Comments and Post-Deadline Extensions of Time at the GAO


On March 17, 2017, the Department of Homeland Security (DHS), U.S. Customs and Border Protection, issued two requests for proposals, Nos. HSBP1017R0022 and HSBP1017R0023, for border-wall prototypes. The first request was for design and construction of solid-concrete border-wall prototypes, and the second was for design and construction of other-than-solid-concrete border-wall prototypes. Both requests were issued under the two-phase design-build provisions of the Federal Acquisition Regulation subpart 36.3. These proposals concerned Phase I of the competition. Proposals submitted during Phase I were to be evaluated to determine whether an offeror would be allowed to participate in Phase II of the procurement.

The requests instructed potential offerors to acknowledge any issued amendments to the proposals by signing an accompanying Standard Form 30 and to submit the form with each proposal. Specifically, the requests stated, “Failure to acknowledge all Amendments issued by the Government may result in the proposal submitted in response to the solicitation being found non-responsive by the Government.” DHS issued seven amendments to the requests. In response to the requests, PennaGroup submitted timely proposals; however, PennaGroup included a single Form 30 acknowledging only the seventh amendment in both of its proposals. Consequently, DHS determined...
PennaGroup’s proposals were non-responsive and excluded PennaGroup from Phase II of the competition. Following an agency protest, PennaGroup filed two protests with the Government Accountability Office (GAO) — one protest for each proposal exclusion.

A protest is a written objection by an interested party to a solicitation or other federal agency request for bids or offers, cancellations of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. See, FAR subpart 33.101. Three fora are available to hear these challenges, and reasons for protesting in each are litigation-strategy dependent. The fora are the federal agency soliciting the requirement, the Court of Federal Claims and the GAO. The GAO adjudicates protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56. The GAO hears the majority of reported protests, which is likely due to two unique characteristics of a GAO protest — the 100-day decision and the CICA automatic statutory-stay-of-contract award. See, 31 U.S.C. §§ 3553(c)-(d); FAR subparts 33.104(b)-(c), (f).

The Filings

After receiving PennaGroup’s two protests, the GAO issued its standard acknowledgment notice that, among other things, set the due date for DHS’s Agency Report for both protests on July 26, 2017. That report contains the agency’s legal memo in opposition to the protest grounds, the contracting officer’s statement in opposition to the protest grounds and documents relevant to the protest grounds. Further, the GAO advised PennaGroup, as it normally does, that its comments in response to the Agency Report were due shortly thereafter. Specifically, the GAO expressly warned that “[w]ritten comments must be received in [the GAO’s office] within 10 calendar days of [PennaGroup’s] receipt of the Agency Report — otherwise, [the GAO] will dismiss [PennaGroup’s] protest.” (Emphasis in original.)

On July 26, 2017, DHS filed its reports and PennaGroup acknowledged its receipt of the reports on the same day. That meant, barring any granted requests for extensions, PennaGroup’s comments were due to the GAO by close of business on Aug. 7, 2017. PennaGroup did not file any comments with the GAO by close of business on Aug. 7, 2017. On Aug. 8, 2017, PennaGroup acknowledged that its comments were due to the GAO by close of business, as the GAO cannot grant post-deadline extensions of time and subsequently dismissed the protests.

In reaching its decision, the GAO referred to its long-standing position that “[b]id protests are serious matters which require effective and equitable procedural standards to assure both that parties will have a fair opportunity to present their cases and that protests can be resolved in a reasonably speedy manner.” See, Reynolds Bros. Lumber & Logging Co.-Recon., B-234740.2, May 16, 1989, 1989 CPD ¶ 468 at 2-3. The GAO further noted that its bid-protest regulations require a protester to file two requests for dismissals of the protests, citing PennaGroup’s failure to file comments. In its response to the requests, PennaGroup acknowledged that its comments were not timely filed, but asserted its failure arose out of technical difficulties — an excuse not raised with the GAO on Aug. 8, 2017. Additionally, PennaGroup asserted that it did attempt to reach the GAO attorneys assigned to the protest regarding the late comments, but the GAO’s phone records indicated PennaGroup’s attorneys called on Aug. 8, 2017 — the day after comments were due — and did not leave any messages. Nonetheless, even if the GAO considered PennaGroup’s post-hoc, inconsistent reasons for missing its deadline persuasive, it did not matter as the GAO cannot grant post-deadline extensions of time and subsequently dismissed the protests.

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to file comments on an agency’s report and that generally a protester’s failure to file comments within 10 calendar days “shall” result in dismissal of the protest. See, 4 C.F.R. § 21.3(i). Lastly, the GAO reasoned that to the extent PennaGroup meant to request an extension of time, its bid-protest regulations “do not allow for post-deadline extensions” and that, unless an extension is granted prior to the deadline, a protest “will be dismissed.” Id. Therefore, because PennaGroup had an opportunity to file its comments and request an extension prior to the deadline, the GAO concluded that allowing PennaGroup to file its comments late “would be inconsistent with [the GAO’s] purpose of providing a fair opportunity for protesters to have their protests considered without unduly disrupting the procurement process.”

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Mediation in Campus Sexual-Assault Claims

Recent actions by the U.S Department of Education have sparked discussion about the use of mediation in campus sexual-assault cases. On Sept. 22, 2017, the Department rescinded two sets of Obama-era guidelines for campus sexual-assault investigations, with the stated purpose of making the campus justice system fairer in sexual-assault cases. The guidelines were replaced with new interim instructions giving schools more freedom to balance the rights of the accused while cracking down on misconduct. U.S. Secretary of Education Betsy DeVos intends to enact new rules after a period of public comment. Among the changes are new interim rules that lift the ban on the use of mediation in campus sexual-assault cases, which has caused some controversy. Stephanie Saul and Kate Taylor, “Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations,” (The New York Times, Sept. 22, 2017). www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.

In 2011, the Obama Administration issued a “Dear Colleague” letter to colleges detailing how to deal with sexual-assault complaints. The 19-page letter spoke specifically about the use of informal methods such as mediation for resolving sexual-assault issues. It stated that, although such mechanisms may be used for resolving some types of sexual-harassment complaints, “in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.” The letter also recommends that school grievance procedures clarify that mediation will not be used to resolve sexual-assault complaints. www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

The 2011 letter was then followed by a 2014 question-and-answer document further explaining how schools were to handle
complaints of campus sexual assault and other Title IX issues.

The Department of Education, under the new administration, issued a “Dear Colleague” letter on Sept. 22, 2017, informing schools that the previously mentioned statements of policy and guidance were henceforth withdrawn, and that the Department will not rely on the withdrawn documents in its enforcement of Title IX. www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

Along with the letter of withdrawal, the Department issued a “Q&A on Campus Sexual Misconduct” that addresses schools’ Title IX responsibilities concerning complaints of sexual misconduct. Question 7 of the document addresses informal resolution of complaints and states, “If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.” www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

This marks a distinct departure from the previously issued guidance that expressly denounced the use of mediation to resolve campus sexual-assault complaints.

Since the release of the new interim guidelines, advocates on both sides of the issue have spoken up about the changes allowing for the use of mediation in these disputes. As the use of informal resolution techniques would require the consent of both parties, some have applauded the Department’s decision to permit mediations, explaining that some victims did not necessarily want a full-scale investigation and trial. See, Saul & Taylor, supra. Many others have expressed concern that mediation is inappropriate, as it may allow schools to sweep sexual-assault complaints under the rug by treating sexual violence as a mere miscommunication between students. There is also fear that victims may be unfairly pressured by schools to pursue informal resolution over formal investigation. Grace Watkins, “Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution,” (Motto, Oct. 2, 2017). motto.time.com/4957837/campus-sexual-assault-mediation/.

In response to the interim policy changes, colleges around the country have begun to review their own policies regarding sexual assaults. Louisiana college and university leaders are now sifting through the new guidelines. According to the Louisiana Board of Regents, educators will decide what changes are needed in state law and policies once the new guidelines are finalized. Will Sentell, “State Colleges to Reassess Sexual Assault Policies in Wake of Federal Guideline Changes,” (The Advocate, Baton Rouge, Oct. 1, 2017). www.theadvocate.com/baton_rouge/news/education/article_8e744922-a3be-11e7-b49c-af06c705f212.html.

Amidst the controversy over the Department’s decision to withdraw the former guidelines, a group of Democratic lawmakers unveiled legislation at a press conference on Oct. 12, 2017, that would undo the changes. The legislation, called the Title IX Protection Act, would codify into law the Obama-era guidelines, as well as the Bush 2001 Guidance on Title IX. If these guidelines were to be codified, mediation would definitively be off the table for resolving sexual-assault complaints. Alanna Vagianos, “Democrats Introduce Bill That Would Turn Title IX Guidelines into Law,” (HuffPost, Oct. 12, 2017). www.huffingtonpost.com/entry/democrats-introduce-bill-that-would-make-title-ix-guidelines-law_us_59de8979e4b0f4dad73b1db28.

Although mediation is presently included as a viable option for schools to resolve campus sexual-assault claims, whether it will remain an option that American colleges and universities can effectively use is yet to be determined.

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Three Bankruptcy Cases, Same Court

Cowin v. Countrywide Home Loans (Matter of Cowin), 864 F.3d 344 (5 Cir. 2017).

In Matter of Cowin, debtor Charles Cowin filed three bankruptcy cases in the same court: two consecutive individual Chapter 11 bankruptcy cases in 2010, which were dismissed, and a Chapter 7 case in 2013.

Cowin was involved in a scheme to deprive mortgage holders of excess foreclosure proceeds by using “tax-transfer” liens. Cowin and his co-conspirators purchased properties secured by first-lien mortgages at foreclosure sales and then entered into loan agreements with two of his companies to pay the property taxes. The lender companies received tax-transfer liens against the properties in return. Cowin then immediately defaulted on the payment obligations and instructed the deed trustee to foreclose on the properties.

Under Texas law, after foreclosure, tax-transfer liens take priority and junior liens are extinguished, leaving only the excess proceeds available to junior lienholders. However, the deeds of trust Cowin drafted in connection with the loan agreements omitted language requiring the deed trustee to distribute “any amounts required by law to be paid before payment to Grantor.” Therefore, after foreclosure, the trustee paid the private lender’s tax-transfer liens in full, leaving all excess funds to Cowin.

Two adversary proceedings were initiated by the mortgage lenders, asserting damages incurred in connection with the scheme and further asserting that those damages were not dischargeable under 11 U.S.C. §523(a)(4), which exempts from discharge any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”

The bankruptcy court found that Cowin had committed larceny, intended to divert the excess proceeds from junior lienholders holding pre-existing mortgages on the properties. In both proceedings, the court found that the damages were nondischargeable debts. The district court affirmed.

On appeal, Cowin argued that the bankruptcy court erred by imputing the intent of his co-conspirators to him in determining nondischargeability. The 5th Circuit rejected this argument, finding that the evidence of Cowin’s individual conduct described above was sufficient to justify nondischargeability. However, regardless of Cowin’s own conduct, the conduct and intent of a debtor’s co-conspirators alone is sufficient to support nondischargeability. The statute “excepts from discharge debts ‘for . . . larceny.’” The character of the debt, not the character of the debtor, determines the issue, and Cowin did not dispute that the debt arose from larceny.

The larger of the two proceedings was initiated during Cowin’s second Chapter 11 case; however, the bankruptcy court retained jurisdiction over the matter after the case was dismissed. Judgment was rendered after Cowin’s Chapter 7 case had begun, but the court emphasized in the judgment that, while the proceeding may have arisen during the Chapter 11 case, the judgment applied in the Chapter 7 case. Cowin argued that this violated the automatic stay because no timely motion to lift the stay had been filed.

The 5th Circuit held that any error was harmless because a motion to lift the stay would have been granted anyway, resulting in the same outcome. Thus, Cowin was not prejudiced by the failure to lift the automatic stay.

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Non-Competition Agreement Among LLC Members

Yorsch v. Morel, 16-0662 (La. App. 1 Cir. 7/26/17), 223 So.3d 1274.

This case considered a non-competition agreement between members of a limited liability company. Prior to 2008, certain Louisiana courts held that non-competition agreements unrelated to employment were outside the scope of the general prohibition contained in La. R.S. 23:921. See, La. Smoked Prods., Inc. v. Saviox’s Sausage & Food Prods., Inc., 96-0716 (La. 7/1/97), 696 So.2d 1373. However, the Louisiana Legislature amended La. R.S. 23:921 in 2008 to add subsection (L) to address non-competition agreements among a limited liability corporation and its individual members.

Yorsch recognized that the 2008 amendment brought non-competition agreements among members of an LLC under the purview of La. R.S. 23:921. In finding the non-competition agreement in question overly broad and unenforceable under La. R.S. 23:921, Yorsch rejected plaintiff’s contention that the plain language of the statute mandated that La. R.S. 23:921 be strictly construed regardless of the bargaining power or sophistication of the parties.

Importantly for business and corporate practitioners, entity-formation documents frequently contain provisions regarding duties of loyalty, business opportunities, non-competition and non-solicitation. Practitioners should consider the strict requirements of La. R.S. 23:921 in drafting these provisions and advising clients on entity formation and preservation.

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Custody

Lewis v. Hart, 16-0415 (La. App. 3 Cir. 5/17/17), 221 So.3d 197.

The trial court denied Lewis’ exception of res judicata regarding the mother’s re-conventional demand, in which he had alleged that her custody claims had already been decided by a prior judgment. Lewis appealed, but the court found it was a prohibited appeal from an interlocutory judgment. As the case involved the custody of an infant, however, the court converted the appeal to a supervisory writ in order to address the assignments of error raised by both parties.

Although the custody judgment rendered by the trial court was a final judgment, the trial court erred in ruling on his exception prior to addressing the mother’s motion for new trial. Further, the trial court’s order vacating its earlier judgments was improper as not made under any al-
lowable procedure. Thus, the court of appeal reinstated the initial custody judgment and remanded for the court to hear the mother’s motion for new trial.

**Ferrand v. Ferrand**, 16-0007 (La. App. 5 Cir. 8/31/16), 221 So.3d 909, *writ denied*, 16-1903 (La. 12/16/16), 211 So.3d 1164.

Vincent, a biological female who identified as male, and Paula had an extended relationship during which Paula gave birth to twins conceived through artificial insemination from a sperm donor. After the relationship dissolved, Vincent filed a petition for custody and for a court-appointed evaluator to be appointed. The trial court found that Vincent failed to show that the children would suffer substantial harm if Paula were awarded custody and denied his petition and his request for an evaluator. After an extensive review of the law and jurisprudence of the “southern states” and of Louisiana, the court of appeal found that Vincent was entitled to seek custody and was entitled to a court-appointed custody evaluation.

The court addressed the concepts of “*in loco parentis*, de facto parent, or psychological parent status in custody contests between a parent and a non-parent.” It found that while those concepts did not apply in Louisiana, they helped define the issues. The court found that since the primary aim in Louisiana custody cases is to determine and protect the best interests of the child, a custody evaluation was warranted to determine whether substantial harm would occur to the children if Paula were granted sole custody. Needless to say, the facts were complex, as was the parties’ relationship. However, the children were clearly bonded with Vincent and identified him as their father. The trial court had issued protective orders preventing Vincent from having any contact with Paula for the rest of her life and prohibiting him from contact with the children until they reached age 18. The court of appeal reversed the order regarding the children, as there were no allegations or evidence of harm by Vincent to the children.

**Gary v. LeBlanc**, 16-1054 (La. App. 3 Cir. 6/7/17), 222 So.3d 784.

Although the trial court found that both parties were fit to be the domiciliary parent, the article 134 factors favored the mother, and the court named her as the domiciliary parent. A change would have both affected the school the child attended and separated her from siblings. The trial court did not err in denying Gary’s request to have the child’s surname changed to his, since his action was not brought under the appropriate statutes; but the court reserved his right to file an amended petition under the proper procedures. The trial court did not err in denying a reduction of Gary’s child support to account for the time the child spent with him as he failed to show that his financial burden had increased and the mother’s financial obligation had decreased. Further, the court appropriately considered his bonuses in calculating his income for child support.

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Relocation

Blake v. Morris, 51,402 (La. App. 2 Cir. 6/30/17), 222 So.3d 1277, writ denied, 17-1334 (La. 9/15/17), 225 So.3d 478.

The court of appeal reversed the trial court’s decision that denied Blake’s request to relocate to Pensacola, Fla., and allowed the relocation. Blake was completing her education, had a job offer in the Pensacola area, and was also engaged to be married to a man who lived and owned a business in that area. She was the child’s primary caretaker, and the court found that she would be able to provide a stable and consistent living environment for the child. Morris, on the other hand, had no permanent home, but traveled often related to his work and spent most of his time in hotel rooms, even when visiting the child. His visits with the child were inconsistent due to his work and travel schedule. Notably, the court of appeal found that the trial court misapplied relocation factor La. R.S. 9:355.14(A) (3), finding: “All interstate visitations pose difficulties, but that factor cannot stand alone as the only consideration, especially in our mobile society.” The trial court had found that the relocation would make it “difficult” on Morris to maintain a relationship with the child. The court of appeal, on the other hand, found that such “difficulty” was inherent in any relocation and if allowed to be a controlling factor “would in effect lead to a jurisprudential repeal of the relocation statute.” Further, the trial court erred in finding that Blake thwarted Morris’ access to the child, finding instead that it was Morris who did not make consistent efforts to see the child, and that Blake had attempted to accommodate him. The court remanded the matter for a custody and visitation schedule to be implemented.

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Principle of Res Ipsa Loquitur

Lyles v. Medtronic Sofamor Danek, USA, Inc., 871 F.3d 305 (5 Cir. 2017).

Mr. Lyles underwent anterior corpectomy and discectomy surgery. A Verte-Stack implant, a vertebral-body implant device, was placed in his cervical spine. An Atlantis Translations Anterior Cervical Plate System (Atlantis Plate) was also implanted to stabilize the Verte-Stack and to promote fusion. Sometime after surgery, the Atlantis Plate either broke or became displaced. Lyles brought suit against Medtronic, manufacturer of all devices used in the surgery, in Louisiana state court under the Louisiana Products Liability Act (LPLA). The district court granted Medtronic summary judgment on claims dealing with the Atlantis Plate.

Lyles returned to the hospital a week after his discharge, stating that he had not improved and had experienced two falls. X-rays showed slight displacement of the plate, but further tests indicated that it had not broken or became unstable. A second surgery was performed nine months after the first, leaving the Atlantis Plate in place. Ten months later, the Atlantis Plate still in place, Lyles’ doctor examined him and found that the anterior and posterior cervical spine had maintained alignment. He opined that the Atlantis Plate never failed.

After defendant removed the case to federal court, Lyles, in his third amended complaint, brought defective construction claims under the LPLA against Medtronic for the Atlantis Plate, as well as claims under the Louisiana Unfair Trade Practices and Consumer Protection Law. Medtronic moved for summary judgment on the defective design and defective construction claims, arguing that Lyles could not show that the Atlantis Plate deviated from Medtronic’s specifications or performance standards so as to make it unreasonably dangerous. Lyles conceded he could not show an alternative design, but argued for the first time that res ipsa loquitur applied to create a presumption that the Atlantis Plate contained a defect in construction. The district court granted summary judgment, and Lyles appealed.

The principle of res ipsa loquitur is “a rule of circumstantial evidence that infers negligence on the part of defendants because the facts of the case indicate that the negligence of the defendants is the probable cause of the accident, in the absence of other equally probable explanations offered by credible witnesses.” Montgomery v. Opelousas Gen. Hosp., 540 So.2d 312 (La. 1989). The Louisiana Supreme Court has held that res ipsa loquitur can be applied in products liability actions and used to “shift the burden of proof to the defendant-manufacturer.” Plaintiff must meet three requirements:

1) The facts must indicate that the plaintiff’s injuries would not have occurred in the absence of negligence;
2) The plaintiff must establish that the defendant’s negligence falls within the scope of his duty to plaintiff; and
3) The evidence should sufficiently exclude inference of the plaintiff’s own responsibility or the responsibility of others besides the defendant in causing the accident.

The court found that, in order to succeed on the theory of res ipsa loquitur, Lyles had to produce evidence excluding other reasonable explanations. Lyles argued there was no evidence for any other cause for the Atlantis Plate’s breakage, but the court noted there was no evidence of a manufacturing defect either. The court stated the operative question in reviewing the trial court’s decision as to the applicability of the res ipsa loquitur doctrine was not whether there was evidence to support other reasonable explanations for the Atlantis Plate’s breakage, but whether Lyles has adduced evidence to exclude other reasonable explanations.

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The United States Court of International Trade recently granted Ford Motor Co. a significant victory over United States Customs and Border Protection (CBP). The dispute involves the process of “tariff engineering” in order to avoid the still persistent consequences of the 1960s trade war between the United States and Europe. Back then, in a retaliatory tit-for-tat, the United States responded to Europe’s increased import tariffs on U.S. chicken by implementing the infamous 25 percent “chicken tax” on trucks imported from Europe. The 25 percent retaliatory chicken tax remained in place in 2009 when Ford was producing and importing certain trucks from Turkey. By contrast, the import tariff on passenger vehicles from Europe in 2009 was 2.5 percent.

Ford imports Transit Connect vehicles from Turkey. The vehicles are manufactured to serve as cargo vans. However, Ford adds second-row seating to the vehicle in order to classify the vehicles for Customs purposes not as trucks subject to the 25 percent chicken tax, but as passenger vehicles with the accompanying 2.5 percent tariff. Once the Transit Connect vehicles clear customs and before leaving port, Ford employs a subcontractor to remove the second-row seating in order to deliver the vehicle to its customers as a cargo van.

Ford’s post-importation port activity raised the ire of CBP, which found that “the inclusion of the second row seat is an improper artifice or disguise masking the true nature of the vehicle at importation . . . .” Id. at 1302. CBP classified the Transit Connect as a truck subject to the 25 percent chicken tax despite the second-row seating indicative of a passenger vehicle. Ford lodged a timely protest contending that its conduct constitutes legitimate tariff engineering and that CBP’s analysis should focus solely on the vehicle as presented at the border.

The court reviewed prior precedent on tariff engineering, noting affirmation of the principle as far back as 1881 by the U.S. Supreme Court. Id. at 1317. In short, manufacturers are entitled to manufacture goods in a way that avoids higher tariffs as long as the goods are truly invoiced and presented to CBP without fraud or deception. On the other hand, disguise or artifice is not allowed in order to avoid a prescribed rate of duty. Id. at 1318. The court reviewed the two competing tariff classifications (truck v. passenger vehicle) and focused its examination on *inter alia* design intent and structural and auxiliary design features. The court concluded that the vehicle presented to CBP at the border is properly classifiable as a passenger vehicle subject to the 2.5 percent tariff rate. There is a strong possibility that this decision will be appealed to the Court of Appeals for the Federal Circuit.

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Office of the U.S. Trade Representative


President Trump signed a Presidential Memorandum on Aug. 14, 2017, directing the Office of the United States Trade Representative (USTR) to investigate whether China may be “harming American intellectual property rights, innovation or technology developments.” USTR formally initiated the investigation on Aug. 18 to determine whether certain Chinese intellectual property practices are actionable under Section 301(b)(1) of the Trade Act of 1974. For years, U.S. industries and companies have complained about Chinese forced technology transfers and intellectual property theft. China allegedly uses domestic legal requirements (including joint venture requirements) to intervene in U.S. companies’ operations in China in order to pressure the U.S. companies to transfer technology and intellectual property to Chinese companies. China also reportedly directs companies to transfer technology in order to pressure the U.S. companies to transfer technology and intellectual property to Chinese companies.

Circuit Split over Legality of Class Action Waivers: Employers Await Supreme Court Decision

In its Aug. 7, 2017, decision in Convergys Corp. v. NLRB, 866 F.3d 635 (5 Cir. 2017), a divided three-judge panel of the U.S. 5th Circuit Court of Appeals held that the National Labor Relations Act (NLRA) does not protect an employee’s right to participate in class and collective actions, whether a class-and-collective-action waiver stands alone or is included in an arbitration agreement.

At issue was Convergys’ requirement that its job applicants sign an agreement including the following waiver:

I further agree that I will pursue any claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit.

A Convergys employee who signed this agreement filed charges with the National Labor Relations Board (NLRB), alleging that Convergys interfered with the exercise of employee rights by maintaining and enforcing the class-and-collective-action waiver. Convergys settled the case with the individual employee, but the NLRB nevertheless issued a complaint against Convergys alleging that it violated Section 8(a)(1) of the NLRA by requiring job applicants to sign and by seeking to enforce the waiver. The NLRB ultimately ordered Convergys to cease and desist from requiring and enforcing the waiver. Subsequently, Convergys petitioned the 5th Circuit for review of the NLRB’s decision, and the NLRB sought enforcement of its order.

In a 2-1 decision penned by Judge Elrod, the 5th Circuit reversed the NLRB decision. The court framed the issue as whether Section 7 of the NLRA, which guarantees employees the right “to engage in other concerted activities for the purpose of . . . mutual aid or protection,” contemplates a right to participate in class-and-collective actions. The majority held that it was bound by the court’s previous decision in D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5 Cir. 2013), wherein the court considered a class-and-collective-action waiver included in an arbitration agreement. Because the waiver involved an arbitration agreement, the court in Horton analyzed whether the waiver was enforceable under both the NLRA and the Federal Arbitration Act (FAA). There, the court held that the NLRA and FAA did not conflict, and that “[t]he use of class action procedures . . . is not a substantive right” guaranteed to employees. Id. at 357.

Judge Higginbotham wrote a dissenting opinion in Convergys, in which he reasoned that Horton was distinguishable because it involved an arbitration agreement and thus implicated the special protections of the FAA. Judge Higginbotham concluded that class and collective actions that are not shielded by the protection of the FAA violate the NLRA. Accordingly, he would have enforced the NLRB’s order. In a concurring opinion, Judge Higginson indicated he was persuaded by the dissent’s conclusion that class-and-collective-action waivers standing alone violate the NLRA, but was constrained by circuit precedent to concur in the majority’s judgment.

As the Convergys dissent acknowledged, circuit courts are split on whether class-and-collective-action waivers contained in arbitration agreements are enforceable. Specifically, the 2nd, 5th and 8th Circuits have held that such waivers are permissible, while the 6th, 7th, 9th and D.C. Circuits have disagreed. In January 2017, the Supreme Court granted certiorari in and consolidated cases from the 5th, 7th and 9th Circuits. 137 S.Ct. 809 (2017), granting cert. in NLRB v. Murphy Oil USA, Inc., 808 F.3d 1013 (5 Cir. 2015); Lewis v. Epic Sys. Corp.,
823 F.3d 1147 (7 Cir. 2016); and *Morris v. Ernst & Young, L.L.P.*, 834 F.3d 975, 985-87 (9 Cir. 2016). The Court heard oral argument on the consolidated cases on Oct. 2, 2017.

The potential impact of the Supreme Court decision in the consolidated cases, which is expected to be published in early 2018, cannot be overstated. Class-and-collective-action filings against employers maintained their popularity in 2017, especially in the area of wage-and-hour litigation. The ability to bring wage-and-hour claims on a class-and-collective basis is especially important for plaintiffs because most individual claims involve fairly small amounts of money, and it can be difficult for a single employee to find a lawyer willing to take the case. Class-and-collective wage actions are also very attractive to the plaintiffs’ bar, as they typically involve a relatively low investment, with potential for high return, in comparison to other types of employer class action litigation.

In sum, while it is difficult to anticipate how the Supreme Court might rule, it is certain that its ruling will be significant. If the Supreme Court decides that employers can avoid class-and-collective actions by simply requiring employees to sign waivers, the success of such actions against employers would dramatically decrease. However, if the Court gives deference to the NLRB’s position and decides that such waivers violate the NLRA, class-and-collective action filings against employers will likely surge. While we await the Court’s decision, employers and employment lawyers should stay tuned and be prepared to alter their practices for better or worse, depending on the outcome of the case.

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**Royalty Dispute; Concursus Proceeding; Contract Interpretation**

*Glassell Producing Co., Inc. v. Naquin,* 16-0549 (La. App. 1 Cir. 7/5/17), 224 So.3d 56.

Three siblings each inherited an undivided 1/3 interest in their father’s 1/16th interest in property located in Lafourche Parish. At the time of the inheritance, a 1947 lease was in effect on the property. The lease contained a 1/8 royalty. The 1947 lease remained in production until 1998. In 1993, five years prior to the termination of the lease, two of the siblings (Junius and Dolores) conveyed to the third sibling (Carol) their right, title and interest to the royalty interest in the 1947 lease — a .00781255 interest.

In April 1998, the holders of the 1947 lease filed a release of the lease in the conveyance records. In May 1998, Carol entered into a new lease with Alfred Glassell, affecting a portion of the subject property (the 1998 lease). The 1998 lease contained a 1/6 mineral royalty, which was in favor of Carol only. Glassell did not seek a lease from Junius or Dolores.

In February 2015, the then-holders of the 1998 lease (Legacy Trust Co., N.A. and operating company, Glassell Producing Co., Inc.) filed a concursus proceeding against Junius, Carol and the heirs of Dolores. Legacy and Glassell claimed that there were conflicting claims to proceeds from production under the 1998 lease. The amount of $397,059.29 was deposited into the registry of the court pending the outcome of the lawsuit.

In April 2015, plaintiffs filed a motion to limit the time to file an answer pursuant to La. C.C.P. art. 4657. Junius did not file
his answer within the 10-day time period. Thus, the court struck Junius’s answer and found that he could not assert any claims in the lawsuit. Carol and the heirs of Dolores timely filed their answers. In November 2015, plaintiffs filed a motion for summary judgment against the heirs of Dolores. Plaintiffs claimed that, pursuant to the 1993 conveyance, Dolores conveyed all of her right, title, and interest in the royalty interest to Carol and thus did not have any claim to the monies in the registry of the court. Plaintiffs claimed that Dolores did not put any limitation on the royalty interest conveyed — it included the 1947 and 1998 leases. Plaintiffs maintained that Carol had the right to all of Dolores’s royalty interest so long as the subject land remained under production without a lapse of 10 years. Dolores’s heirs countered that the 1993 deed conveyed Dolores’s portion of the royalty interest in the 1947 lease only and that the 1993 conveyance does not convey any future royalty interest.

The trial court, after a hearing, ruled that the 1993 conveyance transferred all of Dolores’s interests to Carol, not just the interest in the 1947 lease. The heirs of Dolores appealed. On appeal, the 1st Circuit, performing a de novo review, reversed the trial court and found that the 1993 deed conveyed only Dolores’s royalty interest in the 1947 lease, not any other lease. The appellate court was not persuaded by the argument that the language “ALL OF SELLER’S right, title and interest . . .” meant that Dolores conveyed all of her royalty interest in the property to Carol. The appellate court found that there was no language in the 1993 deed that conveyed “any and all royalty interest” of Dolores to Carol. Rather, the court found that the 1993 deed was a limited conveyance by Dolores to Carol. The appellate court concluded that this interpretation made sense because Louisiana law permits a royalty owner to dismember his/her royalty interest in any legal fashion, including transfer of a fractional interest. Thus, the trial court’s ruling was reversed and the matter was remanded to the 17th Judicial District Court for further proceedings.

**Timeliness of Claims Against Officer of Foreign Corporation**

**Salemi v. TMR Exploration, Inc.**, 16-0567 (La. App. 1 Cir. 6/13/17), 224 So.3d 14.

A plaintiff asserted that he was entitled to compensation because hydrocarbons were drained from beneath his land by a well that was bottomed within 330 feet of his property line, without the formation of a drilling unit, in violation of Louisiana’s well-spacing rules.

The same facts also gave rise to **Hill v. TMR Exploration, Inc.**, 16-0566 (La. App. 1 Cir. 6/13/17), 223 So.3d 556. In **Hill**, several plaintiffs alleged that the well had been directionally drilled, and that it had been bottomed beneath their land without their knowledge or consent. They asserted that this constituted a subsurface trespass. In both cases, the president of the company that had drilled the well was one of the defendants.

In both **Salemi** and **Hill**, the district court dismissed the claims against the president on grounds of prescription, relying on La. R.S. 12:1502, which establishes time limits for suits against “business organizations formed under the laws of this state” or against certain persons associated with such organizations. The Louisiana 1st Circuit reversed the judgments of dismissal. The company that had drilled the well was a Texas corporation, and the court concluded that R.S. 12:1502 applies only to companies organized under Louisiana law.

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Summary Judgment

Lee v. Quinn, 17-0070 (La. App. 1 Cir. 9/15/17), ___ So.3d ____, 2017 WL 4081883.

An infant died from an enlarged heart after being treated at a general hospital under the care of Dr. Boudreaux, a physician certified in pediatrics and emergency medicine. A medical-review-panel found no breach of the standard of care. The baby’s mother filed a lawsuit against the hospital and Dr. Boudreaux, which was met with a motion for summary judgment filed by the defendants.

The mother’s principal defense to the motion was an affidavit from Dr. Meliones, a board-certified pediatric cardiologist specializing in pediatric critical care, which stated that both defendants breached several standards of care.

The district court observed that Dr. Meliones held board certification in pediatric cardiology and was “specializing” in pediatric critical care. Dr. Boudreaux, however, was an emergency-room physician, “a recognized specialty,” and the hospital was a general hospital. Thus, Dr. Meliones’ affidavit failed “to show that he ha[d] the qualifications . . . to offer an expert opinion” about standards of care required of Dr. Boudreaux or the hospital. Once the motion to strike the affidavit was granted, no disputed issue of material fact remained, and defendants’ motion was granted. The appellate court held that the district court had not abused its discretion in excluding the affidavit from evidence.


Coward, an intoxicated 66-year-old man, was knocked unconscious in a bar fight and taken to Richardson Medical Center’s (RMC) emergency room, where he was treated by Dr. Lifshutz. The hospital ran a CT scan, and the images were sent to an off-site radiologist for evaluation. Coward was discharged and walked out of the emergency room in police custody. The CT scan report, transmitted to the hospital 23 minutes after Coward’s discharge, concluded: “Urgent Finding: Pneumocephalus.” The discharge instructions made no mention of follow-up about the CT scan, and neither the physician nor any hospital staff member communicated with Coward or the jail following receipt of the CT report.

Four days after the discharge, Coward was transported from jail to another hospital where a second CT scan showed a skull fracture, subdural hematoma and extensive Pneumocephalus. He died two months later, an autopsy report revealing the cause of death as “Pneumonia Complicating Head Injury.”

The first of two medical-review panels concluded that the hospital met the applicable standard of care but was unable to decide the material issue of fact as to whether the hospital was vicariously liable for any potential negligence by Dr. Lifshutz.

The hospital moved for summary judgment, submitting the panel opinion in support. The plaintiffs opposed with an affidavit from Dr. Sobel, an emergency-medicine physician who, inter alia, found fault on the hospital’s part by virtue of its failure to inform jail personnel of the abnormal CT findings and Coward’s need for additional medical care. Dr. Sobel identified 20 instances in which the hospital, its agents and/or Dr. Lifshutz were negligent, some or all of which increased Coward’s “risk of harm or substantially contributed to his demise.”

The trial court granted partial summary judgment on the direct negligence claims against the hospital, but denied the motion with respect to the hospital’s vicarious liability for Dr. Lifshutz. The
plaintiffs appealed the court’s finding that the hospital did not owe any duty to Coward to review the results of the CT scan or to contact the detention center. The hospital responded that Dr. Sobel’s statements on causation were “conclusory” in that he did not link the breaches to the damages other than to claim that “some or all of [the] deviations” increased the risk of harm or substantially contributed to Coward’s death. The hospital also argued that Dr. Lifshutz admitted that he knew the CT results before discharging Coward, rendering hospital procedures irrelevant.

The appellate court noted that RMC admittedly owed “some sort” of duty to Coward and that the plaintiffs’ expert identified the specific duty that was breached concerning the CT scan results, whereas the first panel’s opinion found no breach of any standard, thereby establishing a genuine issue of material fact.

The hospital also argued that causation was not supported by any evidence because of the “conclusory and unsupported” nature of Dr. Sobel’s affidavit. The court observed that proof of causation requires either expert testimony or obviousness such that lay persons can infer causation. In this case, Coward’s “death certificate lists the very injury he was being treated for as a complicating factor in his death.” The court held:

It is, therefore, obvious to a lay person that there may be some causal connection between Coward’s death and the treatment and care he received from [the hospital] and Dr. Lifshutz. Even if Dr. Sobel’s statement of causation is insufficient, his affidavit along with all of the other medical records creates a genuine issue of material fact regarding causation.

The court reversed the partial summary judgment in favor of the hospital.

**Loss of a Chance of Survival**

*Deykin v. Ochsner Clinic Found.*, 16-0488 (La. App. 5 Cir. 4/26/17), 219 So.3d 1234.

One error of assignment by the plaintiffs, following an adverse jury verdict, was whether the failure to instruct the jury regarding loss of a chance of survival in a medical malpractice case created a fundamental error that mandated overturning the jury’s verdict. The appellate court noted the following in its discussion about why the trial court committed no “plain and fundamental” error:

Although a claim involving death is a necessary element of a loss of a chance of survival claim, not every malpractice claim involving death necessarily implicates the loss of a chance of survival doctrine, or necessitates the giving of a loss of a chance of survival instruction. Only in malpractice cases involving death where the evidence presented indicates that the loss of a chance of survival doctrine is applicable is it appropriate to give such an instruction.

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Finality of Tax Assessment Precludes Use of Overpayment Refund Procedure


Majestic Medical Solutions, L.L.C. (Taxpayer) appealed to the Board of Tax Appeals the Louisiana Department of Revenue’s refusal to act on its request for a refund. On Dec. 13, 2013, the Department sent Taxpayer a Notice of Assessment for sales tax. The assessment informed Taxpayer it had 60 days from the date of the assessment to appeal to the Board, to pay the tax, or to pay the tax under protest in accordance with La. R.S. 47:1565. Taxpayer took none of these actions; and, pursuant to La. R.S. 47:1565(B), after 60 days, the assessment became final and was collectible by distraint. After issuing the proper notices, on April 1, 2014, the Department levied Taxpayer’s checking account. On June 16, 2014, Taxpayer filed a refund request with the Department for the same matters at issue in the assessment. The Department neither allowed nor denied the Taxpayer’s refund request, and on Aug. 20, 2015, Taxpayer filed an appeal with the Board. The Department responded by filing various exceptions, including an exception of no right of action.

The Board noted that Taxpayer neither alleged any procedural impropriety regarding its Notice of Assessment nor disputed that the assessment had become final. The Board reasoned that the right to seek a refund is specifically absent from the remedies available to a taxpayer aggrieved by an action of the Department in assessing the taxpayer pursuant to La. R.S. 47:1565. It was undisputed that the Taxpayer failed to timely pursue the remedies made available under La. R.S. 47:1565(C) (3). Therefore, the Board held that the claim-for-refund procedure set forth in La. R.S. 47:1621 was not available. The Board ruled that the finality of the assessment of the underlying tax at issue in the refund request served to preclude use of the La. R.S. 47:1621 refund procedure. Thus, the Board granted the Department’s exception of no right of action.

The question before the Board was whether a taxpayer can seek a refund of tax through the administrative claim-for-refund procedure provided by La. R.S. 47:1621 if the taxpayer did not appeal the Department’s Notice of Assessment concerning that tax, the assessment of that tax became final, and the assessment of that tax was later satisfied by levy.

The Board noted that regardless of any procedural impropriety regarding its Notice of Assessment, nor did the taxpayer dispute that the assessment had become final. The Board reasoned that the right to seek a refund is specifically absent from the remedies available to a taxpayer aggrieved by an action of the Department in assessing the taxpayer pursuant to La. R.S. 47:1565. It was undisputed that the Taxpayer failed to timely pursue the remedies made available under La. R.S. 47:1565(C) (3). Therefore, the Board held that the claim-for-refund procedure set forth in La. R.S. 47:1621 was not available. The Board ruled that the finality of the assessment of the underlying tax at issue in the refund request served to preclude use of the La. R.S. 47:1621 refund procedure. Thus, the Board granted the Department’s exception of no right of action.

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La. Small Successions Act to Help Solve Heir Property Problems

On June 12, 2017, Gov. John Bel Edwards signed into law an amendment to Louisiana Code of Civil Procedure 3421 providing relief to thousands of Louisiana residents living in homes without proof of ownership. The Louisiana Small Successions Act, which took effect Aug. 1, 2017, was introduced by Rep. Paula Davis, with the help of Louisiana Appleseed, a law-related nonprofit, and its team of attorney volunteers, led by Patricia B. (Patty) McMurray of Baker Donelson. The amendment, which passed unanimously through the House and Senate, further expands the use of the heirship affidavit, a mechanism that allows the passage or transfer of ownership of inherited property to the legal heirs by placing legal title with them when the decedent’s interest in the property does not exceed $125,000. Prior law capped the use of the less expensive and easier process to estates valued at $75,000 or less. The new law also allows families to use the affidavit process for estates of any value in which the person died more than 20 years ago.

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First, the appellant argued that under the LLC’s Operating Agreement, Bergeron improperly transferred property of the LLC to himself because he did not obtain the approval of the LLC’s other members. Here, the appellant pointed to a conflict between the LLC’s Articles of Organization and the Operating Agreement for the LLC. Under the Articles of Organization, Bergeron was given the authority to transfer property from the LLC as he wanted, but according to the Operating Agreement, the managing member needed the consent of the LLC’s other members to transfer property. The 1st Circuit applied La. Civ.C. art. 2049, among others, to conclude that a contract with conflicting provisions should be interpreted so that each provision is given a meaning. In order to give the Articles of Organization and the Operating Agreement meaning, the court interpreted the Articles of Organization as authorizing Bergeron to transfer property from the LLC as he wanted and the Operating Agreement as only applying to future managers of the LLC, not Bergeron. Although the Operating Agreement did not expressly exclude Bergeron from needing a majority of the LLC’s members’ consent before acting, the only way to give meaning to both the Articles of Organization and Operating Agreement’s provisions was to interpret Bergeron as having the authority to transfer property under both without member approval.

Next, the appellant alleged Bergeron’s attorney corrected not merely a clerical error but rather a substantive error, causing the notarial act of correction to be invalid. When drafting the act of transfer Bergeron requested to remove his property from the LLC, Bergeron’s attorney inadvertently included a “less and except” section that prevented some of Bergeron’s property from being transferred. The attorney’s error went unnoticed for two and a half years. Upon noticing his error, the attorney executed a notarial correction to make the document conform to the true intent of Bergeron. The 1st Circuit acknowledged the attorney’s purpose for correcting his mistake was to make the act of transfer conform to the true intent of Bergeron. Next, the 1st Circuit adopted the view taken in In re Huber Oil of Louisiana, Inc., 311 B.R. 440 (Bankr. W.D. La. 2004), that a clerical error includes an inadvertent “cut and paste” function of a word processor. Therefore, the notarial correction was valid.

Last, the appellant contended the LLC should be reinstated because Bergeron had improperly dissolved the LLC. The 1st Circuit disagreed. The court acknowledged that even if Bergeron improperly dissolved the LLC, the former members of the LLC are not statutorily entitled to reinstatement of the LLC. The court also pointed out that the children failed to argue that the district court failed to reinstate the LLC, which was the only issue on appeal. The court refused to reinstate the LLC because it had no remaining assets and because there was intense discord among Bergeron’s children. Ultimately, the 1st Circuit upheld the district court’s ruling and affirmed the involuntary dismissal.

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