Custody and Child Support: UCCJEA and UIFSA

Spears v. McClaine, 23-0664 (La. App. 4 Cir. 1/10/2024), 2024 WL 108850.

Mr. Spears appealed the trial court's judgment denying his motion to retain jurisdiction and granting Ms. McClaine's motion to transfer. Mr. Spears argued that the trial court committed legal error in (1) declaring the jurisdictional provision of the parties' consent judgment null and unenforceable; (2) declining to exercise its subject matter jurisdiction on the basis that Texas is the more appropriate forum for the custody proceeding; and (3) transferring jurisdiction of the corresponding child support matter to Texas.

The 4th Circuit Court of Appeal affirmed the trial court's judgment, noting that:

(1) The trial court did not err in declaring the jurisdictional provision of the parties' consent judgment null and unenforceable because, as set forth in *Holdsworth v. Holdsworth*, 621 So.2d 71 (La. App. 2 Cir. 1993), "[s]ubject matter jurisdiction, such as that exercised in resolving child custody disputes, cannot be conferred by the consent of the parties";

(2) The trial court did not err in declining to exercise its subject matter jurisdiction on the basis that Texas is the more appropriate forum for the custody proceeding; rather, a review of the trial court's reasons for judgment revealed that it properly considered each factor; and

(3) The trial court did not err in transferring jurisdiction of the corresponding child support matter to Texas, even though it retained exclusive and continuing jurisdiction over the child support matter under UIFSA, specifically, La. R.S. 1302.5(A)(1), because there was not then any justiciable controversy over child support between the parties that would warrant consideration of the potential impact of jurisdictional bifurcation of child custody and child support issues.

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World Trade Organization

WTO 13th Ministerial Conference (Abu Dhabi, UAE).

The WTO's 13th Ministerial Conference was held Feb. 26-29 in Abu Dhabi, United Arab Emirates. The Ministerial Conference is the highest decision-making authority in the WTO and meets every two years. This meeting takes place with the trade body's dispute-settlement function essentially

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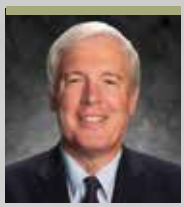
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Meet Marilyn Castle

Marilyn Castle is the newest member of the Patterson Resolution Group. Recently retired, she served on the Fifteenth Judicial District Court for 25 years and held the position of Chief Judge several times. She was an assistant district attorney and practiced civil law for 22 years, handling over 100 cases before the Louisiana Supreme Court prior to holding the gavel. "Making the transition to judge meant changing my role from that of an advocate to that of the neutral party that's going to decide the case." She was the first woman to serve as president of the Lafayette Parish Bar Association and was elected as president of the statewide Louisiana District Judges Association for 2016.

MEDIATION AND ARBITRATION OF COMPLEX DISPUTES

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inoperative. The United States refuses to provide consent for the appointment of new Appellate Body judges, preventing the quorum necessary to conduct judicial business. The United States and other members are demanding significant dispute-settlement reforms before a restart. A sixth draft text on WTO reform was circulated on Jan. 29, 2024. Other items on the conference agenda included fisheries subsidies, agriculture reform and sustainability.

U.S. Court of Appeals for the Federal Circuit

Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States, 617 F.Supp.3d 1343 (Ct. Int'l Trade 2023), appeal No. 2023-2245 (Fed. Cir.) filed Aug. 7, 2023.

The U.S. Court of Appeals for the Federal Circuit is considering an appeal from the Court of International Trade involving the Commerce Department's long-standing nonmarket-economy policy in antidumping cases. In this case, appellant failed to rebut the Commerce Department's presumption that a firm from a nonmarket-economy country is controlled by that country's government. Consequently, appellant received the antidumping duty rate for the China-wide entity. The Court of International Trade initially set aside Commerce's application of the China-wide antidumping duty rate because appellant did not have a meaningful opportunity to respond to information regarding the Chinese Communist Party's control over its labor union. After remand, the Court of International Trade upheld Commerce's conclusion that appellant failed to rebut the presumption of government control but also ruled that Commerce's nonmarket-economy policy does not support application of a China-wide dumping rate to a known exporter supplying sufficient sales data to reach a separate duty rate.

The issue before the appeals court could have wide implications for the U.S. trade remedy laws. For almost 30 years, Commerce has applied its nonmarket-economy policy to impose country-wide rates on entities that cannot rebut the presumption of government control. The relevant statute, 19 U.S.C. § 1673(d), provides that Commerce shall set estimated weighted-average dumping margins for all individually investigated producers. The statute does not, however, dictate how Commerce should address nonmarket-economy countries, and the agency's practice of deploying a rebuttable presumption of state control will be addressed by the court in this case.

U.S. Customs and Border Protection

Your Special Delivery Services Specialty Logistics (HQ H324098).

U.S. Customs and Border Protection (CBP) recently published an earlier ruling regarding whether a logistics provider can act as an importer of record. Your Special Delivery Services Specialty Logistics (YSDS) provides "logistical consultation services" to foreign and domestic shippers of Wi-Fi components such as wireless routers. YSDS is not a licensed customs broker but provides damage control, insurance, packing control, export permit applications, brokering freight, warehousing, origination, valuation and classification services.

YSDS contends that it should be eligible to act as an importer of record because it maintains an ongoing security interest in the imported merchandise by way of contractual lien for non-payment. By statute, importers of record may include owners or purchasers of goods, including non-owners with a financial interest in the transaction. See 19 U.S.C. § 1484(a) & Customs Directive 3530-002A (June 27, 2001). However, nominal consignees with no real right, title or interest in the goods do not qualify as importers of record.

The issue before CBP was whether YSDS's contractual lien financial interest permits YSDS to act as importer of record. CBP concluded that YSDS cannot properly act as importer of record because it never possesses title, ownership or risk of loss, and there is no evidence that YSDS' financial interest in the goods is anything more than cursory. The ruling is important as many logistics providers diversify their services to include issues in the customs-broker space.

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Fair Labor Standards Act

On Jan. 9, 2024, the U.S. Department of Labor announced its final rule on classifying workers as employees or independent contractors under the Fair Labor Standards Act (FLSA). This new rule became effective on March 11, 2024.

The final rule, 89 FR 1638, rescinds the 2021 Independent Contractor Rule so that the analysis for determining employee or independent contractor classification under the FLSA is more consistent with judicial precedent and the FLSA's purpose. More particularly, this rule reverts to the economic-reality test employed by courts throughout the country for the last 60-plus years. The Department also hopes the change will provide proper guidance to employers on proper classification and seeks to combat employee misclassification, which the Department of Labor has stated is a serious issue. Misclassification of employees as independent contractors may deny the workers minimum wage, overtime pay and other FLSA protections.

The final rule refers to independent contractors "as workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves." The rule encompasses those also known as "self-employed" or "freelancers." The FLSA defines employer to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." Employee is defined as "any individual employed by the employer." Employ is defined as "to suffer or permit work." Independent contractors are not encompassed in these definitions.

Prior to the 2021 Independent Contractor Rule, the main test the Department and courts used for classifying someone as an independent contractor or employee was the economic-reality test. Under this application, the ultimate question was economic dependence, i.e., whether the worker is economically dependent on the employer for work or was the worker in business for himself or herself. To assess economic dependence of the worker, the Department and courts like Louisiana applied a totality-of-the-circumstances test and used multiple factors without predetermined weight. Such factors included opportunity for profit or loss, investment, permanency, control, whether the work is an integral part of the employer's business, and skill and initiative. The 2021 Independent Contractor Rule departed from this long-standing and consistent economic-reality test and instead imposed five economic-reality factors, two of which were designated as core factors—nature and degree of control and opportunity for profit and loss—but even these were significantly narrowed by the 2021 rule. Thereafter, in 2022, the Department decided to rescind the 2021 Independent Contractor Rule because it did not comply with the FLSA text as interpreted by courts over the last several decades.

The final rule now provides that a worker is *not* an independent contractor if he or she is, as a matter of economic reality, economically dependent on an employer for work. The final rule applies six factors to determine if a worker is an employee or independent contractor under the FLSA:

(1) opportunity for profit or loss depending on managerial skill;

(2) investments by the worker and the potential employer;

(3) degree of permanence of the work relationship;

(4) nature and degree of control;

(5) extent to which the work performed is an integral part of the potential employer's business; and

(6) skill and initiative.

Considering that Louisiana courts have consistently applied the economic-dependency test and the totality-of-the-circumstances test to determine when a worker is either an employee or independent contractor, this final rule should not result in any changes to Louisiana's jurisprudence but rather support what Louisiana courts have always applied.

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EPA Grants Primacy to Louisiana for Class VI Wells

On Jan. 5, 2024, the U.S. Environmental Protection Agency (EPA) published a notice in the Federal Register of a final rule that grants primacy to the Louisiana Office of Conservation for Class VI wells under the Safe Drinking Water Act. 89 Fed. Reg. 703 (Jan. 5, 2024). This grant of primacy was effective Feb. 5, 2024.

Background

Congress enacted the Safe Drinking Water Act (SDWA) in 1974 "to assure that water supply systems serving the public meet minimum national standards for protection of public health." H.R. Rep. No. 93-1185 (1974). The SDWA protects drinking water systems in various ways. For example, Part C of the SDWA seeks to protect underground sources of drinking water (USDW) by directing the EPA to develop regulations for state underground injection control (UIC) regulations, including "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(a)-(b).

Federal regulations promulgated to implement the SDWA establish six classes of injection wells and provide regulations for each class. 40 C.F.R. § 144.6. Class VI wells are wells used for injection of carbon dioxide for carbon capture and storage (CCS).

Primacy

Part C of the SDWA provides a process for states to seek primary enforcement authority — commonly called "primacy" — to implement and enforce the SDWA within their jurisdictions. When primacy for UIC regulations is granted, it is granted on a class-by-class basis. Thus, a state can receive primacy for one or more classes of injection wells, without receiving primacy for all classes. Indeed, a majority of states have primacy for some classes of injection wells, without having primacy for all classes.

Section 1422 of the SDWA (42 U.S.C. § 300h-1) provides that a state may obtain primacy for a class of wells by demonstrating to the EPA that the state has implemented UIC rules for that class of wells that meet the federal standard for protecting USDWs. Pursuant to Section 1422, Louisiana obtained primacy for Class I, III, IV and V wells in 1982. The year before, in 1981, Louisiana obtained primacy for Class II wells pursuant to Section 1425 of the SDWA (42 U.S.C. § 300h-4), which provides an alternative standard for a state to obtain primacy for Class II wells (though a state may use the Section 1422 process to obtain primacy for Class II wells if the state wishes). At the time Louisiana was obtaining primacy for Classes I through V, federal SDWA regulations did not yet recognize CCS injection wells as a separate class of wells.

Louisiana's Primacy Application

In 2009, Louisiana enacted the "Louisiana Geologic Sequestration of Carbon Dioxide Act," which authorized the Louisiana Office of Conservation to promulgate rules for CCS. La. R.S. 30:1104. The legislation also contemplated that Louisiana would seek primacy for Class VI wells. *See* La. R.S. 30:1104(F). The Office of Conservation promulgated regulations for Class VI wells, and, in September 2021, Louisiana applied for primacy for Class VI wells.

The EPA conducted a comprehensive technical and legal evaluation of Louisiana's Class VI application. After that, the EPA published a proposed rule in the Federal Register on May 4, 2023, to approve Louisiana's primacy application. The EPA held a three-day, in-person public comment period in June 2023, as well as a virtual hearing the same month, and accepted written comments for several weeks.

At the end of June 2023, Louisiana supplemented its application by noting that Louisiana Acts 2023 No. 378 strengthened Louisiana's Class VI rules by amending a portion of state statutes that previously would have allowed a CCS operator to apply to turn over liability for a CCS facility to the state 10 years after injections had ceased. Under the amended statute, a CCS operator generally cannot seek to hand over liability to the state until 50 years after injections cease, and after also demonstrating that the operator has complied with all facility-closure rules.

In addition to increasing the waiting period that a company must wait before seeking to hand over liability to the state, Louisiana also entered a memorandum of agreement with the EPA, in which Louisiana agreed not to approve a hand-off of liability from a CCS operator to the state until coordinating with the EPA.

EPA Grants Primacy

On Jan. 5, 2024, the EPA published a final rule granting primacy to Louisiana for Class VI wells, effective Feb. 5, 2024. 89 Fed. Reg. 703 (Jan. 5, 2024). The final rule states that "[t]he EPA has determined that the application meets all applicable requirements for approval . . . and the state is capable of administering a Class VI program in a manner consistent with the terms and purposes of SDWA and applicable UIC regulations." The EPA also stated that the Louisiana Department of Natural Resources has the expertise needed to implement and administer a Class VI regulatory program. The EPA stated, "The LDNR UIC program is comprised of staff with expertise in the variety of technical specialties needed to issue and oversee Class VI permits, including site characterization, modeling, well construction and testing, and finance." The EPA's final rule also stated that Louisiana's Class VI rules for monitoring and emergency response are as stringent as EPA's own rules.

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Loss of a Chance

Farooqui v. BRFHH Shreveport, LLC, 55,081 (La. App. 2 Cir. 11/15/23), 374 So.3d 364.

Louisiana courts have held that, in medical malpractice cases, "*any* lost chance of a better outcome [is] compensable," whereas, in death cases, the issue on compensability is whether the patient had "some chance — any chance — of survival" due to a defendant's negligence. *Id.* at 366-67, citing *Smith v. State, Dep't of Health & Hosps.*, 95-0038 (La. 6/25/96), 676 So.2d 543, 546. Thus, a claimant msust prove that the "action or inaction deprived the victim of all or part of that chance." *Id*. at 367.

Fourteen years after *Smith*, the Louisiana Supreme Court in *Burchfield v. Wright* declared that the "loss of a chance *of a better outcome*" (distinct from lost chance *of survival*) is a compensable injury for malpractice cases if "the defendant's negligence was a substantial factor *in depriving the patient of some chance of life, recovery, or . . . a better outcome*." Consequently, a plaintiff need not prove the patient "would have survived if properly treated; he need only demonstrate the decedent had a chance of survival or recovery that was denied him as a result of the defendant's negligence." 17-1488 (La. 6/27/18), 275 So.3d 855, 863 (emphasis added).

In *Farooqui*, a patient's family filed a medical malpractice suit against several defendants following her death, and the defendants moved for summary judgment to dismiss the plaintiffs' claims. In opposition, the plaintiffs cited the testimony of a physician who opined that the decedent was deprived of a "possible better outcome" as a result of the defendants' malpractice. The same physician later testified that he was unable to say the patient's better outcome was *probable*. The trial court denied the motion, and the defendants sought supervisory writs.

The appellate court observed that the dispositive issue was whether the malpractice caused the decedent to lose any chance of a better outcome, particularly analyzing the physician's testimony. Considering the entirety of the testimony presented to the trial court, the appellate court reasoned that the physician's "subsequent admission that he could not say it was a *probable* better outcome does not contradict his prior affirmation of a chance — *any* chance — of a better outcome." *Farooqui*, 374 So.3d at 367.

In noting that "[t]he defense's main argument amounts to conflation of the cause of action for *lost chance* with that of *wrongful death*," the court explained:

> This fallacy is encapsulated on page 8 of the defense brief to this court, wherein the defense cites the following testimony as a refusal to testify affirmatively as to [the decedent's] lost chance:
>
> Q: Do you have an opinion more probably than not as to whether Ms. Farhat *would have survived* this surgery had it been performed two to three days earlier?
>
> A: I don't know.

The court affirmed the trial court's decision to deny the defendants' motion and concluded that testimony regarding whether the patient "would have survived" would have provided evidence of wrongful death, "which is unnecessary for establishing lost chance. A plaintiff claiming that medical malpractice caused the loss of a chance of a better outcome need not prove that the malpractice caused the patient's death." *Id.* (footnote omitted).

Consent Form

French v. Quality Nighthawk Teleradiology Grp., Inc., 23-1534 (La. 11/30/23), 373 So.3d 690.

A patient and his wife filed suit against a surgeon and the State of Louisiana after the patient sustained a ureteral injury following a colectomy. The plaintiffs alleged that the surgeon negligently performed the surgery and that the State failed to appropriately assess him for intra-operative injury and failed to timely diagnose and treat his injury.

The parties did not dispute that the patient signed a consent form prior to the procedure and that ureteral injury was a known risk. The plaintiffs filed a motion in limine to exclude the signed consent form under Louisiana Code of Evidence article 403 as substantially more prejudicial than probative, considering that the plaintiffs were not alleging a claim for lack of informed consent. The defendants opposed the motion, arguing that the signed consent form was relevant to show the patient's knowledge of the risks of the surgery. The trial court granted the plaintiffs' motion to exclude the evidence, and the defendants sought supervisory writs to the Louisiana 4th Circuit.

The appellate court found that the trial court abused its discretion in excluding the signed consent form without conducting a proper balancing test under Rule 403: "We acknowledge that [the plaintiffs'] claim is not based upon a lack of informed consent. However, to create a blanket prohibition on introduction of all evidence regarding consent and informed risks is highly prejudicial." *French v. Quality Nighthawk Teleradiology Grp., Inc*., 23-0630 (La. App. 4 Cir. 10/26/23), 2023 WL 7037620, at 3-4. The appellate court advised the trial court to "observe the context in which the issue of informed consent is presented and determine admissibility at that phase of the proceeding," noting that any prejudice could be cured with "a properly curated jury instruction." *Id.* at 4.

The plaintiffs sought supervisory review from the Louisiana Supreme Court, which reversed the appellate court and reinstated the trial court's decision, simply stating in a memorandum opinion that the trial court had not abused its discretion "in excluding the evidence at issue on the ground its probative value was substantially outweighed by its prejudicial effect." *French v. Quality Nighthawk Teleradiology Grp., Inc.*, 23-1534 (La. 11/30/23), 373 So.3d 690, 690.

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Taxation

District Court Lacked Jurisdiction to Consider Solar Tax Credit Claims

Gross v. Robinson, 23-0142 (La. App. 1 Cir. 9/15/23), ____ So.3d ____, 2023 WL 6014144.

In March 2015, Sarah Gross contracted with a solar panel company to purchase and install a solar-energy system for $25,000. According to Gross, she was incentivized by the solar-energy-systems tax credit afforded in La. R.S. 47:6030. At the time, that statute allowed a solar-tax credit for the purchase of a system equal to 50% of the first $25,000 of the cost of a system purchased and installed between Jan. 1, 2008, and Jan. 1, 2018.

Subsequently, the Legislature capped the total amount of solar-tax credits. Gross submitted her 2015 tax return seeking a solar-tax credit for the System. The Louisiana Department of Revenue notified Gross that the cap limits had already been met for the years at issue.

In response, Gross, individually and as a representative of a proposed class, filed a class-action petition in the 19th Judicial District Court. Gross alleged that, at the time of purchase and installation of the system, she obtained the right to a solar-tax credit, and the subsequent legislation to cap the solar-tax credit was unconstitutional and in violation of her due process rights. She sought a declaration that the subsequent legislation was unconstitutional. Gross sought recovery of the full amount of the solar tax credit of $12,500, plus interest, consequential damages due to the delay or denial, and attorney's fees and costs. The Department filed various exceptions, which have been litigated.

The Department moved for summary judgment for mootness, based on the Louisiana Supreme Court's ruling in *Ulrich v. Robinson*, 17-1119 (La. App. 1 Cir. 11/1/18), 265 So.3d 108, which held the statutory amendment cured the constitutional issue and rendered the solar-tax credit controversy moot. Specifically, in 2017, the Louisiana Legislature enacted 2017 La. Acts, No. 413, § 1, which provided additional funding for solar tax credits. The court held Act 413 remediated the alleged unconstitutional aspect of Act 131. The district court denied the Department's motion for summary judgment.

In January 2022, Gross filed an amended class-action petition seeking consequential damages allegedly suffered due to the delayed payment including interest, costs and attorney's fees. The Department again challenged the district court's subject matter jurisdiction. The district court granted Gross' motion to certify a class. The Department appealed, asserting that the district court was divested of subject matter jurisdiction and that Gross failed to satisfy her burden of proof on the essential elements of both Louisiana Code of Civil Procedure article 591(A) and (B) regarding class certification.

The court held that La. R.S. 47:1407 as amended in 2019 vested the Louisiana Board of Tax Appeals (BTA) with jurisdiction over all matters related to state taxes or fees and related disputes on the constitutionality of such laws. The court held the amended statute vested exclusive subject matter jurisdiction for the matters brought by Gross in the class-action petition with the BTA. The court held the district court was without subject matter jurisdiction to consider Gross' claims, the judgment must be vacated, and Gross' appeal must be dismissed.

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Continued next page

Correcting Retirement Plan Errors

Almost every retirement plan of any size has administrative errors, such as errors in documentation and errors in operation. Because of the proliferation of errors, the IRS provided a procedure for correcting errors, the Employee Plans Compliance Resolution System (EPCRS). Three types of correction arrangements are provided — self-correction program (SCP), voluntary correction program (VCP) and audit-closing agreement program (audit CAP). VCP is used by employers who apply to the IRS for a ruling that a plan's failure has been corrected. Audit CAP is used for correction of errors discovered after the plan is under examination.

SCP is used by the employer to correct minor errors and certain document errors. EPCRS has historically provided limits on the use of SCP, such as the number of participants affected, the dollar amount of the failures, the frequency of the failures and the time during which failures can be corrected. Employers greatly prefer the use of SCP because employers do not have to pay a fee to the IRS and do not generally need to inform the IRS of the error and its correction, as would be required under VCP or audit CAP. Another excellent use of SCP applies when the employer is uncertain whether an error has occurred; VCP cannot be used in such circumstances since one of the requirements of VCP is that the employer acknowledge that an error has occurred. With SCP, the employer can make the "correction," whether it is required or not.

The SECURE 2.0 Act § 305 expanded the scope of SCP under EPCRS by allowing the use of SCP for correcting significant inadvertent failures, i.e., large-scale failures. In Notice 2023-43, the IRS provided additional guidance on eligible inadvertent failures and specifically permitted correction of significant failures and permitted completion of the correction within a "reasonable period" that did not include a specified date following the failure, but which did include a requirement that the correction be completed by a specified date following the *discovery* of the failure (i.e., 18 months). Further, the employer under SCP is permitted to correct an insignificant failure even after the plan is under examination.

Act § 350 permits an employer to correct a reasonable administrative error in implementing an automatic enrollment feature, *i.e.*, the withholding of deferrals in a 401(k) plan in the absence of an election offered to the employee. The IRS issued Notice 2024-2 under which the employer may correct such an error by permitting the employee to make deferrals and by contributing any matching contributions that would have been made had the automatic deferrals been made. The correction must be made within 9.5 months after the close of the year or earlier if the employer is notified of the error by an employee.

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