Bank to the Jacksons, and not rent as Lenard asserted.

The trial court's determinations in this regard are factual findings, and we find no manifest error in them. That being the case, we find no merit in the Millers' assertion that the trial court erred in concluding that the July 24, 2008 agreement was a sale with right of redemption, nor do we find merit in the Jacksons' assertion that the trial court erred

in finding that the same agreement was anything other than a complete transfer of the 6.64 acres to them in full ownership subject only to a right of first refusal to the Millers in the event the Jacksons decided to sell the property.”

18. **CLAIMS FOR DAMAGES TO REAL PROPERTY DO NOT TRANSFER TO THE BUYER UNLESS EXPRESSLY TRANSFERRED. *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So.3d 246.**

18.1 **FACTS:**

18.1.a In the 1980s, the former owners of property leased it to a Union Pipe, which conducted pipe-cleaning operations on the property.

18.1.b In the late 1980s, Eagle Pipe purchased the property, not knowing about the contamination caused by the pipe-cleaning operations, a contamination that involved certain radioactive items.

18.1.c After Eagle Pipe found out about the contamination, it brought suit against the former owners and others seeking damages.

18.2 **RESULT:** A buyer cannot sue those who committed torts against the property prior to the sale unless that right was expressly transferred in the act of sale.

18.3 **RATIONALE:** (There are a lot of rationales here)

18.3.a **NOTE:**

18.3.a.(1) It’s a lengthy opinion, more than 50 pages.

18.3.a.(2) The lineup of Justices is interesting:

18.3.a.(2)(i) The majority opinion was written by **Clark**, who also wrote a separate concurring opinion.

18.3.a.(2)(ii) Concurring opinions also by **Victory**, and **Guidry**

18.3.a.(2)(iii) Dissenting opinions by **Weimer**, joined by **Johnson** and **Lobrano** (sitting by designation for Knoll, recused).

18.3.a.(2)(iv) Everyone cites Aubry and Rau, but come to different conclusions.

18.3.b *Jurisprudence Constante* provides the answer here.

“Jurisprudence Constante

The Louisiana Civil Code provides there are only two sources of law: legislation and custom. La. C.C. art. 1; *see Doerr v. Mobil Oil Corp.*, 2000–0947, p. 13 (La.12/19/00), 774 So.2d 119, 128. However, legislation is the superior source of law in Louisiana; custom may not abrogate legislation. La. C.C. art. 3, Revision Comments–1987, (d). ‘Judicial decisions, on the other hand, are not intended to be an authoritative source of law in Louisiana.... our civilian tradition does not recognize the doctrine of stare decisis in our state.’ *Doerr*, 2000–0947, p. 13, 774 So.2d at 128.FN17

FN17. *See also* A.N. Yiannopoulos, *Louisiana Civil Law Systems*, § 35, p. 53 (1977) *and citing cases*.

Under our civilian tradition, we recognize instead that ‘a long line of cases following the same reasoning within this state forms *jurisprudence constante*.’ *Doerr*, 2000–0947, p. 13, 774 So.2d at 128. This concept has been explained, as follows: ‘[w]hile a single decision is not binding on our courts, when a series of decisions form a “constant stream of uniform and homogenous rulings having the same reasoning,” *jurisprudence constante* applies and operates with “considerable persuasive authority.” ’ *Doerr*, 2000–0947, p. 13–14, 774 So.2d at 128.FN18 Thus, ‘prior holdings by this court are persuasive, not authoritative, expressions of the law.’ *Doerr*, 2000–0947, p. 14, 774 So.2d at 129.FN19

With these principles in mind, we will examine the general Louisiana rule that a purchaser of property cannot recover from a third party for property damage inflicted prior to the sale, sometimes referred to as the subsequent purchaser rule. In order to make this examination, we will review the property law precepts that support this rule, and the

reasoning and development of the rule over more than a hundred years of jurisprudence.”

18.3.c The “Subsequent Purchaser” Rule

“Subsequent Purchaser Rule

The subsequent purchaser rule is a jurisprudential rule which holds that an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.”

18.3.d The Court explores the jurisprudential history of the rule at some length, tracing it back to the 1851 case of *Clark v. J.L. Warner et al*, 6 La. Ann. 408 (1851).

18.3.e The claim for damages to the property is personal, not real, and does not “run with the land.”

18.3.f Because the claim is personal, the seller must have “expressly assigned or subrogated his personal right to the new owner.” 79 So.3d at 270.

18.3.g The “Subsequent Purchaser” Rule applies whether the damage to the property is apparent or non-apparent.

“Analysis

Although the plaintiff asserts the subsequent purchaser rule applies only when there is apparent damage to property, we think the rationale also extends to the situation where the damage to property is not apparent. Whether this should be called an extension of the subsequent purchaser rule, or simply the way in which the fundamental principles of property law operate, the result is the same. Damage to property may disturb not only the owner's rights of use of, and enjoyment in, the property (the *usus* and *fructus* rights in ownership), but may also disturb his right to alienate the property, or to dispose of the property, completely and without disturbance (the *abusus* right in ownership).

The property owner at the time the damages were inflicted has a personal right of action against the tortfeasor for the disturbance of his real right in the property. When the damage is apparent, the property owner obtains the personal right of action to sue for damages to compensate for a loss of value in the property or an interference with the property's use. This personal right exists during his use and enjoyment while he owns the property. This personal right exists even during and after his disposal of the property, as it is assumed the apparent damage would result in a loss of value to the property which would be reflected in the sale price. Where damage to the property is not apparent, and the property has been sold, the law provides the purchaser with the right to seek rescission of the sale or a reduction in the purchase price. In that instance, the former owner's right to dispose of the property without disturbance has been affected, as the owner must now defend against an action in redhibition or take some other action to repair, remedy or correct the defect.”

18.3.h A purchaser cannot profit by buying low and then bringing suit against the tortfeasor who caused pre-sale damage;

“With apparent damage to property, the law does not provide to the subsequent purchaser a source of profit by allowing him to negotiate a low purchase price based on the condition of the property *and* the right to seek damages from the tortfeasor who is responsible for the property’s poor condition. with damage that is not apparent, the law does not provide the subsequent purchaser with both the right to sue for rescission of the sale, or a reduction in the purchase price, *and* the right to sue for damages against the tortfeasor. Instead, whether damage to the property is apparent or not, the personal nature of the right of the landowner at that time does not change, and remains with the landowner unless the right is explicitly assigned or subrogated to another.”

18.3.i The fact that discovery and prescription may bar a claim against the former owner for rescission or redhibition is a legislative determination, as is the question of remediation.

“We are not unaware of the effects which the rules of discovery and prescription will have on certain fact

situations under this analysis, especially where the damage to property occurred in the distant past, where property rapidly changes hands, or where ancestors in title are non-existent. We find the rules of discovery and prescription are deliberate legislative choices which ultimately limit otherwise imprescriptible torts and which maintain certainty in transactions involving immovable property. The legislature, if it chose, could have created a right of action to seek damages against tortfeasors for damage to property which affects current property owners no matter when the damage occurred, or could have made an exception to prescription rules for long-term contamination of property. But such legislation has not been enacted. Instead, the legislature has decided the only addition to current legal remedies is a mechanism for remediating the property.

Nor are we indifferent to criticisms of the remediation procedures of the La. DEQ raised by the plaintiff and *amicus curiae*. However, these assessments of the current legislative scheme for property remediation are also matters best addressed to the legislature. What we discern from the current legislative scheme is a determination by the legislature to remediate property to put it back into use and commerce. In the absence of legislative action, we cannot supply a right of action through jurisprudence which the law does not.”

18.3.j When the operations that caused the damage have ceased prior to the sale, the fact that the contamination continues does not interrupt prescription.

“We find the operating cause of the injury claimed in the petition here was the tender of allegedly contaminated oilfield equipment from the Oil Company Defendants and the Trucking Company/Transporter Defendants to Union Pipe, the lessee of the Former Property Owner Defendants. The petition does not claim that there have been continual or ongoing unlawful acts; instead, the petition asserts the alleged tortious acts ceased as of 1988. We also find the continued presence of the alleged contamination, the injury claimed, is simply the continuing ill effect from the original tortious acts. *Crumpp*, 98–2326, p. 9, 737 So.2d at 727–728. The fact that a subsequent purchaser ‘discovers’ the continuing ill effects of the original tortious acts does not give rise to a new, discrete right of action in tort.”

18.3.k There is no continuous tort of trespass that interrupts prescription when the activities ceased pre-sale.

“A civil trespass is a tort. Even if the facts alleged in the petition could be considered tortuous acts which constituted a trespass which caused damage to the property, the principles of Louisiana property law would still provide the owner of the property at the time the injury occurred with a personal right to sue the trespasser for damages, and not the subsequent owner. Moreover, not all trespasses are continuous acts giving rise to successive damages.”

18.3.l The lease between the former owners and the pipe company that caused the contamination did not create real rights.

“Eagle Pipe contends that Union Pipe and the Oil Company Defendants entered into contracts, obligations or agreements that provide for the recovery of damages caused to the property. This contention suggests earlier contracts between the lessee and its customers established a real obligation which followed the property. However, a real obligation is correlative and incidental to a real right. Although Union Pipe as lessee had a right against the Former Property Owner Defendants to use and enjoy the property during the term of its lease, Union Pipe did not have a real right in the property. The Former Property Owner Defendants retained the real rights to use and enjoy the property, while the lease provided Union Pipe with a personal right against the owners to allow it to use and enjoy the property. The contracts between Union Pipe and the Oil Company Defendants, therefore, could not involve any real right in the property. It is a fundamental principle that ‘no one can transfer a greater right than he himself has.’ If there was no real right involved in the contracts between Union Pipe and the Oil Company Defendants, then there could be established no real obligation which was correlative and incidental to that real right. Instead, the contractual rights and obligations between Union Pipe and the Oil Company Defendants established personal rights between the contracting parties. Eagle Pipe does not have a right of action based on a real obligation established by an earlier contract between a lessee of the property and its customers.”

18.3.1.(1) QUERY:

18.3.1.(1)(i) Does this mean that a leasehold mortgage is not a real right?

18.3.1.(1)(ii) Only those holding real rights are entitled to Mennonite notice.

18.4 Justice Weimer's Dissent:

"I respectfully dissent from the majority opinion insofar as it adopts a bright line rule expanding the application of the jurisprudentially created subsequent purchaser rule to all circumstances, regardless of the facts. In my view, the blanket expansion of the subsequent purchaser rule to include latent conditions on property divorced of any consideration of the particular circumstances out of which those conditions arise has the potential to produce unworkable and inconsistent results at odds with the facts and the law. ***"

18.5 Clark's Concurring Opinion, responding to Weimer:

"I believe the dissent falls into legal error in several respects and I write separately to respond to those issues. While the subsequent purchaser rule is a jurisprudential creation, the opinion goes to great lengths to show that its application is based squarely on property law and the law of obligations. Although *Clark v. J.L. Warner & Co.*, 6 La. Ann. 408 (1851) is the first expression of the concept, the rule is derived from the operation of basic property and obligations law.

* * *

Additionally, I believe the dissent's embrace of the analysis by the court of appeal on rehearing is a case of the tail wagging the dog. The analysis focuses on when the cause of action arises, rather than whether the plaintiff has the right to assert the cause of action. Moreover, I believe the rule expressed by the court in *Roman Catholic church of the Archdiocese of New Orleans v. La. Gas Service Co.*, 618 So.2d 874 (La. 1993) is one for the calculation of the amount of damages. As such, I do not believe this case has a place where the focus of the discussion is whether a right of action may be asserted. A party must have a right to an award of compensatory damages before we need determine the proper method of calculation."

18.6 Weimer's further, dissent, responding to Clark's concurring opinion:

"I feel it necessary to respond to certain comments made in the additional concurring reasons which I fear demonstrate a misunderstanding of the dissent and its underlying principles.

At the heart of that misunderstanding is the concurrence's suggestion that the dissent, in contrast to the plurality opinion, is not ground in 'basic property and obligations.' To the contrary, the dissent is firmly rooted in articles of the Civil Code, particularly, La. C.C. arts. 2315 and 3493."

19. CAN AN ACT OF CORRECTION REINSTATE A MORTGAGE THAT HAS BEEN CANCELLED FROM THE PUBLIC RECORDS? Yes. *First Nat. Bank, USA v. DDS Const., LLC*, 2011-1418 (La. 1/24/12), So.3d , 2012 WL 206431.

19.1 FACTS:

19.1.a January 6, 2006, DDS granted a Multiple Indebtedness Mortgage to First National; the mortgage encumbered, among other property Lot 8.

19.1.b Sept. 2006: Bering bought Lot 8 from DDS, but the act of sale erroneously described the property as Lot "8A."

19.1.c Bering then granted a mortgage to Bering Mortgage/MERS on the property he bought; it also described the property as Lot "8A." The Bering Mortgage is eventually acquired by U.S. Bank.

19.1.d In May, 2009,: as part of work-out during a foreclosure, First National executed an act of release of several lots, including Lot 8.

19.1.e The First National May 2009 release was executed by a Vice President of the bank in authentic form.

19.1.f June 3, 2009: the Notary who had passed the act of sale to Bering and the Mortgage in favor of Bering Mortgage executed an act of correction stating that the property described as Lot "8A" should have been described as Lot 8.

19.1.f.(1) This document was filed and recorded June 5, 2009 in the St. John the Baptist mortgage and conveyance records.

19.1.g June 10, 2009: the May 2009 First National release of Lot 8 is recorded.

19.1.h June 15, 2009: First National records an “Act of Correction” (also executed by its VP in authentic form) stating that Lot 8 was released in error and that the mortgage on it remains in effect.

19.1.i Oct. 28, 2009: the Notary before whom the First National May 2009 release was executed signs an authentic act again correcting the May 2009 release, stating that Lot 8 was not released from the mortgage.

19.1.j The question is, did either the June 15, 2009 Act of Correction or the October 28, 2009 Act of Correction retroactively reinstate the First National Mortgage back to January 2006 so that it outranks later the September 2006 mortgage now held by US Bank, or is US Bank now first in priority.

19.2 RESULT: An Act of Correction can have retroactive effect and revive an erroneously cancelled mortgage retroactive to the mortgage’s original ranking date that it held immediately before the erroneous cancellation.

19.3 RATIONALE:

19.3.a R.S. 35:1 is broad enough to cover this situation;¹⁸ the legislature must have known what it was doing when it amended the statute:

“Although US Bank asserts the statute may not be used to correct notarial acts which have canceled a document from

¹⁸ R.S. 35:2.1 provides:

“A clerical error in a notarial act affecting movable or immovable property or any other rights, corporeal or incorporeal, may be corrected by an act of correction executed by the notary or one of the notaries before whom the act was passed, or by the notary who actually prepared the act containing the error. The act of correction shall be executed by the notary before two witnesses and another notary public.

B. The act of correction executed in compliance with this Section shall be given retroactive effect to the date of recordation of the original act. However, the act of correction shall not prejudice the rights acquired by any third person before the act of correction is recorded where the third person reasonably relied on the original act. The act of correction shall not alter the true agreement and in-tent of the parties.

C. A certified copy of the act of correction executed in compliance with this Section shall be deemed to be authentic for purposes of executory process.”

the public records, we find the statute itself does not impose such a limitation, nor are we at liberty to impose such in the absence of legislative directive. * * *

The subject matter of the statute is the correction of notarial acts, including those regarding immovable property. We assume the legislature is aware that notarial acts are used and often required when dealing with immovable property, including mortgages affecting immovable property. La. C.C. art. 3366 provides that the recorder of mortgages shall cancel the recordation of a mortgage upon written request for cancellation in a form prescribed by law. The record in this case shows the Request for Cancellation was executed by First National pursuant to La. R.S. 44:109 B, now La. R.S. 9:5172, which requires an authentic act by a financial institution to be attached to a request to cancel a mortgage.^{FN16} Presuming the legislature was aware that notarial acts are often used in connection with immovable property, including the cancellation of a mortgage on that property, and that these documents are often re-recorded in the public records, we reject a limitation on La. R.S. 35:2.1 which would result in the inapplicability of the statute here. While we find the statute to be clear and un-ambiguous and acknowledge the inquiry ceases there, consideration of the legislative history further supports our holding. *See Faget*, 2010–0188, p. 9; 53 So.3d at 420. As originally enacted in 1984, the legislature limited the scope of an act of correction to the reconciliation or correction of an obvious discrepancy or error only in the description of immovable property.^{FN17} A 1987 amendment resulted in the statute's present form and provisions, with a 1995 amendment refining and expanding the persons who could execute an act of correction. ^{FN18} We find the limitation originally placed on the statute was eliminated through amendment, clearly signaling the legislature's intent to broaden the applicability of La. R.S. 35:2.1.”

19.3.b The kind of “clerical” errors that can be corrected is “almost limitless.”

“We turn now to the application of the provisions of the statute. both in brief and in oral argument to this court, US Bank concedes the Dufrene Act of Correction in his case ‘can likely be said to have corrected a clerical error,’ as the inadvertent inclusion of a lot number among many other numbers may be considered a clerical error.^{FN19} We agree. Black’s Law Dictionary defines a ‘clerical error’ as [a]n

error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.’ Black’s Law Dictionary 622 (9th ed.2009). ***We hold that including, or failing to include, a number in a series of numbers is just one of the almost limitless examples of clerical errors.***”

19.3.c The only kind of Act of Correction that counts is one done by the Notary; an Act of Correction by a corporate officer is insufficient.

“Keeping these requirements in mind, we find the First National Act of Correction executed through its vice-president on June 15, 2009 and recorded that same day, did not comply with the requirements of the statute, although it was an authentic act. Instead of an act of correction executed by the notary before whom the error-containing notarial act was made, as required by La. R.S. 35:2.1(A), the First National Act of Correction was executed by the original party who executed the erroneous Request for Cancellation. Although the First National Act of Correction was executed before the same notary and witnesses as the original, error-containing notarial act, that circumstance is not a requirement of the statute. As such, the First National Act of Correction cannot be afforded retroactive effect to the date of recordation of the original Request for Cancellation.

However, the Dufrene Act of Correction executed on October 28, 2009, and recorded on October 29, 2009, complied with the statute’s requirements. Dufrene was the notary before whom the Request for Cancellation was passed. The Dufrene Act of Correction was executed before two witnesses and another notary public, and declared that the Request for Cancellation contained the clerical error of including Lot 8 in the listing of residential lots over which the Construction Mortgage was to be cancelled when, in truth and in fact, the Construction Mortgage remained in full force and effect as to Lot 8. Consequently, under the plain terms of the statute, the Dufrene Act of Correction must be given retroactive effect to the date of recordation of the Request for Cancellation, June 10, 2009, unless there is prejudice to a third party who reasonably relied on the original act, or if it is found the correction alters the true agreement and intent of the parties. La. R.S. 35:2.1(B).”

19.3.d There is no “temporal limitation” on the retroactivity of an act of correction.

“We find no temporal limitation in the statute. Thus, the fact that the Dufrene Act of Correction was filed four months after the original, error-containing Request for Cancellation does not, in and of itself, affect our consideration. However, we note the common sense observation that the longer the time period is between the filing of the original, erroneous notarial act and its act of correction, the greater the potential that a third person will acquire rights through reasonable reliance on the original act.”

19.3.e There was no prejudice to U.S. Bank

“Between June 10, 2009, when the Request for Cancellation was filed, and October 29, 2009, when the Dufrene Act of Correction was filed, the holders of the Bering Mortgage took no action with regard to Lot 8 in reliance on the requested cancellation of the Construction Mortgage, *other than assigning the mortgage to US Bank*. There were no intervening alienations or encumbrances placed on the property. In fact, the holders of the Bering Mortgage took no action until US Bank filed the intervention in the present suit for executory process and the motion to rank.” (Emphasis Supplied).

19.3.e.(1) **QUERY:** Does this mean an assignee of a mortgage which, at the time of the assignment, is a first mortgage, can be outranked whenever the cancellation of an earlier mortgage is “corrected”?

19.4 JUSTICE KNOLL (joined by Justices Kimball and Johnson) dissented:

“With all due respect, I dissent. In my view, an act of correction pursuant to La.Rev.Stat. § 35:2.1 cannot reinstate a mortgage cancelled from the public records. Under La. Civ.Code art. 3366(B), once First National's mortgage was cancelled it was extinguished from the public records and could not be reinstated absent a court order. The majority's reading of La.Rev.Stat. § 35:2.1 permits acts which go far beyond mere correction. The plain language of the statute and its legislative history do not support such an expansive reading. Further, the majority's interpretation of La.Rev.Stat. § 35:2.1 runs contrary to the principles of

the Louisiana Public Records Doctrine and would create practical difficulties for real estate transactions.

First, the plain language of La.Rev.Stat. § 35:2.1 does not expressly permit the reinstatement of a mortgage cancelled from the public records. The statute merely provides ‘[a] clerical error ... may be corrected by an act of correction....’ The generally understood meaning of ‘correction’ is ‘a change that rectifies an error or inaccuracy.’ NEW OXFORD AMERICAN DICTIONARY (3d ed.2010). Under the majority's interpretation, the statute would permit acts of greater substance than changing an inaccuracy, as it would allow a party to impose a real right on property by reinstating a cancelled mortgage. *See* La. Civ.Code art. 3280.

* * *

In the present case, both First National's mortgage and the Bering mortgage on Lot 8 were properly recorded. Consequently, when the Clerk of Court cancelled the mortgage, it was removed from the public records and identified as “cancelled” in the St. John the Baptist Parish mortgage records. Thus, when First National executed an act of correction several months later, it was too late to effect any change in the mortgage, as it had already been re-moved from the public records. Simply put, once First National's mortgage was cancelled, there was nothing left for it to correct.

Further, the Clerk of Court did not have the authority to reinstate the mortgage following cancellation. This Court has held, while the Clerk of Court or Recorder of Mortgages may be ordered to reinscribe a cancelled mortgage upon his or her records, ‘it is the function of the Court to reinstate [a cancelled mortgage].’ *Carrere v. Reddix*, 211 La. 566, 570, 30 So.2d 432, 433 (1947). Our jurisprudence, both before and after the enactment of La.Rev.Stat. § 35:2.1, has clearly and repeatedly shown a court is the proper authority for reinstatement. *See Urban Property Co. of La., L.L.C. v. Pioneer Credit Co.*, 04–246, p. 7 (La.App. 5 Cir. 8/31/04); 882 So.2d 1178, 1182; *Pioneer Enter., Inc. v. Goodnight*, 561 So.2d 824, 828–29 (La.App. 2 Cir.1990); *McL. Dev. Co. v. Pyburn*, 268 So.2d 296, 297 (La.App. 2 Cir.1972) (actions to reinstate cancelled mortgages to the public records). While First National's act of correction may have conformed to the requirements of La.Rev.Stat. § 35:2.1, it can have no legal

effect beyond correcting the clerical error. First National's only recourse was to commence an action in the District Court seeking to reinstate its mortgage. As noted above, a court should presume the Legislature was aware of these laws and cases in enacting La.Rev.Stat. § 35:2.1.

Additionally, I find nothing in the language of La.Rev.Stat. § 35:2.1 permitting First National to effectively re-rank the priority of mortgages on Lot 8 through its act of correction. When the Clerk of Court cancelled First National's mortgage, the Bering mortgage became at once, by operation of law, a first mortgage on the property. * * *

The majority believes La.Rev.Stat. § 35:2.1(B), will prevent this sort of harm by providing an act of correction shall not prejudice the rights of third persons who reasonably relied on the original act. This provision, however, does not truly cure the practical difficulties which could arise as result of the Court's decision. For example, a buyer purchases property, relying on the absence of a mortgage from the public records. Later, a mortgagee executes an act of correction reinstating a mortgage on the property. While La.Rev.Stat. § 35:2.1(B) may extricate the buyer from this situation, the buyer could still waste time and resources removing this blight from his title. Alternatively, consider if a bank loans money to a borrower on the basis of clear title on his property, and a mortgage is suddenly reinstated on his property through an act of correction. This is the very type of harm the Public Records Doctrine was meant to prevent.

Further, even considering La.Rev.Stat. § 35:2.1(B), real estate transactions would be plagued by uncertainty, as parties could not reasonably rely on the absence of an instrument from the public records. The majority does not address the problems for purchasers, sellers, banks, and title insurance companies, among others, resulting from their decision. Nor does the majority confine its holding to the specific facts of this case, creating a troubling precedent. In my view, the interpretation proposed by the majority is erroneous, as it would lead to absurd and inappropriate consequences affecting countless parties. I cannot believe this is the result the Legislature intended or that is required by the law. I therefore respectfully dissent.”

20. IS EXECUTORY PROCESS CONSTITUTIONAL?

- 20.1 It's been almost 40 years since *Buckner v. Carmack*, 272 So.2d, 326 (La. 1973), and executor process still passes the constitutionality test.
- 20.2 *Roberts v. American Bank & Trust Co., Inc.*, 835 F. Supp. 2d 183 (E.D. (Dec.). 2011), ruled on a number of issues, including
- 20.2.a RESPA,¹⁹ LUTPA,²⁰ TILA,²¹ FDCPA,²² and federal court pleading requirements under *Iqbal* and *Twombly*.²³
- 20.2.b It also held, however, that executory process passes constitutional muster, even after *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006):

“Despite Plaintiff’s attempts to persuade otherwise, it is well-settled that executory process, as well as the confession of judgment it is based upon, is constitutional. *See, e.g., Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) (upholding the constitutionality of Louisiana’s executory process statutes); *Buckner v. Carmack*, 272 So.2d 326 (La.1973) (holding that executory process is constitutional, despite defendant’s attacks on the notice provided and the confession of judgment); *see also Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (upholding the analogous Florida and Pennsylvania ‘replevin’ statutes).

In spite of this clear precedent, Plaintiff continues to argue that executory process procedure is unconstitutional, contending that these long-settled decisions did not grapple with the 2006 holding of *Jones v. Flowers*. But *Jones* does not upset the precedent as Plaintiff would like to believe. In *Jones*, the Supreme Court was faced with a tax sale proceeding in which the certified letters mailed as notice to the homeowner were returned ‘unclaimed.’ *Jones*, 547 U.S. at 223–24, 126 S.Ct. 1708. The home was sold, and Jones filed suit, alleging that the proceeding violated his due process rights by failing to provide him with adequate notice of the sale. *Id.* at 224–25, 126 S.Ct. 1708. In its decision holding the procedure unconstitutional, the

¹⁹ The Real Estate Settlement Procedures Act.

²⁰ The Louisiana Unfair Trade Practices Act.

²¹ The Truth In Lending Act.

²² The Fair Debt Collection Act.

²³ *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Supreme Court found ‘that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.’ *Id.*

Although Plaintiff argues that the *Jones* decision indicates that Louisiana's executory process procedure provides inadequate notice of foreclosure, this is simply not the case. Plaintiff ignores the Supreme Court's focus on the returned certified letters as the basis for their finding notice inadequate in *Jones*. *See id.* The opinion's requirement of ‘additional reasonable steps’ applies to those cases in which the government is made aware that service of notice failed, *see id.* at 234, 126 S.Ct. 1708, not to cases in which a property owner would simply prefer that additional information be delivered to his or her door. Plaintiff continues to ignore the ‘returned mail’ element present in *Jones*'s progeny. *See, e.g., Acevedo v. First Union Nat'l Bank*, 476 F.3d 861 (11th Cir.2007) (undelivered certified letters); *Chaidez v. Gonzales*, 486 F.3d 1079 (9th Cir.2007) (certified letter not received); *Luessenhop v. Clinton Cty.*, 466 F.3d 259 (2d Cir.2006) (mailed notice not received by taxpayers); *Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941 (9th Cir.2006) (certified letters returned ‘refused’ and ‘unclaimed’). Despite Plaintiff's complaint that the notice of sale and seizure was ‘terse, uninformative, and incomplete,’ Pl's. Mem. 16, this does not compare to the complete lack of notice provided to property owners in the *Jones* line of cases.”

21. **TITLE INSURANCE: IS THE FACT THAT PROPERTY HAD BEEN USED AS A WWII BOMBING RANGE A TITLE DEFECT? No. *MGD Partners Ltd. Liability Corp. v. First American Title Ins. Co.*, 440 Fed.Appx. 368, (5th Cir. Sept. 2011), not selected for publication²⁴**

“The landowner (MGD Partners or MGD) purchased a policy of title insurance from the defendant, First American Title Company. The policy generally insured against defects in title to property MGD owned in Tangipahoa Parish, Louisiana that might affect the marketability of the title.

After plaintiffs purchased the property, they learned that it had been under lease to the United States government

²⁴ See Fifth Circuit Rules 28.7, 47.5.3, and 47.5.4 on how and why you can cite unpublished opinions.

during World War II for use as a bombing range. Although the lease had expired years before plaintiff purchased the property, plaintiffs discovered that remnants of bombs were still on the property. More to the point, because of the potential hazards from the bombs, officials in Tangipahoa Parish, Louisiana refused to issue permits to plaintiffs to develop a residential subdivision on the property.

The plaintiff argues that a servitude was created on the property under a Louisiana statute codifying the judicially created *St. Julien* doctrine. La. R.S. 19:14. Under this statute, a servitude is created when: (1) a public body, believing it has authority to do so, takes possession of property; and (2) constructs a facility; (3) under circumstances where the owner of the property consents or acquiesces in the government takeover. *Id.* Plaintiffs argue that the property is not marketable because the prior use of the property and because the residue of explosive material left on the property creates a servitude under the *St. Julien* doctrine in favor of the United States government, and that this was a risk insured against in defendant's policy.

We agree with the district court that the marketability problem plaintiff faces is not due to a defect in title; rather, it was because of the condition of the property. We need not determine whether a *St. Julien* servitude exists or might exist in reference to the subject property, because this risk is not covered by the defendant's title policy. . . .”

22. LENGTH OF A JUDGMENT: CAN IT LAST LONGER THAN 10 YEARS WITHOUT BEING REVIVED?

22.1 DOES THE FEDERAL DEBT COLLECTION PROCEDURES ACT TRUMP THE CIVIL CODE? YES. *F.T.C. v. Namer*, NO. 12-30026, --- Fed.Appx. ----, 2012 WL 3045641 (5th Cir Jul 26, 2012) (Not selected for publication in the Federal Reporter, see 5th Cir. Rule 47.5 for how this opinion can be cited or used)

22.2 FACTS:

22.2.a Nov. 8, 1991, the Federal Government got a judgment against Namer in Federal Court .

22.2.b In 2011 (within 20 years of the date the judgment was rendered), the Federal Government filed a suit to revive the judgment.

22.2.c Namer claimed, under C.C. art. 3501, that the judgment lapsed in 10 years because it was not revived within that time frame.

22.3 RESULT: A U.S. Judgment lapses in 20 years, not 10 years; federal law controls.

22.4 RATIONALE:

22.4.a The Federal Debt Collection Act trumps the Civil Code. The court states (emphasis supplied):

“Although Federal Rule of Civil Procedure 69(a)(1) provides that the federal government's enforcement by writ of execution “must accord with the procedures of the state where the court is located,” that Rule goes on to provide that notwithstanding this directive, “a federal statute governs to the extent it applies.” Fed R. Civ. P. 69(a)(1). The Federal Debt Collection Procedures Act of 1990 (“FDCPA”) is such a statute. The FDCPA provides that, with the exception of conflicting federal law, it “provides the exclusive civil procedures for the United States to ... recover a judgment on a debt.” 28 U.S.C. § 3001. The judgment liens at issue in this case are “debts” within the meaning of the FDCPA. *Federal Trade Commission v. National Business Consultants, Inc.*, 376 F.3d 317 (5th Cir.2004) (an earlier proceeding in this case). The FDCPA further Provides that it “shall preempt State law to the extent such law is inconsistent.” 28 U.S.C. § 3003(d).

The Louisiana state law Namer relies on, Louisiana Civil Code Article 3501, clearly conflicts with the provisions of

the FDCPA. It provides that a money judgment “is prescribed by the lapse of ten years from its signing” although any party having an interest in the judgment may have it revived before it prescribes, as provided in Article 2031 of the Code of Civil Procedure. *Id.* In contrast, the FDCPA provides for the duration of liens as follows:

(c) Duration of lien; renewal.

(1) Except as provided in paragraph (2), a lien created under subsection (a) is effective, unless satisfied, for a period of 20 years.

(2) Such lien may be renewed for one additional period of 20 years upon filing a notice of renewal in the same manner as the judgment is filed and shall relate back to the date the judgment is filed if-

(A) *the notice of renewal is filed before the expiration of the 20-year period to prevent the expiration of the lien;* and

(B) the court approves the renewal of such lien under this paragraph.

28 U.S.C. § 3201 (emphasis added). Louisiana Civil Code Article 3501, which would preclude enforcement of the judgment after ten years from the entry of that judgment unless timely revived, is such an inconsistent state law and is, therefore, preempted. The FDCPA allows twenty years for renewal of judgments. See 28 U.S.C. § 3201.

Further, because the purpose of the FDCPA “is to create a comprehensive statutory framework for the collection of debts owed to the United States government [and to] improve the efficiency and speed in collecting those debts,” H.R.Rep. No. 101-736, at 32 (1990), *a state law limiting such collection is inconsistent with the purpose of the act and is, therefore, preempted.*”

22.5 What About Mortgages (as opposed to judgments) in favor of the Federal Government?

22.5.a **They never prescribe, and neither do the notes the mortgage secures.** *Farmers Home Admin. v. Muirhead*, 42 F.3d 964, 965 (5th Cir.1995) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979)).

22.5.b Is this “fair”? No, but it’s the law in federal court. See *U.S. v. Oliver*, 2008 WL 215398 (W.D.La.1/24/08) (unreported).

“While the Fifth Circuit recognized the problems inherent in the “the federal government’s insistence that it may enforce ancient mortgages ... essentially forever,” it held [in Muirhead] that “present authority compels acceptance of FmHA’s position.” Id. This Court has no authority to depart from that holding.”

22.5.c But at least one Louisiana court has refused to follow *Muirhead*. See: *LLP Mortg., Ltd. v. Food Innovisions, Inc.*, 997 So.2d 628, 08-422 (La.App. 5 Cir. 10/28/08) (La.App. 5 Cir. Oct 28, 2008) (NO. 08-CA-422), *writ den.* 999 So.2d 762 (La. 1/30/09) (La. Jan 30, 2009).

22.5.d Also note that *Oliver* (above) refused to follow *LLP Mortgage*:
“On this point, to the extent that a recent Louisiana Court of Appeals decision can be read as reaching a contrary conclusion, ***we respectfully disagree.*** *LLP Mortg., Ltd. v. Food Innovisions, Inc.*, 997 So.2d 628, 629 (La.Ct.App.2008) . . .(addressing a claim by a private successor to a federal agency). Because the case before us involves a suit by a federal agency regarding interpretation of federal law, we are bound to follow *Muirhead*, rather than a state court decision. * * * ”

23. **DOES AN INVOLUNTARY SALE TRIGGER A FIRST RIGHT OF REFUSAL?**

23.1 **No.** *Mang v. Heisler Properties, LLC*, 11-867 (La.App.5 Cir. 5/22/12), ___ So.3d ___: 2012 WL 1868018, a case involving immovable property.

23.1.a The Court held that a first right of refusal (contained in a lease) to purchase immovable property was not triggered by an involuntary sale through a bankruptcy court.

23.1.b The Court cited *Royal Oldsmobile Co., Inc. v. Heisler Properties, L.L.C.*, 10-152 (La.App. 5 Cir. 12/28/10), 58 So.3d 483, as authority.

23.2 **Yes.** *Avoyelles Trust & Sav. Bank v. Liliedahl's Estate*, 348 So.2d 153 (La. App. 3rd Cir. 1977), *writ ref.* 350 So.2d 1228 (La. 1977), a case involving a stock pledge.

23.2.c The appellate court affirmed a lower court's injunction of a judicial sale of pledged stock when the stock had a restriction requiring that the corporation have a first right of refusal:

“The case before the court presents a *res nova* issue in Louisiana: whether a restriction on the right to sell stock applies to the judicial sale of stock pledged to secure a note. * * *

Appellant contends that at no time did the Intervenor demonstrate that irreparable harm would result because of the foreclosure of the pledged stock and the transfer by sheriff's sale. The trial court found that the only stock which was ever issued by the corporation was the certificate pledged by Marvin Liliedahl for 5,000 shares and the certificate issued to intervenor Roland Mitchel for 1,580 shares. The corporation obviously intended a closed unit or corporate entity between themselves, their heirs and spouses. C.C.P. Art. 3601 provides:

“An injunction shall issue in cases where irreparable injury, loss or damage may otherwise result to the applicant”

The trial court obviously concluded that to protect the closed unit or corporate entity an injunction was necessary. A trial judge has broad discretion in granting an injunction.”

23.3 **QUERY:**

23.3.a Is the difference between the two cases movable vs. immovable property?

23.3.b Is the difference between the two cases a bankruptcy sale vs. a foreclosure sale?

24. **THE RIGHTS OF THIRD PARTY POSSESSORS WHO IMPROVE PROPERTY.**

24.1 Third Party Possessors who improve immovable property subject to a mortgage have a number of rights:

24.1.a Pay the balance due and get legal subrogation. C.C.P. Art. 2703, C.C. Art. 1829.

24.1.b Enjoin the sale for any reason that the mortgagor could use. C.C.P. Arts. 2703, 2751.

24.1.c Enjoin the sale because of non recordation or peremption of recordation. C.C.P. Art. 2703; C.C. Arts. 3308, 3309, 3320, 3321, 3328-3336; R.S. 9:2721 2723.

24.1.d Intervene and claim third party possessor status and obtain a claim for improvements. C.C.P. Art. 2703; C.C. Art. 3315, 3318.

24.1.e Bring action in warranty against seller. C.C. Art. 2500-2519.

24.1.f If it's a legal or judicial mortgage that is being foreclosed on, can claim discussion. C.C.P. Arts. 151, 5154 5156, 926.

24.2 What is the proper test of claiming third party possessor status for improvements?

24.2.a C.C. art. 3318 regulates this right.

24.2.b The key case is *Glass v. Ives*, 126 So. 69, 169, La. 809 (La. 1929).

24.2.c The general procedure is:

24.2.c.(1) First, unenhanced value of the property to the foreclosing creditor.

24.2.c.(2) Second, the lesser of costs of improvements or the value of the enhancements to the third party possessor (or to a creditor holding a mortgage on the property to whom the third party possessor is personally liable).²⁵

24.2.c.(3) Third, any remaining money to the foreclosing creditor.

24.2.c.(4) Finally, any remaining money to inferior creditors, and then to the third party possessor.

24.3 But what is the test of the value of the enhancements?

24.3.a *Hogan v. Turnipseed*, 10-1065 (La.App. 5 Cir. 8/30/11), 79 So.3d 343, 347 held that the test was “the value of the property at the time the [third party possessor] acquired it and began the improvements”:

“Under the *Glass v. Ives*, *supra*, analysis we must determine the value of the property at the time the law firm acquired it and began the improvements. The testimony bearing on this point was provided by Jimmy Thorn, Jr., an expert appraiser. His analysis was that in 2004, when the parish obtained the demolition order, the then residential lot was worth \$10,500. He further noted, however, that because of that order, the demolition costs would have been \$7,500, leaving a net value of \$3,000. At the time of the hearing, he was of the further opinion that because the law firm had converted the lot to commercial use, its value had increased to \$22,500. The new building he appraised for \$186,000. Based on this testimony, we find the value prior to the improvements to be \$10,500. Although the appraiser also deducted \$7,500 as the costs of demolition, we note

²⁵ See: *Federal Land Bank of New Orleans v. Cook*, 179 La. 857; 155 So. 249 (1934).

that according to the testimony of Carl Baloney the demolition occurred simultaneously with the rebuilding of the structure, and thus there was no additional expenditure to tear down the old structure. We also determine that the cost of improvements made was \$75,000 as testified to by Carl Baloney. The value of Hogan's judicial mortgage is as expressed in the judgment of August 27, 2003, which judgment was duly recorded.”

24.3.b QUERY:

- 24.3.b.(1) Why should the test be the time the third party possessor acquired the property rather than the difference between the unenhanced value at the time of the foreclosure and the enhanced value?²⁶
- 24.3.b.(2) What if the property was bought 25 years ago and the improvements were made last year?
- 24.3.b.(3) What if the property was bought 25 years ago and the improvements were made at that time?
- 24.3.b.(4) Don't appraisers often figure out the value of improvements using the present value, not historical value at the time the improvements were made?

²⁶ For more on this, with a number of examples of how this might work, see Rubin, “LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS,” Chapters 21.8-21.11.

25. **A LENDER’S TITLE OPINION DOES NOT ALLOW THE BUYER TO SUE THE LENDER OR THE LENDER’S CLOSING ATTORNEY IF TITLE IS DEFECTIVE. *Lorio v. Teche Federal Sav. Bank*, 2011-1213 (La.App. 3 Cir. 3/7/12), 85 So.3d 1283:**

25.1 Facts:

25.1.a Lorio bought vacant property; it was financed by Teche Federal, which obtained a title opinion (not a title policy) policy; Lorio didn’t get an owner’s policy and didn’t get a title opinion directed to him.

25.1.b After Lorio purchased the property, signed the mortgage papers, and built his home, it was discovered that he didn’t have title because the property had been sold at a tax sale a decade earlier.

25.1.c Lorio sued the bank and the title attorney.

25.2 RESULT: The Bank is not liable and gets out on summary judgment.

25.3 RATIONALE:

“ . . . On de novo review, we find that there are no genuine issues of material fact because Teche owed no duty to notify Plaintiff of any title defects. We further find that there are no genuine issues of material fact that Teche is not liable for the alleged malpractice of Maxwell because there is no evidence that Maxwell was Teche's employee or agent. ‘A principal is not liable for the torts of a non-servant mandatory.’ *Joseph v. Dickerson*, 99–1046, p. 8 (La.1/19/00), 754 So.2d 912, 917.

We agree with the trial court that Maxwell's alleged error and omission does not provide Plaintiff with a cause of action against Teche. Unlike in *Sherwin–Williams Co. v. First Louisiana Construction, Inc.*, 04–133 (La.App. 1 Cir. 5/6/05), 915 So.2d 841, Plaintiff did not believe that Maxwell was his attorney. Teche was Maxwell's client. There is no basis in law to hold a client liable for the malpractice of his attorney. Teche owed no duty to Plaintiff to ensure or even determine that Plaintiff was obtaining a valid and merchantable title. Furthermore, Teche did not in any way guarantee to Plaintiff that he was obtaining a valid and merchantable title. It only sought to assure itself of this before it lent money to Plaintiff. Any failure or omission on

the part of Maxwell to discover the tax sale did not breach any duty owed to Plaintiff by Teche.”

25.4 MORAL: Get an owner’s title policy.

26. GREAT LEGAL TRUISMS

26.1 **How precise should your pleadings be?** *Webb v. Morella*, 11-30175 (U.S. 5th Cir. 1/9/12), unreported, 2012 WL 45411:

The plaintiffs’ pleading was a “disorganized smattering of federal and state law tort claims.”

26.2 **Do judges like unclear pleadings?** *Lopez v. Quarterman* 2009 WL 1325715 (S.D. Tex. 2009), unreported:

“The Court is unable to interpret or otherwise make sense of either of Petitioner's motions. To the extent a request for relief is buried somewhere in Petitioner's ramblings, it is denied as incomprehensible. Or, in the words of the competition judge to Adam Sandler's title character in the movie, ‘Billy Madison,’

‘[W]hat you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it.’”

[End]

2012

**RECENT DEVELOPMENTS IN
SUCCESSIONS AND DONATIONS**

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RECENT DEVELOPMENTS IN SUCCESSIONS AND DONATIONS

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I. LEGISLATIVE DEVELOPMENTS - SUCCESSIONS

A. **Small Successions** - Acts 2012, No. 618 (Senate Bill No. 70; Sponsored by Senator Murray; Approved by the Governor on June 7, 2012)

1. Overview of the Act

Act 618 amends Code of Civil Procedure articles 3421, 3422.1, 3431 and 3432 regarding small successions. The Act also enacts Code of Civil Procedure article 3432.1.

2. Effective Date

(A) Section 3 of Act 618 provides that the Act “shall become effective upon signature by the governor.” The governor signed the Act on June 7, 2012.

(B) Under Civil Code article 6, procedural laws generally “apply both prospectively and retroactively.”

3. The Amendment of Code of Civil Procedure Article 3421

(A) Article 3421 of the Code of Civil Procedure provides the basic definition of a small succession in Louisiana. The definition of article 3421 generally applies to small successions in which judicial proceedings are necessary and to small successions subject to the affidavit procedure under Code of Civil Procedure articles 3431 -

3434.

(B) From its amendment in 2011 until the 2012 legislative session, article 3421 defined a small succession as “the succession or the ancillary succession of a person who has died at any time, leaving property in Louisiana having a gross value of seventy-five thousand dollars or less valued as of the date of death.”

(C) Code of Civil Procedure article 3421 has been amended to provide as follows:

A small succession, within the meaning of this Title, is the succession or the ancillary succession of a person who *at any time* has died ~~at any time~~, leaving property in Louisiana having a gross value of seventy-five thousand dollars or less valued as of the date of death *or, if the date of death occurred at least twenty-five years prior to the date of filing of a small succession affidavit as authorized in this Title, leaving property in Louisiana of any value.*

La. Code Civ. P. art. 3421 (2012) (Deleted portions ~~struck through~~; added portions in *italics*).

(D) Article 3421, as amended, continues to define a small succession as the succession or ancillary succession of a decedent leaving property in Louisiana having a gross value of \$75,000 or less, valued as of the date of death.

(E) As a result of the amendment, article 3421 now also defines a small succession as the succession or ancillary succession of a decedent who died at least 25 years before the filing of the affidavit for small succession, regardless of the value of the Louisiana property of the decedent.

(F) As set forth above, article 3421 generally applies to small successions in which judicial proceedings are necessary and to small successions subject to the affidavit procedure under Code of Civil Procedure articles 3431 - 3434. However, the waiver of the \$75,000 value limitation regarding a decedent who died at least 25 years before the filing of the small succession affidavit, by its terms, applies only to small successions subject to the affidavit procedure.

4. The Amendment of Code of Civil Procedure Article 3422.1

- (A) Article 3422.1 of the Code of Civil Procedure was enacted in 2011 and applies to “immovable property, subject to a small succession proceeding, that is damaged by a disaster or catastrophe for which a declaration of emergency or federal declaration of disaster or emergency was issued.”
- (B) Under article 3422.1, in the absence of a written agreement among the co-owners recorded in the mortgage records, “any public entity or agent of such entity may conclusively presume that a co-owner in possession of the immovable for more than one year has been appointed by all co-owners to manage, administer, repair, reconstruct, and restore the immovable, and to receive, disburse and account for funds given to him by the public entity solely for the purposes of such repair, reconstruction, and restoration.”
- (C) Further, under article 3422.1, “the power of the managing co-owner shall include the power to execute mortgages . . . and also to encumber the immovable . . . without the need to obtain the concurrence of all co-owners.”
- (D) Under Paragraph (G) of article 3422.1, as enacted in 2011, all of the provisions of the article were to “expire on January 1, 2013.”
- (E) Paragraph (G) of article 3422.1 has been repealed. Accordingly, barring further action by the legislature, all other provisions of article 3422.1 will remain in effect on January 1, 2013 and thereafter.

5. The Amendment of Code of Civil Procedure Article 3431

- (A) Articles 3431 - 3434 of the Code of Civil Procedure govern the affidavit small succession procedure.
- (B) From its amendment in 2011 until the 2012 legislative session, Paragraph (A) of article 3431 provided that “it shall not be necessary to open judicially the small succession of a person domiciled in Louisiana who died intestate, or domiciled outside of Louisiana whose testament has been probated by court order of another state.” Accordingly, from 2011 until the 2012 legislative session, the affidavit small succession procedure applied:

- (1) To the succession of a person domiciled in Louisiana who died intestate; and
 - (2) To the succession of a person domiciled outside of Louisiana whose testament was probated by court order of another state.
- (C) From 2011 until the 2012 legislative session, the affidavit small succession procedure did **not** apply:
- (1) To the succession of a person domiciled outside of Louisiana who died intestate leaving Louisiana immovable property (i.e. - an intestate ancillary succession); or
 - (2) To the succession of a person domiciled in Louisiana who died testate.
- (D) Paragraph (A) of Code of Civil Procedure article 3431 has been amended to provide, in part, as follows:
- It shall not be necessary to open judicially the small succession of a person domiciled in Louisiana who died intestate, or domiciled outside of Louisiana who died intestate or whose testament has been probated by court order of another state.**
- La. Code Civ. P. art. 3431 (2012) (added portions underlined).
- (E) As a result of the amendment of article 3431, the affidavit small succession procedure now applies:
- (1) To the succession of a person domiciled in Louisiana who died intestate; or
 - (2) To the succession of a person domiciled outside of Louisiana who died intestate or whose testament has been probated by court order of another state.
- (F) Accordingly, article 3431, as amended, extends the affidavit small succession procedure to the **succession of a person domiciled outside of Louisiana who died intestate leaving Louisiana immovable property** (i.e. - an intestate ancillary succession).
- (G) Under Paragraph (A) of article 3431, as amended, the affidavit small succession procedure does **not** apply to the succession of a person

domiciled in Louisiana who died testate.

- (H) Under article 3431, the affidavit small succession procedure only applies to a testate ancillary succession if the decedent's "testament has been probated by court order of another state." If the testament has not been probated by the court of another state, a judicial proceeding is required. Such a proceeding may involve the probate of a foreign testament under Code of Civil Procedure article 2888. *See also* La. Civ. Code art. 3528 (2012) and La. R.S. 9:2401 (Uniform Wills Law) (2012).
- (I) Paragraph (A) of article 3431 continues to provide that the affidavit small succession procedure is only available in an **intestate** succession if the heirs of the decedent are his descendants, ascendants, brothers or sisters or their descendants, or the surviving spouse. The affidavit procedure is not available in an intestate succession if the decedent is survived only by more remote collateral relations, such as aunts, uncles or cousins.
- (J) Paragraph (A) of article 3431 further continues to provide that the affidavit small succession procedure is available in a **testate** succession if the "sole heirs" are the decedent's "legatees under a testament probated by court order of another state."

6. The Amendment of Code of Civil Procedure Article 3432

- (A) Article 3432 of the Code of Civil Procedure provides the requirements for the completion of an affidavit for small succession.
- (B) From 2011 until the 2012 legislative session, article 3432 addressed the completion of an affidavit for the small succession of a person domiciled in Louisiana who died intestate and for the small succession of a person domiciled outside of Louisiana whose testament was probated by court order of another state.
- (C) As set forth above, from 2011 until the 2012 legislative session, the affidavit small succession procedure did not apply to intestate ancillary successions or to the successions of a persons domiciled in Louisiana who died testate.
- (D) Article 3432 has been amended to delete Subparagraph (A)(8), which required the attachment of "certified copies of the testament and the

probate order of another state” if the affidavit small succession procedure was used to conduct the succession of a decedent who died testate while domiciled outside of Louisiana.

- (E) The amendment of Code of Civil Procedure article 3432 restricts the application of the article to **intestate** small successions, whether the decedent was domiciled in Louisiana or outside of Louisiana at the time of his death.
- (F) As set forth below, Code of Civil Procedure article 3432.1 now provides the requirements for the completion of an affidavit for the small succession of a decedent who dies **testate** while domiciled outside of Louisiana.

Note - Before the 2011 legislative session, the affidavit small succession procedure did not apply to testate successions, regardless of whether the decedent was domiciled in Louisiana at the time of his death. Article 3432 of the Code of Civil Procedure was amended in 2011 to accommodate the succession of a person domiciled outside of Louisiana whose testament was probated by court order of another state. The accommodation was tenuous, at best, as article 3432 continued to require that the “heirs” state under oath that the decedent “died intestate.” *See* La. Code Civ. P. art 3432(A)(2) (2011). As set forth below, article 3432.1, as enacted during the 2012 legislative session, now provides the requirements for the completion of an affidavit for small succession in conjunction with a testate ancillary succession. Although article 3432 remains titled “Affidavit for small succession; contents,” without further clarification, the amendment of the article and the addition of article 3432.1 restrict the application of article 3432 to intestate small successions.

7. The Enactment of Code of Civil Procedure Article 3432.1

- (A) Code of Civil Procedure article 3432.1 is new and provides as follows:

Affidavit for small succession for a person domiciled outside of Louisiana who died testate; contents

- A. **When it is not necessary under the provisions of Article 3431 to open judicially a small succession, at least two persons, including the surviving spouse, if any, and one or**

more competent legatees of the deceased, may execute one or more multiple originals of an affidavit, duly sworn before any officer or person authorized to administer oaths in the place where the affidavit is executed, setting forth all of the following:

- (1) The date of death of the deceased, and his domicile at the time thereof.
- (2) The fact that the deceased died testate.
- (3) The marital status of the deceased, the location of the last residence of the deceased, and the name of the surviving spouse, if any, and the surviving spouses's address, domicile, and location of last residence, together with the names and last known addresses of the legal heirs of the deceased, and identifying those of the legal heirs who are also forced heirs of the deceased.
- (4) The names and last known addresses of the legatees of the deceased, and the statement that a legatee not signing the affidavit was given ten days notice by U. S. mail of the affiants' intent to execute an affidavit for small succession and did not object.
- (5) A description of the property left by the deceased, including whether the property is community or separate, and which, in the case of immovable property, must be sufficient to identify the property for purposes of transfer.
- (6) A showing of the value of each item of property subject to the jurisdiction of the courts of Louisiana, and the aggregate value of all such property, at the time of the death of the deceased.
- (7) A statement describing the respective interests in the property which each legatee has inherited and whether a legal usufruct of the surviving spouse attaches to the property.

- (8) An attachment consisting of certified copies of the testament and the probate order of another state.
 - (9) An affirmation that, by signing the affidavit, the affiant, if a legatee, has accepted the legacy of the deceased.
 - (10) An affirmation that, by signing the affidavit, the affiants swear under penalty of perjury that the information contained in the affidavit is true, correct, and complete to the best of their knowledge, information and belief.
- (B) **If the deceased had no surviving spouse, the affidavit must be signed by at least two persons who have actual knowledge of the matters stated therein.**
- (C) **In addition to the powers of a natural tutor otherwise provided by law, a natural tutor may also execute the affidavit on behalf of a minor child without the necessity of filing a petition pursuant to Article 4061.**

La. Civ. Code P. art. 3432.1 (2012) (underline added).

- (B) As its title indicates, article 3432.1 provides the requirements for the completion of an affidavit for the small succession of a decedent who died testate while domiciled outside of Louisiana.

Note - As set forth above, the affidavit small succession procedure does not apply to the succession of a person who dies testate while domiciled in Louisiana.

- (C) For the most part, the provisions of article 3432.1 (regarding testate ancillary small successions) are similar to the provisions of article 3432 (regarding intestate small successions). However, article 3432.1 includes provisions to address various issues relative to testate successions.
- (D) Subparagraph (A)(3) of article 3432.1, as enacted, requires the inclusion of the marital status of the decedent, the last residence of the decedent, the name of the surviving spouse and the surviving spouse's residence in the affidavit for small succession. Article 3432 contains similar requirements for the affidavit for an intestate small

succession. However, Subparagraph (A)(3) of article 3432.1 further requires the inclusion of “the names and last known addresses of the legal heirs of the deceased . . . identifying those of the legal heirs who are also forced heirs of the deceased.”

- (E) Subparagraph (A)(4) of article 3432 (regarding intestate small successions) provides that the affidavit must include a “statement that an heir not signing the affidavit (a) cannot be located after the exercise of reasonable diligence, or (b) was given ten days notice by U. S. mail of the affiants’ intent to execute an affidavit for small succession and did not object.” Subparagraph (A)(4) of article 3432.1, as enacted, provides simply that the affidavit must include a “statement that a legatee not signing the affidavit was given ten days notice by U. S. mail of the affiants’ intent to execute an affidavit for small succession and did not object.” In other words, in the context of a testate ancillary small succession, the affiants may not simply state that a legatee of the decedent could not be located after the exercise of reasonable diligence. Rather, the affiants must state under oath that a legatee not signing the affidavit was given ten days notice by mail of the affiants’ intent to execute the affidavit for small succession and the legatee did not object to the affidavit.

Note - As with article 3432, it appears that certified or registered mail is not required.

- (F) Subparagraph (A)(6) of article 3432.1, as enacted, refers to a “showing of the value of each item of property subject to the jurisdiction of the courts of Louisiana, and the aggregate value of all such property.” The reference to property subject to the jurisdiction of the Louisiana courts reflects the nature of the testate ancillary succession at issue.
- (G) Subparagraph (A)(7) of article 3432.1, which is modeled after the same subparagraph of article 3432, requires that the affidavit include a statement describing the respective interests in the property each legatee has inherited “and whether a legal usufruct of a surviving spouse attaches to the property.”

Note - Civil Code article 544 defines a legal usufruct as a usufruct created by operation of law. In the context of successions, the term legal usufruct often refers to a usufruct in favor of the surviving spouse over the community property of an intestate decedent under Civil Code article 890. In contrast, a conventional usufruct may be

established by the testament of a decedent in favor of a surviving spouse under Civil Code article 1499 or other persons under applicable law.

- (H) Subparagraph (A)(8) of article 3432.1, as enacted, requires that certified copies of the testament of the decedent and the probate order of another state be attached to the affidavit for small succession.

Note - As set forth above, if the testament has not been probated by the court of another state, the affidavit small succession procedure is not available. Rather, a judicial proceeding is required. Such a proceeding may involve the probate of a foreign testament under Code of Civil Procedure article 2888. *See also* La. Civ. Code art. 3528 (2012) and La. R.S. 9:2401 (Uniform Wills Law) (2012).

- (I) Paragraph (A) of article 3432.1 provides that “at least two persons, including the surviving spouse, if any, and one or more competent legatees of the deceased” may execute the affidavit for the small succession of a decedent who died testate while domiciled outside of Louisiana. Paragraph (B) of article 3432.1 further provides that “if the deceased had no surviving spouse, the affidavit must be signed by at least two persons who have actual knowledge of the matters stated therein.” The wording of article 3432.1 in this regard is a more concise version of the corresponding provisions of article 3432.

B. Testaments; Designation of Attorney for Executor - Acts 2012, No. 125 (House Bill No. 439; Sponsored by Representative Abramson; Approved by the Governor on May 14, 2012)

1. The Repeal of La. R.S. 9:2448

- (A) In *Rivet v. Battistella*, 167 La. 766, 120 So. 289 (1929), the Louisiana Supreme Court held that the designation in a testament of an attorney for the executor is binding upon the legatees under the testament. In support of its opinion, the *Rivet* court explained that the testator may impose any charges or conditions he desires, provided that the charges or conditions are not contrary to law or good morals. The conclusion of the Supreme Court in *Rivet* was followed for almost sixty years. *See Succession of Feitel*, 187 La. 596, 175 So. 72 (1937); *Succession of Rembert*, 199 La. 743, 7 So.2d 40 (1942); *Succession of Bush*, 223 La. 1008, 67 So.2d 573 (1953); *Succession of Pope*, 230

La. 1049, 89 So.2d 894 (1956); and *Succession of Falgout*, 279 So.2d 679 (La. 1973).

- (B) However, in *Succession of Jenkins*, 481 So.2d 607 (La. 1986), the Louisiana Supreme Court changed course. In *Jenkins*, the court found that the designation of an attorney by a testator is not binding, but merely precatory. The court explained that allowing a testator to designate the attorney for an executor infringed on the codal authority of the executor, was not specifically authorized by law, encouraged solicitation and the appearance of impropriety on the part of attorneys, and was contrary to general civilian principles.
- (C) In response to the Louisiana Supreme Court’s opinion in *Jenkins*, the legislature enacted La. R.S. 9:2448 during the 1986 legislative session. Section 2448 provided, in part, as follows:

A testator may designate in his will an attorney to handle the legal matters of his estate, to open and close the estate, and to represent the executor.

* * *

The designation in a testament or a codicil of an attorney or a successor attorney to handle the legal matters of the estate shall be valid and binding on the executor, or other succession representative, and the heirs and legatees.

* * *

An attorney so designated may be removed as such only for just cause.

La. R.S. 9:2448 (1986) (underline added).

- (D) In *Succession of Wallace*, 574 So.2d 348 (La. 1991), the Louisiana Supreme Court found that La. R.S. 9:2448 was “unconstitutional, null, void, and of no effect” insofar as it conflicted with Rule 1.16(a)(3) of the Rules of Professional Conduct. The court explained that Section 2448 was in direct, irreconcilable conflict with Rule 1.16(a)(3), which provides that an attorney is required to withdraw from employment if he is discharged, with or without cause, by the client.

- (E) House Concurrent Resolution No. 127 of the 2011 Regular Session directed the Louisiana State Law Institute to study the authority of a testator to designate an attorney and to make specific recommendations relative to La. R.S. 9:2448. In response to the resolution, the Law Institute recommended that Section 2448 be repealed.
- (F) Act 125 repeals La. R.S. 9:2448 in its entirety.

II. LEGISLATIVE DEVELOPMENTS - TRUSTS

A. **Immovable Property in Trust; Recordation Requirements** - Acts 2012, No. 740 (House Bill 469; Sponsored by Representative Abramson; Approved by the Governor on June 12, 2012)

1. Overview of the Act

Act 740 amends Sections 2092 and 2262.2 of the Louisiana Trust Code.

2. The Amendment of La. R.S. 9:2092

(A) Section 2092 sets forth the recordation requirements applicable to a Louisiana trust holding Louisiana immovable property.

(B) Section 2092 has been amended as follows:

A. **If at any time the trust property of either an inter vivos trust or a testamentary trust includes immovables or other property the title to which must be recorded in order to affect third parties, a trustee shall file the trust instrument, ~~or an extract thereof, of trust, or a copy of the trust instrument or extract of trust certified by the clerk of court for the parish in which the original trust instrument or extract of trust was filed,~~ for record in each parish in which the property is located.**

B. (1) **For purposes of recording an extract of a trust instrument, such an extract shall be executed by either the settlor or the trustee and shall include all**

of the following:

- (a) The name of the trust, if any.
 - (b) A statement as to whether the trust is revocable or irrevocable.
 - (c) The name of each settlor.
 - (d) The name of each trustee and name or other description of the beneficiary or beneficiaries.
 - (e) The date of execution of the trust.
 - (f) ~~A brief description of the immovable property or other property subject to the trust, the title to which must be recorded in order to affect third persons. If the trust instrument also contains a transfer of immovable property or other property to the trust, the title to which must be recorded in order to affect third persons, then the extract shall contain a brief legal description of the property.~~
- (2) *Unless the trust and abstract (sic) of trust recite or otherwise note any modification or restriction of the trustee's power or duties, the trustee shall have all of the powers and duties granted to trustees under the Louisiana Trust Code.*
- ~~(2)~~(3) The provisions of this Section authorizing the filing of an extract of the trust instrument *or a clerk-certified copy of the trust instrument or extract of trust without a description of the property* are remedial and shall be applied retroactively to any trust extract *or clerk-certified copy of either the trust instrument or extract of trust* theretofore filed for record which is in substantial compliance with the provisions of this Subsection, and such extract *or clerk-certified copy* shall affect third persons as of the date of recordation. If the extract of an inter vivos trust instrument *or clerk-certified copy*

***thereof* is recorded, the failure of the trust instrument to be in the form required by R.S. 9:1752 shall not be effective against third parties, who shall be immune from claims based on the failure of the trust instrument to be in the form required by R.S. 9:1752.**

La. R.S. 9:2092 (2012) (Deleted portions ~~struck through~~; added portions in *italics*).

(C) Paragraph (A) of Section 2092

- (1) Before the 2012 legislative session, Paragraph (A) of Section 2092 provided that “a trustee shall file the trust instrument, or an extract thereof” in each parish where immovable property of the trust is located.
- (2) Under Paragraph (A) of Section 2092, as amended, a trustee is not required to record an original of the trust instrument or of the extract of trust in the public records. Rather, the trustee may record a copy of the trust instrument or extract if the copy is certified by the clerk of court of the parish where the original trust instrument or extract was recorded.
- (3) Under Paragraph (A) of Section 2092, recordation of a copy of the trust instrument or extract certified by a notary public only (without a certification by the appropriate clerk of court) does not appear to be sufficient.

(D) Paragraph (B) of Section 2092

(1) Subparagraph (B)(1) of Section 2092

- a. Before the 2012 legislative session, Subparagraph (B)(1) of Section 2092 required that an extract of trust include, among other things, “a brief description of the immovable property . . . subject to the trust.”
- b. Subparagraph (B)(1) of Section 2092, as amended, provides that an extract of trust must only contain a legal description of the immovable property if the trust instrument contained the transfer of the property to the trust. In other words, if a separate act of

transfer of the immovable property to the trust is recorded, the extract of trust need not include a description of the property. In such a case, the description of the immovable property will presumably be included in the act of transfer.

(2) Subparagraph (B)(2) of Section 2092

- a. The text of Subparagraph (B)(2) of Section 2092, as amended, is new.
- b. Subparagraph (B)(2) of Section 2092 provides that “unless the trust and abstract (*sic*) of trust” include modifications or restrictions of the trustee’s powers or duties, the trustee shall have all of the powers and duties granted under the Louisiana Trust Code.
- c. Subparagraph (B)(2) appears intended to clarify the application of the public records doctrine to the transfer of immovable property in trust. For example, if a search of the public records does not reveal any restrictions upon the trustee’s power to alienate or encumber immovable trust property, then as to third persons, the trustee is deemed to have the power to alienate or encumber the property.

Note - That being said, the wording of Subparagraph (B)(2) is troubling. Read literally, Subparagraph (B)(2) requires that both “the trust and abstract (*sic*) of trust” include any modifications or restrictions of the trustee’s powers or duties. Otherwise, the trustee “shall have all of the powers and duties granted to trustees under the Louisiana Trust Code.” Also, as written, Subparagraph (B)(2) is not limited to third persons.

(3) Subparagraph (B)(3) of Section 2092

- a. Before the 2012 legislative session, Subparagraph (B)(2) provided that the provisions of Section 2092 are remedial and should therefore be applied retroactively. Before the 2012 session, Subparagraph (B)(2) further provided that if an extract of an *inter*

vivos trust was recorded, the failure of the trust instrument to be in proper form was not effective against third parties.

- b. The text of the former Subparagraph (B)(2) has been redesignated as Subparagraph (B)(3). The text of the provision has also been amended to include references to “clerk-certified” copies of the trust instrument or extract of trust to be consistent with other provisions of Section 2092, as amended.

3. The Amendment of La. R.S. 9:2262.2

- (A) Section 2262.2 sets forth the recordation requirements applicable to a foreign trust holding Louisiana immovable property.
- (B) Section 2262.1 of the Trust Code defines a “foreign trust” as: (1) a trust which, by the terms of the trust instrument, is governed by the laws of a state other than Louisiana; or (2) a trust of which the settlor was domiciled in a state other than Louisiana at the time the trust was created.
- (C) Section 2262.2 has been amended as follows:
 - A. **If at any time the trust property of a foreign trust includes an immovable or other property in Louisiana the title to which must be recorded in order to affect third parties, a trustee shall file the trust instrument, ~~or an extract thereof, of trust, or a copy of the trust instrument or extract of trust certified by the clerk of court for the parish in which the original trust instrument or extract of trust was filed,~~ for record in each parish in which the property is located.**
 - B. (1) **For purposes of recording an extract of a trust instrument, such an extract of a trust instrument either shall be in such form and contain such information as may be lawful under the law of the jurisdiction which the parties have expressly chosen to govern the trust, or shall be executed by either the settlor or the trustee and shall include all of the following:**

- (a) The name of the trust, if any.
 - (b) The name of each settlor.
 - (c) The name of the trustee.
 - (d) The name or other description of the beneficiary or beneficiaries.
 - (e) The date of the trust instrument.
 - (f) A statement whether the trust is revocable or irrevocable
 - (g) ~~A description of the immovable property or other property subject to the trust.~~ *If the trust instrument also contains a transfer of immovable property or other property to the trust, the title to which must be recorded in order to affect third persons, then the extract shall contain a brief legal description of the property.*
 - (h) Any other provisions of the trust instrument as the party executing the extract deems useful.
- (2) *Unless the trust and abstract (sic) of trust recite or otherwise note any modification or restriction of the trustee's power or duties, the trustee shall have all of the powers and duties granted to trustees under the Louisiana Trust Code.*
- ~~(2)~~(3) The provisions of this Section authorizing the filing of an extract of the trust instrument *or a clerk-certified copy of the trust instrument or extract of trust without a description of the property* are remedial and shall be applied retroactively to any trust extract *or clerk-certified copy of either the trust instrument or extract of trust* theretofore filed for record which is in substantial compliance with the provisions of this Section, and such extract shall affect third persons as of the date of recordation.

La. R.S. 9:2262.2 (2012) (Deleted portions ~~struck through~~; added portions in *italics*).

- (D) The amendments to Section 2262.2 (regarding foreign trusts) are similar to the amendments to Section 2092 (regarding Louisiana trusts), as set forth above.

Note - The authority of a trustee of a foreign trust to transfer Louisiana immovable property may be evidenced in any manner that is lawful under the law which the parties have expressly chosen to govern the trust. *See* La. R.S. 9:2262.3 (2012). Also, a trust instrument executed outside of Louisiana in accordance with the law of the place of its execution or the law of the settlor's domicile shall be deemed to be legally executed, as if executed in the manner required under the Louisiana Trust Code, provided that the trust instrument is in writing and subscribed by the settlor. *See* La. R.S. 9:2262.4 (2012).

B. Trusts for Mixed Private and Charitable Purposes - Acts 2012, No. 742 (House Bill No. 476; Sponsored by Representative Abramson on Recommendation of the Louisiana State Law Institute; Approved by the Governor on June 12, 2012)

1. Overview of the Act

- (A) Act 742 amends La. R.S. 9:1951 and enacts La. R.S. 9:1953.
- (B) Sections 1951 and 1953 form a part of Subpart O (Trusts for Mixed Private and Charitable Purposes) of Part II of Chapter 1 of Code Title II of Title 9 of the Louisiana Revised Statutes.
- (C) Charitable remainder trusts and charitable lead trusts are common examples of trusts for mixed private and charitable purposes.
- (D) Through a charitable remainder trust, a settlor generally names himself or some other person as income beneficiary and a charitable organization as principal beneficiary. The trust then terminates upon the expiration of a specified term (generally the life of the income beneficiary) and the charitable organization receives the trust property upon the termination. Charitable remainder trusts include charitable remainder annuity trusts and charitable remainder unitrusts.

- (E) Through a charitable lead trust, a charitable organization is generally named as income beneficiary for a specified term and the settlor or another person is named as principal beneficiary. Upon the termination of a charitable lead trust, the private principal beneficiary is generally entitled to the trust property.

2. The Amendment of La. R.S. 9:1951

- (A) Section 1951 provides the general rule that a trust may be created for mixed private and charitable purposes.
- (B) Section 1951 has been amended as follows:

A trust may be created for mixed private and ~~educational, charitable, or religious~~ purposes. The ~~dispositions~~ *dispositive provisions* of such a trust in favor of private beneficiaries are governed by the provisions of this Code; those in favor of ~~other charitable~~ beneficiaries are governed by ~~R.S. 9:2271 through 9:2337 relating to trusts for educational, charitable, or religious purposes~~ *Parts I through IV of Chapter 2 of Code Title II of Code Book III of this Title*. As long as there remains a private beneficiary, the trust shall be administered in accordance with the provisions of ~~R.S. 9:2061 through 9:2173~~ *this Code*. ~~Unitrusts and annuity trusts as defined in the United States Internal Revenue Code are mixed trusts.~~

La. R.S. 9:1951 (2012) (Deleted portions ~~struck through~~; added portions in *italics*).

- (C) Section 1951, as amended, refers to “charitable purposes,” rather than “educational, charitable, or religious purposes.” The more concise wording is consistent with the wording of La. R.S. 9:2271 (regarding charitable donations in trust), as amended by Act 637 of 2008.
- (D) The second and third sentences of Section 1951, as amended, are intended to clarify the distinction between private and charitable beneficiaries, as well as the distinction between dispositive and administrative provisions of the trust.
- (E) The last sentence of the former Section 1951 has been deleted as unnecessary.

(3) The Enactment of La. R.S. 9:1953

(A) Section 1953 is new and provides as follows:

Assignment of interest in trust and termination of trust for mixed private and charitable purposes

A. A private beneficiary of a trust for mixed private and charitable purposes, including a spendthrift trust, may at any time gratuitously assign to a charitable principal beneficiary of the trust a fraction or all of his private interest in the trust, unless the trust instrument specifically contains a special needs provision or provides otherwise. An interest that is assignable only to a charitable principal beneficiary of the trust shall not be deemed to be subject to voluntary alienation for purposes of R.S. 9:2004.

B. If the trust instrument provides for the termination of the trust at the end of the specified term of the private interests, the trust may be terminated early as to the portion of the trust that, for any reason, no longer has a private beneficiary.

La. R.S. 9:1953 (2012) (underline added).

(B) Under Paragraph (A) of Section 1953, as enacted, a private income beneficiary of a charitable remainder trust may surrender all or part of his interest in the trust so that a charitable principal beneficiary may receive the trust property before the scheduled termination of the trust under the trust instrument.

(C) Paragraph (A) of Section 1953 is a default rule and shall generally apply unless the trust instrument provides otherwise. In other words, if the trust instrument is silent, the provisions of Paragraph (A) will generally apply.

(D) Paragraph (A) of Section 1953, as enacted, appears to provide an exception to the general rule that a beneficiary may refuse an interest in a private trust only if the beneficiary has not received any benefits of the trust. *See* La. R.S. 9:1981 (2012).

(E) Paragraph (A) of Section 1953 expressly applies to spendthrift trusts.

See La. R.S. 9:1725(7) and 9:2002 - 2007 (2012). Paragraph (A) further expressly provides that an interest assignable to a charitable principal beneficiary “shall not be deemed to be subject to voluntary alienation for the purposes of R.S. 9:2004.”

- (F) Paragraph (A) of Section 1953 does not apply to trusts that contain “special needs” provisions.

Note - Although the term “special needs” is commonly used, the term is not defined in the Louisiana Trust Code and did not appear in the Trust Code prior to the enactment of Section 1953.

- (G) Paragraph (B) of Section 1953 allows the termination of all or a portion of a charitable remainder trust before the expiration of the term if the trust, or the portion of the trust at issue, no longer has a private beneficiary. Such a situation may occur if a private beneficiary surrenders his interest in the trust to a charitable principal beneficiary under Paragraph (A) of Section 1953.

III. LEGISLATIVE DEVELOPMENTS - MANDATE

- A. **Financial Institutions; Powers of Attorney; Written Notice of Revocation or Termination** - Acts 2012, No. 323 (Senate Bill No. 316; Sponsored by Senator Martiny; Approved by the Governor on May 25, 2012)

- 1. The Enactment of La. R.S. 6:311.1

- (A) Section 311.1 is new and provides as follows:

Powers of Attorney; written notice of revocation

- A. (1) **Notwithstanding any provision of law to the contrary, any federally insured financial institution presented with an original or certified true copy of a power of attorney that is sufficient to authorize the named agent to transact business in a deposit account, with a certificate of deposit, or with other funds on deposit, or sufficient to authorize access to a safe deposit box, may rely on the authority designated in such power of attorney**

as being in full force and effect, unless the federally insured financial institution receives written notice that such power of attorney has been terminated or revoked and the institution has reasonable opportunity to act on it.

(2) Written notice shall be deemed to be received upon receipt by an officer of the federally insured financial institution.

(3) For the purposes of this Section, “written notice” shall mean a writing addressed to the federally insured financial institution indicating that the principal has revoked the authority of the agent, or indicating that one of the events of termination as specified in Louisiana Civil Code Article 3024 has occurred.

B. A federally insured financial institution shall not be liable for transactions or activity by an agent occurring prior to the receipt of written notice and a reasonable opportunity to act on it.

La. R.S. 6:311.1 (2012) (underline added).

(B) Under Subparagraph A(1) of Section 311.1, as enacted, a federally insured financial institution may rely upon an “original or certified true copy of a power of attorney” unless and until the institution “receives written notice that such power of attorney has been terminated or revoked and the institution has reasonable opportunity to act on it.”

(C) Under Subparagraph A(2), written notice is deemed to be received by the institution “upon receipt by an officer of the . . . institution.”

(D) Under Subparagraph A(3), “written notice” is defined as “a writing addressed to the . . . institution indicating that the principal has revoked the authority of the agent, or . . . that one of the events of termination as specified in Louisiana Civil Code article 3024 has occurred.”

Note - Article 3024 of the Civil Code provides, in part, that the mandate and the authority of the mandatary terminate upon the death

of the principal or the mandatary, the interdiction of the mandatary, or the qualification of a curator upon the interdiction of the principal. Article 3025 of the Civil Code further provides that the principal may generally terminate the mandate and the authority of the mandatary at any time.

- (E) Under Paragraph (B) of Section 311.1, a federally insured financial institution “shall not be liable for transactions or activity by an agent occurring prior to the receipt of written notice and a reasonable opportunity to act on it.”

Note - Under Civil Code article 3027, a revocation or modification of a recorded mandate is ineffective as to the persons entitled to rely upon the public records until filed for recordation. Under Civil Code article 3028, the principal must notify third persons with whom the mandatary was authorized to contract of the revocation of the mandate or of the mandatary’s authority. If the principal fails to do so, the principal is bound to perform the obligations that the mandatary has undertaken. A mandatary who purports to represent the principal despite the revocation of the mandate acts without authority. Such a mandatary is personally bound to a third person with whom he has contracted. *See* La. Civ. Code art. 3019 (2012). *See also* cmt. (b) to La. Civ. Code art. 3028 (2012).

- (F) Section 311.1 forms a part of Part XI (Deposits) of Subchapter A (Organization and Operation of State Banks) of Chapter 3 (State Banks) of Title 6 (Banks and Banking) of the Louisiana Revised Statutes.

IV. LEGISLATIVE DEVELOPMENTS - LIVING WILLS

- A. **Life-Sustaining Procedures; Declaration by Another Person on Behalf of the Patient** - Acts 2012, No. 353 (Senate Bill No. 114; Sponsored by Senator Mills; Approved by the Governor on May 31, 2012)

- 1. The Amendment of La. R.S. 40:1299.58.5

- (A) Sections 1299.58.1 - 1299.58.10 of Title 40 of the Louisiana Revised Statutes address declarations concerning life-sustaining procedures (commonly known as “living wills”) and related issues.

(B) Section 1299.58.5 addresses the situation in which a patient is not able to communicate and has not made a declaration concerning life-sustaining procedures.

(C) Before the 2012 legislative session, Subparagraph (A)(2) of Section 1299.58.5 provided that the following individuals or classes of individuals were entitled to make such a declaration on behalf of the patient in the following order of priority:

(1) The person or persons previously designated by the patient to make such a declaration on the patient's behalf.

Note - The designation by the patient must have been made while the patient was “an adult” and must have been made “in the presence of at least two witnesses.”

(2) A previously appointed tutor or curator of the patient.

(3) The patient's spouse not judicially separated.

(4) An adult child of the patient.

(5) The parents of the patient.

(6) The siblings of the patient.

(7) Other ascendants or descendants of the patient.

(D) Subparagraph (A)(2) of Section 1299.58.5 has been amended to change the order of priority of the first two classes entitled to make such a declaration on behalf of the patient.

(E) Under Section 1299.58.5, as amended, the order of priority of the first two classes is as follows:

(1) A previously appointed tutor or curator of the patient.

(2) The person or persons previously designated by the patient to make such a declaration on the patient's behalf.

Note - Although the wording is slightly different, Section 1299.58.5 continues to provide that the designation must have been made “by an adult patient by written instrument signed

by the patient in the presence of at least two witnesses.”

- (F) As a result of the amendment of Section 1299.58.5, a previously appointed tutor or curator of the patient will have the authority to make a declaration concerning life-sustaining procedures for a patient who is not able to communicate and who has not made such a declaration. The authority of the tutor or curator of the patient in this regard will supersede any authority of a person previously designated by the patient to make such a declaration on the patient’s behalf.
- (G) The order of priority of the remaining individuals or classes of individuals under Section 1299.58.5 has not been changed.
- (H) Before the 2012 legislative session, Subparagraph (A)(3) of Section 1299.58.5 provided that if there was more than one person in the class of the patient’s children, parents, siblings, or other ascendants or descendants, respectively, then “the declaration shall be made by all of that class available for consultation upon good faith efforts to secure participation of all of that class.”
- (I) Subparagraph (A)(3) of Section 1299.58.5 has been amended to provide that if there is more than one person in the class of adult children, parents, siblings, or other ascendants or descendants, respectively, then the declaration “shall be made by a majority of that class available for consultation upon good faith efforts to secure participation of all of that class.”

B. Acts or Omissions Regarding Declarations Concerning Life-Sustaining Procedures - Acts 2012, No. 538 (Senate Bill No. 176; Sponsored by Senator Buffington and Representative Hunter; Approved by the Governor on June 5, 2012)

1. The Amendment of La. R.S. 40:1299.41

- (A) Sections 1299.41 - 1299.49 of Title 40 of the Louisiana Revised Statutes constitute the Louisiana Medical Malpractice Act.
- (B) Section 1299.41 addresses the general application of the Medical Malpractice Act and defines terms used in the Act.
- (C) Act 538 amends Section 1299.41 to add Paragraph (L), which provides as follows:

Any cause of action for the unintentional acts or omissions arising from resuscitating a patient who has a declaration concerning life-sustaining procedures executed pursuant to R.S. 40:1299.58.1 et seq., a Louisiana Physician Order for Scope of Treatment executed pursuant to R.S. 40:1299.64.1 et seq., or a do not resuscitate order issued by a physician licensed in this state shall be governed by the provisions of this Part.

La. R.S. 40:1299.41 (2012) (underline added).

- (D) Under Paragraph (L) of Section 1299.41, as enacted, any tort action arising out of the resuscitation of a patient with a declaration concerning life-sustaining procedures (living will), a Louisiana Physician Order for Scope of Treatment (LaPOST) or a do not resuscitate order (DNR) shall be subject to the Medical Malpractice Act.
- (E) Under Section 2 of Act 538, the provisions of the Act “shall be given prospective application only and shall not affect any action pending or claim arising prior to the effective date” of the Act.

V. LEGISLATIVE DEVELOPMENTS - BUSINESS ENTITIES

A. **Limited Liability Companies; Conversion of State of Organization** - Acts 2012, No. 476 (Senate Bill No. 746; Sponsored by Senator Peacock; Approved by the Governor on June 1, 2012)

1. The Enactment of La. R.S. 12:1308.3

- (A) Act 476 enacts La. R.S. 12:1308.3, which allows a limited liability company (LLC) to convert its state of organization from one state to another.
- (B) Paragraph (A) of Section 1308.3 generally allows the conversion of a domestic LLC to a foreign LLC, and the conversion of a foreign LLC to a domestic LLC, assuming that the conversion is not prohibited by the laws of the other state at issue and all of the requirements of Section 1308.3 are satisfied.
- (C) Under Paragraph (B) of Section 1308.3, the conversion may be

authorized “by a majority of the members, or by such larger vote as the articles of organization or an operating agreement may require.”

- (D) Paragraph (C) of Section 1308.3 provides that a domestic or foreign LLC seeking conversion shall file a written request with the Louisiana Secretary of State. Paragraph (C) also addresses the requirements of such a written request.
- (E) Paragraph (D) of Section 1308.3 provides that the request for conversion may be delivered to the Louisiana Secretary of State for filing as of a specific date or time within thirty days of the date of delivery.
- (F) Paragraph (E) of Section 1308.3 addresses the obligations of the Louisiana Secretary of State upon the receipt of a request for conversion.
- (G) Paragraph (F) of Section 1308.3 addresses the effects of the conversion, whether upon a domestic or foreign LLC, and provides, in part, that the LLC “shall continue to exist without interruption in its organizational form.” Further, “all rights, title, interests, obligations, and liabilities” of the LLC shall continue “without impairment, diminution, or termination.”
- (H) Under Section 2 of Act 476, the provisions of Section 1308.3 “shall become effective on **January 1, 2013.**”

Note - Conversion under new Section 1308.3 appears to be analogous to domestication under Sections 1010 - 1015 of the Revised Uniform Limited Liability Company Act (2006).

B. Records of the Secretary of State; Removal of Improper or Fraudulent Information - Acts 2012, No. 791 (Senate Bill No. 516; Sponsored by Senator Crowe; Approved by the Governor on June 13, 2012)

1. The Enactment of La. R.S. 12:1701

- (A) Act 791 enacts Section 1701 of Title 12 of the Louisiana Revised Statutes.
- (B) Section 1701 constitutes the entirety of a newly created Chapter 26

(Provisions Applicable to More Than One Kind of Business Organization) of Title 12.

- (C) Under Section 1701, if any officer, member, manager or partner of a corporation, limited liability company or partnership has his name removed from the records of the Secretary of State in violation of state law or in contravention of the documents of the business entity, the aggrieved party may file suit against the party who caused the removal.
- (D) The suit shall be filed in the judicial district court where the business entity is domiciled. The Secretary of State shall be made a party to the suit. Further, the court shall conduct a hearing within ten days after service of process of the suit on all parties.
- (E) If the court finds that the name of the aggrieved party was improperly or fraudulently removed from the records of the Secretary of State, the court shall order the Secretary of State to replace the name of the aggrieved party on “all appropriate documents and records.”
- (F) By its terms, Section 1701 shall not “be construed to supercede or conflict with the provisions of R.S. 12:208.”

Note - Section 208 addresses the defense of *ultra vires* (i.e. - the alleged invalidity of an act of a corporation because the corporation was without the capacity or power to perform such an act.)

C. Professional Licenses of Business Entities Following a Conversion - Acts 2012, No. 434 (House Bill No. 1065 Sponsored by Representative Broadwater; Approved by the Governor on May 31, 2012)

D. Benefit Corporations - Acts 2012, No. 442 (House Bill No. 1178; Sponsored by Representatives Leger and Ortego; Approved by the Governor on May 31, 2012)

VI. LEGISLATIVE DEVELOPMENTS - NOTARIES

A. Acts of Correction - Acts 2012, No. 397 (House Bill No. 470; Sponsored by Representative Abramson; Approved by the Governor on May 31, 2012)

1. The Amendment of La. R.S. 35:2.1

(A) Before the 2012 legislative session, Paragraph (A) of Section 2.1 of Title 35 of the Louisiana Revised Statutes provided that a clerical error in a notarial act may be corrected by the notary or one of the notaries before whom the act was passed or by the notary who actually prepared the act containing the error.

(B) Paragraph (A) of Section 2.1 has been amended as follows:

Affidavit of corrections

A. (1) **A clerical error in a notarial act affecting movable or immovable property or any other rights, corporeal or incorporeal, may be corrected by an act of correction executed by *any of the following*:**

(a) ***The person who was the notary or one of the notaries before whom the act was passed; or by the.***

(b) ***The notary who actually prepared the act containing the error.***

(c) ***In the event the person defined in Subparagraphs (a) or (b) of this Paragraph is deceased, incapacitated, or whose whereabouts are unknown, then by a Louisiana notary who has possession of the records of that person, which records contain information to support the correction.***

(2) **The act of correction shall be executed ~~by the notary~~ before two witnesses and ~~another~~ a notary public.**

La. R.S. 35:2.1 (2012) (Deleted portions ~~struck through~~; added portions in *italics*).

(C) Under Paragraph (A) of Section 2.1, as amended, if the original notary or notaries or the notary who prepared the original act are not available, a Louisiana notary in possession of the records of any of them may execute an act of correction if the records contain

information to support the correction.

- (D) By its terms, Paragraph (A) of Section 2.1 applies only to “clerical” errors.
- (E) Paragraph (B) of Section 2.1, which was not amended, continues to provide that an act of correction executed in compliance with the Section shall be given retroactive effect to the date of recordation of the original act. However, the act of correction shall not prejudice the rights acquired by a third person before the act of correction is recorded if the third person reasonably relied upon the original act.

Note - See also First Nation Bank USA v. DDS Construction, LLC, 2011-1418 (La. 1/24/12), 2012 WL 206431.

B. Notaries; Provisional Appointment - Acts 2012, No. 829 (House Bill No. 1192; Sponsored by Representative Barras and Senator Walsworth; Approved by the Governor on June 14, 2012)

1. The Amendment of La. R.S. 35:191

- (A) Section 191 of Title 35 of the Louisiana Revised Statutes addresses the qualification, examination and appointment of notaries in Louisiana.
- (B) Section 191 has been amended to add Paragraph (W), which generally provides as follows:
 - (1) Any person who resides in a parish with a population of less than 40,000 who has passed the notary examination, except for the performance assessment component, from December 1, 2009 to December 31, 2012 or from January 1, 2013 to August 1, 2016, may be provisionally appointed as a notary public.
 - (2) A provisionally appointed notary under Section 191 may exercise notarial functions only within the course and scope of his employment and only under the direction of a supervisor for a non-notary employer.
 - (3) A provisionally appointed notary “shall not . . . draft and

prepare a last will and testament . . . draft and prepare a trust [or] draft and prepare any instrument that transfers title to immovable property” However, a notarial act executed by a provisionally appointed notary shall not be deemed invalid or unenforceable solely on the basis that the execution of the act exceeded the authority of the notary under Section 191.

- (4) The provisions of Paragraph (W) of Section 191 “shall become effective on January 1, 2013.”
- (5) The provisions of Paragraph (W) of Section 191 shall expire on August 1, 2016. Further, the commission of any provisionally appointed notary shall also expire on August 1, 2016, unless the notary has passed all components of the notarial examination at that time.

VII. LEGISLATIVE DEVELOPMENTS - ANNUITIES

A. **Annuities; the Annuity Contract and the Annuity Charge** - Acts 2012, No. 258 (House Bill No. 466; Sponsored by Representative Abramson; Approved by the Governor on May 25, 2012)

1. Overview of the Act

- (A) Act 258 revises Title X of Book III of the Civil Code. Title X includes articles 2778, 2779 - 2792 (comprising Chapter 1 entitled “Of Rent of Lands”) and 2793 - 2800 (comprising Chapter 2 entitled “Of Annuities”).
- (B) The more significant provisions of Act 258 may be summarized as follows:
 - (1) The Act repeals the present Civil Code articles 2779 - 2792 regarding rent of lands.
 - (2) The Act amends and reenacts the present articles 2793 - 2800 regarding annuities. As part of the amendment and reenactment of these articles, the Act: (a) expands the definition of an annuity contract to include property other than

“a sum of money;” and (b) provides for the establishment of a charge upon immovable property subject to an annuity contract.

- (C) These materials do not address all of the changes in the law as a result of Act 258. Rather, the materials address only some of the changes that may be relevant in the context of an estate planning and administration practice.

2. Effective Date

The provisions of Act 258 “shall become effective on January 1, 2013, and shall apply to transactions within its scope entered into on (*sic*) or after that date.”

3. The Repeal of Civil Code Articles 2779 - 2792

- (A) The present Civil Code article 2779 provides that one party may convey immovable property to a second party and stipulate that the second party shall hold the property as owner, reserving to the first party “an annual rent of a certain sum of money, or of a certain quantity of fruits,” which the second party is bound to pay.
- (B) Under the present Civil Code article 2779, such an agreement is called a “contract of rent of lands.” The present articles 2780 - 2792 provide various rules regarding such a contract.
- (C) Act 258 repeals the present Civil Code articles 2779 - 2792 in their entirety, effective January 1, 2013.

4. The Amendment of Civil Code Articles 2793 - 2800

(A) Application of the Present Articles 2793 - 2800

- (1) The present Civil Code articles 2793 - 2800 involve annuities.
- (2) Annuities, in the context of these articles, are rare and should be distinguished from insurance industry annuity contracts, whether qualified or non-qualified.

- (3) As a practical matter, the application of the present articles 2793 - 2800 is limited.

(B) The Definition of an Annuity

- (1) The present Civil Code article 2793 defines an annuity as a contract “by which one party delivers to another a sum of money, and agrees not to reclaim it so long as the receiver pays the rent agreed upon.”
- (2) In contrast, new Civil Code article 2778, effective January 1, 2013, provides as follows:

Annuity contract; definition

An annuity contract is an agreement by which a party delivers a thing to another who binds himself to make periodic payments to a designated recipient. The recipient’s right to these payments is called an annuity.

A contract transferring ownership of a thing other than money for a certain or determinable price payable over a term is not an annuity contract.

La. Civ. Code art. 2778 (2013).

- (3) Under new article 2778, an annuity contract is not limited to “a sum of money.” Rather, an annuity may be established by the delivery of “a thing,” whether movable or immovable, consumable or nonconsumable, corporeal or incorporeal. *See* cmt. (a) to La. Civ. Code art. 2778 (2013); *compare* La. Civ. Code arts. 2779 - 2792 (2012).
- (4) Further, under new article 2778, the recipient of the periodic payments may be a third person, rather than one of the parties to the annuity contract. *See* cmt. (d) to La. Civ. Code art. 2778 (2013).

(C) The Annuity Charge

(1) Background

- a. As set forth above, the present Civil Code article 2779

provides that one party may convey immovable property to a second party and stipulate that the second party shall hold the property as owner, reserving to the first party “an annual rent of a certain sum of money, or of a certain quantity of fruits,” which the second party is bound to pay. Under the present article 2779, such an agreement is called a contract of rent of lands.

- b. The present Civil Code articles 2786 - 2788 further provide for the establishment of a charge upon the immovable property at issue for the “rent” due.
- c. As set forth above, Act 258 repeals the present articles 2779 - 2792 in their entirety, effective January 1, 2013.

(2) New Civil Code Articles 2787 - 2791

- a. Through the enactment of new Civil Code article 2778, Act 258 expands the definition of an annuity to include contracts established by the delivery of all types of things, whether movable or immovable, consumable or nonconsumable, corporeal or incorporeal.
- b. Further, Act 258 amends and reenacts Civil Code articles 2787 - 2791 to establish the “annuity charge.” More specifically, new Civil Code article 2787 provides as follows:

Annuity Charge

An annuity contract transferring an immovable may provide for the establishment of a charge on the immovable for the periodic payments due under the contract. In such a case, the recipient in whose favor the annuity was established acquires a real right for periodic payments. The establishment of the annuity charge must be express and in writing.

La. Civ. Code art. 2787 (2013).

- c. Under new Civil Code article 2787, among other things, an owner may transfer immovable property to another person, who undertakes a personal obligation to make periodic payments to the transferor or to some other recipient. The parties may agree that the obligation will be a charge on the immovable property that has been transferred. In such a case, the transferor acquires a real right for periodic payments over the transferred immovable property.
- d. For the annuity charge to be effective against third persons, the annuity contract establishing it must be recorded in the conveyance records of the parish where the immovable property is located. La. Civ. Code art. 2788 (2013). If the immovable property is transferred to a person other than the recipient under the annuity contract, the annuity charge continues to burden the property. If the owner of the immovable fails to make payments, the recipient under the annuity contract has recourse against the obligor under the contract and the immovable itself burdened by the annuity charge. La. Civ. Code art. 2791 (2013).
- e. The comments to new Civil Code article 2787 characterize the annuity charge as “a modern, effective, and efficient tool for acquisition of financial resources as an alternative to the so-called reverse mortgage.” *See* cmt. (a) to La. Civ. Code art. 2787 (2013).
- f. Under new Civil Code article 2779, an onerous annuity contract providing for the delivery of a thing other than money is generally governed by Title VII of Book III of the Louisiana Civil Code (Sales). Accordingly, an annuity contract providing for the transfer of corporeal immovable property may be rescinded for lesion beyond moiety. *See* cmt. (d) to La. Civ. Code art. 2779 (2013); *see also* La. Civ. Code arts. 1965, 2589 - 2600 and 2663 (2012).

VIII. LEGISLATIVE DEVELOPMENTS - SIMULATIONS

A. **Simulations; Counterletters** - Acts 2012, No. 277 (House Bill No. 764; Sponsored by Representative Abramson on Recommendation of the Louisiana State Law Institute; Approved by the Governor on May 25, 2012)

1. Overview of the Act

(A) Act 277 amends Civil Code articles 1848 and 2028, enacts Civil Code article 1849 and repeals Civil Code article 2444.

2. The Amendment of Civil Code Article 1848

(A) Civil Code article 1848 provides the general rule that testimonial or other evidence may not be admitted to vary the contents of an authentic act or an act under private signature. Article 1848 also includes exceptions to the general rule.

(B) Civil Code article 1848 has been amended as follows:

Testimonial or other evidence not admitted to disprove a writing

Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent; ~~or a simulation~~; or to prove that the written act was modified by a subsequent and valid oral agreement.

La. Civ. Code art. 1848 (2012) (Deleted portions ~~struck through~~).

(C) As set forth below, new Civil Code article 1849 now addresses proof of a simulation. Therefore, the reference to simulation in article 1848 has been deleted.

3. The Enactment of Civil Code Article 1849

(A) Civil Code article 1849 is new and provides as follows:

Proof of simulation

In all cases, testimonial or other evidence may be admitted to prove the existence or a presumption of a simulation or to rebut such a presumption. Nevertheless, between the parties, a counterletter is required to prove that an act purporting to transfer immovable property is an absolute simulation, except when a simulation is presumed or as necessary to protect the rights of forced heirs.

La. Civ. Code art. 1849 (2012).

- (B) Under Civil Code article 2025, a contract is a simulation when, by mutual agreement, it does not express the true intent of the parties. If the true intent of the parties is expressed in a separate writing, that writing is a counterletter.
- (C) Under Civil Code article 2026, a simulation is absolute when the parties intend that their contract shall produce no effects between them. An absolute simulation, therefore, can have no effects between the parties. An example of an absolute simulation is an act through which the parties make an apparent sale, although the parties actually intend that the vendor will remain the owner of the property at issue.
- (D) Under Civil Code article 2027, a simulation is relative when the parties intend that their contract shall produce effects between them, although the effects are different from those recited in the contract. A relative simulation produces between the parties the effects they intended if all of the requirements for those effects have been satisfied. For example, a relative simulation may take place when the parties make an apparent sale, while actually intending a donation. The simulated sale may be a valid donation if the requirements of form for a donation have been satisfied.
- (E) New Civil Code article 1849 refers to a presumption of a simulation. Civil Code article 2480 provides an example of such a presumption. Under article 2480, when property sold remains in the corporeal possession of the seller, the sale is presumed to be a simulation.
- (F) Under new Civil Code article 1849, testimonial or other evidence may generally be admitted to prove the existence of an absolute or relative simulation, a presumption of an absolute or relative simulation, or to rebut a presumption of an absolute or relative

simulation.

- (G) However, under new article 1849, a **party must present a counterletter** to prove that an act purporting to transfer immovable property is an absolute simulation unless: (1) a simulation is presumed; or (2) as necessary to protect the rights of forced heirs.
- (H) Although Civil Code article 1849 is new, it is intended to reproduce the substance of the former Civil Code article 1848 and to clarify when a counterletter is necessary to prove a simulation. *See* cmt. (a) to La. Civ. Code art. 1849 (2012).

4. The Amendment of Civil Code Article 2028

- (A) Civil Code article 2028 has been amended to provide as follows:

Effects as to third persons

Any simulation, either absolute or relative, may have effects as to third persons.

Counterletters can have no effects against third persons in good faith. *Nevertheless, if the counterletter involves immovable property, the principles of recordation apply with respect to third persons.*

La. Civ. Code art. 2028 (2012). (Added portions in *italics*).

- (B) Civil Code Article 2028, as amended, is intended to clarify the law.
- (C) Under article 2028, simulations may not only have effects between the parties, but also with respect to third persons. Under Civil Code article 3343, a third person is generally defined as a person who is not a party to an instrument or personally bound by the instrument.
- (D) Before the 2012 legislative session, article 2028 provided that counterletters have no effects against third persons in good faith.
- (E) Article 2028, as amended, retains the general rule, but clarifies that a counterletter may have effect with respect to a third person if the counterletter is recorded in the public records. *See* cmt. (c) to La. Civ. Code art. 2028 (2012).

5. The Repeal of Civil Code Article 2444

- (A) Before the 2012 legislative session, Civil Code article 2444 provided as follows:

Sale of immovable by parents to children; disguised donation

The sale of immovable property by parents to their children may be attacked by the forced heirs as a donation in disguise if those heirs can prove that no price was paid or that the price paid was less than one fourth of the value of the immovable at the time of the sale.

La. Civ. Code art. 2444 (2011).

- (B) By its terms, Civil Code article 2444 applied only to disguised donations by parents to their children regarding immovable property. In other words, article 2444 applied to the apparent sale of immovable property by parents to their children when the parties actually intended a donation.
- (C) Article 2444 specifically authorized forced heirs to attack the relative simulation if the forced heirs were able to prove that no price was paid or that the price paid was less than one-fourth (1/4) of the value of the immovable property at the time of the sale.
- (D) Article 2444 has been repealed as unnecessary.

IX. LEGISLATIVE DEVELOPMENTS - USUFRUCT

A. Value of Usufruct - 2012 Regular Session, Senate Concurrent Resolution No. 57 (Sponsored by Senator Murray)

1. Senate Concurrent Resolution No. 57 provides as follows:

- (A) Usufruct is defined by Civil Code article 535 as “a real right of limited duration on the property of another.” Article 535 further provides that “the features of the right vary with the nature of the things subject to it as consumables or nonconsumables.”
- (B) The proper determination of “the value of a usufruct may arise in

matters involving property transfers, successions, business transactions, tax, family, and other personal and commercial legal activities.”

- (C) There “exists a lack of certainty under present state law and cases as to how the value of a usufruct should be properly determined in such matters.” Further, the “lack of certainty increases the potential for disputes, confusion, disagreement, and litigation.”
- (D) Accordingly, the Louisiana State Law Institute is directed “to study how the value of the usufruct should be properly determined under state law.”
- (E) The Law Institute is further directed to report its findings and recommendations to the legislature on or before February 1, 2013.

X. LEGISLATIVE DEVELOPMENTS - SURVIVAL ACTIONS

A. Survival Actions - 2012 Regular Session, House Concurrent Resolution No. 131 (Sponsored by Representative Lopinto)

- 1. House Concurrent Resolution No. 131 provides as follows:
 - (A) Civil Code article 2315.1 “provides a survival action in favor of certain classes of survivors to the exclusion of others.”
 - (B) The “mandatory transfer of a survival action to the favored class under Civil Code article 2315.1 may conflict with the decedent’s testamentary wishes when the decedent has been estranged from the favored class for a considerable length of time.”
 - (C) The “testamentary disposal of a survival action may result in a more equitable distribution of a decedent’s assets.”
 - (D) Accordingly, the Louisiana State Law Institute is directed “to study the testamentary disposition of the right to bring a survival action pursuant to Civil Code article 2315.1 and to make specific recommendations for legislation.”
 - (E) The Law Institute is further directed to report its findings and

recommendations in the form of specific proposed legislation on or before January 1, 2013.

Note - Rainey v. Entergy Gulf States, Inc., 2001-2414 (La. App. 1st Cir. 6/25/04), 885 So. 2d 1193, *writs denied*, 04-1883, 04-1884 (La. 11/15/04), 887 So.2d 479; and *Mouton v. Morton International, Inc.*, 2007-575 (La. App. 3rd Cir. 10/31/07), 970 So.2d 90, *writ denied*, 2007-2314 (La. 2/1/08), 976 So. 2d 718.

XI. LEGISLATIVE DEVELOPMENTS - PERSONS

- A. Intrafamily Adoptions** - Acts 2012, No. 603 (House Bill 912; Sponsored by Representatives Nancy Landry, Barrow, Hodges, Katrina Jackson, Norton, Smith, St. Germain and Thierry and Senators Broome, Buffington, Peterson and Thompson; Approved by the Governor on June 7, 2012)

- B. Filiation** - Acts 2012, No. 621 (Senate Bill No. 90; Sponsored by Senator Riser; Approved by the Governor on June 7, 2012)

XII. LEGISLATIVE DEVELOPMENTS - PROPERTY

- A. Evictions** - Acts 2012, No. 19 (House Bill 350; Sponsored by Representative Arnold; Approved by the Governor on May 4, 2012)

- B. Certificates of Encumbrances** - Acts 2012, No. 178 (House Bill 169; Sponsored by Representative Henry; Approved by the Governor on May 22, 2012)

- C. Erasure or Cancellation of Mortgages** - Acts 2012, No. 179 (House Bill 170; Sponsored by Representative Henry; Approved by the Governor on May 22, 2012)

- D. Inscriptions on Mortgage Certificates** - Acts 2012, No. 712 (House Bill 452; Sponsored by Representative Abramson; Approved by the Governor on June 11, 2012)

- E. **Rights and Servitudes of Passage** - Acts 2012, No. 739 (House Bill 468; Sponsored by Representatives Abramson and Thompson; Approved by the Governor on June 12, 2012)

XIII. LEGISLATIVE DEVELOPMENTS - GENERAL INTEREST

- A. **Long-Term Care Insurance** - Acts 2012, No. 91 (House Bill 564; Sponsored by Representative Johnson; Approved by the Governor on May 11, 2012)

- B. **Corporation Income and Franchise Taxes** - Acts 2012, No. 415 (House Bill 729; Sponsored by Representatives Robideaux, Adams, Barras, Wesley Bishop, Broadwater, Guillory, Hazel, Hoffmann, Johnson, Lorusso, Thibaut and Patrick Williams; Approved by the Governor on May 31, 2012)

- C. **Real Estate Appraisals** - Acts 2012, No. 429 (House Bill 1014; Sponsored by Representative Hoffman; Approved by the Governor on May 31, 2012)

- D. **Secured Transactions** - Acts 2012, No. 450 (House Bill 369; Sponsored by Representative Foil on Recommendation of the Louisiana State Law Institute; Approved by the Governor on June 1, 2012)

- E. **Informed Consent to Medical Treatment** - Acts 2012, No. 600 (House Bill 866; Sponsored by Representative Abramson; Approved by the Governor on June 7, 2012); and Acts 2012, No. 759 (Senate Bill 239; Sponsored by Senator Murray; Approved by the Governor on June 12, 2012)

- F. **Public Notices** - Acts 2012, No. 825 (House Bill 1144; Sponsored by Representative Leger and Senator Murray; Approved by the Governor on June 14, 2012)

XIV. JURISPRUDENTIAL DEVELOPMENTS - TESTAMENTS

A. Testaments - Formalities

Succession of Russo, 12-32 (La. App. 5th Cir. 5/22/12), 2012 WL 1868097. On November 24, 2009, Michael A. Russo (“Mr. Russo”) established the “Michael A. Russo Trust I.” Mr. Russo named his step-grandson, Kaegen Michael Faulk, as the beneficiary of the trust. He named his niece, Samantha Ronquille-Green (“Green”), and his sister, Danielle Ronquille-Lipski, as the co-trustees of the trust.

On that same date, Mr. Russo also executed a purported notarial testament. In his testament, Mr. Russo left the bulk of his property to his step-grandson in trust. He named his niece, Green, as executrix.

Mr. Russo then died on February 5, 2010.

In March of 2011, Green petitioned the court to be appointed as the administratrix of Mr. Russo’s succession. Green alleged that the purported November 24, 2009 testament was not valid. Therefore, Russo died intestate. In an affidavit submitted with her petition, Green and her sister attested that they had personal knowledge that neither the notary public nor the two witnesses who signed the testament were present when Mr. Russo executed the document. Rather, the notary and the witnesses were outside of the room at the time.

Thereafter, Green, in her capacity as the administratrix of the succession, filed a petition for declaratory judgment that Mr. Russo’s testament was in fact invalid. Tammy Faulk Gorman, as the “provisional custodian” of Mr. Russo’s step-grandson, Kaegen Michael Faulk, filed an exception of no cause of action in response to Green’s petition for declaratory judgment.

After a hearing, the trial court granted the exception of no cause of action.

In its review, the court of appeal first noted that no evidence may be introduced to support or controvert an exception of no cause of action. Consequently, the court must review the petition and accept the allegations of fact as true. The issue at the trial of an exception of no cause of action is whether, on the face of the petition, the plaintiff is legally entitled to the requested relief.

Following a review of the requirements of a notarial testament under Civil Code article 1577, the court of appeal found that Green “failed to allege in her petition or provide support for her claim that either of the witnesses or the notary public would

attest that they failed to observe the requirement formalities under La. C.C. art. 1577.” Therefore, even “accepting all of the allegations in Green’s petition as true,” the court of appeal found no error in the trial court’s ruling that Green’s petition failed to allege facts sufficient to state a cause of action for the invalidation of Mr. Russo’s testament.

It was unclear from the record on appeal whether Green sought leave of the trial court to amend her petition to state a cause of action. However, the trial court apparently concluded that the grounds raised in the exception could not be removed by amendment. Noting that the right to amend a petition is subject to the restriction that the objection be curable, the court of appeal affirmed the ruling of the trial court.

Judge Gravois *dissented* and assigned reasons. Judge Gravois noted that in the petition for declaratory judgment, Green affirmatively alleged that Mr. Russo’s purported testament was not valid because neither the notary public nor the two witnesses were present when the document was signed, in clear violation of Civil Code article 1577. Accordingly, Judge Gravois found that the petition did state a cause of action and that the trial court erred in granting the exception.

Succession of Dunaway, 2011-1747 (La. App. 1st Cir. 5/2/12), 2012 WL 1535737. Ira and Wilda Dunaway were married in 1950 and had four children: Rob; Tim; Dannie; and Ira Lynn. Ira Lynn predeceased Mr. and Mrs. Dunaway and was survived by one child, Jessica Vampran (“Vampran”).

Mr. and Mrs. Dunaway each executed purported testaments on October 19, 1992 and February 18, 1999. Mrs. Dunaway also executed a purported testament on June 14, 1993. All of the testaments were virtually identical. The only differences were the dates on which the testaments were executed, the designation of the executor for the succession and the correction of a typographical error in Mrs. Dunaway’s name.

All of the testaments at issue were purported statutory testaments under the former La. R.S. 9:2442. In each of the testaments, Mr. and Mrs. Dunaway left all of their property to each other. Upon the death of both Mr. and Mrs. Dunaway, their surviving children were to inherit all of their property in equal shares.

Vampran, the child of the Dunaways’ predeceased daughter, Ira Lynn, challenged the validity of all of the testaments. Vampran alleged that the testaments were not valid, as the attestation clauses in all of the testaments failed to satisfy the requirements of Civil Code article 1577.

The trial court agreed with Vampran and found all of the testaments to be null.

The court of appeal noted that under Civil Code article 1577: (1) the testator must declare or signify in the presence of a notary and two witnesses that the instrument is his testament; (2) the testator must sign his name at the end of the testament and on each separate page; and (3) the notary and the two witnesses must sign a declaration in the presence of each other and the testator attesting that the formalities of article 1577 have been satisfied. A material deviation from the manner of execution is fatal to the validity of the testament. If the formalities prescribed for the execution of a testament are not observed, the testament is absolutely null under Civil Code article 1573.

Each of the testaments at issue contained three attestation-type clauses. The first clause was contained on the first page of each of the testaments and provided as follows:

Signed, sealed, published and declared to be his [her] Last Will and Testament by the within named Testator in the presence of us, who in his [her] presence and at his [her] request, and in the presence of each other, have hereunto subscribed our names as witnesses this [respective date].

Three (3) witnesses signed under this clause in each of the testaments.

Although the clause stated that the testament was signed by the testator in the presence of the witnesses and that the testator declared the document to be his or her testament, the clause failed to state that the testament was signed by the testator in the presence of the notary or that the witnesses themselves signed in the presence of the notary. Therefore, the court of appeal found that the clause failed to satisfy the requirements of Civil Code article 1577.

The next attestation-type clause in the testaments was entitled “Affidavit of Execution and Attestation” and provided as follows:

I sign my name to this, my Will, and being duly sworn, declare that I sign voluntarily for the purposes expressed therein, and am of lawful age, of sound mind and under no undue influence.

This clause was signed by the testator. Although the clause stated that the testator had been duly sworn and that the testator was signing and declaring the testament to be his or her own, the clause did not state that it was actually signed in the presence of the notary and the two witnesses. Therefore, the clause also did not satisfy the requirements of article 1577.

Finally, each of the testaments contained another clause as follows:

The undersigned witnesses being duly sworn, each declares that the Testator signed this Will consisting of one page with writing on both sides thereof, at the end thereof, and on each side thereof, in our presence, and signified, published and declared in our presence that this instrument is his [her] Last Will and Testament, and that at the request of and in the presence of Tes[t]ator and in the presence of each other and in the presence of a Notary Public each has subscribed his/her name to this will as witness to Testator signing this [respective date], and to the best of his/her knowledge Testator is of lawful age, of sound mind and under no undue influence.

(1) Witness [signed] residing at Franklinton, La. [signed]

(2) Witness [signed] residing at Franklinton, La. [signed]

(3) Witness [signed] residing at Franklinton, La. [signed]

State of Louisiana

Parish of Washington

Subscribed, sworn and acknowledged before me by [the Testator] and [witnesses] this [respective date].

Notary Public [signed]

This clause provided that the testator signed the testament in the presence of the witnesses and declared to the witnesses that the document was his or her testament. This clause also stated that the witnesses signed the testament in the presence of the notary. However, this clause did not state that the testator signed the testament in the presence of the notary. Further, the clause did not state that the testator specifically declared the testament to be his testament to the notary or to the notary in the presence of the two witnesses. Therefore, the court of appeal found that this clause also failed to satisfy the requirements of Civil Code article 1577.

For these reasons, the court of appeal found that all of the testaments at issue were null and therefore affirmed the judgment of the trial court.

Comment

Article 1577 of the Civil Code was enacted as a result of Acts 1997, No. 1421, effective July 1, 1999. The purported testaments at issue in *Dunaway* were executed on October 19, 1992, June 14, 1993 and February 18, 1999, respectively. Therefore,

the documents at issue were purported statutory testaments under the former La. R.S. 9:2442, rather than purported notarial testaments under the present Civil Code article 1577. As such, the provisions of the former Section 2442 should have been used to determine their validity. *Compare* La. Civ. Code art. 870(B) (2012).

Succession of Carlton, 2011-288 (La. App. 3rd Cir. 10/5/11), 77 So.3d 989, *writ denied*, 2011-2840 (La. 3/2/12) 84 So.3d 532. Dewayne Carlton died in September of 2008. In July of 2009, two of Mr. Carlton’s aunts, Ellen Wise and Melba Phillips, filed a petition for the probate of a notarial testament and for possession. The trial court rendered a judgment of possession in August of 2009. However, shortly thereafter, Mr. Carlton’s sister, Monica Player, filed a motion to annul the probated testament, as it did not contain an attestation clause. The trial court declared the testament null and further nullified its judgment of possession. The court of appeal affirmed. *See Succession of Carlton*, 09-1339 (La. App. 3rd Cir. 4/7/10), 34 So.3d 1015 (“*Carlton I*”).

In April of 2010, Mr. Carlton’s wife and “illegitimate” son filed a joint petition for possession in a “new suit.” In response, Mr. Carlton’s sister, Player, filed a “Motion for New Trial, Exception of Peremption or in the Alternative Petition to Annul Judgment of Possession, Contempt and Perjury.” On July 12, 2010, Phillips and Wise filed a petition for probate of notarial testament and alleged that they had found a second page of Mr. Carlton’s testament which contained a valid attestation clause. Phillips and Wise filed the document and sought to have it read in conjunction with the previously filed single page testament that was the subject of the court of appeal’s decision in *Carlton I*. On July 15, 2010, the trial court denied the petition for probate with a note that a conference would be scheduled upon request.

In September of 2010, Player filed an exception of *res judicata* and alleged that the validity of the testament had already been adjudicated in the other suit and was a final judgment. Therefore, Phillips and Wise were precluded from asking the court to probate the testament as a two page document.

In November of 2010, the trial court conducted a hearing on the exception of *res judicata*. No evidence was introduced. Following the hearing, the trial court granted the exception and dismissed the petition for probate by Phillips and Wise.

In its review, the court of appeal found that the trial court’s July 15, 2010 denial of the petition for probate filed by Phillips and Wise was subject to its review, as it was encompassed within the appealable judgment on the grounds of *res judicata*. Having reached this conclusion, the court of appeal found that the trial court properly denied the petition for probate. The court explained that “the instant suit [was] a separate and distinct suit from that involving the single-page testament previously filed for

probate.” The two suits were not consolidated. The only document filed into the record of the petition to probate was the alleged second page of Mr. Carlton’s testament. The petition referred to the first page of the alleged testament. However, the first page was not filed into the record in the new suit any form. The second page, which contained only an attestation clause, was not in and of itself a testament. Therefore, the trial court had no obligation to order the document to be filed and given the effect of probate.

The court of appeal then turned its attention to the trial court’s dismissal of the petition for probate on the grounds of *res judicata*. In this regard, the court of appeal found that Player failed to introduce the judgment that declined to probate the first page of Mr. Carlton’s alleged testament in the first proceeding. As Player failed to introduce the judgment into evidence at the hearing in conjunction with her exception, she failed to prove an essential element of *res judicata*. The trial court therefore erred when it sustained her exception.

For these reasons, the court of appeal reversed and remanded the matter to the trial court for further proceedings.

B. Testaments - Interpretation of Legacies

Succession of Smith, 47,023 (La. App. 2nd Cir. 6/13/12), 2012 WL 2123217. William Smith (“Mr. Smith”) died in October of 2009. Mr. Smith was not married at the time of his death. Mr. Smith had one child, Jeffrey Smith.

Mr. Smith executed a notarial testament in July of 2009. Mr. Smith’s testament provided, in part, as follows:

I give, devise and bequeath all of my monetary assets to my special friend, EVERLENA C. LANE, including but not limited to sales from any and all properties shared between my sister and I. I further give, devise and bequeath my IRA, Savings and Checking Accounts to my friend, EVERLENA C. LANE.

Mr. Smith further left all of his “personal belongings” to Ms. Lane’s son, Richard Lane. Mr. Smith’s testament did not include a residuary clause. Through the testament, Mr. Smith appointed Ms. Lane as executrix.

As a result of various petitions, Ms. Lane was placed in possession of Mr. Smith’s “money, stocks, annuities and bank accounts.” Richard Lane was placed in possession of Mr. Smith’s corporeal movable property. However, Ms. Lane was not

placed in possession of Mr. Smith's undivided one-half (1/2) interest in four tracts of land in Caddo Parish that Mr. Smith owned with his sister.

In July of 2010, Jeffrey Smith filed a petition to be placed in possession of his father's interest in the immovable property in Caddo Parish. In his petition, Jeffrey alleged that the Caddo Parish property was not addressed in Mr. Smith's testament. Therefore, as his father's only child and intestate heir, Jeffrey asked to be placed in possession of his father's interest in the property. The trial court rendered a judgment of possession accordingly.

In October of 2010, Ms. Lane filed a petition to reopen the succession. Ms. Lane alleged that Mr. Smith had intended that his interest in the Caddo Parish property be sold and that Ms. Lane be entitled to the proceeds. Alternatively, Ms. Lane alleged that Mr. Smith intended for her to receive his interest in the property. In support of her petition, Ms. Lane submitted the affidavit of Mr. Smith's attorney, who stated that it was Mr. Smith's desire that the Caddo Parish property be sold and that Ms. Lane be entitled to the proceeds of the sale allocable to Mr. Smith's interest in the property.

The trial court dismissed Ms. Lane's petition and affirmed the judgment in favor of Jeffrey. The trial court explained that Mr. Smith's testament did not specifically address the Caddo Parish property and did not include a residuary clause. Therefore, Mr. Smith's interest in the Caddo Parish property fell intestate.

The court of appeal noted that under Civil Code article 1611, the testator's intent controls the interpretation of his testament. Courts must seek to give meaning to all testamentary language and to avoid any interpretation that would render the language meaningless. La. Civ. Code art. 1612 (2012); *Succession of Tyson*, 30,703 (La. App. 2nd Cir. 6/26/98), 716 So.2d 148; *Succession of Meeks*, 609 So.2d 1035 (La. App. 2nd Cir. 1992). The first and natural impression conveyed to the mind upon reading a testament as a whole is entitled to great weight.

Following its review of the applicable law, the court of appeal concluded that Mr. Smith's testament did provide for the disposition of his interest in the Caddo Parish property. The court conceded that the wording was somewhat awkward. However, the first impression conveyed upon reading Mr. Smith's testament was that Mr. Smith intended to give Ms. Lane his interest in the property. The court of appeal found that to conclude otherwise would render meaningless the testamentary language regarding Mr. Smith's interest in the property.

The court of appeal further found that the lack of a residuary clause in the testament supported its conclusion. More specifically, the court found that the lack of a residuary clause supported the presumption that Mr. Smith intended to dispose of all

of his property, including his ownership interest in the Caddo Parish property, through the legacies in his testament. The court noted that it would require a strained interpretation of Mr. Smith's testament to believe that Mr. Smith did not intend to give his interest in the Caddo Parish property to Ms. Lane in spite of his express reference to the property in his legacy to her.

For these reasons, the court of appeal reversed the judgment of the trial court and rendered a judgment of its own placing Ms. Lane in possession of the decedent's interest in the immovable property in Caddo Parish.

Judge Caraway *dissented* and assigned reasons. Judge Caraway pointed out that at the time of the execution of Mr. Smith's testament, his sister had recently died and there was a family dispute in conjunction with her succession. For these and other reasons, Mr. Smith may have assumed that the Caddo Parish property would be sold and therefore addressed that possibility in his testament.

Judge Caraway found it to be "very much in doubt" that Mr. Smith ever contemplated the possibility that some or all of the Caddo Parish property would not be sold and would remain co-owned by himself and other members of the family at the time of his death. As Mr. Smith's legacy clearly contemplated the sale of the Caddo Parish property before Mr. Smith's death and the distribution of the proceeds, but did not address the possibility of the property remaining in Mr. Smith's name at the time of his death, Judge Caraway found that there was "no operative and valid testamentary disposition" of the property in Mr. Smith's testament.

Succession of White, 2011-2183 (La. App. 1st Cir. 6/8/12), 2012 WL 2061465 - ***Unpublished Opinion***. Carlos White executed a testament on January 29, 2004. Mr. White drafted the testament himself using forms provided by an attorney. At the time of the execution of the testament, Mr. White had one child, Lauren Elizabeth White, who was born in 2000. Mr. White's testament included the following provisions:

1.4.1 To the extent I have not designated a beneficiary, I bequeath any interest I have in qualified retirement plans, individual retirement accounts, investment accounts, and insurance policies to the trust created herein for the benefit of my daughter, Lauren Elizabeth White.

* * *

1.4.3 The remainder of my estate I leave in trust for the benefit of my child(ren). I name and appoint my sister, Rodgrika LaShandra Pugh, as trustee, for the Lauren Elizabeth White Trust ... I name my

wife, Latangia Conway White trustee for any trust [sic] that are created by this instrument for any children that she and I may have together.

* * *

2.1.1 The trust(s) is/are created for the benefit of Lauren Elizabeth White and any other children born or adopted.

2.1.2 The trust(s) created by this instrument will be known by the name of the child for which it is meant.

In February of 2004, Mr. White changed the beneficiary designation in conjunction with his Met Life insurance policy to read as follows:

Specifically I designate 3 parts to my wife, Latangia C. White 2 parts to my daughter's Trust: Lauren E. White Trust, Trustee: Rodgrika L. Pugh ...

Thereafter, Mr. White had two other children: Carlson, who was born in May of 2004; and Cayden, who was born in June of 2008.

Mr. White died in October of 2009. A judgment of possession in conjunction with his succession was rendered in March of 2010. Thereafter, the Reverend Van Brass, as the tutor of the property of Carlson and Cayden, filed a petition for declaratory judgment. Brass claimed that the proceeds of the Met Life policy were paid to Lauren in trust and that the proceeds should have been allocated equally among the trusts for Lauren, Carlson and Cayden. Rodgrika Pugh, as the trustee of the trust for Lauren, answered Brass' petition and claimed that the proceeds of the Met Life policy were properly paid to Lauren in trust and that Mr. White's other two children were not entitled to any portion of the proceeds.

The trial court found that the proceeds of the Met Life policy were properly distributed to Lauren in trust and dismissed Brass' petition.

The court of appeal affirmed. The court of appeal found that in 2004, Mr. White allocated 40% of the proceeds of the Met Life policy in trust for Lauren and the remaining 60% of the proceeds of the policy to his wife, the mother of Carlson and Cayden. The court of appeal also contrasted the beneficiary designation regarding the Met Life policy to a beneficiary designation completed by Mr. White at approximately the same time regarding an Amica life insurance policy. In the beneficiary designation for the Amica policy, Mr. White named the "Trustee(s) named in the Last Will and Testament of CARLOS S. WHITE" as the primary

beneficiary.

Following its review of all of the evidence, the court of appeal found that Mr. White intended for his daughter, Lauren, to receive 40% of the proceeds of the Met Life policy in trust. Mr. White did not intend for his other children to share in the proceeds of the Met Life policy.

The court of appeal further declined to accept Brass' contention that Mr. White's testament established one trust for the benefit of all three of his children. Rather, the court of appeal found that the testament established three trusts, one for the benefit of each of Mr. White's children. Although the court of appeal cited Civil Code article 1611 regarding the interpretation of testaments in its opinion, the court found that the application of article 1611 was unnecessary. The court explained that Mr. White's testament was clear and unambiguous. Therefore, the court had no difficulty whatsoever in determining Mr. White's intentions.

For these reasons, the court of appeal affirmed the judgment of the trial court.

Succession of Bernat, 2011-368 (La. App. 3rd Cir. 11/2/11), 76 So.3d 1287, *writ denied*, 2012-0263 (La. 3/30/12), 85 So.3d 122. Frank Bernat executed a notarial testament on January 19, 2010. The testament was prepared by Mr. Bernat's attorney, Watson. Mr. Bernat executed the testament in Cabrini Hospital in Alexandria in the presence of Watson and two witnesses. Mr. Bernat's signature was unsteady due to his ailments. Therefore, Mr. Bernat signed some of the pages of the testament. On others, he marked an "X."

In the testament, Mr. Bernat left property to eleven legatees "in indivision, according to their appropriate legal share." The testament further provided as follows:

Further it is not my intention that the residuary legatees named herein shall receive their proportionate percentage in each and every asset forming the remainder of my Estate, but rather that they shall receive property or properties to be selected by my Executor, which shall satisfy the respective percentages bequeathed to them of the remainder of my assets.

Mr. Bernat named two of his nieces, Carolyn Tuma and Joanne McLain, as executrixes of his succession.

Carolyn and Joanne filed Mr. Bernat's testament on April 14, 2010. Henry Bernat, a nephew of Mr. Bernat, intervened in the succession proceeding and challenged an interpretation of Mr. Bernat's testament apparently included in the pleadings filed by

the executrixes.

The trial court dismissed Henry's claims.

On appeal, Henry continued to argue that the legacy to the eleven legatees "in indivision, according to their appropriate legal share" demonstrated Mr. Bernat's intent that his property be divided among the legatees by roots. Henry cited Civil Code articles 884, 885 and 892 in support of his argument that the "legal share" for descendants of brothers and sisters of the decedent refers to a division by roots, rather than an equal division by heads. Henry further argued that the use of the term "respective percentages" in the testament further demonstrated Mr. Bernat's intent that the legatees receive different percentages pursuant to a division by roots, rather than equal shares under a division by heads.

The court of appeal disagreed. The court of appeal found that the Civil Code articles cited by Henry applied only to intestate successions and there was nothing to suggest that Mr. Bernat intended for the law of intestacy to apply. Further, the court of appeal found that the word "respective" does not by definition mean unequal.

On appeal, Henry further argued that Mr. Bernat's testament was null, as it was not in valid form under Civil Code article 1577. However, as Henry did not raise the validity of the testament in the trial court, the court of appeal refused to consider the issue for the first time on appeal.

For these reasons, the court of appeal affirmed the judgment of the trial court dismissing Henry's claims regarding the interpretation of Mr. Bernat's testament.

Judge Saunders *dissented* and assigned reasons, which consisted of the following two sentences:

I respectfully dissent. See Louisiana Civil Code Arts. 1577, 1578, 1579.

C. Testaments - Capacity; Undue Influence

Succession of Himel, 2011-1638 (La. App. 1st Cir. 7/17/12), 2012 WL 2921495 - *Unpublished Opinion*. Geneva Himel executed a notarial testament on May 11, 2000 in which she left the bulk of her property to her four children in equal shares.

Mrs. Himel executed another notarial testament on February 16, 2001. In the 2001 testament, Mrs. Himel left various particular legacies in favor of her four children.

She then left the remainder of her property to her three daughters to the exclusion of her son, Dennis.

Mrs. Himel then executed a codicil in notarial form on June 28, 2004. In the codicil, Mrs. Himel stated that she wished to “remove” Dennis “entirely from [her] will.” She further provided that the property subject to the particular legacies to Dennis in her 2001 testament should be divided equally between her three daughters.

Mrs. Himel died in December of 2009. Her 2001 notarial testament and the 2004 notarial codicil were filed and ordered executed. Mrs. Himel’s son, Dennis, challenged the 2001 testament and the codicil and alleged that the documents were the subject of undue influence by Mrs. Himel’s daughters. In support of his contention, Dennis introduced evidence that Mrs. Himel was a paranoid schizophrenic, making her susceptible to suggestion.

The trial court found that the 2001 testament and the codicil were in fact the product of undue influence by Mrs. Himel’s daughters and accordingly found the 2001 testament and the codicil to be null. The court of appeal affirmed.

Judge Hughes *dissented* and assigned reasons.

Succession of Chiasson, 2011-01421 (La. App. 3rd Cir. 4/10/12), 2012 WL 1605511 - ***Unpublished Opinion***. In the context of a complicated factual and procedural history involving two successions and a petition for declaratory judgment, the court of appeal addressed the capacity of Anne Comeaux Chiasson at the time of the execution of June 3, 2004 notarial testament. Following its review of the evidence, the court of appeal concluded that the opponents of the testament failed to prove by clear and convincing evidence that Mrs. Comeaux lacked testamentary capacity at the time of its execution.

Succession of Barattini, 11-752 (La. App. 5th Cir. 3/27/12), 2012 WL 1020685. William Barattini was married to Marilyn Charvannes Barattini. Mr. and Mrs. Barattini had one child, Patrice Barattini (“Patrice”). Mrs. Barattini then died.

Following Mrs. Barattini’s death, Mr. Barattini had a long term relationship with June Clesi (“Clesi”). Mr. Barattini and Clesi had one child, Michael Barattini (“Michael”). Clesi also had two daughters from a prior relationship.

Mr. Barattini executed a statutory testament on April 24, 1997, in which he forgave debts owed to him to his son, Michael, and left all of his property to his daughter, Patrice.

Mr. Barattini also left a notarial testament dated November 9, 2006, in which he left all of his property to his son, Michael, and nothing to his daughter, Patrice.

Mr. Barattini died on July 13, 2010.

Patrice filed a petition to annul the November 9, 2006 testament. Following a trial on the merits, the trial court found that Mr. Barattini lacked capacity to execute the 2006 testament and therefore annulled the testament. Michael appealed the judgment of the trial court.

The court of appeal noted that Mr. Barattini was admitted to the hospital on October 30, 2006 and was not discharged until November 9, 2006 - the date of the execution of the testament at issue. Clesi, Michael, Clesi's two daughters and the notary who handled the execution of the 2006 testament all testified that Mr. Barattini "was in good physical condition and that he knew what he was doing" at the time of the execution of the testament. However, the medical records of East Jefferson Hospital on that same day indicated that Mr. Barattini was "delirious and almost comatose." Further, none of the witnesses recalled that Mr. Barattini was transported from the hospital on the date of the execution of the testament approximately one hour after the witnesses testified that the testament had been signed at Mr. Barattini's home.

The court of appeal also noted the testimony of a geriatric psychiatrist who reviewed all of Mr. Barattini's medical records. The psychiatrist testified that he was "100% certain" that Mr. Barattini did not have the capacity to execute a testament on November 9, 2006.

On appeal, Michael argued that Patrice failed to call Mr. Barattini's treating physician as a witness. Therefore, Michael contended that he was entitled to a presumption that the testimony of the treating physician would have been adverse to Patrice's claims. Citing *Dixon v. Travelers Ins. Co.*, 02-1364 (La. App. 4th Cir. 4/2/03, 842 So.2d 478 *writ denied*, 03-1482 (La. 9/26/03), 854 So.2d 366, the court of appeal found that such an adverse presumption does not apply when the witness at issue is equally available to both parties. The court of appeal found that the treating physician was equally available to Michael and therefore the "uncalled witness" rule did not apply.

For these reasons, the court of appeal found no reason to disturb the trial court's conclusion that Mr. Barattini did not have capacity to execute the November 9, 2006 testament. Accordingly, the court of appeal affirmed the judgment of the trial court finding the 2006 testament to be null.

Succession of Folse, 2011-0639 (La. App. 1st Cir. 2/13/12), 2012 WL 440395 - *Unpublished Opinion*. Shirley Folse died on December 10, 2007. Mrs. Folse was survived by nine children. Mrs. Folse left a testament executed on November 14, 2007. Five of Mrs. Folse's children challenged the testament on the grounds of testamentary capacity and undue influence.

Following a two day trial, the trial court found that the opponents of the testament failed to prove that Mrs. Folse lacked capacity at the time of the execution of the testament or that the testament was the subject of undue influence. The trial court noted that Mrs. Folse had executed an affidavit in May of 2007, almost six months before her death, and that the provisions of the affidavit were almost identical to the provisions of the testament in question. The court of appeal affirmed.

XV. JURISPRUDENTIAL DEVELOPMENTS - SUCCESSIONS

A. Successions - Forced Heirship

Succession of Linder, 11-633 (La. App. 5th Cir. 5/22/12), 2012 WL 1867553. Rosalie Bigman Linder ("Mrs. Linder") died testate in November of 1994. Mrs. Linder was not married at the time of her death. Mrs. Linder had one child, Jane Linder Rosenthal ("Rosenthal").

In her testament, Mrs. Linder left "any royalties and/or mineral interests . . . to [her] dear friend, Leo A. Guenther." Mrs. Linder also left particular legacies of cash and personal belongings to other persons. She then left the "balance of [her] estate" to the Touro Synagogue in New Orleans. Mrs. Linder appointed Guenther as executor.

In her testament, Mrs. Linder attempted to disinherit her daughter, Rosenthal. However, the Fifth Circuit Court of Appeal found the disinherison to be invalid. *See Succession of Linder*, 97-1269 (La. App. 5th Cir. 6/30/98), 717 So.2d 1276 (unpublished) ("*Linder I*"); *See also, Succession of Linder*, 02-106 (La. App. 5th Cir. 7/30/02, 824 So.2d 523 ("*Linder II*"); *Succession of Linder*, 05-640 (La. App. 5th Cir. 2/14/06), 924 So.2d 293 ("*Linder III*"); and *Succession of Linder*, 08-394 (La. App. 5th Cir. 10/14/08), 994 So.12d 148 ("*Linder IV*").

During the pendency of *Linder IV*, Guenther, as executor, filed a Petition for Homologation of Final Account, covering the period from January, 2007 to November, 2007. Guenther also filed a Final Tableau of Distribution and other documents.

Following a trial, the trial court ordered the final tableau in conjunction with the succession to reflect the following:

Assets	\$69,046.41
Debts Due on Date of Death	(\$21,745.00)
Funeral Expenses	(\$3,773.55)
Legal Charges	<u>(\$1,657.00)</u>
Net Estate	\$41,870.86
Forced Portion (1/4)	\$10,467.72

Rosenthal moved for a new trial in November of 2010 on the issues of the valuation of the mineral interests of the succession, the calculation of the value of the estate, the method of the satisfaction of her legitime as a forced heir, and whether Guenther breached his fiduciary duty as executor. Following the denial of her motion for a new trial, Rosenthal appealed.

On appeal, Rosenthal first argued that the trial court erred in valuing the mineral interests of the succession at \$2,949, when the mineral interests were actually worth \$2,549,571. In support of her contention, Rosenthal cited the testimony of Terry A. Johnston of Atwater Consultants. Mr. Johnston first became involved in the succession as a court appointed appraiser. Pursuant to his appointment, Johnston provided an appraisal report which valued the mineral rights at issue at \$2,949 as of the date of Mrs. Linder's death in November of 1994. Thereafter, Johnston was hired by Rosenthal to complete additional appraisals. In a report rendered in June of 2010, Johnston valued the mineral rights at issue at \$2,549,571. Both reports purported to value the mineral rights as of the date of Mrs. Linder's death in November of 1994.

Johnston explained the discrepancy by noting that the initial valuation of \$2,949 was based only upon information available at the time of Mrs. Linder's death in 1994. The subsequent valuation of \$2,549,571 was based upon a post-production analysis, which included a review of the income derived from the mineral rights from November of 1994 until June of 2010. Although Johnston determined that the higher figured represented what the mineral rights were actually worth in 1994, he conceded "that no quantifiable data existed" in 1994 to suggest such a value.

The court of appeal affirmed the judgment of the trial court assigning a value of \$2,949 to the mineral rights of the succession as of the date of Mrs. Linder's death. The court explained that Rosenthal failed to present any evidence to show that the

fair market value was anything other than \$2,949 in November of 1994, nor had Rosenthal presented any evidence that a willing buyer could have learned at that time that the unit well at issue was capable of producing more than it had produced in the years before Mrs. Linder's death. The court found that to say eighteen years later that the value of the mineral rights should be increased based upon subsequent information would be untenable.

In summary, the court found that "post-mortem information, unbeknownst to the parties and discovered subsequent to the date of death, may not be used to re-value an estate since the succession is 'calculated as of the date of death,' regardless of appreciations of value." In support of its conclusion, the court of appeal cited *Succession of Pratt*, 97-580 p. 7 (La. App. 5th Cir. 11/25/97), 704 So.2d 310 and *Succession of Dorand*, 94-1627 (La. App. 4th Cir. 7/26/95), 659 So.2d 523.

Rosenthal further argued that as a forced heir, she was entitled to an undivided one-fourth (1/4) interest in the particular assets of the succession, rather than simply one-fourth (1/4) of the value of the assets. Therefore, Rosenthal argued that all of the legacies in Mrs. Linder's testament, whether particular or universal and including the legacy of the mineral rights to Guenther, should be reduced pro-rata to satisfy her legitime. As a result, Rosenthal argued, she was entitled to one-fourth (1/4) of the income from the mineral rights from the date of Mrs. Linder's death in 1994.

Citing Civil Code articles 1493 and 1505 as they stood at the time of Mrs. Linder's death in 1994, the court found that Rosenthal was not entitled to an undivided interest in the assets themselves, rather than the value of the assets. The court explained that "academic and judicial interpretation of the calculation of forced portions as it relates to valuation of the estate" did not support Rosenthal's argument. Rather, the court of appeal affirmed the judgment of the trial court that the net estate was \$41,870, the forced portion (legitime) was \$10,476, and the disposable portion was \$31,403.

Having reached the conclusion that Rosenthal was entitled to a legitime amount of \$10,476, the court of appeal turned its attention to the reduction of the legacies in Mrs. Linder's testament to satisfy Rosenthal's legitime. In doing so, the court of appeal cited Civil Code article 1511, as it read in 1994. At that time, article 1511 provided as follows:

[w]hen the dispositions *mortis causa* exceed either the disposable quantum or the portion of that quantum that remains after the deduction of the value of the donations *inter vivos*, the reduction shall be made pro rata, without any distinction between universal dispositions and particular ones.

The court of appeal concluded that under article 1511, universal or particular legatees

were subject to a pro rata reduction only when dispositions *mortis causa* exceeded the disposable portion or balance of the estate. The court noted that the “monetary dispositions” in Mrs. Linder’s testament included a \$2,000 cash legacy and the legacy of the mineral rights to Guenther, which had a value of \$2,949 at the time of Mrs. Linder’s death. The court found that under the facts presented, “there [was] no impingement on [Rosenthal’s] forced portion and no requirement that the particular legacies be reduced.” More specifically, the particular legacy of mineral rights to Guenther was not subject to reduction to satisfy the rights of Rosenthal as a forced heir. Rather, Rosenthal’s legitime should be satisfied from the balance of the estate - the residuary legacy in favor of the Touro Synagogue.

Citing *Pratt, supra*, the court found that Rosenthal was “entitled to any increases in the assets within her legitime.” However, Rosenthal’s legitime did not include an interest in the mineral rights specifically bequeathed to Guenther.

Finally, the court of appeal addressed Rosenthal’s claims that Guenther breached his fiduciary duty. Rosenthal primarily argued that Guenther breached his duty by failing to return over \$600,000 in mineral royalties after being ordered to do so by the trial court following the judgment of the court of appeal in *Linder IV, supra*. Although the court of appeal was “especially concerned” with Guenther’s failure to return the royalties, the court found that Guenther’s actions did not amount to a breach of his fiduciary duty.

For these reasons, the court of appeal affirmed the judgment of the trial court and remanded the case for further proceedings consistent with its opinion.

Judge Edwards *dissented* and assigned reasons. Judge Edwards found that Guenther did in fact breach his fiduciary duty as executor and that the breach was sufficient to warrant Guenther’s removal as succession representative. Judge Edwards further found that the trial court erred in its “evaluation of the mineral rights.”

Succession of Celestin, 11-426 (La. App. 5th Cir. 12/28/11), 82 So.3d 520. Willie Celestin, Jr. was married to Edna Saul Celestin. Mr. Celestin had two children: Terry and Michael.

Mr. Celestin executed a testament on October 18, 1993. In his testament, Mr. Celestin provided as follows:

I leave bequeath and devise the disposal portion of all of my property, both real and personal, separate and community, movable and immovable that I may die possessed of to my wife, EDNA SAUL CELESTIN.

Mr. Celestin died on March 22, 2001. However, his succession was not opened until 2010.

Mr. Celestin's son, Michael, filed a claim as a forced heir in conjunction with his father's succession. The trial court dismissed Michael's claim.

On appeal, Michael argued that when a testament is executed during a forced heirship regime and the testator dies after forced heirship is abolished, the law at the time of the execution of the testament should apply, not the law at the time of the testator's death. Michael did not qualify as a forced heir under Civil Code article 1493 at the time of his father's death in 2001, as Michael was not under twenty-four years of age and did not suffer from a physical infirmity or mental incapacity at that time. However, Michael would have qualified as a forced heir under the law at the time of the execution of Mr. Celestin's testament in 1993. Under the law at that time, all children were forced heirs.

In its review, the court of appeal first focused on Paragraph (B) of article 870 of the Civil Code. Article 870 provides that testate and intestate succession rights, including the right to claim as a forced heir, are governed by the law in effect on the date of the decedent's death. Accordingly, the court of appeal applied the law as it stood at the time of Mr. Celestin's death in 2001 to Michael's forced heirship claims. Under Civil Code article 1493 as it stood in 2001, Michael did not qualify as a forced heir.

The court of appeal then turned its attention to the issue of Mr. Celestin's testamentary intent. In this regard, the court cited *Succession of Collett*, 2009-70 (La. App. 3rd Cir. 6/3/09), 11 So.3d 724 (2009). In *Collett*, the decedent left the disposable portion of his property to his wife and the forced portion of his property to his children. The *Collett* court, applying Civil Code article 870, found that the decedent had no forced heirs and therefore no forced portion at the time of his death. The *Collett* court further found that through the use of the terms "disposable portion" and "forced portion," the decedent intended to leave his wife the maximum portion allowed by law.

The court of appeal concluded that Mr. Celestin, just as the decedent in *Collett*, intended to leave the maximum portion allowed by law to his wife. He did not intend to leave a portion of his estate to his children.

The court of appeal recognized that under Paragraph (B) of Civil Code article 1611, when a testament uses a term the legal effect of which has changed after the date of the execution of the testament, the court may consider the law in effect at the time the testament was executed to ascertain the testator's intent in the interpretation of a legacy. However, the court of appeal found article 1611 to be inapplicable. The

court explained that Mr. Celestin's testament did not use a term the legal effect of which changed after the execution of the testament.

The court of appeal further recognized that La. R.S. 9:2501 was in effect at the time of Mr. Celestin's death in March of 2001. At that time, Section 2501 governed the construction of testaments executed before January 1, 1996. However, Section 2501 was repealed by Acts 2001, No. 560, effective June 22, 2001. Section 3 of Act 560 provided that the act was "interpretative, curative, and procedural in nature" and that the act applied "both prospectively and retroactively."

For these reasons, the court of appeal affirmed the judgment of the trial court dismissing Michael's claims.

B. Successions - Usufruct

Succession of DiLeo, 2011-1256 (La. App. 4th Cir. 3/21/12), 90 So.3d 488, *writ denied*, 2012-1025 (La. 6/22/12), 2012 WL 2478410. Carlo DiLeo and Lillian DiLeo had five children: Carol, Janet, Lucia, Sylvia and Mary. Mr. DiLeo executed a testament on January 26, 1996. In his testament, Mr. DiLeo left Mrs. DiLeo a lifetime usufruct over all of his property. Mr. DiLeo further provided as follows:

I expressly grant to my spouse, as usufructuary, the right to sell, exchange, lease or otherwise dispose of all assets subject to the usufruct, whether the assets are consumable or non-consumable things. Such disposition shall not require the consent of the naked owners ... My spouse shall have the power and authority to convert any and all property which is not productive of income into income producing property and to convert any and all non-consumable property into consumable property ...

Mr. DiLeo further left the remainder of his property to his children, subject to the lifetime usufruct in favor of Mrs. DiLeo.

Mr. DiLeo died on April 30, 2001. A judgment of possession was rendered in conjunction with his succession on May 11, 2001. The judgment recognized Mrs. DiLeo as usufructuary. However, the judgment of possession did not provide that Mrs. DiLeo, as usufructuary, was authorized to dispose of nonconsumable property subject to the usufruct.

Thereafter, Mrs. DiLeo sought to access the principal balance of a Merrill Lynch account subject to the usufruct. After reviewing the judgment of possession, Merrill

Lynch requested that the DiLeos' children, as naked owners, sign documents clarifying that Mrs. DiLeo had the authority to sell securities and other assets in the account without the consent of the naked owners. Four of the DiLeos' five children signed the requested documents. Lucia, however, refused to sign.

Following Lucia's refusal to sign the Merrill Lynch forms, Mrs. DiLeo wrote a letter to all five of her daughters (including Lucia) advising them that she intended to exercise the rights conferred upon her in Mr. DiLeo's testament. On February 26, 2010, Mrs. DiLeo filed an *ex parte* petition to amend the original judgment of possession in conjunction with Mr. DiLeo's succession. Mrs. DiLeo requested that the original judgment of possession be amended "to reflect the critical language of the testamentary usufruct and, thus, clarify the explicit rights conveyed to her in her husband's will." That same day, the trial court signed the amended judgment of possession clarifying that Mrs. DiLeo, as usufructuary, was authorized to dispose of nonconsumable property subject to the usufruct.

Shortly thereafter, Lucia filed a petition to annul the amended judgment. Lucia argued that the amended judgment was invalid, as she and her sisters did not join as petitioners and were not notified that the petition had been filed. Mrs. DiLeo answered Lucia's petition and filed a reconventional demand. In her reconventional demand, Mrs. DiLeo requested that in the event the amended judgment was annulled, Mr. DiLeo's succession should be reopened to recognize her rights as usufructuary. In the alternative, Mrs. DiLeo requested that the initial judgment of possession rendered in 2001 be annulled, as the original judgment afforded additional rights to the naked owners that were not intended by Mr. DiLeo.

Mrs. DiLeo and Lucia each filed motions for summary judgment. The trial court granted Mrs. DiLeo's motion for summary judgment and dismissed Lucia's petition to annul the amended judgment of possession entered in 2010.

On appeal, Lucia argued that "the omission in the initial judgment of possession of Mrs. DiLeo's explicit right to alienate all consumable and nonconsumable property constitute[d] a permanent elimination of that right." In support of her contention, Lucia cited *Yokum v. Van Calsem*, 2007-0676 (La. App. 4th Cir. 2008), 981 So.2d 725 and *Succession of McCarthy*, 583 So.2d 140 (La. App. 1st Cir. 1991).

The court of appeal declined to accept Lucia's argument that the judgment of possession had primacy over the language of Mr. DiLeo's testament. The court of appeal found that to accept Lucia's argument would be to advocate "a 'gotcha' form of succession law wherein a layman, unversed in the technicalities of usufructs, [would be] without recourse if she fails to recognize that the language of the initial judgment of possession omits rights conveyed to her by the testator and one heir refuses to acknowledge the usufructuary rights clearly delineated by the testator but

not specifically delineated in the judgment of possession.”

Rather, the court of appeal noted that Paragraph (C) of article 3061 of the Code of Civil Procedure was enacted in 2010 to expressly provide that a “judgment sending one or more petitioners into possession under a testamentary usufruct or trust automatically incorporates all of the terms of the testamentary usufruct without the necessity of stating the terms in the judgment.” Although Paragraph (C) of article 3061 was enacted after the issuance of the original judgment of possession and the amended judgment of possession in Mr. DiLeo’s succession, the court of appeal found that the amendment was not a substantive change in the law and therefore should be applied retroactively.

Accordingly, the court of appeal found that article 3061, as amended in 2010, was “determinative.” In other words, the court found that the initial judgment of possession automatically incorporated the terms of Mr. DiLeo’s testament, including Mrs. DiLeo’s right as usufructuary to dispose of nonconsumable property, without the necessity of stating the terms in the judgment.

Lucia further argued that she did not join in the petition to amend the judgment of possession and that she was not notified that the petition had been filed. Accordingly, Lucia argued that the amended judgment was a nullity. The court of appeal rejected this argument as well. The court of appeal explained that article 1951 of the Code of Civil Procedure allows a final judgment to be amended at any time “with our without notice, on [the court’s] own motion or the motion of any party . . . to alter the phraseology of the judgment, but not the substance.” As the original judgment of possession rendered in 2001 automatically incorporated all of the terms of the testamentary usufruct, the amendment to the judgment of possession in 2010 did not constitute a substantive change. Rather, the amendment simply altered the phraseology of the judgment. Accordingly, under article 1951, Lucia was not entitled to notice in conjunction with the amended judgment of possession.

For these reasons, the court of appeal affirmed the judgment of the trial court dismissing Lucia’s petition to annul the amended judgment of possession.

Judge Bonin *dissented* and assigned reasons. Judge Bonin found that the provisions of Mrs. DiLeo’s usufruct set forth in the original judgment of possession superseded the provisions of her usufruct provided by the testament. In other words, because the judgment of possession did not expressly grant Mrs. DiLeo the right to dispose of nonconsumable property, Mrs. DiLeo had no such right. Judge Bonin found that the retroactive application of Paragraph (C) of article 3061 of the Code of Civil Procedure do be “insupportable,” as Paragraph (C) of the article was not adopted until after the rendition of the amended judgment of possession. For these reasons, Judge Bonin found that the amendment of the judgment of possession was clearly

one of substance and not one of phraseology.

As the amendment of the judgment of possession was substantive, Judge Bonin found that Lucia was an indispensable party entitled to service of process of the petition to amend. In the absence of such service before the rendition of the amended judgment of possession, Lucia was clearly entitled to pursue an action to nullify the judgment for vices of form.

Therefore, Judge Bonin would have reversed the summary judgment in favor of Mrs. DiLeo and remanded the case for a trial on the merits of the nullity action.

Judge Landrieu *concurred* and assigned reasons. Judge Landrieu also found that Paragraph (C) of article 3061 did not apply, as both the initial judgment of possession and the amended judgment of possession were rendered before its enactment. Further, Judge Landrieu found that the amended judgment of possession altered the substance, not merely the phraseology, of the original judgment.

Therefore, Judge Landrieu concluded, Mrs. DiLeo was only able to attack the original judgment of possession through an action for nullity, rather than through the filing of an *ex parte* petition to amend the judgment. However, in response to the petition filed by Lucia, Mrs. DiLeo asserted a reconventional demand requesting that in the event the amended judgment of possession was annulled, the initial judgment of possession should also be annulled. Judge Landrieu found that Mrs. DiLeo's assertion of the nullity issue in her reconventional demand was equivalent to the assertion of an action for nullity of the original judgment of possession.

Accordingly, Judge Landrieu concluded, each party had notice and an opportunity to present evidence in support of her claim. As there were no material facts in dispute regarding the testament and the rights conferred by it to Mrs. DiLeo, the trial court correctly granted Mrs. DiLeo's motion for summary judgment and dismissed Lucia's action for nullity of the amended judgment of possession.

C. Successions - Characterization of Property

Succession of Tabor, 2011-1245 (La. App. 3rd Cir. 4/4/12), 87 So.3d 982. Billy James Tabor and Martha Elliott Tabor were married on January 1, 2000. At the time of the marriage, Mrs. Tabor owned immovable property in Sabine Parish, which she had received by inheritance.

On January 5, 2010, Mrs. Tabor executed a written mineral lease through which she leased her separate property in Sabine Parish to Petrohawk Properties, LP

(“Petrohawk”). The lease described the property at issue as 224 acres in Sabine Parish. In conjunction with the lease, Petrohawk tendered to Mrs. Tabor a conditional draft for a lease bonus payment in the amount of \$702,144. The conditional draft provided that it was only to be paid “[o]n approval of lease described hereon, and on approval of title by [Petrohawk] not later than 30 banking days after arrival of this draft at collecting bank.” Further, Mrs. Tabor signed a receipt of the conditional draft, which provided as follows:

The payment of this draft shall be subject to the satisfaction by Lessee of any or all of the following:

Lessee’s full acceptance of title. That title reflects 100% ownership by Lessor and that payment may be proportionately reduced in the event of less than 100% ownership by Lessor.

In the event that it is determined that Lessor’s interest is greater than that shown herein, bonus payment shall be increased proportionately.

All historical Oil and Gas Mineral Leases have expired.

All mineral servitudes have prescribed to Lessor.

All Mortgages, if any, being subordinated to the lease.

Mr. Tabor died on March 20, 2010. Mr. Tabor left a testament in which he named his daughter from his first marriage, Donna Beth Tabor Carter (“Carter”) as executrix.

On March 23, 2010, Petrohawk’s bank issued a mineral lease bonus payment to Mrs. Tabor in the amount of \$672,354. The \$672,354 lease bonus payment was less than the conditional draft amount of \$702,144 because Petrohawk determined that Mrs. Tabor’s property contained less than the 224 acres initially stated in the mineral lease. The actual mineral lease bonus payment was based upon the lesser acreage amount. The parties then recorded the mineral lease on March 30, 2010.

Carter opened Mr. Tabor’s succession on April 16, 2010. Upon her qualification as executrix, Carter sought payment from Mrs. Tabor of one-half (½) of the amount Mrs. Tabor received from Petrohawk. Carter claimed that the mineral lease bonus formed a part of the community that existed between Mr. and Mrs. Tabor before Mr. Tabor’s death.

Carter and Mrs. Tabor both filed motions for summary judgment regarding the

classification of the mineral lease bonus payment as separate or community. The trial court classified the payment as community property. The trial court explained that the mineral lease bonus acquired the status of community property on January 5, 2010 when Mrs. Tabor received the conditional draft from Petrohawk. Accordingly, the trial court granted Carter's motion for summary judgment on behalf of her father's succession and denied Mrs. Tabor's motion for summary judgment.

The court of appeal noted that bonuses arising from mineral leases regarding separate property of a spouse are generally community property under Civil Code article 2339. The court of appeal further noted that the legal regime of community property between Mr. and Mrs. Tabor terminated upon Mr. Tabor's death under Civil Code article 2356. The classification of property as separate or community is fixed at the time of its acquisition. Therefore, the court of appeal stated, if Mrs. Tabor acquired the mineral lease bonus before the community regime terminated, the bonus was community property. If Mrs. Tabor acquired the bonus after the community regime terminated, the bonus was her separate property. The court of appeal therefore turned its attention to the language of the agreements between Mrs. Tabor and Petrohawk and the facts surrounding the agreements to determine when Mrs. Tabor acquired a claim to collect the mineral lease bonus payment.

The court of appeal observed that Petrohawk conditioned the mineral lease's effect by stating that the actual payment to Mrs. Tabor would not be made unless and until Petrohawk confirmed that she had valid title to the Sabine Parish property in conformity with all of the requirements of the January 5, 2010 receipt and that the stated number of acres in the lease was correct. Although the draft provided a thirty day window for Petrohawk to verify ownership and acreage, the initial thirty day period was extended a number of times to give Petrohawk time to accomplish its investigation. Ultimately, Petrohawk determined that the acreage at issue was less than 224 acres and the final mineral lease bonus payment was based upon the lesser acreage amount.

Petrohawk became aware of the discrepancy in the acreage on March 18, 2010 when it received an e-mail from the company retained to examine title to the property. The March 18, 2010 e-mail from the title company to Petrohawk provided that Mrs. Tabor's acreage was less than initially understood, that the title to the property was otherwise approved, and that Mrs. Tabor should be paid a mineral lease bonus of \$672,354, rather than \$702,144. On March 22, 2010 Petrohawk approved the payment of the lesser amount to Mrs. Tabor. On the following day, March 23, 2010, Petrohawk issued a new, unconditional draft payable to Mrs. Tabor in the amount of \$672,354.

The conditional draft and the receipt signed by Mrs. Tabor on January 5, 2010 specified that the draft would not be paid until Petrohawk determined that Mrs. Tabor

had valid title to the land, that all existing oil and gas leases had been canceled, that all pre-existing mineral servitudes had prescribed, that no mortgages encumbered the property (or, if any, the mortgages were subordinated to the lease), and that the property contained the acreage described in the lease agreement. Of all of these requirements, only the last did not give Petrohawk the right to withdraw from the mineral lease. However, if the examination of title revealed title defects or if there existed oil and gas leases, mineral servitudes or mortgages affecting the ranking of the mineral lease, Petrohawk would not be bound by the agreement. All of these conditions were suspensive conditions under Civil Code article 1767, which were required to be satisfied before Petrohawk would authorize payment of the mineral lease bonus to Mrs. Tabor. Until Petrohawk determined that Mrs. Tabor's ownership interest satisfied all of these conditions, Mrs. Tabor had no legal right to enforce or collect payment of the conditional draft amount.

However, the court of appeal found that the March 18, 2010 e-mail from the title company to Petrohawk demonstrated that title to the property was approved, with the lesser acreage amount, before Mr. Tabor died. The court of appeal further found Petrohawk's failure to act upon the approval of the title to the property until March 22, 2010 to be irrelevant. The court of appeal explained that the mineral lease at issue was drafted by Petrohawk. Therefore, Petrohawk could not have any complaints about its own lease agreement once the title to the property was approved and the number of acres was verified. For these reasons, the requirements of the conditional draft and the release - title and acreage verifications - were satisfied on March 18, 2010, two days before the death of Mr. Tabor.

For these reasons, the court of appeal found the mineral lease bonus payment to be community property of Mr. and Mrs. Tabor. The court of appeal therefore affirmed the trial court's summary judgment in favor of Mr. Tabor's succession.

Judge Peters *dissented* and assigned reasons. Judge Peters found that the March 18, 2010 e-mail from the title company to Petrohawk was not dispositive of the case. Rather, Judge Peters concluded that the suspensive conditions in the lease agreement and the draft receipt were not satisfied until Petrohawk accepted the report from the title company and authorized payment to Mrs. Tabor on March 22, 2010. Therefore, the mineral lease was not effective and the bonus payment not owed until two days after Mr. Tabor's death. For these reasons, Judge Peters found the mineral lease bonus payment to be separate property of Mrs. Tabor.

Jenkins v. Leonard, 47,001 (La. App. 2nd Cir. 2/29/12), 87 So.3d 230. Willie Jenkins and Thelma Atkins Wilson Jenkins were married in 1975. Each of them had been married before and had his or her own children. Three days before their marriage, Mr. and Mrs. Jenkins entered into a Marriage Contract, through which they

renounced the community property regime in favor of a separate property regime. The prenuptial agreement was in authentic form and was recorded in the Conveyance Records of Jackson Parish, Louisiana.

Mr. Jenkins died first. His succession was opened and an executrix appointed. Mrs. Jenkins then died. Her succession was also opened and a judgment of possession was rendered in favor of her children. The judgment of possession in Mrs. Jenkins' succession included ten properties acquired during the marriage of Mr. and Mrs. Jenkins.

The executrix of Mr. Jenkins' succession asked Mrs. Jenkins' heirs to amend the judgment of possession to reflect the "true ownership" of the ten tracts. The heirs refused and the executrix of Mr. Jenkins' succession filed suit.

The court of appeal first reviewed the prenuptial agreement of Mr. and Mrs. Jenkins and found that each of them clearly opted out of the legal regime of community property and chose instead a separate property regime for their marriage.

The court then turned its attention to the deeds for the ten properties at issue. The court noted that Mr. Jenkins signed only three of the ten deeds. However, Mrs. Jenkins did not sign any of them. In four of the deeds, Mr. and Mrs. Jenkins were both shown as purchasers. The parties agreed that these properties were co-owned by Mr. and Mrs. Jenkins.

Two of the deeds referred only to Mr. Jenkins. These properties were clearly Mr. Jenkins' separate property.

The four remaining deeds listed the purchaser as Mr. Jenkins with "varying descriptive language" regarding his marriage to Mrs. Jenkins. One deed described the purchaser as "Willie Jenkins, husband of Thelma Jenkins, with who he is living and residing in community." Another deed described the purchaser as "Willie Jenkins, married twice, first to . . . and then to Thelma Jenkins (nee Atkins) with who he is now living in community."

Following its review of the deeds, the court of appeal stated that when a couple has clearly chosen to be separate in property and has followed the legal prerequisites to accomplish their intent, the mere inclusion of the name of a spouse and one's marital status in a deed does not, standing alone, constitute evidence of an intent to make an asset community rather than separate.

The court of appeal found that a common sense reading of the deeds, even with descriptive language regarding Mr. Jenkins' marriage, led to the inescapable conclusion that Mr. Jenkins was the purchaser. Therefore, without any other

evidence to the contrary, the court of appeal found that the tracts were his separate property.

D. Successions - Community Property Partitions

McCann v. McCann, 2011-2434 (La. 5/8/12), 2012 WL 1606029. On May 29, 2009, Rose Manale McCann filed a petition for divorce against Walter Lester McCann in the Family Court for the Parish of East Baton Rouge. A judgment of divorce was subsequently granted and the community of acquets and gains between Mr. and Mrs. McCann was terminated retroactively as of May 29, 2009.

In August of 2009, Mrs. McCann also filed in the Family Court a petition for the partition of the community property under La. R.S. 9:2801. Mr. McCann, however, then died on June 27, 2010. At the time of Mr. McCann's death, the community property partition proceeding remained pending.

Mr. McCann's daughter, Peggy Blackwell, opened Mr. McCann's succession in the 19th Judicial District Court for the Parish of East Baton Rouge and was appointed as executrix. Shortly thereafter, Ms. McCann filed a motion in the Family Court to substitute Blackwell, as the executrix of Mr. McCann's succession, as a party defendant in the community property partition proceeding.

Blackwell filed a declinatory exception of lack of subject matter jurisdiction and a motion to transfer the partition action to the 19th Judicial District Court. The Family Court overruled Blackwell's exception and substituted Blackwell, as executrix, as a defendant in the partition action. Blackwell applied for supervisory writs, and the matter was eventually resolved by the Louisiana Supreme Court.

The issue before the Supreme Court was whether the East Baton Rouge Family Court retained exclusive subject matter jurisdiction over the community property partition proceeding when Mr. McCann died.

Following its review of the applicable Louisiana constitutional provisions, the Supreme Court focused upon La. R.S. 13:1401, which established the East Baton Rouge Family Court and the exclusive jurisdiction of the Family Court. In part, Section 1401 provides as follows:

There is hereby established the family court for the parish of East Baton Rouge, which shall be a court of record with exclusive jurisdiction in the following proceedings:

* * *

All actions between spouses or former spouses for partition of community property and property acquired pursuant to a matrimonial regime.

The Louisiana Supreme Court noted that under the Louisiana Constitution and Section 1401, the Family Court was granted the exclusive jurisdiction over all actions between spouses and former spouses for partition of community property and property acquired pursuant to a matrimonial regime. However, the Supreme Court found that after the death of Mr. McCann, Mrs. McCann's partition action was no longer an action to partition community property or property acquired pursuant to a matrimonial regime between former spouses. Rather, it became an action to partition the movable and immovable property between Mrs. McCann and the legatees of the succession.

To give effect to the constitutional and statutory language and not render any part of the statute meaningless, the Supreme Court concluded that the Family Court was divested of its exclusive limited subject matter jurisdiction upon Mr. McCann's death. The Supreme Court found that to conclude otherwise would be to enlarge the limited jurisdiction of the Family Court beyond that contemplated by the legislature.

For these reasons, the Louisiana Supreme Court found that the East Baton Rouge Family Court did not retain exclusive subject matter jurisdiction over the partition of the community property following Mr. McCann's death. Accordingly, the Supreme Court reversed the Family Court's overruling of the defendant's exception of lack of subject matter jurisdiction.

Justice Weimer *dissented* and assigned reasons. Justice Weimer found that the majority overlooked La. R.S. 13:1401(A)(2)(c), which confers jurisdiction upon the Family Court over all actions for the settlement and enforcement of claims arising from matrimonial regimes. Further, Justice Weimer found that the majority's ruling was contrary to the longstanding rule that the personal jurisdiction of a court over a party is determined as of the time of the filing of the suit. For these and other reasons, Justice Weimer found that the Family Court retained exclusive jurisdiction over the community property partition proceeding following Mr. McCann's death.

Comment

The issue before the Louisiana Supreme Court in *McCann* was whether the East Baton Rouge Family Court retained its exclusive limited subject matter jurisdiction over the community property partition proceeding after Mr. McCann's death. However, the Supreme Court's opinion in *McCann* arguably raises the broader issue

of the applicability of La. R.S. 9:2801 under similar circumstances. Section 2801 governs the judicial partition of community property. Section 2801 provides, in part, as follows:

When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising either from the matrimonial regime, or from the co-ownership of the former community property following the termination of the matrimonial regime, either spouse, as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter, may institute a proceeding [to partition the community property or settle such claims].

The references in Section 2801 to “the spouses” and “either spouse” are similar to the reference in La. R.S. 13:1401 to “spouses or former spouses,” and may arguably be subject to the same interpretation. See *Succession of Sessions*, 2008-1683, 2008-1684 (La. App. 1st Cir. 9/10/09), 23 So.3d 954; compare *Richard v. Richard*, 2010-0906 (La. App. 4th Cir. 1/19/11), 68 So.3d 1094.

Cannatella v. Cannatella, 11-618 (La. App. 5th Cir. 3/13/12), 2012 WL 833301. Cynthia Dufour Cannatella and Anthony Cannatella were married in 1981. In May of 2010, Mrs. Cannatella filed a petition for divorce. Mr. Cannatella then died in December of 2010. At the time of his death, the divorce proceeding remained pending.

In January of 2011, the executor of Mr. Cannatella’s succession filed a motion seeking the dismissal of the pending matters in the divorce proceeding, including Mrs. Cannatella’s request to partition community property, a motion for new trial filed by Mrs. Cannatella, the issue of fault in conjunction with the divorce, Mrs. Cannatella’s spousal support claims and other issues.

The trial court rendered judgment granting the executor’s motion and dismissed the pending matters in the divorce proceeding without prejudice. The trial court explained that Mrs. Cannatella could re-urge her motions in the succession proceeding.

The court of appeal reversed. The court of appeal found that under article 428 of the Code of Civil Procedure, an action does not abate upon the death of a party unless the obligation or right at issue is strictly personal. An action for divorce, alone, is a personal action. However, an action to divide the former community property and allocate debts is heritable.

The court of appeal found that many of Mrs. Cannatella's outstanding claims were moot. However, the court further found that her claims pertaining to community property and reimbursement may proceed in the divorce proceeding. Accordingly, the court of appeal reversed the trial court's judgment dismissing Mrs. Cannatella's claims.

Gravlee v. Gravlee, 2011-509 (La. App. 3rd Cir. 12/7/11), 79 So.3d 1169. In 1996, Deborah Gravlee filed a petition for divorce and partition of community property against her husband, Mitch Gravlee. The parties were divorced in 1997. However, the community property partition remained pending.

Mr. Gravlee died in 2005. At the time of his death, the community property partition remained incomplete. In 2006, Mrs. Gravlee filed a proof of claim in Mr. Gravlee's succession proceeding.

In 2011, the executor of Mr. Gravlee's succession (who was not a party to the community property partition proceeding) filed a petition to dismiss the partition proceeding on the grounds of abandonment under article 561 of the Code of Civil Procedure.

In response to the motion, Mrs. Gravlee submitted a list of the payments she had received from the executor of Mr. Gravlee's succession in settlement of her claims. The list, which the executor did not dispute, included insurance proceeds related to a fire at the family home in 2006, as well as the proceeds of the sales of the family home in 2006, Crowley property in 2009, St. Martinville property in 2010 and properties in Eunice and Jeanerette in 2011. At the time of the filing of the abandonment motion, the only major asset remaining at issue was a jointly controlled bank account with a balance of approximately \$1,400,000.

The trial court denied the executor's motion for dismissal on the grounds of abandonment. The executor applied for supervisory writs, which were granted by the court of appeal.

In its review, the court of appeal first noted that article 561 of the Code of Civil Procedure provides that either a party or "an interested person" may file a motion to dismiss on abandonment grounds. Therefore, the executor of Mr. Gravlee's succession was entitled to bring the action.

The court of appeal further noted that most of the funds received by Mrs. Gravlee from the succession over the years involved the sale of community assets. Generally, the court of appeal stated, sales of succession property require court authorization. The record of Mr. Gravlee's succession was not before the court of appeal.

Therefore, it was unclear whether the executor obtained court authorization to sell the various properties at issue. However, based upon the provisions of articles 3271 and 3281 of the Code of Civil Procedure, the court of appeal presumed that the executor did obtain court authorization to sell each of the properties. Accordingly, the court of appeal concluded that “formal steps related to this litigation have been taken.”

The court of appeal conceded that the steps were not taken in the partition action. However, the court found that the sale of community assets and the issuance of funds to Mrs. Gravlee for her share of the assets were “inextricably bound up by law” with the partition action so as to constitute a step that hastened the resolution of the partition action.

The court of appeal further conceded that the issuance of a check to settle a claim is different from an unconditional tender and may be regarded as an informal settlement negotiation. However, the court of appeal found that the funds paid to Mrs. Gravlee “came from the sale of properties for which a court authorization was required.” These “court authorizations took the transactions out of the realm of informal settlement negotiations and made them formal steps in litigation.”

For these reasons, the court of appeal affirmed the judgment of the trial court dismissing the executor’s motion on the grounds of abandonment.

Comment

In the context of a writ application regarding the denial of the motion to dismiss the community property partition proceeding, the *Gravlee* court did not have access to the record of Mr. Gravlee’s succession. However, the *Gravlee* court’s conclusion that the executor obtained court authorization to sell the decedent’s interest in the properties at issue appears to be based on the court’s assumption that Mr. Gravlee’s succession was subject to a court-supervised administration, rather than an independent administration under articles 3396 - 3396.20 of the Code of Civil Procedure.

E. Successions - Mandate

Succession of Samuel, 2011-1511 (La. App. 4th Cir. 5/2/12), 89 So.3d 1275. Bernard Samuel, Sr. and Bertha Samuel had three children: Bernard, Jr.; Barry; and Barbara.

In 1963, Mr. and Mrs. Samuel bought commercial property on South Jefferson Davis

Parkway in New Orleans (the “commercial property”). The Samuels’ son, Bernard, Jr., died in 1977. Bernard, Jr. was survived by three children.

Mrs. Samuel died in 1990. In her testament, Mrs. Samuel left her interest in the commercial property in trust for the benefit of Barry, Barbara and Bernard, Jr.’s children.

Following Mrs. Samuel’s death, Mr. Samuel married Dorothy Jones Samuel (“Dorothy”).

In 1998, Mr. Samuel sold the commercial property to Barry for the stated price of \$250,000. Of the stated price, \$200,000 was payable in cash. However, rent paid by Barry in conjunction with the commercial property from the 1970s was acknowledged in the act of sale as full payment of the \$200,000 cash amount. The balance of \$50,000 was payable in twenty equal monthly installments of \$2,500 without interest, commencing upon the act of sale.

Mr. Samuel did not sign the act of sale. Rather, Mr. Samuel’s second wife, Dorothy, signed the act of sale on Mr. Samuel’s behalf by authority of a general power of attorney dated December 24, 1995.

The act of sale and the power of attorney were recorded in the Conveyance and Mortgage Records of Orleans Parish on August 6, 1998.

Mr. Samuel died in 2001. Mr. Samuel left a 1994 statutory testament in which he left one-third (1/3) of his property to Barry and the remainder of his property in trust for Barbara and Bernard, Jr.’s children. Mr. Samuel named Barry and Barbara as the co-trustees of the trust.

Mr. Samuel also left a February, 1995 purported olographic testament. However, the olographic testament was declared null, as Mr. Samuel lacked testamentary capacity at the time of the execution of the document.

In 2010, Barry and Barbara jointly filed a petition for possession in accordance with Mr. Samuel’s 1994 statutory testament. The petition for possession and accompanying documents did not refer to the commercial property. Accordingly, Barbara acknowledged under oath that the commercial property did not form a part of Mr. Samuel’s succession.

Barbara thereafter filed a motion to traverse the detailed descriptive list in conjunction with Mr. Samuel’s succession. Barbara also filed a separate action to rescind the 1998 act of sale of the commercial property. Barbara sought to set aside the 1998 act of sale on the ground that the power of attorney used by Dorothy to

convey the property to Barry was invalid, as Mr. Samuel did not have capacity at the time of the execution of the power of attorney. In support of her argument, Barbara noted that Mr. Samuel's purported February, 1995 olographic testament had already been annulled due to Mr. Samuel's lack of capacity. Barbara further argued that her father's condition was worse at the time of the execution of the power of attorney in December of 1995 than it was at the time of the execution of the purported olographic testament several months earlier.

Barbara alleged that as the power of attorney used to effectuate the sale was not valid due to Mr. Samuel's lack of capacity, then the act of sale itself was also defective.

The trial court disagreed and found that Barry was the owner of an undivided one-half (1/2) of the commercial property, having validly purchased Mr. Samuel's interest in the property before Mr. Samuel's death.

The court of appeal found that La. R.S. 9:5647 was dispositive of the validity of the 1998 act of sale and the case in general. Under Section 5647, an action to set aside a document on the ground that the party executing the document under authority of a power of attorney was without authority to do so, or that the power of attorney was not valid, is subject to a liberative prescriptive period of five years, beginning from the date the document was recorded in the public records.

The court of appeal noted that the act of sale and the power of attorney were recorded in the public records of Orleans Parish in August of 1998. Barbara did not file an action to rescind or otherwise set aside the sale until 2010. Therefore, under Section 5647, Barbara's action to set aside the sale on the ground that the power of attorney was not valid was clearly prescribed.

For these reasons, the court of appeal affirmed the judgment of the trial court and found that the 1998 act of sale validly transferred title to Mr. Samuel's undivided one-half (1/2) interest in the property to Barry.

F. Successions - Conflicts of Law

Succession of Ackel, 11-102 (La. App. 5th Cir. 9/27/11), 75 So.3d 965. George J. Ackel, Jr. lived most of his life in Louisiana. However, at the time of his death in November of 2009, Mr. Ackel was a resident of Texas. At the time of his death, Mr. Ackel was married to Jerilyn Ackel. Mr. Ackel had four children from prior marriages.

An estate proceeding was instituted in Texas. However, as Mr. Ackel owned

property in Louisiana at the time of his death, an ancillary succession was opened in Jefferson Parish, Louisiana as well. During the course of the ancillary succession, Mr. Ackel's children requested a declaratory judgment establishing the rights of the parties to succession property under Louisiana law.

The trial court entered a judgment in the ancillary proceeding in which it concluded that: (1) Mr. and Mrs. Ackel entered a valid prenuptial agreement in which they renounced Louisiana community property law and adopted a separate property regime; (2) Mr. Ackel's children were his sole heirs in conjunction with the Louisiana property; and (3) Mrs. Ackel's right to seek the marital portion under Louisiana law was preserved.

Mrs. Ackel appealed the judgment of the trial court. Mrs. Ackel asserted that the prenuptial agreement was not valid under Texas law due to vices of form and specificity. Mrs. Ackel further contended that because a portion of Mr. Ackel's estate consisted of ownership interests in six Louisiana limited liability companies, all of which are considered movables under Texas law, ownership of the entities must be determined under Texas law. Mrs. Ackel explained that she would be deemed an heir under Texas law, particularly in regard to the LLC interests, and therefore it was error to exclude her from these rights.

The court of appeal declined to address the merit of Mrs. Ackel's arguments. Rather, the court of appeal found that the arguments were more appropriately raised in the Texas probate court. The court of appeal recognized that the trial court's judgment recited that the prenuptial agreement was valid under Louisiana law and that all of the decedent's property subject to Louisiana law was the decedent's separate property. The trial court further determined that the decedent died intestate and that his four children were his sole heirs of whatever portion of his estate was subject to Louisiana law.

However, the court of appeal explained, the trial court's judgment did not identify any specific property to which it applied. As Mr. Ackel was a Texas resident at the time of his death, the court of appeal found that it was for the Texas courts to determine how particular types of property are to be classified, by which laws they are to be controlled, and by whom they are to be inherited. Based upon these principles, the court of appeal affirmed.

G. Successions - Filiation

Succession of Bailey, 11-147 (La. App. 5th Cir. 11/29/11), 82 So.3d 322. Elliot Bailey and his wife, Mildred Bailey, had two children. However, during his marriage

to Mrs. Bailey and after his divorce from her in 1976, Mr. Bailey had five other children as well. The five other children were born from 1970 through 1980. Mr. Bailey then died in 2009.

On April 1, 2010, within one year of Mr. Bailey's death, the five other children filed a petition to establish Mr. Bailey's paternity. In response to an exception of prescription, the trial court dismissed the children's claims.

The court of appeal noted that before its repeal in 2005, the former Civil Code article 209 required that a child bring a filiation claim within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever occurred first. Following the repeal of Civil Code article 209, the legislature enacted the present Civil Code article 197. For succession purposes, the present article 197 imposes a peremptive period of one year from the day of the death of the alleged father.

The court of appeal noted that each of Mr. Bailey's alleged children attained nineteen years of age prior to the repeal of the former Civil Code article 209 in 2005. In other words, article 209 was the clear and unambiguous law in effect at the time each of the alleged children turned nineteen. Therefore, as each of the children turned nineteen years of age, his or her filiation claim was extinguished under the law as it stood at that time. The filiation claims were not revived by the enactment of the present Civil Code article 197.

For these reasons, the court of appeal affirmed the dismissal of the alleged children's filiation claims.

H. Successions - General Interest

Acker v. Bailiff, 47,160 (La. App. 2nd Cir. 6/27/12), 2012 WL 2401006. The successions of Beatrice Stewart Bailiff, LeBain Bailiff and Willie Mae Brewster Bailiff were opened as a joint proceeding in September of 2004. A hearing was then conducted before the Honorable Judge Teat of the Second Judicial District Court in December of 2004. However, Judge Teat did not render a judgment as a result of the hearing.

In February of 2006, the Honorable Judge Fallin of the Second Judicial District Court rendered a judgment in conjunction with the succession. Judge Fallin apparently rendered the judgment following a conference in chambers. Through the judgment, Judge Fallin recognized the ownership of the six heirs at issue, fixed their ownership interests and placed them in possession of the immovable property of the successions, all as prayed for in the original petition filed in conjunction with the

successions.

In November of 2010, Tammy Bailiff Roy Acker (“Acker”), in her capacity as the representative of the successions of her father, Billy Gene Bailiff, and her uncle, Richard Leon Bailiff, filed suit to annul the February, 2006 judgment. Acker alleged that the judgment should be declared an absolute nullity for various procedural reasons. Acker further alleged “a number of ill practices as a basis for nullity.”

The trial court, Judge Fallin presiding, concluded that Acker stated a cause of action for nullity due to the “many mistakes found by Acker” in the succession proceeding. However, the trial court further concluded that Acker’s claims were prescribed under article 2004 of the Louisiana Code of Civil Procedure, which provides that an action to annul a judgment on the grounds of fraud or ill practices must be brought within one year of the discovery of the fraud or ill practices by the plaintiff.

The court of appeal explained that the hearing in conjunction with the successions in December of 2004 was conducted by Judge Teat. However, according to the record on appeal, Judge Teat never rendered a judgment. Rather, the judgment was rendered by Judge Fallin in February of 2006. Under these circumstances, the court of appeal found that the February, 2006 judgment was in fact “not a final judgment.” Rather, the fact that the signing judge was not the judge who conducted the hearing constituted a fatal defect that rendered the purported judgment invalid. In support of its conclusion, the court of appeal cited *Ledoux v. Southern Farm Bureau Cas. Ins. Co.*, 337 So.2d 906 (La. App. 3rd Cir. 1976) and *Employers Nat. Ins. Co. v. Second Injury Bd.*, 95-1756 (La. App. 1st Cir. 4/4/96), 672 So.2d 309.

For these reasons, the court of appeal found that no final judgment had been rendered in the succession proceeding. Accordingly, the court of appeal vacated the trial court’s judgment dismissing Acker’s claims and remanded the matter for further proceedings.

Kennedy v. Fagan, 2011-0482 (La. App. 1st Cir. 5/1/12), 2012 WL 1513686. Sylvia Antonia Acosta Kennedy Graves (“Mrs. Graves”) died on or about July 21, 2001. In her testament, Mrs. Graves left her property to her children, Julie and Richard. Mrs. Graves further named Julie as executrix.

Julie was formally appointed as the executrix of Mrs. Graves’ succession. However, Julie was subsequently removed as executrix due to her apparent failure to properly administer the succession. Upon Julie’s removal, Richard was appointed as dative testamentary executor.

Richard, in his capacity as executor and in his individual capacity, then filed suit in

tort against Julie, the attorneys who represented Julie as executrix, the Bank of Louisiana (the “bank”) and the bank’s employee, Henderson. Richard alleged that the negligence of the defendants caused significant financial losses and other damages to the succession.

The trial court granted motions for summary judgment file on behalf of the bank and its employee, Henderson, and dismissed the claims against the bank and Henderson accordingly.

On appeal, Richard noted that prior to her death, Mrs. Graves maintained an account at the bank for the succession of her first husband, Mr. Kennedy (the “Kennedy succession account”). The Kennedy succession account was established in 1972. Mrs. Graves, Julie and Richard were all authorized signatories on the account.

Shortly after Mrs. Graves’ death, Julie requested in writing that the bank “freeze” the Kennedy succession account. The bank imposed the “freeze” a few days later. However, at Julie’s direction, Henderson subsequently issued cashier’s checks on the Kennedy succession account in the amount of \$44,275, the bulk of which involved the payment of invoices submitted by Julie’s attorneys in conjunction with Mrs. Graves’ succession. Richard alleged that the issuance of the cashier’s checks by the bank was improper and that Mrs. Graves’ succession was damaged by the issuance of the checks.

In response to these allegations and the supporting evidence, the court of appeal concluded that La. R.S. 6:325, when read in conjunction with articles 3302, 3303, 3222 and 3224 of the Louisiana Code of Civil Procedure, “prohibits a bank that receives written notice of the death of a customer from transferring any assets belonging to the deceased person without proper court authority and receiving a receipt therefor.”

Richard further noted that Julie, as executrix, obtained a safe deposit box at the bank in conjunction with Mrs. Graves’ succession on January 14, 2002. Ten days later, Julie faxed an authorization to the bank to allow her attorney to access the safe deposit box. The attorney then accessed the box on January 24, February 4 and April 3 of 2002. Richard alleged that valuable pieces of jewelry were removed from the safe deposit box during this time period.

In response to these allegations, the court of appeal found that it was “undisputed that the bank and Ms. Henderson received notice of the decedent’s death, of Julie’s appointment as executrix, and Julie’s request that the bank ‘freeze’ decedent’s ‘bank accounts until disposition of the estate.’” The court of appeal further found that “[i]t would therefore seem reasonable for the bank to similarly deny access to a safety deposit box subsequently opened in the name of the decedent’s succession pending

a public inventory of it (sic) contents or further orders of the court.”

The court of appeal then addressed “whether a bank may release funds from a deceased customer’s account based solely upon the order of a succession representative.” (Although the court refers to “a deceased customer’s account,” the court appears to be referring to the checking account for Mrs. Graves’ succession under article 3222 of the Louisiana Code of Civil Procedure.)

In this regard, the trial court found that once an account is properly established on behalf of a succession representative, the bank has no further responsibility. However, the court of appeal disagreed. The court of appeal explained that article 3301 of the Code of Civil Procedure provides that a succession representative may generally pay an estate debt only upon authorization of the court. Article 3303 of the Code of Civil Procedure provides that when a succession representative desires to pay estate debts, he must file a petition for authority and must include a listing of the debts to be paid. Finally, article 3307 of the Code of Civil Procedure requires that the list of debts be homologated by the court.

For all of these reasons, the court of appeal reversed the summary judgment in favor of the bank and its employee, Henderson. The court of appeal further remanded the case for further proceedings consistent with its opinion.

Judge McClendon *dissented* and assigned reasons. Judge McClendon disagreed with the conclusions of the majority regarding the safe deposit box. Citing La. R.S. 6:325 and La. R.S. 6:328, Judge McClendon found that under the facts presented, the bank was fully protected in allowing Julie’s attorney to access the box based upon Julie’s written authorization. Allegations regarding the loss of property from the safe deposit box, Judge McClendon concluded, are more properly directed against Julie, as executrix, rather than against the bank.

Succession of Horrell, 2011-1577 (La. App. 4th Cir. 4/18/12), 89 So.3d 1267. This case involves a motion filed by Walter Horrell (“Walter”) to fix compensation and expenses for the time and money he expended as the executor of the succession of his father, Edward A. Horrell, Sr., from July of 1993 to January of 1997.

Walter sought \$20,055 for compensation and \$50,217 for expenses. The trial court awarded Walter the total sum of \$10,000.

The trial court explained that the case presented a unique situation in which the court found that Walter was not entitled to be compensated for his efforts. The trial court noted Walter’s role in having his father execute a testament which was subsequently determined to be executed without testamentary capacity. The trial court believed

that Walter was aware that his father lacked capacity at the time of the execution of the testament. The trial court explained that to reward Walter's efforts would fly in the face of sound legal principles. Although Walter was entitled to expenses and legal fees incurred in the administration of his father's succession, it was virtually impossible to calculate those fees and expenses with absolute accuracy, as the evidence submitted by Walter was intertwined with his efforts to defend the purported testament. The trial court therefore estimated the fees and expenses at \$10,000.

After reviewing Code of Civil Procedure article 3351 and the comments to the article, the court of appeal agreed with the trial court's characterization of Walter's listing of fees and expenses. The court of appeal further noted that "the trial court judge has been handling this matter for almost twenty years . . . [and] understands every nuance presented in the facts and circumstances of this case."

The court of appeal affirmed the judgment of the trial court accordingly.

Biggs v. Hatter, 46,910 (La. App. 2nd Cir. 4/11/12), 2012 WL 1192132. Isaac Hatter, Sr. and Steno Hatter had two children: Isaac, Jr.; and Carolyn. Mr. and Mrs. Hatter were then divorced in California in 1950. Mr. Hatter died in California on April 21, 2003.

Isaac, Jr. opened an estate proceeding for his father in California in May of 2003. Isaac, Jr. alleged that his father died intestate and was therefore appointed as the administrator of the California estate. However, Mr. Hatter left a testament. In his testament, Mr. Hatter left his interest in property in Claiborne Parish, Louisiana to his surviving brother and sisters in equal shares.

Mr. Hatter's testament was probated in the California estate proceeding. In November of 2004, Isaac, Jr. was removed as administrator and Mr. Hatter's sister, Pearl, was appointed as executrix of the California estate proceeding.

In December of 2005, Mrs. Hatter, Isaac, Jr. and Carolyn filed a petition in Claiborne Parish and alleged that Mr. Hatter died intestate. On January 31, 2006, a judgment of possession was rendered accordingly placing Isaac, Jr. and Carolyn in possession of their father's interest in the Claiborne Parish property. On October 23, 2006, Isaac, Jr. and Carolyn sold their interest in the Claiborne Parish property to Lewis Louisiana Properties, LLC (the "LLC") for \$90,000.

On July 11, 2007, Pearl filed a petition for the ancillary probate of Mr. Hatter's testament. The court in Claiborne Parish then appointed Pearl as testamentary executrix of the ancillary succession.

On July 30, 2007, Pearl, in her capacity as executrix, filed the initial pleading in this case against Mrs. Hatter, Isaac, Jr., Carolyn and the LLC. Through the initial pleading, Pearl sought to annul the judgment of possession, to cancel the judgment of possession from the conveyance records, to cancel the cash sale to the LLC, and to collect damages.

Thereafter, on October 24, 2007, Pearl, in her individual capacity, and Mr. Hatter's other sisters, filed a petition of intervention demanding the same relief against the same defendants.

In June of 2010, the intervenors filed a motion for summary judgment against Isaac, Jr., Carolyn and Mrs. Hatter. In December of 2010, the intervenors filed a motion for summary judgment against the LLC. The trial court denied both of the motions for summary judgment. However, the intervenors applied for supervisory writs, which were granted by the court of appeal.

The court of appeal first addressed the intervenors' motion for summary judgment against Isaac, Jr., Carolyn and Mrs. Hatter. Following a review of article 2004 of the Code of Civil Procedure, the court of appeal stated that an *ex parte* judgment of possession may be annulled for fraud and ill practices if affidavits presented to the court to obtain the judgment contained false information to the effect that the decedent did not leave a testament.

The court of appeal found that the intervenors clearly established that Isaac, Jr. knew that his father left a testament and that the testament had been probated in California over Isaac, Jr.'s objections. However, Isaac, Jr., Carolyn and Mrs. Hatter filed a petition in Claiborne Parish stating that Mr. Hatter died intestate. On the basis of this information which each of them knew to be false, Isaac, Jr. and Carolyn were then placed in possession of their father's interest in the Claiborne Parish property. They then sold the property to the LLC.

The court of appeal found that the evidence submitted by the intervenors demonstrated that the judgment of possession entered in favor of Isaac, Jr. and Carolyn was obtained by fraud and ill practices. There were no genuine issues of material fact and the intervenors were entitled to judgment as a matter of law. The court of appeal therefore reversed the judgment of the trial court and affirmatively declared that the judgment of possession in favor of Isaac, Jr. and Carolyn was null due to fraud and ill practices. The court of appeal further ordered that the judgment of possession be canceled from the conveyance records.

The court then turned its attention to the intervenors' motion for summary judgment against the LLC. In opposition to the motion, the LLC argued that it was in good faith and was protected by the public records doctrine. However, the court of appeal

found that the public records doctrine does not create rights in a positive sense. Rather, it has the negative effect of denying the effectiveness of certain rights unless they are recorded. The public records doctrine is essentially a negative doctrine. Third persons are not allowed to rely on what is contained in the public records, but can instead rely on the absence from the public records of those interests that are required to be recorded.

Further, the court explained, the law of registry is inapplicable when the ownership of, or claim affecting, immovable property has been acquired by inheritance and title has become vested by operation of law. In this regard, courts have recognized a right to property obtained through a succession even when that interest was omitted from a judgment of possession that was filed in the public records and relied upon by a third party.

Having addressed the LLC's arguments regarding good faith and the public records doctrine, the court of appeal turned its attention to La. R.S. 9:5630. Paragraph (A) of Section 5630 allows successors of a deceased person not recognized in a judgment of possession to assert an interest in an immovable formerly owned by the deceased against a third person who has acquired an interest in the immovable by onerous title from a person recognized as an heir or legatee of the deceased in the judgment of possession, or his successors, within a prescriptive period of two years from the date of the finality of the judgment of possession. The court of appeal explained that the existence of Section 5630 demonstrates that the public records doctrine does not bar claims against third persons for title to immovable property when successions are involved if the action is brought within the applicable time limit.

The judgment of possession in favor of Isaac, Jr. and Carolyn was rendered on January 31, 2006. Pearl, in her capacity as executrix, filed the initial pleading to set aside the judgment and the cash sale on July 30, 2007. The petition of intervention was then filed on October 24, 2007. Accordingly, the initial pleading and the intervention were filed within two years of the judgment of possession in accordance with La. R.S. 9:5630.

For these reasons, the court of appeal again reversed the judgment of the trial court and ordered that the sale of the Claiborne Parish property from Isaac, Jr. and Carolyn to the LLC be canceled from the conveyance records.

Succession of Horrell, 2011-1574 (La. App. 4th Cir. 4/11/12), 2012 WL 1232593. Edward A. Horrell, Sr. ("Mr. Horrell") died in 1993. His succession has been in litigation since that time.

In this case, Mr. Horrell's oldest son, Walter J. Horrell ("Walter") appealed a

judgment of partial possession rendered by the trial court placing his mother and his four siblings in possession of a substantial portion of the property of the succession.

Walter first argued that the judgment of partial possession included “side deals, unproved assumptions of obligations, and so forth” in violation of articles 3061 and 3362 of the Code of Civil Procedure. However, the court of appeal noted that the side deals, unproved assumptions of obligations, and so forth were all items contained in the petition for possession and then ultimately in the judgment for partial possession. The record on appeal revealed that the trial court painstakingly reviewed each line item individually and heard arguments from all counsel. Further, the administrator of the succession demonstrated to the satisfaction of the trial court that sufficient amounts were being retained to pay all claims, charges, debts and obligations of the succession, and that no irreparable injury would result if the petitioning heirs and the surviving spouse were placed in partial possession.

The court of appeal concluded that the trial court’s findings in this regard were findings of fact. The court of appeal further found that the findings of the trial court were not manifestly erroneous or clearly wrong.

Walter further argued that the judgment of possession incorrectly assessed only 17.12% of the total unallocated expenses of the succession to his mother, Mrs. Horrell. Walter argued that Mrs. Horrell should be assessed one-half (½) of the expense of the administration of the community property of the succession.

Following a review of the record, the court noted that the “community estate” was relatively free from debt. In fact, the entire estate was free from debt. The substantial expenses that accrued were due to eighteen years of litigation precipitated by Walter. The trial court found that the costs for the administration should be borne in proportion to the value of the assets of the community. The trial court found this to be 17.12% of the total unallocated expenses, which was the share of the estate assets encumbered by Mrs. Horrell’s usufruct, which amounted to \$52,127. The court of appeal was unable to say that the trial court erred in these calculations.

Further, the court of appeal noted that Mr. Horrell died in 1993. At the time of the hearing on the judgment of partial possession, Mrs. Horrell was 95 years old and had yet to be placed in possession of what was rightfully hers or to benefit from the usufruct over the other half of the community property.

For these reasons, the court of appeal affirmed the judgment of the trial court in all respects.

Succession of Jones, 46,904 (La. App. 2nd Cir. 1/25/12), 86 So.3d 25, *writ not considered*, 2012-0485 (La. 4/13/12), 85 So.3d 1234. John Jones, Sr. died in 2006. Mr. Jones was not married at the time of his death. He had nine children. Mr. Jones left a purported testament which was null, as it was in improper form. Therefore, Mr. Jones died intestate.

In May of 2009, eight of Mr. Jones' nine children filed a petition to be placed in possession. In September of 2009, the trial court rendered a judgment of possession placing all nine of Mr. Jones' children in possession of their inheritance. None of the children appealed the judgment of possession.

Approximately one year later, in September of 2010, one of Mr. Jones' children, Hurie, and the Joe Jones Memorial Foundation, Inc. filed a petition to reopen Mr. Jones' succession. The plaintiffs alleged that the judgment of possession was substantially incomplete, as it excluded "assets, lands, mineral royalty rights [and] the correct amounts in bank accounts."

Following a hearing, the trial court dismissed the plaintiff's petition. The trial court explained that the issues presented were identical to issues previously litigated in conjunction with the succession and that Hurie had known about the issues for many years.

The court of appeal noted that a succession may be reopened in appropriate situations under article 3393 of the Code of Civil Procedure. However, the court found Hurie's allegations were simply "a litany of confusing complaints." Further, the issues of which Hurie "belatedly complained [were] known to him in this tediously and endlessly litigated family dispute." For these reasons, Hurie made no showing that the limited circumstances that justify reopening a succession were presented. The court therefore affirmed the judgment of the trial court.

Succession of Griggs, 2011-0172 (La. App. 3rd Cir. 12/21/11), 83 So.3d 86. Melba Lee Mitchell Griggs was married to Francis Clyde Griggs. Mrs. Griggs had three children from a prior marriage. Mrs. Griggs died intestate on June 9, 2000.

In September of 2008, Mrs. Griggs' children opened her succession by filing a petition for possession. In conjunction with the petition for possession, the children submitted a detailed descriptive list in which the children listed their mother's immovable and movable property and characterized the property as community or separate. One of the separate movable items on the detailed descriptive list was a guitar with an alleged value of \$23,000.

The children requested that the petition for possession and accompanying documents

be served upon Mr. Griggs, as Mrs. Griggs' surviving spouse.

Through the petition for possession, the children did not request that the succession be placed under administration or that an administrator be appointed. Rather, the children affirmatively pleaded that an administration of the succession was not necessary.

In August of 2009, the children filed an amended detailed descriptive list. In the amended detailed descriptive list, the guitar was again valued at \$23,000. Further, the children alleged that the guitar was in the possession of Mr. Griggs or an individual named Harley Humphrey, and that Mr. Griggs or Humphrey owed the succession for the return of the guitar or its fair market value.

On that same day, the children also filed a "Petition to Return Funds to the Succession," in which the children named Humphrey as a defendant. The children asserted that Humphrey was Mr. Griggs' brother-in-law and that Humphrey was in possession of the guitar. The children further sought a judgment against Humphrey ordering him to return the guitar or the fair market value of the guitar "to be administered and distributed pursuant to the orders of this Court."

In October of 2009, Mr. Griggs filed a motion to traverse the children's detailed descriptive lists. Among other things, Mr. Griggs alleged that the guitar at issue was given to Humphrey, the guitar did not work at the time of Mrs. Griggs' death, and had no value at that time.

Following a hearing, the trial court found that the guitar at issue was in fact Mrs. Griggs' separate property and that the guitar had a value of approximately \$23,000. The trial court rendered judgment against Mr. Griggs accordingly.

The court of appeal noted that the children opened Mrs. Griggs' succession by filing a petition for possession and accompanying documents under articles 3001 - 3008 of the Code of Civil Procedure. These articles address the acceptance of an intestate succession without an administration. However, the pleadings filed by the children demonstrated that a conflict clearly existed between the children and Mr. Griggs.

To address this conflict, the court of appeal stated, the children should have placed the succession under administration and appointed an administrator under articles 3091 - 3098 of the Code of Civil Procedure. Upon his or her appointment, the administrator of the succession would then be the proper plaintiff to enforce the rights of the succession against Mr. Griggs under article 685 of the Code of Civil Procedure. The children, in their individual capacities as their mother's intestate heirs, had no standing to pursue the claims of the succession against Mr. Griggs. For these reasons, the court of appeal reversed the judgment of the trial court and

remanded the matter for further proceedings.

Judge Cooks *dissented* and assigned reasons. Judge Cooks noted that counsel for the children and counsel for Mr. Griggs agreed that an administration was not necessary. Rather, the children were willing to accept the succession and be placed in possession of their mother's property.

Judge Cooks further cited Civil Code article 935, which provides that prior to the qualification of a succession representative, the universal successors may represent the decedent with respect to the heritable rights of the decedent. Further, under Civil Code article 938, prior to the qualification of a succession representative, a successor may exercise rights of ownership with respect to his interests in property of the succession. Judge Cooks found that article 685 of the Code of Civil Procedure applies only after a succession representative has been appointed.

For these reasons, Judge Cooks found that the children, as their mother's heirs, had a legal right to proceed in their claims against Griggs. She found that an administration of the relatively small succession was not necessary and, in fact, would needlessly deplete the assets of the succession.

Succession of Horrell, 2011-0194 (La. App. 4th Cir. 11/30/11), 79 So.3d 1162, *writ denied*, 2012-0810 (La. 3/23/12), 85 So.3d 96. Lisa Matthews, the provisional administratrix of Mr. Horrell's succession, filed a motion for an interim payment of fees and expenses in the total amount of \$152,135. In conjunction with her motion, Matthews (who is an attorney) submitted approximately 200 pages of detailed time records. The records identified the entries and the corresponding charges that were caused by specific heirs. Matthews requested that the fees and expenses be apportioned to the heirs that caused the succession to incur them.

The trial court granted Matthews' motion for interim payment and ordered that the payment be apportioned among the heirs as requested by Matthews.

Mr. Horrell's son, Walter, who has been the subject of several appellate court opinions, appealed the judgment of the trial court. On appeal, Walter and other members of the Horrell family argued that the interim payment to the administratrix was excessive, as the payment constituted more than half of the remaining assets of the succession. The heirs further argued that each of them had received less than \$50,000. For these reasons, the heirs argued that the compensation was not fair and reasonable under article 3351 of the Code of Civil Procedure. The heirs other than Walter also argued that the fees should be charged to Walter's share of the estate.

The court of appeal noted that under article 3351 of the Code of Civil Procedure, in

the absence of an agreement among the parties, a succession representative is generally entitled to compensation in an amount equal to two and one-half percent of the inventory of the succession. However, the court of appeal further noted that under article 3351, the court may increase the compensation upon a proper showing that the usual commission is inadequate. The court may also allow a succession representative an advance upon his compensation at any time during the administration.

The court of appeal found that the compensation requested by Matthews, as administratrix, was not *per se* unfair or unreasonable as a result of its proportion to the total amount of the estate. Rather, the law provides that the amount of compensation may be increased by the court upon a proper showing.

Further, Matthews established in detail the amount of expenses that she incurred and the trial court found merit in those expenditures. The court explained that the succession at issue had been under administration for more than seventeen years. The record reflected that Matthews spent a considerable amount of time engaged in the administration of the succession and the litigation surrounding the succession. Moreover, Matthews was sued individually and in her capacity as the administratrix of the succession.

For all of these reasons, the court of appeal found no merit in the arguments that Matthews' compensation was unfair or unreasonable. The court of appeal further found no viable basis for concluding that Matthews mismanaged the succession.

The court of appeal then turned its attention to the apportionment of the administratrix's fees and expenses according to the responsibility for these amounts as outlined in the administratrix's records. The court of appeal noted that the records submitted by the administratrix set forth the individual persons responsible for each charge billed in detail. For these reasons (with the exception of one \$25 charge), the court of appeal affirmed the trial court's apportionment of the fees and expenses as well.

XVI. JURISPRUDENTIAL DEVELOPMENTS - DONATIONS *INTER VIVOS*

Horton v. Browne, 47,253 (La. App. 2nd Cir. 6/29/12), 2012 WL 2478274. Willie Mae Huggins Martin owned forty acres in Red River Parish. Mrs. Martin had three children: Felton; Kenneth; and Sandra.

In 1997, Mrs. Martin executed a donation *inter vivos* in which she divided the forty acres into three separate tracts. Under the terms of the donation, each of her children

received ownership of a particular tract to the exclusion of the others. Felton and Kenneth each received a tract of approximately 18.75 acres. Sandra received a tract of approximately 2.5 acres.

Mrs. Martin also stated in the donation that each of her children was to receive an undivided one-third (1/3) interest in the minerals under the entire forty acres. More specifically, the act of donation provided as follows:

Donor does *further* donate unto donees an undivided one-third (1/3) interest each in and to all of the minerals situated on and under all of the above described property, they are to own *this mineral right* in indivision. (Emphasis in original).

In 2002, Sandra sold her 2.5 acre tract to Felton. In November of 2003, Felton and Kenneth conveyed the entire forty acres, subject to their reservation of all mineral rights, to Judy Lazarus. In 2004, Lazarus sold the property to Donald Browne.

Felton and Kenneth (as the owners of the minerals) and Browne (as the owner of the surface) executed a mineral lease in 2005. However, no wells were started on the property until 2010. At that point, Felton and Kenneth sought a declaratory judgment recognizing themselves as the owners of the mineral rights in conjunction with the property. Browne filed an answer and a reconventional demand claiming that the plaintiffs' mineral servitude was granted in 1997 and therefore prescribed due to ten years of nonuse in 2007.

The trial court found that the 1997 donation created a single mineral servitude, which was not extinguished or modified until 2007, when it prescribed. As a result of the prescription of the mineral servitude, Browne was the sole owner of the property.

The court of appeal found that the donation of the surface rights and the donation of the mineral rights, although in the same instrument executed in 1997, were separate and distinct donations. The court of appeal explained that Mrs. Martin donated the surface tracts to her children and then "further" donated an undivided one-third (1/3) interest in the mineral rights to the entire tract to each of her children. The intent of Mrs. Martin and her children was clearly set forth in the document. By agreeing to the terms in the conveyance, each of Mrs. Martin's children intended to be subject to a mineral servitude in favor of the others.

For these reasons, the court of appeal found no error in the trial court's determination that a valid mineral servitude was created in the 1997 donation and that the servitude prescribed for nonuse in 2007. The court of appeal therefore affirmed the judgment of the trial court.

Manshack v. Kershaw, 2011-820 (La. App. 3rd Cir. 12/7/11), 2011 WL 6088861 - ***Unpublished Opinion***. In October of 2003, Maggie Manshack executed an act of donation of her home in favor of her niece, Mary Kershaw. Mrs. Manshack reserved a usufruct over the property in conjunction with the donation.

Thereafter, Mrs. Manshack filed a petition to annul the donation. Mrs. Manshack alleged that she could “barely read and had no idea that she was signing an act of donation when the document was executed.”

Following a trial in February of 2011, the trial court annulled the donation. The trial court explained that based upon the evidence presented, Mrs. Manshack did not have the requisite donative intent at the time of the execution of the donation. Also, the donation was not in proper form, as one of the witnesses was not present when Mrs. Manshack signed the document.

After a comprehensive review of the record, the court of appeal found no error in the trial court’s determination that Mrs. Manshack lacked the requisite donative intent and therefore affirmed the judgment of the trial court accordingly. In light of its conclusion regarding the issue of donative intent, the court of appeal did not address the form of the purported donation.

Malone v. Malone, 46,615 (La. App. 2nd Cir. 11/2/11), 77 So.3d 1040. James G. Malone, Sr. and Doris Malone had two sons, Ken and Greg. Mr. Malone died in 2007. At the time of his death, Ken and Greg each owned 849 shares of Winnsboro Equipment, Inc. (the “company”). Mr. Malone owned two shares of stock in the company.

A judgment of possession was rendered in conjunction with Mr. Malone’s succession in April of 2009. Through the judgment of possession, Mrs. Malone was recognized as the owner of one share of stock, as her one-half (½) interest of the community property. Ken and Greg each received one-half (½) of the other share of stock, as their father’s legatees.

In the latter part of 2009, before undergoing surgery, Doris executed a document purporting to donate her one share of stock in the company to Ken and Greg in equal shares of one-half (½) each. The act of donation was signed by Doris, Ken, Greg and two witnesses. Although the document was prepared in the form of a notarial act, it was not notarized. Further, the document was not dated.

The act of donation stated that Doris, contemporaneously with signing the document, delivered the property to Ken and Greg and that each of them accepted the donation and received the property. However, there was no evidence that a stock certificate

was in fact transferred between them by endorsement and delivery.

For a number of reasons, Ken filed multiple actions in November and December of 2010. In one of these actions, Ken sought to enforce the donation of Doris' share of stock, to have the transfer recorded on the company books and reflected on the certified list of shareholders, and to have new stock certificates issued.

The trial court dismissed Ken's claims regarding the donation. In summary, the trial court found that the act of donation was not in the form of an authentic act as required under Civil Code article 1541, was not in a form provided for donations of certain incorporeal movables under Civil Code article 1550, and was not in compliance with the company's articles of incorporation.

In its review, the court of appeal focused on Civil Code article 1550, which provides as follows:

The donation or the acceptance of a donation of an incorporeal movable of the kind that is evidenced by a certificate, document, instrument, or other writing, and that is transferable by endorsement or delivery, may be made by authentic act or by compliance with the requirements otherwise applicable to the transfer of that particular kind of incorporeal movable.

In addition, an incorporeal movable that is investment property, as that term is defined in Chapter 9 of the Louisiana Commercial Laws, may also be donated by a writing signed by the donor that evidences donative intent and directs the transfer of the property to the donee or his account or for his benefit. Completion of the transfer to the donee or his account or for his benefit shall constitute acceptance of the donation.

On appeal, Ken conceded that the purported donation did not satisfy the requirements applicable to the transfer of shares of stock, as there was no endorsement or delivery of the stock certificate. For these reasons, the donation was not in valid form under the first paragraph of Civil Code article 1550.

The court of appeal therefore addressed Ken's argument that the donation satisfied the requirements of the second paragraph of Civil Code article 1550. In this regard, Ken asserted: that the stock was "investment property" as used in the article; that the purported donation was a writing signed by Doris evidencing her donative intent and directing the transfer of the stock to Ken; and that the transfer of the stock to Ken or for his benefit was completed to constitute an acceptance of the donation.

In support of the latter allegation, Ken argued that he and Greg acknowledged their receipt of the property and declared their acceptance in the purported donation. Ken contended that the language regarding delivery and acceptance demonstrated that there was a completion of the transfer of the stock to him for his benefit as required by the second paragraph of article 1550.

The court of appeal was “not persuaded by Ken’s arguments.” Rather, after considering the definition of investment property, the court of appeal found that the second paragraph of article 1550 was intended to facilitate the gratuitous transfer of property, which would generally be held in bank or brokerage accounts, by the donor directing in writing that the property be transferred to “the donee or his account or for his benefit” and then by the completion of the transfer.

The court of appeal found that even if the other requirements of the second paragraph of article 1550 were satisfied, the transfer was not completed as required by the article, as there was no delivery or endorsement for the transfer of the one share of stock at issue.

For these reasons, the court of appeal affirmed the judgment of the trial court dismissing Ken’s petition to enforce the purported donation.

Succession of Bella, 2011-0092 (La. App. 4th Cir. 10/12/11), 75 So.3d 972, *writ denied*, 2011-2728 (La. 2/17/12), 82 So.3d 286. Letitia Nell Bella was not married and did not have any children. Ms. Bella had one brother, Sam M. Bella, Jr. Ms. Bella was born with cerebral palsy and required assisted care twenty-four hours a day seven days a week. Although physically incapacitated, Ms. Bella had no mental deficiency.

Ms. Bella lived with her mother in the family home in Chalmette until her mother’s death in 2002. Ms. Bella’s brother, Mr. Bella, renounced his interest in the family home in Chalmette in favor of his sister.

After the death of Ms. Bella’s mother, Kathleen Tassara, a neighbor, became Ms. Bella’s full time caregiver. Tassara was compensated for her services.

In August of 2005, as Hurricane Katrina approached, Ms. Bella evacuated to Lafayette with Tassara. Shortly thereafter, Ms. Bella and Tassara moved to LaPlace, where they lived with Tassara’s daughter for ten months. In June of 2006, Ms. Bella and Tassara agreed to rent a house and live together in Reserve near Tassara’s family.

In August of 2006, Ms. Bella and Tassara agreed to open joint savings and checking accounts and a certificate of deposit in both of their names at Chase Bank. Ms. Bella

deposited \$10,000 into the checking account, \$30,000 into the savings account, and \$60,000 into the certificate of deposit. Tassara deposited \$30,000 of her own funds into the certificate of deposit.

Ms. Bella and Tassara agreed that they would pay their rent and other living expenses out of the joint accounts. They further agreed that Tassara would care for Ms. Bella without compensation to preserve the funds. Finally, they agreed that upon the death of either of them, the survivor would be entitled to the funds in the joint accounts.

At the time of the agreement, Ms. Bella was 57 years of age. Tassara was 79 years of age. Accordingly, they believed that Ms. Bella would outlive Tassara. Tassara wanted to contribute \$30,000 into the joint certificate of deposit and forego being paid for her services to give Ms. Bella additional funds to pay for private health care assistance in the event of Tassara's death. Mr. Bella acknowledged the agreements between Ms. Bella and Tassara and that the agreements were intended to benefit his sister.

Ms. Bella died in December of 2007. Ms. Bella left a testament in which she left all of her property to her brother, Mr. Bella. She also named Mr. Bella as executor.

Upon his appointment as executor, Mr. Bella filed suit against Tassara seeking the return of the funds in the joint accounts and the certificate of deposit.

The trial court found that the deposit of the funds into the joint accounts did not qualify as an onerous donation because Ms. Bella could have accessed the funds at any time prior to her death. Therefore, she failed to divest herself irrevocably of her right to the funds as required under Civil Code article 1468.

The trial court, however, concluded that the same analysis did not apply in the case of a remunerative donation. Rather, the trial court found that at the time Ms. Bella and Tassara opened the joint accounts in August of 2006, Tassara had already provided substantial services for which she had not been compensated, and Ms. Bella intended to compensate Tassara by placing the funds in her name.

The trial court noted that Ms. Bella placed the combined amount of \$100,000 into the joint account and the certificate of deposit. For the purposes of the remunerative donation, the trial court calculated the value of the uncompensated services provided by Tassara before the opening of the joint accounts at \$20,000. The court found that the intended remunerative donation was the actual value of the services performed. It was limited to the intent to donate for past services and preserve the remaining funds. As the value of the services rendered was the same as the value of the donation, the value of the services was in excess of two-thirds (2/3) of the value of the thing donated as provided by Civil Code article 1527. Accordingly, under article

1527, no formal authentic act was required as the rules peculiar to donations did not apply.

For these reasons, the trial court found that through the establishment of the joint accounts, Ms. Bella made a valid remunerative donation to Tassara in the amount of \$20,000. The trial court therefore rendered judgment ordering that \$50,000 of the funds be returned to Ms. Bella's succession and that Tassara be recognized as the owner of the other \$50,000 of the funds - \$30,000 as Tassara's original contribution and \$20,000 as a result of the remunerative donation by Ms. Bella to Tassara.

The court of appeal found that the record supported the trial court's determination that by placing the funds into the joint accounts, Ms. Bella made a remunerative donation with the intent to compensate Tassara for her past services from the time they evacuated due to Hurricane Katrina until they opened the joint accounts. The court of appeal further found that the evidence supported the trial court's finding that the value of Tassara's past uncompensated services amounted to \$20,000. Therefore, the court of appeal affirmed the judgment of the trial court.

XVII. JURISPRUDENTIAL DEVELOPMENTS - JOINT BANK ACCOUNTS

Bower v. Menard, 2011-1005 (La. App. 3rd Cir. 2/1/12), 84 So.3d 691. Marx Menard and Brenda Bower lived together from 1992 until 2009. However, they were never married.

In 2002, six certificates of deposit were purchased at Farmers State Bank & Trust Company ("Farmers State Bank") in Church Point, Louisiana in the name of Marx Menard or Brenda Bower. Shortly after their relationship ended in 2009, Menard redeemed all six of the certificates of deposit and closed the joint checking account. Upon doing so, Menard obtained the total sum of \$355,007.

Bower sued Menard and alleged co-ownership of the certificates of deposit and of the funds in the joint checking account. Accordingly, Bower sought the return of one-half (½) of the funds. Menard disputed Bower's allegations that she had an ownership interest in the certificates of deposit or the funds in the joint checking account.

At trial, Bower testified that she worked at Menard's bar, Cajun Country Lounge in Church Point, during their relationship. Although she did not receive a paycheck, Bower testified that she regularly performed bookkeeping, worked as a bartender, cleaned the bar, cooked suppers hosted at the bar and frequently closed the bar.

Menard testified at trial that he placed Bower's name on the certificates of deposit and the checking account simply in case of an emergency. If something were to happen to him, he wanted Bower to have access to the money to provide for herself and for his children. Menard testified that he did not consider Bower a co-owner.

He disputed Bower's claims that she worked at the bar and claimed that she never contributed money toward their living expenses. Instead, Menard testified that he supported Bower completely during the entire eighteen years of their relationship. Menard testified that he acquired the funds in the joint checking account and the funds to purchase the certificates of deposit from the sale of farming equipment, from a personal injury settlement and from the sale of his bar. However, Menard did not introduce any documentary evidence to support his contentions.

After taking the matter under advisement, the trial court awarded Bower \$170,503, which constituted one-half (1/2) of the certificates of deposit and the funds in the joint checking account.

The court of appeal affirmed the judgment of the trial court. In doing so, the court of appeal relied upon article 797 of the Civil Code. Article 797 provides that ownership of the same thing by two or more persons is ownership in indivision. In the absence of other provisions of law or a juridical act, the shares of all co-owners are presumed to be equal.

Accordingly, the court of appeal concluded, there is a presumption that a joint bank account is owned in equal shares by each depositor. The presumption of equal ownership may be rebutted by appropriate evidence. However, Menard offered no competent documentary evidence to support his assertions that the certificates of deposit and the funds in the checking account were his alone. For these reasons, Menard failed to overcome the presumption of equal ownership.

XVIII. JURISPRUDENTIAL DEVELOPMENTS - TRUSTS

Cole v. Mitchell, 46,546 (La. App. 2nd Cir. 9/21/11), 73 So.3d 452, writ denied, 2011-2319 (La. 12/16/11), 76 So.3d 1205. Kirby E. Cole was the trustee of the Phillips Foundation. In 2006, Cole's attorney, Mitchell, drafted a document in which the Foundation granted Cole unlimited authority to buy and sell property on behalf of the Foundation. The document was an extracted portion of the Phillips Foundation Board of Trustee's minutes for a plan of reorganization that authorized Cole, as trustee, to buy, sell, grant, option, encumber or lease movable or immovable property on behalf of the trust "in any manner he sees fit, upon and on such terms and conditions and for such prices and consideration as he in his sole discretion deems

advantageous to the corporation.”

On the same day that the authorization was executed, the Foundation sold 37 acres to Cole for the stated price of \$56,607. The cash sale deed was prepared and witnessed by Mitchell and signed by Cole for the Foundation, as the seller. Cole and his wife signed as purchasers. However, the stated purchase price of \$56,607 was not paid.

In November of 2007, Cole sold the 37 acres he had purchased from the Foundation to a third person for \$190,000. Cole kept the proceeds and reserved the mineral rights for himself and his wife.

In June of 2008, Cole reached an agreement for an oil and gas lease with a \$15,000 per acre signing bonus and a 25% royalty on future production for 169 acres owned by the Foundation and for Cole’s 37 acres. Shortly thereafter, the Foundation, acting through Cole, sold the mineral rights to 85 of the Foundation’s 169 acres to Cole and his wife. Again, however, no purchase price was paid by Cole.

Cole, acting as the trustee of the Foundation, then executed an oil and gas lease for the 122 acres on behalf of himself and his wife for the price of \$1,850,715.

Mitchell allegedly prepared the documents necessary to accomplish all of the transactions.

In November of 2009, Cole pleaded guilty to mail fraud in federal court and was sentenced to twenty months in prison. Following his guilty plea, Cole filed this legal malpractice action against his attorney, Mitchell. Cole alleged that Mitchell advised him that he could “do anything he wanted” as the trustee of the Foundation. Cole further alleged that had Mitchell advised him against self-dealing as the Foundation trustee, he would never have transferred Foundation property to himself. Cole contended that Mitchell’s failure to properly advise him resulted in Cole’s actions, guilty plea and imprisonment.

Cole filed exceptions of peremption and of no cause of action and a motion for summary judgment. The trial court sustained the exception of peremption regarding Cole’s actions in 2006, but overruled the exception as to the later transactions. The trial court likewise overruled the exception of no cause of action and denied the motion for summary judgment.

The court of appeal reversed the trial court’s judgment, in part, and dismissed Cole’s claims in their entirety.

The court of appeal explained that the doctrine of *in pari delicto*, a corollary of the

“unclean hands” doctrine, precluded Cole from recovery as a result of his own participation in tortious conduct.

The court noted that under Section 2206 of the Louisiana Trust Code, a trust instrument may not relieve a trustee from liability for a breach of the duty of loyalty to a beneficiary or for a breach of trust committed in bad faith. Further, the Foundation instrument specifically required that Cole deem the terms and conditions of the actions he performed on behalf of the Foundation to be advantageous to the Foundation.

Regardless of whether Mitchell prepared the documents for Cole and regardless of whether Mitchell failed to advise Cole against self-dealing, there were no grounds for Cole to argue that his actions were in any way advantageous to the Foundation. Cole’s actions were not the result of Mitchell’s failure to advise Cole of the prohibitions against self-dealing. Rather, Cole’s actions were “a dishonest, selfish and illegal betrayal of the trust that had been placed in him as trustee.”

Carrollton Presbyterian Church v. The Presbytery of South Louisiana of the Presbyterian Church (USA), 2011-0205 (La. App. 1st Cir. 9/14/11), 77 So.3d 975, writ denied, 2011-2590 (La. 2/17/12), 82 So.3d 285. The Carrollton Presbyterian Church (“Carrollton”) and the Presbytery of South Louisiana (the “Presbytery”) are constituent members of the Presbyterian Church (U.S.A.) (hereinafter “PCUSA”). The PCUSA is governed by its constitution, which is comprised of two books. One of the books is the Book of Order. Under the Book of Order, the Presbytery, as one of the PCUSA’s governing bodies, exercises supervisory powers over Carrollton, a local church, subject to review by the next higher governing body.

Carrollton was organized in 1855 and incorporated as a Louisiana corporation in 1894. Over the years, Carrollton acquired property in its name, including immovable property in New Orleans that is the site of Carrollton’s sanctuary. Carrollton also sold property in its name over the years.

This litigation involved the issue of whether Carrollton held property in its name in full and exclusive ownership such that Carrollton was entitled to sell the property as it desired. The Presbytery maintained that Carrollton was subject to the Book of Order’s express trust provision, which created an express trust in church property in favor of the PCUSA. Carrollton argued, among other things, that the trust provision of the Book of Order did not comply with Louisiana trust law.

The trial court rendered judgment in favor of Carrollton. The trial court explained that all property held by, for, or in Carrollton’s name was held and owned by Carrollton, which held and owned the property in full, complete and unfettered

ownership under Louisiana law. The trial court further explained that the express trust provisions relied upon by the Presbytery were unenforceable and without legal effect regarding the property at issue.

The court of appeal affirmed. The court of appeal found that any purported trust would be subject to the form requirements set forth in the Louisiana Trust Code. The court of appeal found that it was “undisputed that those form requirements have not been met.” The court further found that the public records relating to the subject property reflected that the property was owned by Carrollton. There was no mention of the property being held in trust in the deeds themselves and no trust instruments related to the property had ever been filed of record in Orleans Parish.

XIX. JURISPRUDENTIAL DEVELOPMENTS - ANNUITIES

Estate of Kirsh v. Blanchard, 2011-1835 (La. App. 1st Cir. 8/9/12), 2012 WL 3228973 - *Unpublished Opinion*. Agnes Kirsh purchased two single premium deferred annuities from Nationwide Life & Annuity Insurance Agency (“Nationwide”) through Bank One, N.A. Mrs. Kirsch purchased each of the annuities for the sum of \$100,000. Jeffrey Blanchard purchased the second of the annuities on Mrs. Kirsch’s behalf using Mrs. Kirsch’s power of attorney. Mr. Blanchard was named as the beneficiary of both of the annuities.

Mrs. Kirsch died on January 1, 2000. Following Mrs. Kirsch’s death, Mr. Blanchard received the proceeds of the two annuities through the conversion of the funds into a single annuity contract in his own name.

The executor of Mrs. Kirsh’s succession sued Blanchard, Nationwide and Bank One. The executor claimed that the succession had been damaged by the intentional acts of Blanchard and by the negligence of Nationwide and Bank One. The trial court granted summary judgment and dismissed the claims against Bank One.

The court of appeal affirmed. The court of appeal noted that the evidence submitted fully supported the trial court’s conclusion that Bank One followed the instructions of Mrs. Kirsch in regard to the first annuity and followed the instructions of Mrs. Kirsch and Mr. Blanchard in regard to the second annuity. The court of appeal concluded that there was no evidence that the ultimate result - the receipt of the funds by Mr. Blanchard - was contrary to Mrs. Kirsch’s intentions. Rather, the evidence submitted in conjunction with the summary judgment demonstrated that Mrs. Kirsch intended for Blanchard to receive the funds. The court of appeal also noted that the executor was not able to recover from Bank One under a theory of breach of contract, as the bank was not a party to the annuity contracts.

Bijeaux v. Broyles, 2011-830 (La. App. 3rd Cir. 2/8/12), 88 So.3d 523, *writ denied*, 2012-0970 (La. 6/22/12), 2012 WL 2478346. In 1998, Mildred Broyles allegedly forged Achille Bijeaux's signature on applications for two annuity contracts that named Broyles as beneficiary. David Alford allegedly acted as the agent of John Hancock Life Insurance ("John Hancock") and as the employee of Morgan Stanley Smith Barney ("Morgan Stanley"). Alford allegedly completed the applications and assisted Broyles in the forgery. Broyles, with Alford's assistance, then allegedly converted funds from Mr. Bijeaux's bank accounts to pay for the annuity contracts.

Mr. Bijeaux died in January of 2003. Broyles allegedly submitted claim forms for the two annuities and, again assisted by Alford, submitted the claim forms to John Hancock, which paid the annuity proceeds to Broyles.

The representative of Mr. Bijeaux's succession filed suit against Broyles, Alford, John Hancock and Morgan Stanley and requested damages for the conversion of Mr. Bijeaux's funds.

Alford and Morgan Stanley filed exceptions of peremption and asserted that the claims against them were barred by La. R.S. 9:5606, which provides a three year peremptive period for claims for damages against insurance agents and brokers. John Hancock filed a similar exception of peremption and a motion for summary judgment.

The trial court ruled in favor of Alford, Morgan Stanley and John Hancock and dismissed the claims of the succession against these defendants.

On appeal, the representative of Mr. Bijeaux's succession argued that La. R.S. 9:5606 did not apply. The succession representative explained that Mr. Bijeaux did not contract for insurance services and, as he did not do so, there was no "engagement to provide insurance services" as required for the application of Section 5606. The court of appeal did not find these arguments to be persuasive.

Rather, the court of appeal noted that the alleged acts occurred in 1998. The annuity contracts were delivered to Mr. Bijeaux. The annuity contracts clearly identified Broyles as the beneficiary. It was incumbent upon Bijeaux to review the annuities and if he did not understand them, to make inquiries. Mr. Bijeaux's receipt of the annuity policies represented constructive notice sufficient to commence the tolling of the peremptive period.

For these reasons, the court of appeal found that the claims of Mr. Bijeaux's succession against Alford, Morgan Stanley and John Hancock were clearly perempted and therefore affirmed the judgment of the trial court.

XX. JURISPRUDENTIAL DEVELOPMENTS - LIMITED LIABILITY COMPANIES

Belgard v. Manchac Technologies, LLC, 2012-191 (La. App. 3rd Cir. 6/6/12), 2012 WL 2018223. Manchac Technologies, LLC (“Manchac”) was organized in March of 2005 by Randall Murphy, Monroe Milton and Jimmie Belgard (the “founders”) to develop a device for the packing of pharmaceuticals in mass quantities. Each of the founders was issued a one-third (1/3) membership interest in the company. The founders did not pay cash for their membership interests. Rather, each of them contributed what they referred to as intellectual property and prior services.

The founders recognized their need for capital and amended the operating agreement of the LLC to allow the company to raise capital by selling membership interests. The amended operating agreement provided that if new shares were sold before December 31, 2008, only the founders’ shares would be diluted. In other words, if Manchac sold 3% of its shares to A and then later sold 7% to B, the founders would each then own a 30% interest in the company. If thereafter, but before December 31, 2008, Manchac sold 30% to C, then each founders’ ownership percentage would be reduced by 10%, leaving each founder with a 20% membership interest. The percentages of A and B would not change.

In 2008, a group of investors offered to guarantee a line of credit of up to \$1,800,000 in exchange for a 24% ownership interest in Manchac. The group formed IWMM, LLC (“IWMM”). Upon the agreement of IWMM to guarantee a line of credit in favor of Manchac, a 24% membership interest in Manchac was transferred to IWMM. The 24% interest was transferred from the founders’ interests as set forth in the amended operating agreement. Accordingly, Belgard’s ownership interest in Manchac was reduced by 8%.

Belgard sued Manchac and alleged that the 24% membership in Manchac was illegally transferred to IWMM. Therefore, his shares were improperly diluted. The trial court granted a motion for summary judgment by Manchac and dismissed Belgard’s claims.

On appeal, Belgard noted that the Manchac subscription agreement provided that the “Capital Commitment shall be paid upon execution and delivery of this Agreement by either (i) delivery of a check made payable to ‘Manchac Technologies, L.L.C.’; or (ii) delivery into the Company’s account of other immediately available funds acceptable to the Company.” Belgard argued that IWMM did not deliver a check or other immediately available funds to Manchac as required for the transfer of a membership interest under the subscription agreement. As no cash was exchanged on the date of the transfer, the transfer was invalid and the dilution of Belgard’s membership interest accordingly was inappropriate.

The court of appeal disagreed. The court of appeal first noted that under La. R.S. 12:1301(A)(3), a capital contribution means anything of value that a person contributes to a limited liability company as a prerequisite to membership, including “a promissory note or other binding obligation to contribute cash or property.” Section 1321 of Title 12 of the Revised Statutes reiterates that a contribution of a member to an LLC may take the form of “a promissory note or other binding obligation to contribute cash or property.”

The court of appeal noted that IWMM contractually bound itself to Manchac to provide a \$1,800,000 line of credit for Manchac’s benefit. Further, the obligation was secured by the personal property of the members of IWMM. The obligation was real and became effective immediately when IWMM’s agent signed the subscription agreement. Further, the consideration offered by IWMM was clearly acceptable to Manchac, as required by the subscription agreement, as the terms of the transfer agreement were approved by a strong majority of the members of Manchac before the transfer was effected. No member of Manchac, including Belgard, opposed the transfer of the 24% membership interest to IWMM in return for the line of credit. Further, Manchac’s actions after the fact ratified the transfer, both implicitly and expressly.

For these reasons, the court of appeal found that the 24% membership interest in Manchac was properly transferred to IWMM and Belgard’s membership interest in Manchac was diluted accordingly. The court of appeal therefore affirmed the judgment of the trial court dismissing Belgard’s claims.

In Re Cat Island Club, L.L.C., 2011-1557 (La. App. 3rd Cir. 5/2/12), 2012 WL 1521521. Cat Island Club, L.L.C. (the “LLC”) was formed in 2000 and eventually owned 383 acres in West Feliciana Parish. The LLC was plagued by irregularities in the execution of its operating agreement, disputes regarding the members’ ownership interests, and disagreements over the use of the property of the LLC.

In 2010, Ty-Bar Industries, Inc. (“Ty-Bar”), a member of the LLC, filed a petition to dissolve the LLC. Two of the individual members of the LLC opposed the dissolution. The trial court ordered the dissolution of the LLC and appointed William Ford as liquidator.

The court of appeal affirmed. The court of appeal found that a statutory dissolution by consent under La. R.S. 12:1308 was not available, as due to the death of one of the members, there was no majority consent for the dissolution. However, the court of appeal found that a judicial dissolution under La. R.S. 12:1335 was available and appropriate, as the members of the LLC were clearly not able to work together toward any goals and there was no reason for the members to continue their

association with each other.

Show-Me Construction, LLC v. Wellington Specialty Insurance Company, 11-528 (La. App. 5th Cir. 12/29/11), 83 So.3d 1156. Alan Whitesides formed Show-Me Construction, L.L.C. (“Show-Me”) to repair and renovate New Orleans area homes damaged by Hurricane Katrina, including the repair and replacement of roofs.

In April of 2006, Show-Me was engaged to repair a home on Fairfield Drive in Metairie. Shortly thereafter, a rainstorm damaged the home and its contents. The owners of the home made a claim against Show-Me for the repair of the damages caused by the rainstorm. Show-Me allegedly voluntarily paid for the damages itself and sought reimbursement from its insurer, Wellington Specialty Insurance Company (“Wellington”). Wellington denied Show-Me’s claim.

In May of 2007, Show-Me filed an affidavit of dissolution and ceased its existence as a limited liability company.

In 2009, Show-Me filed a petition for damages against Wellington associated with its payment to the owners of the damaged residence. In 2010, Show-Me filed a supplemental and amending petition in which Whitesides was added as a plaintiff and asserted claims as an insured under the Wellington policy.

Wellington filed exceptions of no right of action and no cause of action. The trial court sustained the exceptions and dismissed Whitesides’ claims.

On appeal, Whitesides argued that he was insured by Wellington under Show-Me’s insurance policy because he was the sole member and manager of the company. However, the court of appeal disagreed. The court of appeal explained that Whitesides did not assert a right of action against Wellington. There was no assertion that Whitesides personally incurred any damages that would give him a real and actual interest in the action under article 681 of the Code of Civil Procedure. Rather, all of the allegations in the petitions alleged that Show-Me, not Whitesides, incurred damages as a result of any breach by Wellington of the provisions of the insurance policy.

For these same reasons, the court of appeal found that Whitesides failed to state a cause of action as well. The court of appeal therefore affirmed the judgment of the trial court dismissing Whitesides’ claims.

Sanders Family, LLC No. 1 v. Sanders, 46,476 (La. App. 2nd Cir. 12/14/11), 82 So.3d 434, *writ denied*, 2012-0414 (La. 4/9/12), 85 So.3d 702. Sanders Family, LLC

No. 1 (the “LLC”), a family owned limited liability company, sought to rescind four sales of immovable property of the company. The LLC claimed that its manager was improperly influenced and induced by her son to convey the properties to the son for prices significantly less than their fair market value. The LLC alleged that the manager’s execution of each sale was based upon the advice and was within the confidence of the son, thereby vitiating the manager’s consent to the sales under Civil Code articles 1953 - 1958. In a lengthy opinion, the court of appeal addresses the issue of prescription in the context of each of the four sales at issue.

Robert v. Robert Management Company, LLC, 2011-0406 (La. App. 4th Cir. 12/7/11), 82 So.3d 396. MarketFare, L.L.C. (“MarketFare”) was formed before Hurricane Katrina for the operation of a chain of grocery stores. Andre Robert, Randall Mouro, J. Storey Charbonnet, Mark Robert and Darlene Robert were members of MarketFare.

Andre Robert, Mouro and Charbonnet (the “plaintiffs”) filed suit against Mark Robert and Darlene Robert (the “defendants”) and alleged that the defendants breached their fiduciary duty to MarketFare. More specifically, the plaintiffs alleged that the defendants formed a new LLC in 2006 to lease and operate a grocery store without the inclusion of MarketFare or the plaintiffs. In doing so, the defendants intentionally violated their fiduciary duty.

The defendants filed a peremptory exception of peremption and/or prescription. The trial court sustained the exception and dismissed the plaintiffs’ claims. In doing so, the trial court concluded that the time periods for the filing of such an action under La. R.S. 12:1502 are peremptive, rather than prescriptive.

The court of appeal reversed. The court of appeal noted that after the trial court’s ruling, the court of appeal rendered *Suhren v. Gibert*, 10-0767 (La. App. 4th Cir. 1/12/11), 55 So.3d 941. In *Suhren*, the court of appeal found that La. R.S. 12:1502 was “a prescriptive statute with peremptive time limitations.” Accordingly, the court of appeal found that Section 1502 was prescriptive in nature. The court of appeal therefore reversed the judgment of the trial court and remanded the case for further proceedings.

XXI. JURISPRUDENTIAL DEVELOPMENTS - PERSONS

Interdiction of Noel, 2012-6 (La. App. 3rd Cir. 5/2/12), 2012 WL 1521535. Three of the children of Theodule Pierre Noel, Sr. filed a petition for his full interdiction. Mr. Noel, who was 83 years of age, responded by filing a motion for summary

judgment. In conjunction with his motion, Mr. Noel submitted affidavits from friends and physicians regarding his mental capacity. In particular, two board-certified psychiatrists testified by affidavit that Mr. Noel was able to consistently make reasoned decisions regarding the care of his person and his property. The trial court granted summary judgment in favor of Mr. Noel and the court of appeal affirmed.

Interdiction of Helm, 2011-0914 (La. App. 4th Cir. 12/21/11), 84 So.3d 607. In December of 2010, Althea Helm filed a petition to interdict her husband, Henry Helm. Mr. Helm was interdicted in January of 2011. Thereafter, motions to tax costs were filed by Mrs. Helm's attorney and Mr. Helm's attorney.

The trial court awarded attorney's fees in favor of Mrs. Helm and ordered Barbara Manteris to pay the fees and costs. Manteris was Mr. Helm's niece and his agent under a power of attorney prior to Mr. Helm's interdiction. As a practical matter, Manteris was quite involved in the interdiction proceeding. However, Manteris was not a party to the proceeding.

The court of appeal vacated the assessment of attorney's fees and costs in conjunction with the interdiction proceeding against Manteris. The court of appeal noted that article 4550 of the Code of Civil Procedure allows the assessment of attorney's fees and costs against "any party." However, Manteris was not a defendant in the interdiction proceeding, did not intervene in the proceeding, and was not the subject of a third party demand. As Manteris was not a party to the interdiction, the trial court erred in its assessment of attorney's fees and costs against her.

Interdiction of Helm, 2011-0500 (La. App. 4th Cir. 11/2/11), 84 So.3d 601. As set forth above, Henry Helm was interdicted in January of 2011. Mr. Helm's court-appointed attorney appealed the appointment of Mr. Helm's wife as curatrix. He argued that Mr. Helm's niece, Barbara Manteris, was entitled to preference over Mrs. Helm in the appointment as curatrix, as Manteris was Mr. Helm's agent under a power of attorney before Mr. Helm's interdiction.

The court of appeal noted that under article 4561 of the Code of Civil Procedure, a person designated by the interdict in a writing signed by the interdict while he had sufficient ability to communicate a reasoned preference generally has priority over the interdict's spouse in conjunction with the appointment as curator.

However, the court of appeal further noted that Manteris' power of attorney was not entered into evidence at trial of the interdiction proceeding. A copy of the act of procuration was attached as an exhibit to the original petition for interdiction filed

by Mrs. Helm. However, the petition and the exhibit were not evidence and did not form a part of the record. For these reasons, the court affirmed the appointment of Mr. Helm's wife as curatrix without addressing the issue of whether Mr. Helm was able to communicate a reasoned preference at the time of the execution of the power of attorney.

The court of appeal further *sua sponte* questioned the appointment of one of the undercurators in the interdiction proceeding. The court of appeal noted that the undercuratrix, Donna Oufnac, obligated herself as a legal surety for the curatrix. Mrs. Oufnac's obligation was solidary, albeit conditional, with Mrs. Helm's obligation to cover any losses or damages to the interdict which may be caused by an improper administration. In the event of a judgment against Mrs. Helm, as curatrix, which she could not satisfy, Mrs. Oufnac's own property was subject to seizure to satisfy the suretyship obligation. For these reasons, the court of appeal found that Oufnac had a "substantial conflict of interest arising from the irremediable incompatibility of her responsibilities, obligations and duties as the undercuratrix on the one hand and the curatrix's surety on the other hand." Therefore, the court of appeal, on its own motion, removed Mrs. Oufnac as undercuratrix.

The court of appeal further noted that Mrs. Oufnac's husband, Lester Jack Oufnac, was also named as undercurator. The court found that if there is a community property regime, Mr. Oufnac's own interest in the community property could be adversely materially affected by Mrs. Oufnac's obligation to pay as surety, which may impair his performance of the duties of an undercurator as well.

For these reasons, the court of appeal affirmed the appointment of Mrs. Helm as curatrix, reversed the appointment of Mrs. Oufnac as undercuratrix, and remanded the case for further proceedings.

Interdiction of Mottinger, 2011-0693 (La. App. 1st Cir. 10/11/11), 2011 WL 4833092 - ***Unpublished Opinion***. A judgment of full interdiction was entered against Elsie Mottinger, who was 91 years of age at the time. Mrs. Mottinger appealed the judgment. Mrs. Mottinger argued that a limited interdiction was appropriate, rather than a full interdiction as ordered by the trial court. Following a review of the evidence, including the testimony of Mrs. Mottinger's treating physicians, the court of appeal affirmed the judgment of full interdiction.

Tutorship of Franques, 2011-190 (La. App. 3rd Cir. 10/5/11), 74 So.3d 812. Mitchell Franques was born in 1981. In 1999, following the deaths of his parents, Franques was placed under a continuing tutorship pursuant to articles 354 - 362 of the Civil Code. These articles involve the continuing tutorship of "mentally

retarded” persons. Franques’ aunt, Earline Landry, was appointed as tutrix.

In 2000, Franques was moved to DeRidder so that he could learn to live on his own. In 2010, Ms. Landry filed a rule to show cause seeking to move Franques to a different facility closer to her home. Franques opposed the move.

The trial court found that even though Franques was subject to a continuing tutorship, he could live where he chose. The trial court therefore denied the transfer. Applying the law as it stood at the time Franques turned 18 years of age, the court of appeal affirmed.

XXII. JURISPRUDENTIAL DEVELOPMENTS - GENERAL INTEREST

Paretti v. General Motors Corporation, 2011-0844 (La. App. 1st Cir. 2/10/12), 91 So.3d 323, *writ denied*, 2012-0583 (La. 4/20/12), 85 So. 3d 1275. Craig Paretti owned a Pontiac dealership for over 35 years and participated in the GM Dealer Group insurance plan. In 2004, Mr. Paretti’s dealership was terminated by GM. As a result, Mr. Paretti became ineligible to participate in the group insurance plan.

Mr. Paretti received a June 18, 2004 letter from the GM Dealer Insurance Group informing him that he was no longer eligible to continue his \$300,000 life insurance policy under the group plan. The letter informed Mr. Paretti that although his policy was being canceled, he could convert his group policy to an individual policy within 31 days. The letter further provided that Mr. Paretti could continue a reduced portion of his coverage under the group plan’s Retirement Continuance Option (“RCO”). The letter included an RCO form, but did not contain a form to apply for a conversion to an individual policy. Rather, the letter instructed Mr. Paretti to contact Met Life if he was interested in applying to convert his coverage.

Mr. Paretti signed and returned the RCO form on or about July 9, 2004. A July 19, 2004 letter from the GM Dealer Insurance Group confirmed receipt of Mr. Paretti’s completed RCO form and Mr. Paretti’s enrollment in that plan for \$120,000 in life insurance coverage.

In addition to signing and returning the RCO form, Mr. Paretti also met with Barry Bellina, a Met Life agent, on July 15, 2004 to discuss the conversion of his policy. On July 26, 2004, Paretti signed an application provided by Bellina to convert his coverage to an individual policy. The premium check for the converted policy was negotiated on July 30, 2004.

On August 27, 2004, Met Life informed Bellina that Mr. Paretti was not eligible to

convert his policy to an individual one because he had elected to continue reduced coverage under the RCO. Approximately six weeks later, on October 7, 2004, Bellina informed Mr. Paretti that he was not eligible for conversion. Mr. Paretti became very angry when he was told that he could not convert his policy to an individual one. Paretti told Bellina that his intent had been to secure the maximum coverage for which he was eligible. According to Paretti, had he been informed that he was limited to either the reduced coverage under the RCO or the conversion policy, he would have chosen to convert to an individual policy.

On the following day, October 8, 2004, Mr. Paretti suffered a massive heart attack and died. Met Life declined to pay under the conversion policy and eventually returned the premium paid for the conversion policy. Mr. Paretti's widow, Willamena Paretti, sued Met Life and Bellina. Met Life deposited the \$120,000 RCO death benefit with interest into the registry of the court. The sum was thereafter withdrawn by Mrs. Paretti.

The trial court granted motions for summary judgment filed by the defendants and dismissed Mrs. Paretti's claims. The trial court concluded that the only coverage in place at the time of Mr. Paretti's death was the reduced amount under the RCO, as Mr. Paretti's application for conversion coverage was not accepted. The trial court also found no negligence on behalf of the defendants.

In its review, the court of appeal focused on La. R.S. 22:942. Under Section 942, a group life insurance policy must contain the following provisions regarding conversion upon termination of eligibility:

(10) Conversion on termination of eligibility: A provision that if the insurance, or any portion of it, on an individual covered under the policy ceases because of termination of employment or of membership in the class or classes eligible for coverage under the policy, such individual shall be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits, provided application for the individual policy shall be made and the first premium paid to the insurer within thirty-one days after such termination.

* * *

(12) Death pending conversion: A provision that if a person insured under the group policy dies during the period within which he would have been entitled to have an individual policy issued to him in accordance with Paragraphs (10) and (11) of this Section and

before such an individual policy shall have become effective, the amount of life insurance which he would have been entitled to have issued to him under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made.

The court of appeal noted that the June 18, 2004 letter from the GM Dealer Insurance Group appeared to indicate that Mr. Paretti could not choose to continue his coverage under the RCO and also convert his coverage to an individual policy. However, as Mr. Paretti met the statutory requirements to convert his coverage under La. R.S. 22:942, his right to the converted coverage could not be affected by a letter. As Mr. Paretti was entitled to convert his group policy to an individual one through his application and his payment of the premium, the trial court erred in granting summary judgment on the grounds that no insurance contract was formed.

The court of appeal recognized other language in La. R.S. 22:942 limiting the amount of an individual's policy, whether under RCO coverage or conversion coverage, to the amount of life insurance under the group policy. However, the court of appeal did not find that Section 942 prohibited Mr. Paretti from converting his group policy to an individual one. Rather, Paretti may have been required to cancel the RCO coverage or to select a lesser amount of conversion coverage.

On appeal, the defendant, Bellina, argued that he could not be liable as a result of any unreasonable delay in notifying Mr. Paretti of the denial of his application because Mrs. Paretti was not able to show any loss caused by the delay. However, as the court of appeal determined that Mr. Paretti was entitled to convert his coverage to an individual policy under Section 942, the court of appeal was not able to say that Mr. Paretti was not harmed by the unreasonable delay in notifying him of Met Life's denial of his application.

For these reasons, the court of appeal reversed the trial court's judgment in its entirety and reinstated Mrs. Paretti's claims against the defendants.

Barnes v. Cloud, 46,685 (La. App. 2nd Cir. 12/14/11), 82 So.3d 463. Clyde Barnes, Jr. and Jo Ann Boggs Barnes purchased a lot in Caddo Parish in 1993 and built a house on the lot. In 1994, Mr. and Mrs. Barnes transferred the property to their son, Tony, and daughter-in-law, Julia, for the stated sum of \$1,500. The price, however, was not paid. The property was transferred "in trust" to protect it from possible financial issues related to Mr. Barnes' alcohol and gambling addictions. There was no intention to permanently transfer the property.

Mr. Barnes died in 1998. Mrs. Barnes continued to live in the home, paid the

property taxes, maintained the property and made beneficial improvements to the property over the years.

In 2004, Tony and Julia were divorced. In the divorce proceeding, Julia sought one-half (½) of the property as part of the community property settlement.

In August of 2008, Mrs. Barnes filed suit against Tony and Julia. Mrs. Barnes requested that the court either transfer the property back to her or allow her full use of the property. Alternatively, Mrs. Barnes requested reimbursement in the amount of \$116,468 for property taxes and improvements. Various claims between and among Mrs. Barnes, Tony and Julia ensued. The claims involved rent, reimbursement, eviction and other issues.

The trial court treated the claims as actions between a possessor (Mrs. Barnes) and owners (Tony and Julia).

However, the court of appeal found that the claims were more properly analyzed under the Civil Code provisions regarding usufruct. The court of appeal explained that all of the parties testified that Mrs. Barnes was living on the property in a “usufruct-type situation,” even though there was no evidence regarding the parties’ intent of the duration of the arrangement. The court of appeal therefore resolved the parties’ claims under the law of usufruct.

Guest House of Slidell v. Hills, 2010-1949 (La. App. 1st Cir. 8/17/11), 76 So.3d 497. Leroy Gilley was elderly and infirm. His stepson, Sam Hills, had his power of attorney. In 2008, Mr. Gilley was admitted to the hospital. Upon his discharge, Mr. Gilley was transferred to the Guest House of Slidell (the “Guest House”).

Using the power of attorney, Hills signed the Guest House admission agreement on Mr. Gilley’s behalf. However, the preprinted form indicated that Hills was signing in his individual capacity, as well as on behalf of the resident, Mr. Gilley. When Hills asked about the wording, he was advised by a Guest House employee that he would not be accepting any financial responsibility for Mr. Gilley by signing the agreement. Rather, Hills was advised that he was signing as a formality so that Mr. Gilley could be admitted to the facility.

Thereafter, the Guest House filed a petition on open account against Hills, individually and on behalf of Mr. Gilley, seeking to recover \$9,159 for services rendered by the Guest House on behalf of Mr. Gilley. The Guest House alleged that the open account was created by the admission agreement signed by Hills and that Hills was obligated to pay basic daily room charges for Mr. Gilley in accordance with the agreement.

The trial court dismissed the Guest House's claims and explained that Hills had no legal obligation under the contract under the facts presented. The court of appeal affirmed. The court of appeal found the admission agreement to be ambiguous. Further, considering the entirety of the circumstances, the court found that the parties to the contract intended for Mr. Gilley, not Mr. Hills, to be the responsible party.

TORTS
RECENT DEVELOPMENTS
2012

LSU LAW CENTER

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RECENT DEVELOPMENTS IN TORTS – 2012

I. Trends in Torts – Litigation and Scholarship

A. Wrongful Birth

A recent trend involves states either implementing or considering legislation that would immunize healthcare professionals from wrongful birth lawsuits. Currently, Pennsylvania, North Dakota, South Dakota, Utah, Idaho, Indiana, Missouri, Minnesota, and North Carolina have wrongful birth laws. Arizona, Kansas and New Jersey are among the states considering this type of legislation that prevents parents from suing a doctor who fails to warn them about fetal problems. Pennsylvania's law, 42 Pa. Cons. Stat. § 8305, states that there is no cause of action for wrongful birth or wrongful life. This law was challenged by a couple whose daughter was born with downs syndrome. Because of her age, the mother had a blood test and her doctor neglected to tell her that the test showed that she had elevated levels for the risk of the child having Downs syndrome. The law was upheld by the state supreme court. This past March, Arizona's Senate passed a wrongful birth bill, Senate Bill 1359. Under Senate Bill 1359 a doctor could not be sued for medical malpractice if the doctor withholds information from a mother about a child's potential health issues that could influence her decision to have an abortion. In addition, a lawsuit could not be filed on the child's behalf regarding a disability. Arizona's bill does contain an exception that allows parents to sue for intentional or grossly negligent act or omission, including an act or omission that violates a criminal law. The bill is set to go before the House. Legislation in other states, such as Kansas' House Bill 2598 and New Jersey's Assembly Bill 1488, does not contain similar exceptions. The proposed legislation in Kansas allows for a doctor to withhold information from a mother in order to prevent an abortion and not face a malpractice suit. Other states, like Florida and Oregon, allow for wrongful birth lawsuits. For example, in 2011 a Florida jury awarded a couple \$4.5 million to care for their son who was born with no arms and one leg. Jurors held the doctor and hospital liable for not detecting the boy's "horrific" disabilities before he was born. The couple sought damages, not for their mental anguish and suffering, but to ensure that they would be able to properly care for their son's special needs including prostheses, wheelchairs, operations, attendants and other needs he will have during his life. The issue of medical malpractice in the context of wrongful birth is complex and rife with moral issues.

The Supreme Court of Louisiana has addressed the appropriateness of these types of suits in *Pitre v. Opelousas General Hospital*, 530 So. 2d 1151 (La. 1988).

B. Climate Change

For some advocates of greenhouse gas regulation, tort law has become a vehicle to achieve their goal by presenting their claims to courts as tort lawsuits. In *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), the Supreme Court of the United States spoke for the first time regarding the propriety of using common law tort actions to regulate greenhouse gas emissions in the United States. Eight state attorneys general, the City of New York, and several land trusts claimed a federal common law right of action against private and public energy companies to remedy alleged injuries associated with the “public nuisance” of global climate change. A unanimous Court rejected the claim. It held that the appropriate path for regulating GHG emissions is through the Environmental Protection Agency (“EPA”) acting pursuant to congressional authority and that, through the Clean Air Act (“CAA”), Congress had displaced any federal common law action seeking to limit GHG emissions. The Court did state, however, that the ruling did not bar this case or any other climate change tort suit from proceeding under a state’s common law.

According to legal scholarship regarding these issues, the leading cause of action in climate change litigation is nuisance. Nuisance, by its nature, implicates policy issues. These issues range from a state legitimately seeking to protect jobs and revenue where carbon dioxide emitters provide significant jobs and tax revenue to states with significant coastlines presumably asserting concerns based on the dire predictions about rising sea level. These policy issues become even more intertwined due to the fact that nuisance claims are governed by community standards. Climate change litigation is problematic because it requires juries and judges to attempt to apply “community standards” on a national, even international, level and make balancing judgments involving different communities with different standards. As the Restatement recognizes, in that situation, “there is often no uniformly acceptable scale or standard of social values to which courts can refer.” Therefore, it is possible that applying “community standards” to a global problem is fundamentally illegitimate and leaves the courts open to charges of lawmaking from the bench.

The courts have yet to hand down a common law nuisance tort judgment, and even proponents of climate change litigation recognize that plaintiffs face significant “doctrinal hurdles” that make any ultimate judgment in plaintiffs’ favor highly unlikely. In addition to political question doctrine, climate change litigation can be attacked on a multitude of different grounds including, jurisdictional arguments, such as standing and personal jurisdictional arguments, quasi-merit doctrines, such as displacement and preemption doctrines, merit-based arguments that may include lack of proximate cause and constitutional defenses to liability based on due process and takings protections, and asserting the First Amendment privilege to protect the clients’ privacy rights regarding their lobbying efforts with respect to climate change regulations.

American Electric Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) and Tristan L. Duncan, *The Past, Present, and Future of Climate Change Litigation: How to Successfully Navigate the Shifting Landscape*, ASPATORE (2012).

C. Chinese Drywall Litigation

***In Re Chinese-Manufactured Drywall Products Liability Litigation*, 2012 WL 92498 (E.D. La. Jan. 10, 2012)** – Hurricanes Katrina and Rita devastated the Gulf Coast in 2005, creating a boom in construction, that led to a shortage of drywall for the construction and reconstruction of buildings in the United States. As a result, from approximately 2005-2008, Chinese drywall was exported to the United States, changing hands in the chain of commerce, and ultimately installed in thousands of homes in buildings in the United States, primarily in Florida, Louisiana, Alabama, Mississippi, Texas, and Virginia. Sometime after the installation of Chinese drywall, homeowners, residents, and occupants began to notice odd odors, corrosion of metal components, failure of electronics and appliances, and physical ailments such as nose bleeds and respiratory problems. In response to complaints, a number of government agencies and special interest groups began to investigate, conduct testing and issue remediation protocols related to Chinese drywall. As a result, numerous lawsuits were filed in both state and federal court by property owners and occupants damaged by the Chinese drywall installed in their residences and buildings. Because of the commonality of facts in the federal lawsuits, and the complexity of the issues involved, the suits were coordinated and consolidated and transferred to the U.S. District Court for the Eastern District of Louisiana. A settlement was reached in this case in December 2011, and the Court issued a preliminary order approving the settlement in January 2012. The proposed global class Settlement Agreement intends to resolve claims made in filed actions, which arise out of the Chinese drywall from manufacturer KPT, installed in properties in the United States. “Chinese drywall” is defined as any and all drywall products manufactured, sold, marketed, distributed, and/or supplied by KPT and which are alleged to be defective. The Settlement Agreement class includes all persons or entities, who, as of December 9, 2011, who filed a lawsuit as a named plaintiff, asserting claims arising from KPT Chinese Drywall, whether or not other manufacturers were parties to the lawsuit. The class is then divided into three subclasses: Residential Owners, Commercial Owners, and Tenants. The Settlement Agreement establishes two funds for the benefit of class members: a Remediation Fund and an Other Loss Fund. The Remediation Fund is uncapped. It will pay costs of the three types of relief the class members can choose from: (i) remediation by Moss & Associates, the contractor for the remediation program established by the parties in October 2010; (ii) self-remediation by a qualified contractor of the homeowner's choosing; and (iii) a cash out option, in which the homeowner can elect to receive a cash payment. The Other Loss Fund, which is capped, will reimburse for certain provable economic loss and provide a review process for individuals who believe they have bodily injury claims. In addition, the

Agreement provides for attorneys' fees and costs, which is entirely separate from the compensation allotted for class members.

D. Formaldehyde FEMA Trailer Litigation

After the landfalls of Hurricanes Katrina and Rita, the homes of hundreds of thousands of citizens of the United States who resided along the Gulf Coast were rendered uninhabitable, leaving these citizens homeless. FEMA provided housing for these citizens, in part by acquiring EHUs manufactured by certain manufacturers. Plaintiffs alleged that they were exposed to hazardous levels of formaldehyde in the trailers. In late May 2012, a proposed settlement agreement was reached, which would resolve all of the remaining claims. Residents of Louisiana, Texas, Alabama and Mississippi who lived in FEMA trailers after the 2005 hurricanes are eligible to participate. The court assigned to hear this case is expected to hold a fairness hearing on the proposed settlement on Sept. 27, 2012.

See <http://www.laed.uscourts.gov/FEMA07md1873/Orders/order25666.pdf>; *In re FEMA Trailer Formaldehyde Product Liability Litigation*, MDL No. 07-1873, (E.D. La.) (last visited August 20, 2012).

E. NFL Helmet Litigation

Concussions in sports have received a significant amount of attention in recent years, including football. Litigation has started to arise over these issues. For example, on July 19, 2011, seventy-five former NFL players and many of their spouses brought suit against the NFL, NFL Properties, and sports equipment manufacturer Riddell in the Superior Court of California. The Maxwell Complaint includes counts of negligence, negligence-monopolist, fraud, strict product liability, failure to warn, and loss of consortium. The descriptions of the Maxwell plaintiffs are relatively similar in that they all claim to have “suffered multiple concussions,” been “improperly diagnosed and improperly treated throughout [their] career,” and not been “warned of the risk of long-term injury due to [concussions], or that the league-mandated equipment did not protect [them] from such injury.” The ailments allegedly suffered by the Maxwell plaintiffs range from headaches and memory loss to dementia. The Maxwell complaints negligence claims assert that the NFL, an “industry icon,” owed a duty to them, as well as all football leagues, players, and the public at large. The duty allegedly owed to the plaintiffs was to protect them on the playing field and educate them, as well as trainers and physicians, about CTE and concussion injury. Additionally, the Complaint claims the NFL had a duty to have in place strict return-to-play guidelines and to design rules and penalties for riskier hitting and tackling. The Complaint states that the NFL had a duty to players and the public as a monopoly to protect their health and safety. This duty was allegedly breached by “failing to enact rules, policies and regulations to best protect its players,” failing to provide “complete, current, and competent information,” and failing to provide “reasonably safe helmets.” The plaintiffs

claim were it not for this breach of duty they would not have suffered from their conditions or would have recovered more rapidly. The Maxwell plaintiffs also claim the NFL has assumed a “tort duty to invoke rules that protect the health and safety of its players.” The plaintiffs claim by enacting safety rules the NFL confirmed this historical duty, but failed to create any guidelines protecting mental health and safety until August 14, 2007. The Complaint also claims the NFL has never warned retired players of the long-term harms of concussions. The Complaint also asserts that the NFL was negligent in mandating the use of equipment, namely Riddell helmets, which provided insufficient protection. As a result, the plaintiffs claim they suffered long term effects of concussive brain injuries. The plaintiffs also attack the helmet makers themselves, accusing Riddell of strict liability for design and manufacturing defect in addition to failure to warn and negligence. The plaintiffs claim Riddell helmets were improperly tested as well as “defective in design, unreasonably dangerous, and unsafe for their intended purpose.” The negligence and failure to warn claims against Riddell stem from alleged failures to provide instructional materials and warnings of the risks and means available to reduce concussive brain injuries. David S. Cerra, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers Over Concussion Risks in Maxwell v. NFL*, MICHIGAN STATE UNIVERSITY JOURNAL OF MEDICINE & LAW (2012).

F. A Return to Strict Liability

Recent scholarship has suggested that a return to common law style strict liability (Louisiana absolute liability) may be appropriate for certain types of risk. *See, e.g.*, Brian Dalviso, “Is the Meat There Safe?” How Strict Liability for Retailers Can Lead to Safer Meat, 92 Bost. Univ. L. Rev. 1081 (2012); Neal J. Manor, What the Frack? Why Hydraulic Fracturing is Abnormally Dangerous and Whether Courts Should Allow Strict Liability Causes of Action, 4 Ky. Jnl. of Equine, Agric. & Nat. Resources 459 (2012).

G. Mass Torts and Due Process

A growing body of scholarship asks whether due process is protected in mass-tort settlements, given that many of these actions are not class actions. *See, e.g.*, Sergio J. Campos, Mass Torts and Due Process, 65 Vand. L. Rev. 1059 (2012); Jeremy T. Grabill, Judicial Review of Private Mass Tort Settlements, 42 Seton Hall L. Rev. 1236 (2012).

H. “Exposure-Only” Cases

A number of scholars are revisiting the issue of whether “exposure-only” plaintiffs should be allowed to recover. *See, e.g.*, Sheila B. Scheurman, Against Liability for Private Risk-Exposure, 35 Harv. J. L. & Pub. Policy 681 (2012).

I. BP Redux

Scholarship analyzing the substance and procedure of the BP Oil Spill continues to grow. *See, e.g.*, Thomas H. Koenig and Michael L. Rustad, Reconceptualizing the BP Oil Spill as PAREN PATRICE PRODUCTS LIABILITY, 49 HOUS. L. REV. 291 (2012); Deborah E. Greenspan and Matthew A. Neuburger, Settle or Sue? The Use and Structure of Alternative Compensation Programs in the Mass Claims Context, 17 ROGER WILLIAMS U. L. REV. 97 (2012); George W. Cunk, Diving Into the Wreck: BP and Kenneth Feinberg's Gulf Coast Gambit, 17 ROGER WILLIAMS U. L. REV. 137 (2012).

II. Medical Malpractice

A. Constitutionality of the Cap

1. Recent Case Law

***Oliver v. Magnolia Clinic*, 11-2132 (La. 3/13/12), 85 So. 3d 39** – Joe and Helena Oliver brought action on behalf of their child against nurse practitioner arising out of negligent treatment of minor child, and after a jury trial, filed a petition challenging the constitutionality of the Louisiana Medical Malpractice Act (“LMMA”), which provides a cap on Medical Malpractice Awards. The district court’s application of the LMMA’s cap reduced a \$6,233,000 general damage award to \$500,000. Due to alleged inadequate treatment by the nurse practitioner at the Magnolia Clinic during the first year of her life, the Oliver’s child was not diagnosed with neuroblastoma during the period when a correct diagnosis might have provided a chance of an event-free survival. The Third Circuit held that the \$500k cap discriminated against the plaintiffs by limiting their recovery while permitting less-severely injured victims to fully recover their general damage awards and, here, the court held that the cap was unconstitutional as applied. The Supreme Court, granting certiorari, held that La. Const. Art. V, § 8(B) provided that a “majority of the judges sitting in a case must concur to render judgment,” and since the court of appeal’s decree did not reflect a majority judgment on the principal issues considered in the instant case. Accordingly, the Supreme Court ordered that the ruling of the court of appeal was to be vacated, and further ordered that the matter be considered *en banc* in order that a decree could be rendered reflecting a majority vote on each of the issues presented. On August 31, 2011, the Third Circuit adopted the original opinion finding the cap unconstitutional. The Supreme Court then granted writs again and held that the cap is constitutional as it applies to all health care providers, including nurse practitioners.

***Arrington v Galen-Med, Inc.*, 12-909 (La. 5/22/12), 89 So.3d 1159** – The Supreme Court of Louisiana affirmed its holding in *Oliver v. Magnolia Clinic* that the medical malpractice cap is constitutional.

2. Analysis

Since the cap was enacted, the Supreme Court of Louisiana has upheld the act's constitutionality when challenged. In its most recent analysis, *Oliver v. Magnolia Clinic* (summarized above), the Supreme Court of Louisiana reviewed its prior cases upholding the cap. The court stated that the right of malpractice victims to sue for damages is not a fundamental constitutional right. Therefore, Louisiana must only articulate "a rational basis" reasonably related to a governmental interest for medical malpractice legislation that limits monetary recoveries. However, the "rational basis" standard shifts to a higher standard if the legislation creates a separate or suspect classification, requiring a showing that a legitimate state objective is substantially furthered by the classification. Louisiana's medical malpractice cap creates two classes: those who are fully compensated by an award equal to or less than \$500,000.00 (the amount of the medical malpractice cap) and those whose severity of injuries require an award in excess of \$500,000.00 and who, therefore, receive less than full compensation. Therefore, the separate statutory classification discriminates on the basis of physical condition. In order for Louisiana to prove such discrimination is not arbitrary, capricious, or unreasonable, a legitimate state objective substantially furthered by the discrimination must be shown. The Supreme Court of Louisiana found that the Louisiana legislature acted to combat the rising insurance premiums in an inherently risky industry in order to avoid a healthcare crisis in Louisiana, which the Supreme Court of Louisiana determined substantially furthers a legitimate state interest.

3. Challenges To Texas's Medical Malpractice Cap

Challenges to Texas's medical malpractice cap have been upheld. Currently, Texas has three relevant damage caps, the one most recently challenged being a limit on noneconomic damages. Under Texas law, in a medical malpractice action filed on or after September 1, 2003, regardless of the number of actions asserted, non-economic damages are limited to a total of \$250,000 from all doctors and other individuals. Non-economic damages are limited to \$250,000 from each hospital or other institution and a total of \$500,000 from all institutions. Tex. Civ. Prac. & Rem. Code. § 74.301. The cap applies to each claimant, which includes everyone seeking damages due to one person's injury or death. *Id.*; Tex. Civ. Prac. & Rem. Code. § 74.001(a)(2). A constitutional amendment authorizes this legislation. Tex. Const. art. III, § 66. This law was challenged in a class action filed in 2008. In March 2012, U.S. District Judge Rodney Gilstrap adopted a report submitted by a magistrate judge leaving the Medical Malpractice and Tort Reform Act of 2003 unchanged. The report and recommendation was submitted by Magistrate Judge Charles Everingham in September 2010. The plaintiffs argued that the caps violated the Seventh Amendment, the Petition Clause of the First Amendment, the Takings Clause of the Fifth Amendment and the Fourteenth Amendment's Due Process and Equal Protection clauses. In upholding the act, the judge stated that the state has not

appropriated any of the plaintiffs' property to its own use. Rather, by limiting the amount of noneconomic damage, the State has enacted legislation in an effort to adjust the benefits and burdens of economic life to promote the common good.

B. Proper Role of Medical Review Panel

***McGlothlin v. Christus St. Patrick Hospital*, 10-2775 (La. 7/1/11), 65 So. 3d 1218** – The court of appeal found that the trial court erred in admitting an edited version of the medical review panel's opinion. Under de novo review, it concluded that the patient and her husband proved the hospital's malpractice caused the injury, and awarded both general and special damages. The admission of the medical review panel opinion was erroneous because the panel exceeded its statutory authority and rendered its opinion based on its determination of the patient's credibility, rather than the medical standard. By discrediting the patient's evidence and relying strictly upon the medical records, the panel impermissibly rendered an opinion based on its resolution of an issue La. Rev. Stat. § 40:1299.47(G)(3) clearly and explicitly reserved to the jury. Therefore, the panel's opinion did not constitute an expert opinion and was neither subject nor entitled to the mandatory admission requirement for expert opinions set forth in § 40:1299.47(H). But, any error in admitting the panel's opinion was rendered harmless by the redaction of the offending credibility language and, therefore, the appellate court erred in its de novo review. The jury did not manifestly err in finding for the hospital.

C. Malpractice Defined – *Coleman v. Deno*, 01-1517 (La. 1/25/02), 813 So.2d 303 (“Coleman factors”)

***Matherne v. Jefferson Parish Hospital District No. 1*, 11,1147 (La. App. 5 Cir. 5/8/12), 90 So. 3d 534** – The Mathernes sought damages for an injury Mrs. Matherne sustained when she fell as she was being transported, by West Jefferson's employee, to her hospital bed. The Fifth Circuit states that all the *Coleman* factors are satisfied in this case. First, the hospital performed a risk assessment on the plaintiff. Because full assessment is part of the treatment for all patients at West Jefferson, the first *Coleman* factor was satisfied. Second, medical evidence was necessary in this case to determine whether West Jefferson breached the standard of care when an employee single-handedly attempted to transport a 250–pound elderly woman, suffering with a hematoma on her leg, from a bedside commode to her bed. The third *Coleman* factor considers whether the pertinent act or omission involved assessment of the patient's condition. This factor was easily satisfied because West Jefferson requires an assessment of all patients to determine their fall risk factor. The Fourth *Coleman* factor considers whether the incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform. It is apparent that the injury in this case occurred during the scope of activities that West Jefferson was licensed to perform—

transporting a patient who had been assessed as a high risk for falls. Thus, this factor is satisfied. The fifth *Coleman* factor is whether the injury would have occurred if the patient had not sought treatment. Here, Mrs. Matherne was admitted to the hospital for treatment of her leg hematoma. If she had not sought treatment, she would not have been transported by the employee, and the fall would not have occurred. Therefore, the fifth *Coleman* factor is also satisfied. Finally, Mrs. Matherne does not allege that West Jefferson's actions were intentional; thus the final *Coleman* factor, whether the tort alleged was intentional, is satisfied.

***Jones v. Ruston Louisiana Hospital Company*, 46,356 (La. App. 2 Cir. 8/10/11), 71 So. 3d 1154** — Actions by nursing personnel to honor a “Do not Resuscitate” order which resulted in physical limitation and disabilities requiring rehabilitation until the patients ultimate death two months later is not covered by the Medical Malpractice Act, but should be governed by principles of Louisiana negligence law.

***Pleasure v. Louisiana Organ Procurement Agency*, 11-175 (La. App. 5 Cir. 12/28/11), 83 So. 3d 174** – In a medical malpractice action, alleging that contrary to the patient's wife's requests, a hospital continued life support after the patient was declared brain dead in order to determine whether the patient's organs were viable for donation, the trial court properly held that the claims against the hospital and the organ procurement agency were premature because the wife had not convened a medical review panel prior to filing suit. All of the treatments rendered by the hospital and the agency were "medical services" pursuant to La. Civ. Code Ann. art. 2322.1 and La. Rev. Stat. Ann. § 9:2797.

***Armand v. Lady of the Sea General Hospital*, 11,1083 (La. App. 1 Cir. 12/21/11), 80 So. 3d 1222** – Plaintiff was injured when she fell exiting a whirlpool, which was part of her inpatient treatment at the hospital. She alleged that the hospital failed to provide her with sufficient assistance. Her petition was dismissed without prejudice because the hospital claimed status as a qualified health care provider, therefore requiring a medical malpractice claimant to submit all medical malpractice claims to a medical review panel, which plaintiff had not done. Based upon the *Coleman* factors, the First Circuit found plaintiff's claims stemming from inpatient rehabilitation to be as the result of alleged medical malpractice. Therefore, they fell within the parameters of the act, requiring plaintiff to present her claims to a medical review panel before filing suit.

***McMillian v. Westwood Manor Nursing Home*, 12,54 (La.App. 3 Cir. 5/30/12), 2012 WL 1934466** – Court held that claims involving the handling of a patient and loading and unloading the patient to be covered under the LMMA and were required to be submitted to a medical review panel. Medical malpractice is defined as any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been

rendered, by a health care provider, to a patient, including failure to render services timely *and the handling of a patient, including loading and unloading of a patient*. Therefore the asserted facts fell within the malpractice definition.

***Lagasse v. Tenet Health System Memorial Medical Center, Inc.*, 11,0782 (La. App. 4 Cir. 12/14/11), 83 So. 3d 70** – Plaintiff brought action against doctor and health care system after her mother died at the hospital during Hurricane Katrina. Plaintiff alleged that the doctor euthanized her mother. Trial court held that her claims fall under the LMMA and plaintiff appealed. Fourth Circuit held that claim that physician intentionally injected a patient with a lethal dose of narcotics in order to bring about patient’s death was an intentional tort and was therefore not covered by the Louisiana Medical Malpractice Act. Therefore, dismissal of claim based on failure to file a claim with the medical review panel was erroneous. The claims alleging causes of action for malpractice based on hospital and physician’s care during hurricane fell under LMMA and were required to be submitted to a medical review panel.

***Montalbano v. Buffman, Inc.*, 11,0753 (La. App. 4 Cir. 3/21/12), 90 So. 3d 503** – Children of nursing home residents brought wrongful death actions against nursing home following residents’ death during a hurricane. Children settled claims with nursing home but reserved rights against Patient’s Compensation Fund, claiming that nursing home’s failure to evacuate nursing home prior to hurricane constituted medical malpractice and that the PCF was liable for sums in excess of those received in settlement. Court analyzed plaintiff’s claims based upon the Coleman factors. It stated that the alleged wrong, failure to evacuate the nursing home, was not treatment related. It was an administrative decision. This failure to evacuate or have an adequate evacuation plan did not require expert testimony to determine if the appropriate standard of care was breached. The actual decision to not evacuate did not involve the nursing director, medical director, or any health care professionals and therefore did not involve assessment of the condition of each individual resident. The failure to evacuate did not involve a physician-patient relationship. Nothing in the record indicated that the residents died as a result of medical treatment they received or should have received at the hospital. Based upon review of the applicable Coleman factors, the court stated that the decision to not evacuate the nursing home was an administrative decision not covered under the malpractice act.

***W.P and E.P v. Universal Health Services Foundation*, 11,801 (La. App. 5 Cir. 3/27/12), 2012 WL 1020683** – Plaintiffs filed suit on behalf of their minor son alleging that hospital was negligent in failing to prevent a sexual assault that occurred while their son was a patient at the hospital. They alleged negligence in placing their minor son in a room with another patient with special medical needs. The hospital responded by filing an exception of prematurity on the basis that the claims were governed by the LMMA and must be reviewed by a medical review panel prior to commencement of litigation. Plaintiffs argued

that their claims were not governed by the LMMA because the negligent conduct referred to in their petition was not committed within the context of the administration of medical services and was not treatment related in any way. The Fifth Circuit stated that the allegations related to the particular medical assessment and condition of each patient, and therefore related to the treatment of the patients within the meaning of the medical malpractice act. Whether the hospital exercised appropriate care in assigning plaintiff's son to a room with another person being treated in the psychiatric hospital is beyond the common experience of a layman. Therefore the determination of a breach of appropriate standard of care for assessment of psychiatric patients and making room assignments based on this assessment falls within the scope of the medical malpractice act.

***Buford v. Williams*, 11,568 (La. App. 5 Cir. 2/14/12), 88 So. 3d 540** – Patient brought action against psychiatric hospital and hospital employee, seeking damages arising from hospital employee's alleged rape of patient. The Fifth Circuit held that the trial court did not err in granting the hospital's exception of prematurity as to the patient's negligence claims because its actions were within the definition of malpractice in La. Rev. Stat. Ann. § 40:1299.41(A)(13). The allegations related to its responsibility arising from acts or omissions in the training and supervision of an employee who raped the patient. Because rape was an intentional act, any vicarious liability of the hospital for rape was also classified as an intentional act. As such, the hospital's vicarious liability was excluded from the LMMA.

***Rivera v. Bolden's Transportation Services, Inc.*, 11,1669 (La. App. 1 Cir. 6/28/12), 2012 WL 2455073** – Nursing home failed to carry its burden of proving that the patient's claim was governed by the LMMA, such that it was entitled to a medical review panel. This case did not involve the patient's fall from a wheelchair while inside the nursing home or while being pushed by a nursing home employee. Her fall occurred in a vehicle while being transported to a medical facility in a wheelchair that was not equipped with a seatbelt or safety strap.

***Buelle v. Periou*, 11,1067 (La. App. 1 Cir. 5/2/12), 2012 WL 1550436 (Not Designated for Publication)** – Trial court erred in granting summary judgment finding that claims asserted by the plaintiffs were not covered by a LAMMICO policy, because they did not arise from an injury from a medical incident resulting from a negligent act, error or omission in rendering or failure to render professional services. The acts at issue involved an anesthesiologist, who had read extensively on joint and bone manipulation to find alternatives to treat patients who were experiencing back pain. He then applied this acquired knowledge to his practice, performing the Fortin test on patients when indicated when they came in for epidural injections. Further, he did not expect payment for this service, his testimony indicated that this type of activity is one for which

he could expect to be paid from anyone else, and indeed, had been paid or had billed patients for such activity in the past.

***Voorhies v. Administrators of Tulane Educ. Fund*, 2012 WL 1672748 (E.D. La. May 14, 2012)** – Plaintiff had two procedures at the hospital, after which she had sexual relations with her husband. She was subsequently informed that the instruments used in the procedures were not properly sterilized and that she was at risk for infectious diseases. This case addresses a husband’s medical malpractice claims and asked whether they fell under the LMMA, or were separate and distinct because he was a non-patient. Cases have held that a non-patient’s claims can be subject to the LMMA. The damages claimed by the husband, a non-patient, are based on the alleged failure of the health care provider to render adequate medical care to his wife, a patient. Considering the facts of the instant case, his claim is clearly derivative of his wife’s claim. Therefore, his claim was one for “malpractice” as defined in the LMMA even though he was a non-patient.

***Russell v. Eye Associates of Northeast Louisiana*, 46,525 (La. App. 2 Cir. 9/21/11), 74 So. 3d 230** – The trial court erred in granting summary judgment in favor of a professional liability insurer in a patient's action against it and a medical practice on the ground that the patient's claim was based in tort and not in medical malpractice. There were genuine issue of material fact as to whether the accident constituted a medical incident that occurred in connection with the rendering of professional services, satisfying the definition of malpractice under the LMMA, and meeting the terms of the insurer's policy for coverage.

***Ivy v. St. Tammany Parish Hospital Service District No. 1*, 11,1624 (La. App. 1 Cir. 3/23/12), 2012 WL 996545 (Not Designated for Publication)** – Plaintiff stated that the trial court erred when it found that plaintiff's claims were “standard of care issues” and that plaintiff's claim was not proper under EMTALA as a matter of law. In this case, plaintiff’s condition was stable and he was not transferred to another medical facility for treatment. He was discharged home and advised to seek medical treatment in the morning. Thus, his condition did not meet the statutory definition of a medical emergency. He was stable when he was discharged and this is what the statutes require, therefore it was not an emergency situation.

D. Qualified Healthcare Provider (“QHCP”) Status

***Bickham v. Lammico*, 11,0900 (La. App. 4 Cir. 2/1/12), 90 So. 3d 467** – Patient who was rendered quadriplegic following treatment for injuries sustained in a car accident and his wife brought medical malpractice action against radiologists, their employer, and neurosurgeon. The Fourth Circuit stated that if a health care provider posts the required bond to be self-insured and pays the surcharge required by the PCF, the healthcare provider becomes a qualified healthcare provider having all the benefits of the LMMA. In this case,

evidence in the form of sworn statements of the executive director of the Patient's Compensation Fund were sufficient to demonstrate that proof of financial responsibility and enrollment form were submitted on behalf of the healthcare provider and that the applicable surcharges were paid on his behalf as required to afford him the protections of the LMMA. Also, status as a qualified healthcare provider under the LMMA is not limited to services and treatments provided within the course and scope of employment at a hospital that tendered medical malpractice premiums on behalf of him. This was because his employment contract with the hospital expressly provided that he had the right to admit and treat patients at other hospitals.

E. Duty/Standard of Care

***Cavet v. Louisiana Extended Care Hospital*, 47,141 (La. App. 2 Cir. 5/16/12), 2012 WL 1698132** – Patient's daughter filed suit against hospital who was caring for her mother after the drop arm of a bedside commode chair gave way under patient's weight and caused her to fall forward into her daughter. Both women then fell against a door and slid to the floor. Patient's daughter asserted numerous allegations against the hospital. The Second Circuit held that summary judgment was appropriate because patient's daughter could not meet her burden of proof showing that the hospital owed a duty to her under the facts alleged, or that any duty was breached. The daughter was a visitor to the hospital. Although a hospital owes a duty to visitors to exercise reasonable care for their safety, it is commensurate with the particular circumstances involved. The issue here involved the ease of association between the duty the hospital owed a visitor and the particular risk she encountered. The hospital's duty to exercise reasonable care did not encompass the unlikely risk that a visitor would sustain an injury in connection with a patient using a commode chair. The court specifically distinguished a case where a hospital employee moved something directly into a plaintiff's path, resulting in injury.

***Schilling v. Aurich*, 11,1325 (La. App. 3 Cir. 5/30/12), 91 So. 3d 580** – Patient who had been involuntarily committed to psychiatric care facility brought medical malpractice action against psychologist responsible for the commitment. Following jury verdict for the plaintiff, district court granted JNOV and a motion for new trial in favor of the defendant. The Third Circuit reversed and reinstated jury trial. The doctor who committed plaintiff to psychiatric care did not conduct a face-to-face interview prior to committing her, which medical review panel found to breach the standard of care. The locality standard in Louisiana requires an actual exam, meaning an in-person examination within 72 hours prior, before a person can be involuntarily committed. Therefore, a phone interview is a violation of the standard of care in Louisiana.

***Coward v. Cresson*, 12,33 (La. App. 5 Cir. 6/28/12), 2012 WL 2476518** – Patient brought medical malpractice action against dentist for failing to

diagnose malignant tumor. Summary judgment for the defendant was affirmed because none of the expert testimony presented by plaintiff established that defendant's referral to an oral surgeon, as opposed to an ENT, fell below the required standard of care for a dentist.

F. Lost Chance of Survival

***Goudia v. Mann*, 11,960 (La. App. 5 Cir. 5/22/12), 2012 WL 1867657** – Surviving family members of patient who died following surgery to have his toe amputated brought medical malpractice action against physician who performed the surgery. To succeed in a medical malpractice action, with respect to causation, a plaintiff must prove by a preponderance of evidence that he suffered injury due to a defendant's conduct. The issues in loss of chance of survival cases are whether the tort victim lost any chance of survival because of the decedent's negligence and the value of that loss. The plaintiff need not show that the decedent would have survived had she received the appropriate treatment. Rather the plaintiff need only show that the decedent had a chance of survival, which was denied as a result of the defendant's negligence. The burden of proof in such case is by a preponderance of evidence.

G. Causation

***Langley v. American Legion Hospital*, 11,1521 (La. App. 3 Cir. 5/2/12), 2012 WL 1521520 (Not Designated for Publication)** – Plaintiffs sued hospital for damages they claim to have suffered as a result of the wife's having been administered epinephrine intravenously rather than subcutaneously. In order to prevail, plaintiffs had to prove by a preponderance of the evidence that the intravenous administration of the epinephrine caused plaintiff's injuries and damages. A doctor stated in expert testimony that when medication is administered intravenously as opposed to subcutaneously, it immediately enters circulation and has a very acute effect. Further, he explained that epinephrine is a very, very potent stimulant to the heart and that the effects of epinephrine are complex. He also noted that when plaintiff went to the hospital after the bee sting, her pulse and blood pressure were reasonably stable and remained so until the second dose of epinephrine was administered, indicating her response to the subcutaneous injection of epinephrine was normal. The explanation of the effects of epinephrine administered intravenously, plaintiff's normal reaction to the subcutaneous injection of epinephrine, the hospital's documentation of her physical reaction to the epinephrine administered intravenously, and her description of her physical and psychological reaction to it supports the trial court's determination that the plaintiffs' proved the hospital's actions caused her damage. Accordingly, there was no error in the court's determination.

***Boudreaux v. Parnell*, 11,631 (La. App. 5 Cir. 4/10/12), 2012 WL 1192165** – Patient filed medical malpractice action against surgeon in connection with permanent and disabling radial nerve palsy that developed in patient's right arm

after shoulder replacement surgery. In this case, plaintiff failed to carry her burden of proof regarding causation. The Fifth Circuit stated that the fact there is an injury during or following medical care or treatment is not by itself an indication of substandard care that either the physician or hospital provided. The mere fact of an injury or accident does not raise a presumption or inference of negligence on the part of the healthcare provider. The plaintiff must establish a causal connection between the physician's alleged negligence and the plaintiff's injuries resulting therefrom.

H. Expert Testimony

***Davis v. Women & Children's Hospital Lake Charles*, 11,0318 (La. App. 3 Cir. 10/5/11), 74 So.3d 291**— Patient sued doctor and hospital after sponge was left in her after a lap band procedure. The Third Circuit held that expert testimony was not necessary to establish that the doctor was negligent in leaving the sponge in her.

***Howard v. Vincent*, 11,0912 (La. App. 4 Cir. 3/28/12), 88 So. 3d 1219** – Plaintiff appealed district court's holding that plaintiff's expert was not qualified to testify as a specialist. The Fourth Circuit reversed and stated that where the alleged acts of negligence raise issues peculiar to the particular specialty involved, then only those qualified in the specialty may offer evidence of the applicable standard of care. However, it is a specialist's knowledge of the requisite subject matter, rather than the specialty within which the specialist practices, which determines whether a specialist may testify as to the degree of care, which should be exercised. A particular specialist's knowledge of the subject matter on which he is to offer testimony is to be determined on a case-by-case basis.

***Benjamin v. Zeichner*, 11,1524 (La.App. 3 Cir. 6/27/12), 2012 WL 2400630** – The trial court found that a doctor was not qualified to testify as to the standard of care of a general surgeon because plaintiffs failed to prove under La. Rev. Stat. Ann. § 9:2794(D)(1)(d) that the doctor graduated from an accredited medical school. The doctor was already actively involved in the proceedings of the case as an expert witness prior to surrendering his licenses. Therefore, many, if not all, of the conclusions the doctor reached concerning defendant's potential negligence, came when he was clearly qualified under La. Rev. Stat. Ann. § 9:2794(D)(1) as an expert witness. La. Rev. Stat. Ann. § 9:2794(D)(1)(d) did not specifically require that the prospective expert be licensed at the time of his testimony. The court found that it was reasonable to assume, considering the lack of a specific time period referenced in § 9:2794(D)(1)(d), that a physician was qualified to testify as an expert if he was licensed at the time the claim arose. Therefore, the trial court erred in disqualifying the doctor from testifying in the case.

Harper v. Minor, 46,871 (La. App. 2 Cir. 2/1/12), 86 So. 3d 690 – Patient’s expert in this case was improperly excluded from testifying as to the standard of care expected of a radiologist as to a biopsy procedure. The court stated that it is specialist’s knowledge of the requisite subject matter, rather than the specialty or subspecialty within which the specialist practices, that determines whether a specialist may testify as to the degree of care which should be exercised. A particular specialist’s knowledge of the subject matter on which he is to offer expert testimony should be determined on a case by case basis. The proffered expert was an expert in reading the films and determining the correct placement of the hook wire.

Wansley ex rel. Wansley v. ABC Ins. Co., Inc., 11,0592 (La. App. 4 Cir. 11/16/11), 81 So. 3d 725 – Court granted hospitals motion for summary judgment because of the lack of an expert opinion establishing the standard of care owed by the hospital, and that the hospital breached the standard of care. The lack of expert testimony precluded the Wansleys from establishing that the hospital’s actions caused their son to sustain injuries and to prove damages thereof.

Knight v. Swiger, 11,0269 (La. App. 1 Cir. 9/14/11), 2011 WL 4433574 (Not Designated for Publication) – Plaintiff was a patient of defendant during her pregnancy. She had an extensive and complicated medical history and had suffered three miscarriages prior to this pregnancy. Defendant delivered plaintiff’s baby and it was later determined that the baby suffered from non-immune hydrops fetalis, a severe medical condition characterized by birth defects, chromosomal abnormalities, and liver disease. Plaintiff filed medical malpractice action. Defendant’s motion for summary judgment was granted. Plaintiff appealed and asserted that while expert testimony is generally required to establish the applicable standard of care and breach thereof, since this was a clear case of negligence, an expert witness was not needed. The court stated that an expert witness is generally necessary as a matter of law to meet the burden of proof in a medical malpractice action. This general requirement is especially apt when the defendant has filed a motion for summary judgment supported by expert opinion evidence that the treatment met the applicable standard of care. Plaintiff asserted that it is patently obvious that this is a case where an unnecessary delay in treatment constituted medical malpractice. After thorough review of the record, the court concluded that the circumstances of this case did not fall within the category of exceptions to the general rule requiring expert medical testimony to establish the particular medical standard of care and breach of that standard of care. There was no evidence in the record the doctor violated any standard of care or that any negligent act or omission on his part caused or contributed to the medical condition. After the doctor established his burden of proof on his motion for summary judgment, it was incumbent upon the plaintiff to produce factual support in the form of expert testimony sufficient to establish that she would be able to satisfy her evidentiary burden of proof at

trial of these issues. She failed to do so, and therefore summary judgment was appropriate.

I. Prescription/Peremption

***Turner v. Willis Knighton Medical Center*, 46,988 (La. App. 2 Cir. 2/29/12), 87 So. 3d 209** – Patient's wife brought medical malpractice action against hospital and physicians arising out of patient's death following kidney transplant. After death, she filed for a medical review panel. One-year statute of limitations applicable to a patient's survivor's medical malpractice claim, ran from the date she received the Dismissal Letter, stating that her request for a medical review panel would be dismissed if she did not appoint an attorney chairman within one year from the date that she filed the complaint. Date of limitations did not run from the date the time for appointing an attorney chairman for a medical review panel expired. Therefore, the claim had not prescribed. There was no inherent conflict or repetition resulting from the nine-month letter and the dissolution notice set forth in the statute, as both served differing purposes.

***Wherland v. Fastabend*, 11,903 (La. App. 3 Cir. 2/22/12), 85 So. 3d 237** – Because a medical malpractice suit was filed more than four years from the last contact with the doctor's office, the claims had prescribed on the face of the petition. Although claimants timely requested a medical review panel pursuant to statute, they did not timely file suit after the 90-day suspensive period ended, and therefore prescription began to run again.

***Horton v. Sanders*, 11,0878 (La. App. 1 Cir. 2/10/12), 2012 WL 601891 (Not Designated for Publication)** – Plaintiff filed suit against a doctor and hospital. She asserted that the timely filing of her civil suit against the defendant hospital, an alleged joint and solidary obligor and/or joint tortfeasor, interrupted prescription as to her claims against the doctor. The specific provision of the LMMA regarding the suspension of prescription against joint and solidary obligors and joint tortfeasors applies to the exclusion of the general codal articles on interruption of prescription against joint and solidary obligors and joint tortfeasors. Therefore, the civil suit filed against the defendant hospital did not interrupt prescription as to the claim against the doctor.

***Duncan v. Querens*, 11,289 (La. App. 5 Cir. 12/28/11), 82 So. 3d 537** – Plaintiff challenged an order granting defendant's exception of prescription in her medical malpractice suit. The petition had prescribed on its face. She had to file her petition by May 7, 2010, but did so on May 19, 2010. She failed to file suit within the 90 day period after she received the medical review panel opinion. Since the request for the medical review panel was filed exactly one year after discovery of the alleged malpractice, plaintiff had no time remaining once the suspension of prescription ended.

***Patin v. State*, 11,290 (La. App. 3 Cir. 10/5/11), 74 So. 3d 1234** – Patient appealed a judgment that granted an exception of prescription in favor of State of Louisiana through a state university medical provider in her medical malpractice action. The appellate court found, inter alia, that because the patient did not allege the date she discovered that she was the victim of a tort or submit any evidence to allow a determination of when she should have discovered the facts on which to base her medical malpractice cause of action, as required by La. Rev. Stat. Ann. § 9:5628(A), the medical center's exception of prescription was properly sustained.

J. Negligent Supervision

***Talbert v. Evans*, 11,1096 (La.App. 4 Cir. 3/7/12), 88 So.3d 673** – John Lee Talbert presented as a new patient at the Louisiana Avenue Medical Center, Inc. (LAMC) with complaints of recurring headaches for three days. During his visit to LAMC, Mr. Talbert was seen and exclusively treated by a physician's assistant. Mr. Talbert told her that he had been experiencing headaches that lasted for approximately five minutes for several days. A number of diagnostic tests were performed on Mr. Talbert and an EKG was ordered. However, the physician's assistant failed to chart the results of the tests and the EKG was not performed because the EKG machine had run out of tracing paper. From her examination of Mr. Talbert, she concluded that he suffered from migraine headaches. He was sent home with a prescription for Zomig. Within thirty minutes of taking the Zomig, Mr. Talbert began to experience nausea, weakness and slurred speech. Mr. Talbert was transported by ambulance to Memorial Medical Center. It was discovered that he had had a reaction to Codeine. After his headache decreased, Mr. Talbert was discharged later that day with a new prescription for Fiorcet. Mr. Talbert again returned to his home. However, his condition worsened to the point where he could no longer sit up and his speech was impaired. He also complained of abdominal pain and shortness of breath. He was then taken to Charity Hospital. An EKG was run and it was found to be abnormal. It showed a pattern of sinus tachycardia, right bundle branch block, anterior infarct of undetermined age, and possible infarct of undetermined age. Mr. Talbert died at 3:10 a.m. the following morning. The cause of death was acute myocardial infarct due to atherosclerotic coronary artery disease. The patient's adult children filed a medical malpractice suit. The appellate court ruled that there was no error in the trial court's finding that the acts constituted medical malpractice. The physician's assistant (PA) failed to perform an adequate assessment of the patient, and the physician was the sole supervising physician of the PA. Also, the physician breached the standard of care by allowing his PAs access to his unlocked medication sample closet and pre-signing blank prescription sheets.

K. Non-Delegable Duty

***Davis v. Women & Children's Hospital Lake Charles*, 11,0318 (La. App. 3 Cir. 10/5/11), 74 So.3d 291** – Patient sued doctor and hospital after sponge was left in her after a lap band procedure. In addition to finding expert testimony unnecessary, the court also found that a doctor cannot delegate his obligation to someone else to count the sponges used in a procedure that he performed.

L. Hospital Liability for Peer Review

***Granger v. Christus Health Center Louisiana*, 11,85 (La. App. 3 Cir. 7/20/12), 2012 WL 2946644** – The peer review action taken by the hospital in the doctor's case was not without malice and was not taken in a reasonable belief that its action was warranted by the facts known to it. Nor, did it take its action in the reasonable belief that it was in furtherance of quality health care. Also, the hospital failed to substantially comply with its own bylaws in the peer review proceeding. Thus, the hospital was not entitled to immunity under either the Health Care Quality Immunity Act, 42 U.S.C.S. § 11112 et seq., or La. Rev. Stat. Ann. § 13:3715.3.

III. Attorney Malpractice

A. Continuous Representation Rule

***Jenkins v. Starns*, 11-1170 (La. 1/24/12), 85 So. 3d 612** – A legal malpractice action was brought against an attorney who had represented Laurie Jenkins in a breach of contract action. The attorney mistakenly relied on an informal agreement for an extension of time to file responsive pleadings, and a default judgment was entered against the client. The peremptive period for the client's legal malpractice action began to run when the client knew or should have known of the existence of facts that would have enabled her to state a cause of action for legal malpractice. The client had constructive knowledge of facts sufficient to state a cause of action against the attorney in January 2007, when she received notice of the default judgment against her and when the attorney advised her that a mistake had been made. The client failed to file the malpractice action within one year of the discovery of the injury. The time periods in § 9:5605 were peremptive and, therefore, could not be renounced, interrupted, or suspended by the continuous representation rule. Consequently, the malpractice action was untimely and the continuous representation rule should not have been applied in this case. Therefore, the malpractice action was dismissed.

***Smart v. Vazquez*, 11-1228 (La. 4/13/12), 85 So. 3d 686** – Upon writs to the Supreme Court, this case was remanded to the trial court for reconsideration after the decision in *Jenkins v. Starns*.

B. Date of Accrual

***Scranton v. Ashley Ann Energy*, 46, 984 (La.App. 2 Cir. 4/11/12), 2012 WL 1193733** – Because clients did not discover attorney’s alleged malpractice in drafting unenforceable mineral lease agreements was the reason why they had not received a bonus payment from a lessee, peremption did not begin to run until they hired new attorneys. They did not discover that their attorney’s recordation of the agreements had caused damage, consisting of delay in being able to secure another lease, until their new counsel attempted to secure another lease and informed them of the impediment.

***Guy v. Brown*, 11, 0099 (La. App. 4 Cir. 6/23/10), 67 So. 3d 704** – Former clients brought legal malpractice action against attorney and law firm, alleging that attorney and law firm negligently failed to file a wrongful death action on their behalf, causing them to lose all rights to recover damages they sustained from their father's death. Attorney and law firm filed exceptions of no cause of action and prematurity, and the district court granted exception of no cause of action. Former clients appealed and the court of appeal held that underlying malpractice-based wrongful death claim prescribed before clients sought to file. Because the underlying claim had prescribed before the attorney’s representation had begun, the defendant could not be held liable.

C. Damages

***Jenkins v. Washington and Wells, L.L.C.*, 46,825 (La. App. 2 Cir. 1/25/12), 86 So. 3d 666** –Plaintiffs brought legal malpractice action, questioning the attorney’s handling of the appeal of their medical malpractice action against a medical center. The plaintiff’s brought claims for emotional stress and anguish, independent of the loss of their medical malpractice claim. They contended that clients can recover damages against former attorneys for the emotional distress caused to them by negligence. They argued that when their attorney advised them of his failure, they suffered real and substantial mental anguish at having lost the opportunity or chance to prevail in their case. The Second Circuit stated that in order to recover mental distress damages where the victims suffered no physical injury, the plaintiff’s must show an especial likelihood of genuine and serious mental distress resulting from conduct directed at them. Also, to assert a cause of action for negligent infliction of emotional distress, there must be proof that the defendant violated a legal duty owed to the plaintiffs, who must bear the heavy burden of proving outrageous conduct by the defendant. In this case, attorney’s negligence in filing writ application a day late did not constitute outrageous conduct. Furthermore, plaintiffs did not show that they suffered genuine and serious mental distress, caused by the defendant’s negligent conduct. Also, the defendant immediately told plaintiffs about his error in filing their writ application and was honest with them about

what had happened. Because of these reasons there were no genuine material issues of fact and summary judgment was properly granted.

D. Clean Hands Doctrine

***Cole v. Mitchell*, 46,546 (La. App. 2 Cir. 9/21/11), 73 So. 3d 452** – Former client brought action against attorney and attorney's insurer for legal malpractice, based on assertion that attorney did not advise him against self-dealing while acting as foundation trustee. If attorney had advised him against self-dealing, he would have never transferred property. The Second Circuit discussed the common law doctrine of *in pari delicto*, a corollary of the “unclean hands” doctrine. It stated that it is a mechanism by which a plaintiff is precluded from recovery as a result of plaintiff's own participation in the tortious conduct. Although plaintiff's damages result from his criminal charges and plea, he was nonetheless estopped from recovering damages as a result of his own conduct.

E. Necessity of Appeal

***MB Industries, L.L.C. v. CNA Insurance Company*, 11-0303 (La. 10/25/11), 74 So. 3d 1173** — Client brought legal malpractice action against two attorneys alleging client lost underlying lawsuit on its breach of non-competition agreement claims against former employees due to attorneys' negligence. The Supreme Court granted certiorari. The court held that as a matter of first impression, a party does not waive its right to file a legal malpractice suit by not filing an appeal of an underlying judgment unless it is determined a reasonably prudent party would have filed an appeal. Also, the client did not waive right to file a legal malpractice claim by not filing an appeal of the underlying judgment.

F. Actionable Legal Malpractice

***Leonard v. Reeves*, 11,1009 (La. App. 1 Cir. 1/12/12), 82 So. 3d 1250** – Former client brought legal malpractice action against attorney who represented him in post-divorce litigation involving a default judgment against him and two consent judgments concerning his child support obligations. The First Circuit held that proof of violation of an ethical rule by an attorney, standing alone, does not constitute actionable legal malpractice per se or proof of factual causation, although the rules of professional conduct will usually be relevant in defining the legal standard of care. In determining whether incorrect advice rises to actionable legal malpractice, the question is not whether the advice was given, but whether the advice given was the proper exercise of skill and professional judgment under the conditions existing at the time advice was given. An attorney is not required to give perfect advice in every instance.

G. Venue

***Chumley v. White*, 46,479 (La. App. 2 Cir. 11/9/11), 80 So. 3d 39** —Venue in a legal malpractice action was proper under La. Code Civ. Proc. Ann. art. 74 in the parish where the attorney allegedly erred in arguing a summary judgment motion in open court, resulting in the clients losing the motion, although the attorney's domicile and law practice were in another parish, and the attorney claimed to have made all decisions regarding his argument in his law office. If venue was proper in both parishes, then the choice of where to file belonged to the clients. Therefore, the Second Circuit ruled that venue in an attorney malpractice action may be where the wrongful attorney conduct occurred.

IV. Constitutional Torts— *Bivens* Claim for Denial for Medical Treatment

***Minnecci v. Pollard*, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012)** – Respondent prisoner in a privately operated federal prison brought an action in federal court against petitioner prison employees alleging that the employees deprived the prisoner of adequate medical care. Upon the grant of a writ of certiorari, the employees appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit which held that the prisoner could pursue an implied right of action under the Eighth Amendment. The employees contended that creating an implied action under the Eighth Amendment was not warranted in view of existing state law remedies. The prisoner argued that federal law should control based on the vagaries of different states' laws, and that state-law remedies did not provide protection based on federal constitutional rights. The U.S. Supreme Court held that no new federal remedy could be implied since state tort law authorized adequate alternative damages actions, providing both significant deterrence and compensation. The prisoner's claim focused on a kind of conduct that typically fell within the scope of traditional state tort law and, in the case of the private rather than government employees, state tort law provided an alternative, existing process capable of protecting the constitutional interests at stake. Further, it appeared that all states provided actions for a claim such as that of the prisoner, the fact that a state law might prove less generous than an implied federal action did not render the state process inadequate, and state tort law and a potential implied federal remedy were not required to be perfectly congruent.

V. Slip and Fall

A. Vessels

***Lemelle v. St. Charles Gaming Company, Inc.*, 11,255 (La. App. 3 Cir. 1/14/12), 2012 WL 130351** –Patron sustained injury when he fell on a flight of stairs in a riverboat casino. He was intoxicated at the time of the accident and the riverboat was moored dockside. He brought an action against the casino alleging negligence in its service of alcohol to patrons. He sought damages

under the general maritime laws of the United States, asserting that the application of maritime law preempted the application of La. R.S. 9:2800.1, which limits liability for loss connected with the service of alcoholic beverages. St. Charles responded asserting that the riverboat was not a vessel for maritime purposes. The Third Circuit stated in this case that a party asserting admiralty tort jurisdiction must establish that the incident occurred on navigable waters, and that it had a maritime nexus. In order to establish the location component, a party must demonstrate that the tort occurred on navigable waters or that an injury suffered on land was caused by a vessel on navigable waters. The Third Circuit held that riverboat was not a vessel for purposes of invoking federal admiralty jurisdiction. The riverboat was practically incapable of transportation or movement, had been affixed in its dockside location for over ten years by lines and cables, and the Coast Guard no longer inspected it.

B. Merchants

***Kelly-Williams v. AT&T Mobility, L.L.C.*, 11-1179 (La. App. 3 Cir. 2/1/12), 90 So. 3d 1071** – Child was injured in a slip and fall case after being struck by a falling advertisement sign in a store. The trial court provided a jury charge pursuant to La. R.S. 9:2800.6. It did not include any interrogatory on the jury verdict form regarding general negligence. Third Circuit held that this was not error. The failure of store employee to ballast advertisement sign with sand, as instructions on the sign directed, did not require the inclusion in verdict form of an interrogatory on general negligence, in addition to the interrogatories under merchant liability statute. If the absence of sand caused the sign to be unreasonably dangerous, the issue was covered by merchant liability interrogatories, whereas if absence of sand did not cause sign to be unreasonably dangerous, then failure to add sand did not constitute negligence.

C. Public Entity

***Chambers v. Village of Moreauville*, 11-898 (La. 1/24/12), 85 So. 3d 593** – Pedestrian tripped on a one-and-one-half inch deviation in sidewalk and brought a premises liability action against the Village of Moreauville. The Supreme Court of Louisiana stated that a municipality is not an insurer of the safety of the pedestrians traversing its sidewalks. Instead, it is only liable for conditions that create an unreasonable risk of harm. Under the risk-utility balancing test, the size of a deviation in a public sidewalk is a necessary consideration in determining the risk of harm created by a sidewalk defect. In the premises liability action, the trial court failed to consider the cost of repair, an indispensable component of the risk-utility balancing test. This constituted legal error and was therefore reviewed de novo. Under the risk-utility balancing test, one-and-one-half inch deviation in well traveled, public sidewalk did not present unreasonable risk of harm such that village could be held liable in premises liability action for injuries pedestrian sustained when she tripped on the deviation. Utility of the sidewalk was high, as was the cost to correct

similar sidewalk deviations in the village. The deviation was readily observable and there had not been a reported complaint about it in the approximately forty years it had been in existence. Therefore, it did not present an unreasonable risk of harm.

***Hoffman v. Jefferson Parish Hosp. Services Dist. No. 2*, 11, 776 (La. App. 5 Cir. 4/10/12), 87 So. 3d 370** – Visitor to hospital filed action against hospital arising from slip and fall in a patient break room at the hospital, which caused visitor to undergo four knee surgeries. Applying *Blount v East Jefferson General Hospital*, 887 So 2d 535 (5th Cir. 2004), the Fifth Circuit affirmed that R.S. 9:2800, and not R.S. 9:2800.6, applies to a claim for a slip and fall in a public entity and thus the claimant must prove the facility’s actual or constructive notice of the liquid substance found on the floor.

VI. Animals – Strict Liability

***St. Julien v. Landry*, 12,100 (La. App. 3 Cir. 6/20/12), 2012 WL 2434759** – Property owner filed a complaint against her neighbor after a dog from neighbor's property entered her property and knocked her down. The dog had allegedly been tied with a leash in the neighbor's yard. Plaintiff sued Defendant alleging that the dog was either owned by Defendant or by others present at her house and defendant's fault or negligence was the proximate cause of her injuries. District court granted summary judgment, and property owner appealed. The Third Circuit found that the trial court erred as a matter of law in concluding that if defendant was not the owner of the dog she could bear no liability to plaintiff for her injuries caused by a dog, kept on defendant's property and allowed to go onto plaintiff's property causing her injury. Plaintiff alleged facts, and defendant was deemed to have admitted facts, which established multiple possibilities for defendant's liability to plaintiff for her alleged injuries, including liability pursuant to La. Civ. Code Ann. arts. 2317 and 2317.1.

***Marie v. American Alternative Insurance Company*, 11,832 (La. App. 5 Cir. 3/27/12), 2012 WL 1020777** – In this case, the Fifth Circuit absolved a hospice from strict liability stemming from a patient bitten by a dog brought on to the premises by a visitor to another patient. It held that hospice and its liability insurer could not be strictly liable for visitor’s injuries from dog bite by dog who was owned by hospice resident’s daughter, who brought dog in to visit the resident. The strict liability of an animal owner cannot be imputed to a non-owner. The dog’s owner, and not hospice where owner was visiting resident had “custody” and control over dog and thus, hospice and its liability insurer were not liable for injuries sustained by visitor from dog bite. Although hospice had authority to have the dog removed from facility if it became disruptive, owner had right of direction and control over dog, owner was holding dog in her lap when it bit the visitor, owner and resident derived benefit from having dog at the facility, in view of resident’s close relationship with the dog and his

enjoyment at seeing the dog. Court also held that dog's presence at the hospice did not create an unreasonable risk of harm to visitor when considering the likelihood and magnitude of harm versus utility of having dog on premises, as grounds for imposing liability on hospice for injuries to visitor from the dog bites. The hospice had policy to allow pets, subject to screening for aggression and disruption, because of their therapeutic effect on residents. The dog was small and the hospice would have likely allowed the dog on premises had he been screened. In view of owner's testimony that dog was friendly and allowed strangers to pet him and visitor who suffered the dog bite at issue had experience with handling dogs and admitted that the dog did not present signs of danger.

***Williams v. Galofaro*, 11,0487 (La. App. 1 Cir. 11/9/11), 79 So. 3d 1068** – Housekeeper and her husband brought action against homeowners and their insurer after housekeeper tripped over family dog and sustained injuries to her arm and shoulder. Housekeeper had been instructed by the defendants to either spank or put the dog in the guest bedroom if he was ever bothering her while she was trying to work. Therefore, she was well aware of the puppy's playful tendencies prior to the accident and had the option to close the door to the room she was working in to keep the dog from interfering with her work and she failed to do so. The court did not believe, after weighing all social, economic, moral, and other considerations, that the behavior of Buddy in accidentally getting in the way or underfoot is an unreasonable risk of harm. Further, it did not appear that the likelihood of injury resulting from such puppy-like behavior multiplied by the gravity of the harm threatened by it would outweigh the utility of keeping a dog as a pet in a home where it may be displayed and exposed to visiting relatives and guests.

VII. Art. 667-669 – Obligations of Neighborhood

***Teekell v. Chesapeake Operating, Inc.*, 2012 WL 2049922 (W.D. La. June 6, 2012)** – Suit arose out of the drilling operations conducted by Chesapeake Operating, Inc. The plaintiffs were owners of immovable property located in one of the sections drilling operations were being conducted on. The two wells at issue are on adjacent property owned by Crow Horizons Company. The plaintiffs' claimed that the water they obtain through water wells on their property has been adversely affected by the aforementioned drilling operations. Specifically, they claimed that, "defendants have discharged and/or released salt water, natural gas, hydrogen sulfide gas, and/or other pollutants into the ground, air, surface water, ground water, and aquifers." Plaintiffs contended that they had a cause of action under Articles 667 and 668 of the Louisiana Civil Code. These articles state that a landowner may not make any work on his property which may deprive his neighbor of the liberty of enjoying his own property, or which may cause damage to his neighbor." The Teekells argued that this liability attaches to any person acting on the landowner's behalf. At issue were drilling operations that were all part of a unit well. The units were all

created by the Commissioner of Conservation and drilling was commenced by a permit obtained through the Commissioner. Unitization takes place pursuant to a permit of the Commissioner of Conservation and not the consent of the landowner. A landowner cannot prevent the establishment of a unit and, in fact, a unit can be established directly against the wishes of a landowner. A landowner in a unit does not have the right to choose the operator of the unit or the location of the drilling site. Moreover, a landowner is not allowed to keep all of the production from drilling on his property. Rather, he must share the production with the others in his unit. Therefore, the plaintiffs' claims were not proper. A unit operator is not controlled or selected by the landowner or his lessees or assignees. The unit, the unit operator, and the drill site are all chosen by the Commissioner of Conservation and can be chosen without the consent of the landowner or his lessees and assigns.

***Jones v. Capitol Enterprises, Inc.*, 11,0956 (La. App. 4 Cir. 5/9/12), 89 So. 3d 474** – The relevant factors that a court must consider in making the factual finding of whether a nuisance has been established under La. C.C. art. 667 are as follows: (a) *The place where the activity occurs*. Here one considers the neighborhood, zoning and planning standards, environmental goals. That which would be unreasonable on St. Charles Avenue might well pass muster in the marshes of Terrebonne Parish; (b) *The importance of the activity to the community as a whole*. This is of great importance in determining whether an activity should be banned or merely regulated, or condemned to pay damages for continuing to operate as well as for past damages; (c) *The possibility, feasibility and cost of measures which would eliminate or reduce the harm to neighbors*; (d) *The sensitivity of the one complaining*. Obviously, in the absence of malice, the courts cannot be expected to let the matter be governed by the most sensitive neighbor. Applying the above factors the particular circumstances constituted a continuing nuisance. The water tower abutted a residential neighbor. Defendants had a combined duty to use “utmost caution” throughout the project, and defendants breached their duty by using an 85% shroud as opposed to the mandatory 100% shroud. The defendants should have known that this deviation would result in particle emissions that would inevitably cause damage to the abutting neighborhood residents. Finally, the defendants could have prevented the resulting damages by exercising reasonable care and implementing the use of the 100% containment shroud. Therefore, the noise and dust constituted a nuisance.

VIII. Mental Distress

A. Generally

***Jones v. Centerpoint Energy Entex*, 11,0002 (La. App. 3 Cir. 5/25/11), 66 So. 3d 539** – In this case, the court found no abuse of discretion in mental anguish award. The parents suffered the temporary physical loss of their child during the initial treatment for her injuries, and in doing so lost that ability to hold and

comfort her during that period, but the societal and companionship relationship that would normally exist between a parent and child has been permanently destroyed. As a result of her injuries, their child cannot run, play outside, or even watch an outside event because of her damaged skin. Because of this, her parents will never have the chance to watch her do basic activities such as an Easter egg hunt, cheerleading, or bike riding to name a few. In fact, they cannot even sit together outside and watch others participate in those activities. Furthermore, the parents now have the added burden of working tirelessly with their daughter to assist her in overcoming her social development limitations, and continuously counseling her on how to address the thoughtless teasing of children her age. With regard to the other applicable factor, the loss of performance of material services, almost all children help around the home in some small way. Whether it is to help wash dishes, sweep and dust, or take care of one's room, a child can contribute. In this case, it is clear that she will be severely limited in her abilities to contribute even the smallest assistance to her parents. These limitations are not something that will improve in the future—in fact the overall relationship will forever be constrained by her ongoing medical needs.

B. Anguish Associated With Property Damage

***Barrios v. Safeway Insurance Company*, 11-1028 (La. App. 4 Cir. 3/21/12), 2012 WL 1000864** – Dog owners brought action against motorist for mental anguish and property damage resulting from the loss of their dog which died after being struck by motorist's vehicle. The district court awarded damages in favor of the owners and the motorist's insurer appealed. The court of appeal held that the trial court could allocate fault entirely to the motorist and that the damages award was not an abuse of discretion. An award for mental anguish resulting from property damage is permissible only when at least one of four conditions is satisfied: 1) damage by an intentional or illegal act; 2) damage by an act for which the tortfeasor will be strictly or absolutely liable; 3) damage by acts constituting a continuing nuisance; or 4) when the owner is present or nearby and suffers psychic trauma as a result. The majority observed that there is an emotional bond that sets in between some pets and their owners, and in this case there was a close family-like relationship between the husband and wife and their dog, which had been part of their lives for approximately 12 years, and the dog's loss caused the couple psychic trauma.

***Jones v. Capitol Enterprises, Inc.*, 11,0956 (La. App. 4 Cir. 5/9/12), 89 So. 3d 474** – The Fourth Circuit held in this case that evidence was sufficient for recovery of mental anguish for damages to one's property because the property was damaged by activities amounting to a continuous nuisance. In addition to a continuous nuisance, damages for mental anguish can be established in three other types of cases: when the property was damaged by an intentional or illegal act, when the property was damaged by acts giving rise to strict or absolute liability, or under circumstances where the owner was present or nearby at the

time the damage occurred and suffered psychic trauma in the nature of or similar to a physical injury as a direct result of the incident itself.

IX. Immunities

A. Recreational Use

***Richard v. Louisiana Newpack Shrimp Company, Inc.*, 11,309 (La. App. 5 Cir. 12/28/11), 82 So. 3d 541** – Pedestrian who fell and sustained serious injuries while walking on a levee walkway to reach her friend’s boat in an adjacent bayou brought action against lessee of the property, alleging claims of negligence and strict liability. Lessee moved for summary judgment, claiming immunity under the recreational use immunity statutes. The district court granted summary judgment and pedestrian appealed. The Fifth Circuit stated that levee walkway where pedestrian fell was an integral part of recreational activities and was recreational within the meaning of the use immunity statutes for the purposes of the pedestrian’s negligence suit, even if the levee was not primarily recreational in character. The walkway allowed persons the ability to reach their boats in the bayou, the pedestrian’s sole purpose of walking over lessee’s levee property was to gain access to her friends boat, and this type of action is for recreational purposes. The Fifth Circuit also stated that immunity exception for willful or malicious failure to warn against a dangerous condition did not apply. A failure to warn of a dangerous condition, within immunity exception in recreational use immunity statutes, connotes a conscious course of action. It is deemed willful or malicious when action is knowingly taken or not taken, which would likely cause injury, with conscious indifference to the consequences thereof. Lessee’s duty to discover any unreasonably dangerous condition on the property he allowed persons to use for recreational purposes, and to either correct the condition or warn potential victims of its existence, did not extend to alleged potentially dangerous condition, consisting of ruts in levee, so as to deprive lessee of immunity from pedestrian’s negligence claims because pedestrian was aware of ruts in the levee before the alleged action. Furthermore, there was no evidence that the lessee was aware of the alleged danger.

***Souza v. St. Tammany Parish*, 11,2198 (La.App. 1 Cir. 6/8/12), 2012 WL 2060873** – Plaintiff was injured when he fell off his bike while riding through a tunnel on the Tammany Trace and filed a suit against the city and parish. He alleged that while riding his bike through the tunnel, he encountered an extremely slippery roadway surface that was covered with mold, mildew, slime, or growth, which was an unreasonably dangerous condition. The city was not liable to bicyclist injured on recreational bike trail because the accident happened on land designated for a recreational purpose, bicyclist was using trail for a recreational purpose, bike riding, when accident occurred, city did not willfully or maliciously fail to warn of any allegedly dangerous condition on

trail, and there was no evidence that city had knowledge of an unreasonably dangerous condition existing on trail.

B. Sovereign

Arshad v. City of Kenner, 11-1579 (La. 1/24/12), 2011 WL 7111322 – Plaintiff family filed a negligence action against defendants, a city, a police department, the chief and certain officers and two insurers. The trial court granted the city’s request for a jury trial, finding that La. Rev. Stat. Ann. § 13:5105(D) permitted the city to waive the prohibition against jury trials on a case-by-case basis. The family members alleged that police officers falsely arrested the decedent, subjecting her to unnecessary force and battery, and improperly left her unattended in a police car where she died. The family’s petition requested trial by jury, but the family later moved to strike the jury demand. The following day, the city council enacted a resolution pursuant to § 13:5105(D), waiving the prohibition against jury trials in this specific case and filed a request for a jury trial. Court of appeals held that the resolution was a prohibited special law because it waived the prohibition against jury trials only in this single case. The Supreme Court, applying different reasoning, found the plain language of § 13:5105(D) did not permit a political subdivision to waive the prohibition against jury trials in a single case.

Bordelon v. Gravity Drainage Dist. No. 4 of Ward 3 of Calcasieu Parish, 10,1318 (La. App. 3 Cir. 10/5/11), 74 So. 3d 766 – Homeowners brought negligence action against parish drainage district and its insurer for flood damage in the wake of Hurricane Rita. The Third Circuit held that parish drainage district was not immune from claims under the Louisiana Homeland Security and Emergency Assistance and Disaster Act or pursuant to La. R.S. 29:735, emergency preparedness activities. Drainage district was not immune under the Louisiana Homeland Security and Emergency Assistance and Disaster Act because precedent established that a drainage district cannot be immune for claims based upon its alleged failure to property draft, implement, distribute, and/or review doomsday policies, adopted many years prior to a hurricane. Drainage district was not immune under La. R.S. 29:735 because the primary function of the drainage district is to provide for drainage. These districts are mandated to make adequate provision for drainage. Automating the pumps was a step the district had never considered. Despite the mandate that the district provide for adequate drainage, it failed to anticipate the contingency that when no one was available to turn on the pumps, flooding would ensue. Therefore, immunity under this statute did not attach.

X. Children – La. Civ. Code Art. 2318

LaGrone v. Neely, 10,1330 (La. App. 1 Cir. 2/11/11), 2011 WL 766689 (Not Designated for Publication) – Christopher Neely, a minor, approached David LaGrone and stuck him in the head with a glass liquor bottle, which broke upon

impact and injured LaGrone. LaGrone filed suit for damages against Neely and his parents under La. Civ. Code art. 2318. The parents contend that it was the plaintiffs burden to prove that their son was an unemancipated minor living with his parents at the time of the incident in order for them to be liable, and that the plaintiffs failed to meet this burden. Under art. 2318, parents are liable for the torts committed by their minor child who resides with them or who has been placed by them in the care of another person. Parents may be relieved from tort liability for the acts of their minor child if that child has been emancipated by marriage, judgment of full emancipation, or by judgment of limited emancipation that expressly relieves the parents of liability for damages. Thus, emancipation of a minor child would be an affirmative defense, which must be specifically pleaded (and thereafter proven) *by the defendants*. To establish his claims against parents, the burden was to sufficiently establish that at the time of the September 21, 2003 Taco Bell incident, Christopher Neely was the minor child of Luther and Sharon Neely and either that he resided with them or that he had been placed in the care of another by them. He did so by offering evidence from the criminal proceeding that he lived with his parents and listed their home as his address.

Miller v. St. Tammany Parish School Board, 10,1919 (La. App. 1 Cir. 5/6/11), 2011 WL 2119286 (Not Designated for Publication) – A special education teacher brought suit against a student’s parents and their insurer for injuries stemming from an incident at school. Parent and his insurer filed a reconventional demand against the school board, claiming that they were entitled to indemnity, or in the alternative, contribution, from the school board under the provisions of La. Civ. Code art. 2318, for its negligence since the child was under the care of the school board at the time of the incident. Art. 2318 states, in pertinent part that, the father and the mother are responsible for the damage occasioned by their minor child, who resides with them or who has been placed by them under the care of other persons, *reserving to them recourse against those persons.*” The parent and insurer contended that they were entitled to indemnity or contribution because the parent had placed the child under the care of the school board. The First Circuit had already been presented with an identical issue, *White v. Naquin*, 500 So.2d 436 (La. App. 1st Cir. 1986). Citing *White*, the court concludes that it is bound by the holding and states that parent and insurer did not state a cause of action for which the law affords a remedy. Therefore, they were not entitled to indemnification from the teacher’s employer, the school board, since the teacher has received workers’ compensation benefits for the injury sued upon.

Latino v. Jones, 11-0463 (La. App. 1 Cir. 2/10/12), 91 So. 3d 335 – Plaintiffs filed suit against defendants asserting that they were vicariously liable for the acts of their minor daughter, Victoria, which caused their son extensive injuries and that required the partial removal of one of his kidneys. The main issue in this case was whether or not defendant’s homeowners insurance policy covered for injuries stemming from an accident on a motorized golf cart, the defendants

contended that it did and included them in the suit. The insurer was dismissed and the First Circuit agreed. There was an exclusion in a subsection of the policy that applied because there was vicarious liability for the acts of a minor in connection with motorized conveyance. This is statutorily provided by La. Civ. Code art. 2318. Analyzing the plain meaning of the words of the policy the golf cart driven by Victoria Jones with the permission of her parents clearly fit into the policy's exclusion clause.

XI. Products Liability

A. Pre-LPLA Claims

***Singleton v. Chevron USA, Inc.*, 835 F. Supp. 2d 144 (E.D. La. 2011)** – Painter brought action against manufacturer of paints, thinners, and other substances, asserting claims of negligence, strict liability, and under the Louisiana Products Liability Act (LPLA) for damages associated with his contraction of multiple myeloma due to alleged exposure to products containing benzene. Defendant argued that strict liability and negligence claims should be dismissed because the plaintiff's exclusive remedy was under the LPLA. Plaintiffs argued that for pre-LPLA benzene exposure, pre-LPLA law governs, removing the bar to negligence and strict liability claims. The problem in this case was not that the plaintiffs selected the wrong law temporally, but that plaintiffs' complaint did not allege which benzene exposures occurred through which products manufactured by which defendants at which times. Thus, from the face of the complaint, it was impossible for the court to discern whether plaintiff's exposure occurred before or after the date of the LPLA's enactment. However, plaintiffs could not be faulted for this lack of information. Because the motion to dismiss occurred prior to discovery, issue of whether LPLA was exclusive remedy could not be resolved on motion to dismiss.

***Wagoner v. Exxon Mobil Corp.*, 813 F. Supp. 2d 771 (E.D. La. 2011)** – Case analyzed a products liability claim pre-LPLA. The Louisiana Supreme Court has held that the LPLA altered substantive rights and is not retroactive. Therefore if exposure occurs pre-LPLA it is analyzed under that law. In order to prevail on a product liability action under pre-LPLA Louisiana law, a plaintiff must prove that the product is unreasonably dangerous to normal use. The Louisiana Supreme Court has identified four theories by which a plaintiff can show that a product is unreasonably dangerous pre-LPLA. In particular, a product is unreasonably dangerous if it has 1) a warning defect, 2) a design defect, 3) a manufacturing defect or if 4) it is unreasonably dangerous per se. A product is unreasonably dangerous if the manufacturer fails to adequately warn about a danger related to the way the product is designed. A manufacturer is required to provide an adequate warning of any danger inherent in the normal use of its product which is not within the knowledge of or obvious to the ordinary user. Thus, when the danger is known to the manufacturer and cannot justifiably be expected to be within the knowledge of users generally, the

manufacturer must take reasonable steps to warn the user. Under pre-LPLA Louisiana law, there are three possible ways in which a product can be unreasonably dangerous in design. First, a product is unreasonably dangerous in design if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. Second, a product is unreasonably dangerous in design if alternative products are available to serve the same needs or desires with less risk of harm. Third, a product is unreasonably dangerous in design if there is a feasible way to design the products with less harmful consequences. A product is unreasonably dangerous in construction or composition if at the time it leaves the control of its manufacturer it contains an unintended abnormality or condition, which makes the product more dangerous than it was designed to be. To show that a product has a flaw in its construction or composition, the plaintiff need not prove that there was any negligence on the manufacturer's part in creating or failing to discover the flaw. The inquiry is simply whether the product failed to conform to the manufacturer's own standards. A product is unreasonably dangerous per se if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. The focus of this inquiry is on the actual danger of the product regardless of whether the manufacturer perceived or could have perceived it. In addition, the test looks to the benefits that are “actually found to flow from the use of the product.

B. Definition of Manufacturer

Ayo v. Triplex, Inc., 457 F. App'x 382 (5th Cir. 2012) – Plaintiff must establish that the defendant was a manufacturer of a product in order to prevail on a claim under the LPLA. Court concluded in this case that defendant was not a manufacturer. Defendant Triplex cut the hose and installed the end fittings on the hose that subsequently leaked. The court stated that the plaintiffs’ expert conceded that the rupture did not arise as a result of those modifications. It is not dispositive that a number of significant structural changes were made to the hose when those changes were not linked to the product's failure. Similarly, there was no evidence here to suggest that the pressure testing caused the hose's subsequent failure. Indeed, the plaintiffs have not argued that pressure testing altered the hose or caused damage that made the hose susceptible to rupture. The simple act of testing a product after modifications does not transform a seller into a statutory “manufacturer. Further, the argument that Triplex is a manufacturer by virtue of exercising control over or influencing a characteristic of the design, construction or quality of the product that causes damage was unavailing.

C. Failure to Warn

Halverson v. Ronk, 12,85 (La. App. 5 Cir. 6/28/12), 2012 WL 2476411 – Plaintiff filed petition for damages asserting that he was injured when he fell off a ladder. At the time of the fall, he was at the home of his daughter, assisting in

the inspection of the building following Hurricane Katrina. Plaintiff followed the insurance adjustor up the roof. While the adjustor remained on the roof to take some measurements, plaintiff attempted to climb down. He got onto the ladder safely, however, as he attempted to climb down, the feet of the ladder slid out. He fell on the concrete and severely injured his right shoulder. Plaintiff filed suit against the ladder manufacturer, who filed a motion for summary judgment regarding the failure to warn claim, which was granted by the trial court. Plaintiff appealed. Plaintiff claimed that ladder manufacturer failed to provide proper and safe instructions for the use of the ladder and failed to warn of the inherently dangerous conditions of using the ladder. He argued that there was no warning that the base of the ladder should be placed on level ground before a user attempts to climb the ladder. The Fifth Circuit decided that the manufacturer did not have a duty to warn that the base of the ladder should be placed on a level surface before use. The court considered this to be a fact that a user of the ladder already knows or reasonably should have expected to know.

***Peart v. Dorel Juvenile Group, Inc.*, 456 F. App'x 446 (5th Cir. 2012) (Not Designated for Publication)** – Case involved a failure to warn claim. The court stated that the LPLA requires that a manufacturer use reasonable care in deciding whether to provide a warning for its product. The plaintiff, however, bears the burden of proving that, “but for” the inadequate warning, the accident would not have occurred. At plaintiff’s deposition, she testified that she did not read the pre-existing warning labels on the step stool. Thus, even if defendant acted unreasonably by not including a warning about the useful life of the step stool, plaintiff cannot show that defendant’s inadequate warning was the cause of her injuries, because she did not read the warnings.

***Bates v. E.D. Bullard Co.*, 11, 187 (La. App. 3 Cir. 10/5/11), 76 So. 3d 111** – Sandblaster and his wife brought action against suppliers who had sold sand to sandblaster's employer after he was diagnosed with silicosis. Plaintiffs argued that the sand manufactured or sold to his employer was unreasonably dangerous or defective because the sellers failed to warn and instruct him or employer of the hazards of the sand and failed to properly design products in that products were defective for failure to instruct and warn. The employer was a sophisticated user of sand. Therefore suppliers had no duty to warn employer or employee of the dangers associated with using sand to sandblast.

D. Learned Intermediary

***Frischhertz v. Smithkline Beecham Corp.*, 2012 WL 2952427 (E.D. La. July 19, 2012)** – Louisiana applies the “learned intermediary doctrine” to products liability claims involving prescription drugs. Under the learned intermediary doctrine, a drug manufacturer discharges its duty to consumers by providing an adequate warning to prescribing physicians. The two-prong test governing inadequate warning claims under the LPLA requires first that the plaintiff show

that the defendant failed to warn or inadequately warned the physician of a risk associated with the product that was not otherwise known to the physician. Second, the plaintiff must show that this failure to warn the physician was both a cause in fact and the proximate cause of the plaintiff's injury. That is, the plaintiff must show that but for the inadequate warning, the treating physician would not have used or prescribed the product.

E. Design Defect

***Batiste v. Brown*, 11,609 (La. App. 5 Cir. 1/24/12), 86 So. 3d 655** – Plaintiff alleged that a wrench used to tighten an electrode was defective in design. The court began its analysis by stating that in order to prevail on this claim, plaintiffs bear the burden of proving that at the time the product left its manufacturer's control there (1) existed an alternative design that was capable of preventing the damage, and (2) the likelihood that the design would cause the damage and the gravity of that damage outweighed the burden on the manufacturer to use a different design. In this case there was no way now to determine whether the tool plaintiff was using was altered after it left the manufacturer's control, or whether the normal wear and tear of use had simply worn out the tool. Therefore, the court assumed that at the time of the accident the tool remained as manufactured and was still usable. With those assumptions, the issue is thus whether there was a foreseeable likelihood that the design would cause the damage suffered by plaintiff. The court held that the damage was not foreseeable because the tool at issue was not the proper one to be used in tightening the electrode. The manufacturer could not have foreseen that someone would use the tool to do something for which it was not intended, under circumstances, which were not in compliance with OSHA regulations.

***Chamblee v. Yamaha Motor Co., Ltd.*, 2012 WL 844725 (W.D. La. Mar. 12, 2012)** – Court granted defendant's motion for summary judgment because plaintiff failed to establish a design defect. It is the plaintiff's burden to prove each elements of his claim. The defendant is not required to submit any evidence, but need only to point to the lack of evidence supporting the plaintiff's claims. In this case, plaintiff put forth no evidence in support of his design defect claim. Although defendant did not have to, it went a step further and submitted an unopposed affidavit from an expert stating with a reasonable degree of scientific certainty that the subject accident was not the result of any design defect associated with the vehicle's handling and stability characteristics. Rather, the accident was proximately caused by plaintiff operating the vehicle in an intentionally aggressive manner while under the influence of alcohol in violation of numerous on-product warning.

F. Proximate Cause

***Graham v. Hamilton*, 2012 WL 1898667 (W.D. La. May 23, 2012)**— Plaintiff sought recovery stating that an allegedly defective door was the proximate cause

of a passengers' death. The court stated that the risk of a mother not being able to rescue her child after an accident is encompassed in the scope of defendant's duty not to design a defective door. The ease of association between an allegedly defective door that opens during impact and a mother being unable to rescue her child after an accident is sufficient to satisfy proximate cause.

G. Strict Products Liability Claim

***Cargill, Inc. v. Degesch Am., Inc.*, 2012 WL 2367392 (E.D. La. June 21, 2012)** – Plaintiffs' products liability claim alleged that a fumigant used was unsafe for its intended use because of impurities and/or diphosphin present within the fumigant, and that defendants negligently failed to warn of these impurities. Plaintiffs' theory was grounded in the suggestion of one of the surveyors that this defect caused or contributed to the explosions. Courts recognize the doctrine of strict products liability as part of the federal maritime law, and generally embrace § 402 of the Restatement (Second) of Torts as the best expression of the doctrine of strict liability as it is generally applied. The Restatement provides: (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. Plaintiffs failed to state a claim under strict products liability on its face because their allegation was based solely on the opinions of a surveyor unnamed in the complaint. There was no indication of what the impurities might be, how they might have caused the explosions, the basis upon which the surveyor formed his theory, or his qualifications for so doing. There is likewise no description of diphosphine or its properties, why its presence in the fumigant is plausible, or how it might have caused the explosions. Absent these allegations, there is no plausible claim that the product was unreasonably dangerous.

H. Discovery

***Bourque v. CNH American L.L.C.*, 2011 WL 4904430 (W.D. La. Oct. 14, 2011)** – Products liability case arose from injuries sustained by the plaintiff when the tractor he was operating allegedly spewed gasoline from its fuel tank/cap onto him and ignited. He sought discovery from the company who manufactured the caps relevant to a recall, which the company opposed. Under the LPLA, one of the elements to determine whether a product is unreasonably dangerous in design is whether there existed an alternative design for the product that was capable of preventing the claimant's damage. If the information provided by the plaintiff was true, i.e. that the subject gas cap is the same as the gas cap that was the subject of the recall, there is very little question that the information is discoverable. However, even if the gas cap is of a different size as maintained by CNH, the court stated that it could not find that the

information sought could have “no possible bearing” on the claims of the plaintiff given that the same type of event, “geysering,” occurred in the same or similar model tractors, with the same or similar fuel systems at about the same period in time as the subject tractor was on the market. If there existed an alternative design that would have prevented the claimant's accident that came about through the recall/Mandatory Modification Program, it may certainly have a bearing on the plaintiff's claims, therefore it was discoverable.

I. Federal Preemption

***Hutto v. McNeil-PPC, Inc.*, 11,609 (La. App. 3 Cir. 12/7/11), 79 So. 3d 1199** – Parents brought medical malpractice and products liability claims against, respectively, hospital and manufacturer of infant acetaminophen following death of infant daughter from liver failure caused by acetaminophen toxicity. Defendants argued that the plaintiff's products liability claims asserting a failure to warn were preempted by the Food, Drug and Cosmetic Act (FDCA) and its implementing regulations, asserting the FDA has the final say with regard to warnings it can include on Infants' Tylenol®. Defendant claimed it could not modify or change the warnings on Infants' Tylenol® without FDA approval and that all attempts to make such modifications or changes had been rejected by the FDA. Defendant failed to establish by clear evidence that the FDA would not have approved a change to the drug's label. Under the changes-being-effected regulation, the manufacturer could have strengthened its label before obtaining approval from the FDA. Also, the parents carried their burden of proof on their failure to warn claims.

XII. Negligence (including comparative fault)

A. Scope of the Duty

***Nola 180 v. Treasure Chest Casino, L.L.C.*, 11,853 (La. App. 5 Cir. 3/27/12), 91 So. 3d 446** – This case presented a res nova issue for the Fifth Circuit to determine whether a remedy exists when a third party loses money at a casino through the criminal activities of another. Nola 180 alleged damages as a result of Treasure Chest's activities in the operation of its casino. It contended that casino was responsible for damages sustained when a financial officer of Nola 180 embezzled funds from the school and then used the funds in slot machines. Among its claims, Nola 180 asserted a claim against Treasure Chest for general negligence. The Fifth Circuit held that the casino did not owe a duty of care to the school to prevent the criminal acts of a third party.

***Hodges v. Taylor*, 12,107 (La. App. 3 Cir. 6/6/12), 2012 WL 2016214** – Plaintiffs were involved in a vehicular collision with defendant. They first filed suit against Taylor and then amended their petition to include the person who sold the vehicle to Taylor. Plaintiffs alleged that the seller failed its statutory duty under La. R.S. 32:862 to secure an affidavit from the buyer of a new or

used vehicle, attesting that the buyer had the appropriate insurance coverage on the vehicle. Seller filed a motion for summary judgment arguing that he had complied with his statutory duty and that his duty under La. R.S. 32:862 did not extend to third parties injured by uninsured motorists. The Third Circuit held that the duties imposed by La. R.S. 32:862 extends to third parties injured by the fault of the buyer, because these are the people the law is meant to protect. Therefore this statutory duty extends to third parties.

BL v. Caddo Parish School Board, 46,557 (La. App. 2 Cir. 9/21/11), 73 So. 3d 458, – Mother brought action against school board on behalf of her minor son. Her son suffered from learning disabilities and was in the school’s special education classes. He got off of his school bus at his regular stop, with another male student. He accompanied the other student to his home to exchange video games. He was sexually assaulted by the other student. Mother asserted that her son, due to his mental disabilities, was entitled to a heightened duty of supervision. The Second Circuit held that her son was not entitled to a heightened duty of supervision. There was no medical expert testimony that the son had mental disabilities and his special education program director stated he was in the program due to his poor performance in math and reading. He was thriving in the program and had made up three grades within two years. Based on his progress and mental capabilities exhibited at school, she believed he would no longer need nor qualify for special education anymore. The court also held that the duty owed by the school board did not extend to this sexual assault. This was because the victim and assailant had been discharged from school for the day at their regular bus stop. More importantly, the assault took place off campus.

Brodnax v. Foster, 47,079 (La. App. 2 Cir. 4/11/12), 2012 WL 1192252 – Burn victim brought personal injury action against owners of a convenience store, alleging that owners were liable for his injuries because they had sold beer to his underage friend who then accidentally set fire to him. Trial court dismissed the action and the victim appealed. Under the duty-risk analysis, the foreseeability of the unusual and reckless conduct of all participants with gasoline around a fire was remote in its association with the breach of the vendor's duty regarding the sale of alcohol to underage persons. Therefore, in this case, the risk of a burn to one man by a gasoline infused bonfire caused by another person’s recklessness during horseplay is not within the scope of the risk of the duty of a convenience store not to sell alcohol to an underage person.

B. Rescuer Doctrine

Daniels v. USAgencies Casualty Insurance Company, 11,1357 (La. App. 1 Cir. 5/3/12), 2012 WL 1564324 – Motorist witnessed a car crash into a concrete barrier. She came upon the scene and because the shoulder was too narrow for her to park completely off the roadway, she parked partially in the left lane and partially on the narrow left shoulder, so that she could render assistance as well as protect the occupants in the other vehicle, which was

disabled and vulnerable to oncoming traffic. Five to ten minutes later another driver crashed into motorist's vehicle. The passengers of this vehicle filed suit alleging a breach of duty of La. R.S. 32:141 which provides imposes a two-fold duty on drivers of vehicles stopped on a highway: (1) to remove the vehicle as soon as possible; and (2) to protect traffic until the vehicle is removed. The First Circuit held that because the driver acted on an impulse to aid an injured motorist, who was subject to the immediate danger of being hit broadside, the application of the rescuer doctrine was warranted, and there was no breach of duty by the driver.

C. Causation

***Robertson v. Doug Ashy Bldg. Materials, Inc.*, 10,1552 (La. App. 1 Cir. 10/4/11), 77 So. 3d 339** – Deceased drywall worker's wife and children brought survival and wrongful death claims against retail seller of drywall products and others, alleging that worker's mesothelioma was caused by asbestos exposure at work. Summary judgment was granted in favor of the defendants, thus plaintiffs appealed. The First Circuit engaged in a thorough analysis of causation because it is the premier hurdle faced by plaintiffs in asbestos litigation. Most importantly, it stated that the causal link between asbestos exposure and mesothelioma contraction has been demonstrated to such a high degree of probability, and at “the same time, few if any other possible causes have been identified that a universal causal relationship has been recognized.” If one is diagnosed as having mesothelioma and that person was exposed to asbestos, that exposure is recognized to be the cause of the mesothelioma.

D. Comparative Fault

***Vitrano v. Franks*, 12,183 (La. App. 3 Cir. 6/6/12), 2012 WL 2016234** – Case involved allocation of fault between two parties involved in an automobile accident. When apportioning fault, whether the conduct resulted from inadvertence or involved an awareness of the danger, how great a risk was created by the conduct, the significance of what was sought by the conduct, the capacities of the actor, whether superior or inferior and any extenuating circumstances which might require the actor to proceed in haste without proper thought, are among the factors to be considered.

XIII. Negligence Per Se

***MCI Communications Services, Inc. v. Hagan*, 11-1039 (La. 10/25/11), 74 So. 3d 1148** – Violation of Damage Prevention Law statutes regarding damage to underground cables does not result in either strict civil liability or negligence per se. Instead, the failure of an excavator to detect the presence of an underground utility as required by statute subjects the excavator to delictual liability under the theory of negligence, and any statutory violation is considered in the traditional duty-risk analysis, placing certain statutory duties

upon the excavator. Therefore, violation of a statute does not result in negligence per se.

XIV. Wrongful Death/Survival

***Boling v. Hoyt*, 11, 2249 (La. App. 1 Cir. 6/8/12), 2012 WL 2061479 (Not Designated for Publication)** – In order to recover on a wrongful death claim, a plaintiff must fall within the class of persons designated as a beneficiary under La. Civ. Code art. 2315.2. Art. 2315.2(A) delineates the classes of individuals who have a right to bring a wrongful death action as follows: (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children. (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving. (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving. Courts have no authority to judicially expand the classes of beneficiaries to which the law grants the remedy of the wrongful death and survival actions. Because of the hierarchy established in art. 2315.2 (3), suit was improperly filed. This is because the decedent's surviving brothers and sisters filed suit while decedent's mother was still alive. Under art. 2315.2, the mother was the appropriate party to bring suit.

***Barber v. Employers Insurance Company of Wausau*, 11, 0357 (La. App. 1 Cir. 6/28/12), 2012 WL 2454956** – Petition in wrongful death action was insufficient. It simply stated that, “We those beneficiaries, spouses, children, and other legal heirs join as plaintiffs in this lawsuit to assert the wrongful death action.” The petition did not state who the beneficiaries were or how the named legal representatives met the statutory requirements for a beneficiary under La. Civ. Code art. 2315.2. Therefore, their rights to bring the action were not established, either by the petition or other evidence in the record.

***Bailey ex rel. Brown v. ExxonMobil Corp.*, 11,459 (La. App. 5 Cir. 5/31/12), 2012 WL 1957561** – Plaintiffs filed this action seeking recovery of damages resulting from the wrongful deaths of their decedents as a result of their decedents' exposure to naturally occurring radioactive material and other hazardous, toxic, and carcinogenic radioactive material, including technologically enhanced radioactive material accumulated on the inside of pipes used in oil production. Defendants filed exceptions of prescription, arguing that plaintiffs' claims were prescribed on their faces because all of their decedents had died more than one year prior to filing suit. Plaintiffs asserted in their petition and argued in opposition to the exceptions of prescription that prescription on their causes of action had been suspended by the earlier filing of a putative class action suit. The Fifth Circuit held that prescription was suspended pursuant to La. Code Civ. Proc. Ann. art. 596 by the filing of an earlier class action suit involving both the decedents' then-existing personal

injury actions and the survivors' wrongful death claims. Decedents, when alive, opted out of that prior case in filing a separate personal injury only case. However, their decision to opt out could not bind their survivors as to the wrongful death actions.

***Udomeh v. Joseph*, 11,342 (La. App. 3 Cir. 10/5/11), 75 So. 3d 523** – Putative father of child born out-of-wedlock filed wrongful death suit against mother, who had killed child, hospital where mother had undergone psychiatric treatment, and Department of Social Services (DSS), which had denied putative father's request for an investigation and protection of child. Hospital and DSS filed exceptions of no right of action. The Third Circuit held that putative father had no right of action for wrongful death of child, where he failed to establish paternity within one year of child's death

XV. Prescription

A. Class Actions

***Duckworth v. Louisiana Farm Bureau Mutual Insurance Company*, 11,0837 (La. App. 4 Cir. 11/23/11), 78 So. 3d 835**—Fourth Circuit upholds the proposition that when a plaintiff files an independent suit before a determination on class certification has been made cannot benefit from the tolling of prescription applicable to putative class members under federal law. The rationale behind this rule is that the plaintiff has opted out of the class action by filing his own suit.

B. Limited Liability Company

***Robert v. Robert Management Company, L.L.C.*, 11,0406 (La. App. 4 Cir. 12/7/11), 82 So. 3d 396** – Fourth Circuit holds that La. R.S. 12:1502, a statutory provision that required that any action for damages against a member of a limited liability company (LLC) for breach of a fiduciary duty be brought within one year from the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered, but in no event more than three years from the date of the alleged act, omission, or neglect, was prescriptive, rather than preemptive.

XVI. Vicarious liability/Employer Negligence

A. Vicarious Liability

***Migliore v. Gill*, 11,407 (La. App. 5 Cir. 12/13/11), 81 So. 3d 900** – A motorcyclist and his spouse brought a tort action against a driver for damages sustained when he took evasive action to avoid collision with driver and drove motorcycle off roadway, hitting a traffic control sign. They then added a vicarious liability claim against the driver's employer because he was "on call"

at the time of the accident. The Fifth Circuit held that driver, who was employed as a pathologist, and who was “on call” on day of the accident that alleged injuries occurred at, was not within the course and scope of his employment at the time of accident. Therefore, his employer could not be held vicariously liable for his alleged tortious conduct, even though he wore a beeper and was expected to report to his place of employment within 30 minutes if called to work, where, at the time of the accident, driver was operating his own vehicle, which he personally insured, and was taking his son to his ex-wife’s house. This was a personal activity that did not benefit employer and he was never called to report to work during his “on call” shift that day. Therefore a physician’s being on call at the time of an accident does not automatically give rise to employer liability where doctor’s personal activities throughout the day were not sufficiently connected to his employment duties.

Certified Cleaning & Restoration, Inc. v. Lafayette Insurance Co., 10, 948 (La. App. 5 Cir. 6/14/11), 67 So. 3d 1277 – Cleaning service company brought action against landlord, landlord’s liability insurer, tenant, subtenant, and roofing to recover unpaid balance due for cleaning up fire damage to building allegedly caused by roofer, and subtenant cross-claimed for damages allegedly resulting from fire. The Twenty-Fourth Judicial District Court rendered judgment against roofer, landlord, and landlord’s insurer, and subtenant in the amount of \$45,992.59, and in favor of subtenant against landlord, roofer, and landlord’s liability insurer in the amount of \$90,680.48 for damages incurred as a result of fire. The court of appeal reversed, holding that roofer was an independent contractor, rather than landlord’s employee. Landlord was not vicariously liable to subtenant, or cleaning service hired by subtenant to clean up fire damage for damages caused by independent contractor. Also, the evidence was insufficient to support finding that landlord was independently negligent in its hiring of roofer. The mere fact that a contractor does not have a contractor’s license at the time of an accident is not in itself enough to make a landowner independently liable under the tort of negligent hiring.

Edmond v. Pathfinder Energy Services, Inc., 11,151 (La. App. 3 Cir. 9/21/11), 73 So. 3d 424 – Court states that there is a distinction between liability in negligence cases and cases involving vicarious liability. “Vicarious liability is imposed upon the employer without regard to its own negligence or fault; it is a consequence of the employment relationship.” Defendants in this case argued that the sexual attack perpetrated on the plaintiff was motivated by personal considerations extraneous from defendant’s interests. The court stated that this did not, in and of itself, insulate defendant from liability. The attack occurred only after the supervisor ordered plaintiff inside, where his co-employees were seemingly lying in wait. The employee was using his supervisory powers to direct Mr. Edmond to the location where the attack occurred. Thus, at a minimum, there is a question of fact whether the eventual attack was employment-rooted. It is not far-fetched to conclude that the tortious conduct committed by the supervisor in this case was reasonably incidental to

the performance of his duties, even if totally unauthorized by the employer and motivated by the employee's personal interest.

***Masanz v. Premier Nissan, L.L.C.*, 11,61 (La. App. 5 Cir. 12/13/11), 81 So. 3d 169** – The Fifth Circuit found defendant was not liable to the plaintiff under employer's vicarious liability for the acts of its employees. An employer is not vicariously liable merely because his employee commits an intentional tort on the business premises during working hours. Vicarious liability will attach in such a case only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objective. Generally speaking, an employee's conduct is within the course and scope of his employment if the conduct is of the kind he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer. In this case, it was clear that the employees were not acting in furtherance of their employer's objectives by selling a car that was not owned by the employer and from which the employer received no benefit.

***Loftus v. Kuyper*, 46,961 (La. App. 2 Cir. 3/14/12), 87 So. 3d 963** – The Walkers were interested in having a home built for them in Shreveport. They entered into a written contract with Raymond W. Davis Construction, Inc. (“RWDC”), to frame the house and to perform the carpentry work. The contract provided that RWDC was to “furnish all the labor, material, tax, and insurance” for the construction of the new residence. Leland Kuyper was one of RWDC's employees working on the home. The Walkers entered into verbal contracts with other contractors including Arkla Electric, Grand Cane Plumbing, and Danny Corley Painting. Marilyn Loftus was an employee of Corley Painting. In order to protect the finished stairs in the home from damage caused by the workers who were building the home, Kuyper tacked cut-to-size sheets of plywood to the stairs. Marilyn alleged that when she was descending the stairs while working, a sheet of plywood came loose, which caused her to fall down the stairs and become injured. The Loftuses filed suit against Kuyper, RWDC, and the Walkers, alleging that the Walkers were the general contractors on the project. Walkers filed motion for summary judgment, which was granted. The Loftuses appealed. The Second Circuit affirmed stating that vicarious liability does not apply when an independent contractor relationship exists. The distinction between employee and independent contractor status is a factual determination to be decided on a case-by-case basis. The Supreme Court of Louisiana has found the following factors to be relevant in determining whether the relationship of principal and independent contractor exists: (1) there is a valid contract between the parties; (2) the work being done is of an independent nature such that the contractor may employ nonexclusive means in accomplishing it; (3) the contract calls for specific piecework as a unit to be done according to the independent contractor's own methods, without being subject to the control and direction of the principal, except as to the result of the services to be rendered; (4) there is a specific price for the overall undertaking agreed upon; and (5) the duration of the work is for a specific time and not

subject to termination or discontinuance at the will of either side without a corresponding liability for its breach. The most important inquiry is whether the principal retained the right to control the work. When applying this test, it is not the supervision and control actually exercised that is significant; the important question is whether, from the nature of the relationship, the right to do so exists.

Nizzo v. Wallace, 11,467 (La. App. 5 Cir. 12/28/11), 83 So. 3d 161 – Case arose out of an altercation between two nurses employed by the same company. One nurse struck the other, allegedly injuring her. She filed suit and subsequently amended her petition adding their employer as a defendant alleging that the incident happened while in the course and scope of employment therefore it was liable to her under the doctrine of respondeat superior. Plaintiff also brought her employer’s insurance agency into the suit. Plaintiff subsequently settled with employer and insurance agency. She signed a release against all claims against these two parties, but it specified that she did not release her claims against the other employee. Case addressed the legal effect of La. Civ. Code art. 2320 on a victim’s tort claims against an employee who was acting within the course and scope of employment, where the victim has settled fully with the employer and reserved all rights to proceed against the employee individually. This issue was res nova before the court. By releasing employer from all liability, plaintiff had effectively released other employee’s rights under La. Civ. Code art. 2320 and La. R.S. 9:3921 to have her employer be made answerable for the damages occasioned by its employee. Therefore, employee’s right to seek indemnity and reimbursement from employer of any damages over and above the total amount of the settlement received that employee may be individually found liable for resulting from the altercation in question, has effectively and for all practical purposes been released as a result of the plaintiff’s execution of her full release of employer.

XVII. Intentional Torts

A. Trespass

MCI Communications Services, Inc. v. Hagan, 11-1039 (La. 10/25/11), 74 So. 3d 1148–Telecommunications provider brought suit against landowner and backhoe operator for severing its underground cable. The Louisiana Supreme Court accepted a certified question presented to it: “Is the proposed jury instruction in this case, which states that ‘[a] Defendant may be held liable for an inadvertent trespass resulting from an intentional act,’ a correct statement of Louisiana law when the trespass at issue is the severing of an underground cable located on property owned by one of the alleged trespass[e]rs, and the property is not subject to a servitude by the owners of the underground cable but only to the contractual right to keep it, as an existing cable, underneath the property?” The court answered this question in the negative, “[a] Defendant may be held liable for an inadvertent trespass resulting from an intentional act,” is not a

correct statement of Louisiana law when the “trespass” at issue is the severing of an underground cable located on property owned by one of the alleged trespassers, and the property is not subject to a servitude by the owners of the underground cable but only to the contractual right to keep it, as an existing cable, underneath the property.

B. Defamation

***Williams v. New Orleans Ernest N. Morial Convention Center*, 11,1412 (La. App. 4 Cir. 5/11/12), 2012 WL 1662072** – City convention center filed petition from emergency writ seeking review of decision by district court as to the denial of convention center's special motion to strike the defamation and discrimination suit that a contract worker filed. The worker had filed suit after he was banned from the convention center for an alleged history of altercations with other workers there. The convention center posted a blow up size picture of the banned worker at various security checkpoints. He filed suit alleging defamation and discrimination. The Supreme Court granted writs and remanded stating that since it has recognized that there is a valid cause of action for defamation by implication or innuendo regarding the posting of photographs, under a special factual circumstance a cause of action for defamation by implication or innuendo can exist when a photograph has been posted without any written words. Therefore, this photograph was sufficient to give rise to a claim of defamation, although technically, no "defamatory statement" had been made.