

Mediation Confidentiality Privilege Enforced: Mediator Not Compelled to Testify

In July 2022, several years after a case was mediated, the mediator was subpoenaed to testify at a hearing in a fee dispute among the attorneys for the plaintiff. One of the lawyers for the plaintiff issued a subpoena for the mediator to testify about what happened at the mediation. The mediator refused to testify and filed a motion to quash the subpoena based on two things: (1) the Louisiana Mediation Confidentiality Privilege, La. R.S. 9:4112; and (2) the Agreement to Mediate, which contained a confidentiality provision stating that the parties agreed that the mediator will not be compelled to testify. At the hearing on the motion to quash the subpoena, the trial judge granted the motion, stating that the mediator could not be compelled to testify.

Louisiana's Mediation Confidentiality Privilege, La. R.S. 9:4112

La. R.S. 9:4112 states that all oral and written communications and records made during a mediation are not subject to disclosure and may not be used as evidence in any judicial or administrative proceeding. The section also states that the parties, counsel, the mediator and other participants shall not be required to testify concerning the mediation proceedings, and they may not be subject to any process or subpoena, issued in any judicial procedure, that requires the disclosure of any communications or records of the mediation. This provision was cited by the mediator in the memorandum filed in support of the motion to quash. What this section means is that generally, when a motion to quash is filed on behalf of a mediator who has been subpoenaed in a judicial proceeding to testify about what happened at a mediation, the motion should be granted. That is what the judge did in this case.

Confidentiality Provision in the Agreement to Mediate

Before the mediation process begins, parties are usually asked to sign an Agreement to Mediate. This document contains, among other things, a confidentiality provision, stating that the parties acknowledge that for the mediation process to be as effective as possible, the mediator, as well as all participants, agree that the mediator must be insulated and protected from being compelled to testify, produce records or otherwise reveal information, opinions, views, facts, documents, positions or statements brought out or made during the mediation process. A similar document was signed by the mediator and all participants in the mediation. This document was also attached to the motion to quash.

During the hearing on the motion to quash the subpoena, both the confidentiality statute and the confidentiality provision in the Agreement to Mediate were argued to the court in support of the motion. The trial judge, in quashing the subpoena, articulated a concern that requiring mediators to testify would be detrimental to the mediation process in Louisiana.

The case was heard in Orleans Parish


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Civil District Court. The docket number is being withheld to protect the confidentiality of the process, the mediator, the lawyers and the parties.

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Surety Bond Program

Argonaut Ins. Co. v. Falcon V, L.L.C. (In re Falcon V, L.L.C.), 44 F.4th 348 (5 Cir. 2022).

Falcon V, L.L.C. and its affiliated debtors filed for Chapter 11 bankruptcy in May 2019. Falcon engaged in oil and gas exploration and development in Louisiana. To fulfill its contractual obligations with certain third parties, Falcon maintained a surety bond program with Argonaut Insurance Co. Argonaut issued four performance bonds totaling $10,575,000, which consisted of a $10 million bond in favor of Hilcorp Energy I LP, a $300,000 bond in favor of Chevron Corp., a $250,000 bond in favor of the Louisiana Office of Conservation and a $25,000 bond in favor of the United States (together, the Bonds).

Similar to other surety bond programs, the Bonds provided that, in exchange for premium payments from Falcon to Argonaut, if Falcon failed to perform the obligations owed to the obligees, Argonaut would either pay the obligee an amount equal to the obligation or perform the obligation itself, with a subsequent right of indemnification from Falcon. Importantly, however, the Bonds provided that "regardless of the payment or nonpayment by [Falcon] of any premiums owing with respect to this Bond, [Argonaut's] obligations under this Bond are continuing obligations and shall not be affected or discharged by any failure by [Falcon] to pay any such premiums." As such, Argonaut's obligations to post the bond amount was irrevocable, regardless of Falcon's obligations to pay premiums.

During Falcon's bankruptcy, Argonaut filed a proof of claim in the amount of the combined value of the Bonds, claiming that $3.2 million was secured by cash and the rest was unsecured. Argonaut also stated that the Bonds "may not be assumed and assigned, for among other reasons, because such agreement constitutes a 'financial accommodation,'" but reserved its rights with respect to such argument. On Oct. 10, 2019, the bankruptcy court confirmed Falcon's plan of reorganization, which provided that all executory contracts not expressly rejected would be assumed. Falcon did not expressly reject the Bonds, nor did Argonaut object to Falcon's disclosure statement or plan of reorganization.

Post-confirmation, Falcon continued to pay premiums for a short period but subsequently stopped. After Argonaut demanded that Falcon either release the Bonds or provide additional collateral, Falcon responded by asserting that Argonaut had violated the injunction provisions under its plan. Argonaut subsequently filed a motion seeking a declaration that the Bonds were assumed as executory contracts. The bankruptcy court applied the Countryman test, named after Professor Vern Countryman, who first proposed it in a 1973 law review article, and held that the Bonds were not executory contracts "because Argonaut owed no continuing performance to [Falcon]" and even "if the surety bond program were executory, it is a non-assumable financial accommodation." On appeal, the district court affirmed, (1) finding that the surety bond program failed both prongs of the Countryman test; (2) agreeing with the bankruptcy court that the surety owed no duty to the debtors after issuing the bonds; and, (3) further, that the debtors' failure to perform under the program — by failing to pay bond premium or otherwise perform under the general indemnity agreement — would not excuse the surety's obligation to honor the Bonds. Argonaut subsequently appealed to the 5th Circuit.

The 5th Circuit first considered whether Falcon assumed the Bonds under the plan, starting with an analysis of whether the Bonds were executory contracts. Citing Professor Countryman, the 5th Circuit noted that a contract is executory if performance remains due on both sides and if, at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract that would excuse the performance of the other party. Argonaut urged the 5th Circuit to adopt a flexible interpretation of the Countryman test and find that the surety bond program, as a multilateral arrangement, was, indeed, executory. Argonaut argued that the Countryman test should be modified in the context of surety bonds such that, where the surety and the principal continue to owe obligations to the obligees and the principal has not satisfied its indemnification obligations to the surety, the surety bond is an executory contract.

The 5th Circuit agreed with Argonaut that courts should apply the Countryman test to multiparty contracts in a manner that accounts for the obligations owed to all of the parties rather than exclusively between the debtor and creditor. Applying the Countryman test in a flexible manner, the court found that the surety bond program satisfied the first prong of the Countryman test because, even if the surety no longer owed any continued performance to the debtors, the surety had continuing obligations to the bond obligees.

The 5th Circuit, however, declined to adopt Argonaut's proposed modification in full and agreed with the lower courts that even though Falcon had a continuing obligation to pay premiums to and potentially indemnify Argonaut, Argonaut had already irrevocably posted the Bonds and owed no

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further performance to Falcon. As such, the 5th Circuit held that, even if there were material obligations owed between Falcon and Argonaut, the Bonds failed the second half of the Countryman test because the Bonds were irrevocable, and Falcon's failure to pay premiums would not excuse Argonaut from its obligations to the obligees. The 5th Circuit additionally dismissed Argonaut's argument that the Bonds "passed through" the bankruptcy and were, therefore, unaffected. Because the Bonds were found to be non-executory, the 5th Circuit also noted that they were not subject to the ride-through doctrine.

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Cross-Examination

Runkle v. La. Urology, LLC, 22-0514 (La. 6/1/22), 338 So.3d 483.

The plaintiff sued in the 19th Judicial District Court for East Baton Rouge Parish, alleging she incurred damages during an operation performed under the defendant's care. During her case-in-chief, the plaintiff called the doctor who performed her operation as a "witness identified with an adverse party" under Code of Evidence 611(C). According to that provision, the plaintiff was allowed to ask leading questions of the witness. The defendant later used the same doctor as a witness in its case-in-chief, but the trial court refused to allow the plaintiff's cross-examination. The jury found for the defendant, and the plaintiff's motion for a new trial was denied. On a supervisory writ, the Louisiana Supreme Court advised that, although the plaintiff had previously been allowed to ask leading questions of the witness, that was not the same as being able to cross-examine him because the jury was not able to properly weigh his uncriticized testimony. The trial court erred in denying the plaintiff's cross-examination, defeating the right to a fair trial. The court granted a new trial.

Res Judicata

Carollo v. State, 22-1670 (La. 9/9/22).

The Louisiana Supreme Court granted certiorari in this case to resolve a circuit split as to the interpretation of La. C.C.P. art. 425. That article states, in pertinent part, that a "party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation," referring to the well-known doctrine of claim preclusion, also known as *res judicata*. A similar and more extensive restatement of *res judicata* doctrine can be found in La. R.S. 13:4231 and 13:4232. A key difference between those statutes and article 425, however, is that the latter contains no reference to the traditional

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requirement for identity of *parties* in addition to claims.

The 2nd, 3rd and 4th Circuit Courts of Appeal had held that article 425 was merely a codal reference to the principles of *res judicata* as expressed in R.S. 13:4231 and R.S. 13:4232. The 1st and 5th Circuits, on the other hand, interpreted article 425 as having its own independent preclusive effect, without requiring identity of parties. To resolve the split, the supreme court turned to the principles of statutory interpretation. The express language of article 425 did not suggest one interpretation over the other, so the court delved next into the legislative intent behind its creation.

The court explained the origins of article 425 in its current form, having been revised in 1990 together with the other *res judicata* statutes in an attempt to bring Louisiana's preclusion doctrine in line with the common law. Prior to the amendment, article 425 had been designed to prohibit an "obligee . . . divid[ing] an obligation due him for the purpose of bringing separate actions on different portions thereof," a previously common situation whereby plaintiffs would file multiple suits, against the same defendants and for the same harm, but requesting different relief. Under that regime, article 425 contained a penalty provision, as offenders risked waiver or loss of rights to the remaining portion of an obligation due. The 1990 revision removed penalties entirely. Where the article had its own enforcement provision, which was removed by revision, the court found evidence of legislative intent that article 425 not have its own enforcement power aside from the *res judicata* statutes. This was consistent with the revision comments and minutes of the Civil Law and Procedure Committee of the State House of Representatives, which emphasized that the revised article would serve to place parties "on notice" that "all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation must be raised." In other words, article 425 is intended to be an "admonition," which is expounded upon and given real effect in R.S. 13:4231 and R.S. 13:4232.

Having divined the legislative intent, the court further explained how a contrasting interpretation of the law resulted in an illogical result. Were article 425 intended as a separate preclusion remedy, which did not require identity of parties, R.S. 13:4231 with its higher bar would be rendered completely superfluous. Where a reasonable, alternative interpretation exists, the court stated, it must be endorsed. Thus, the court ultimately concurred with the 2nd, 3rd and 4th Circuits, finding that article 425 is merely a notice or warning to parties that all causes of action arising out of the same transaction or occurrence must be asserted in the same suit, lest they be lost by way of *res judicata* pursuant to La. R.S. 13:4231.

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Corporate and Business Law

UM Rejection Form Held Invalid: Stamped Signature

Havard v. Jeanlouis, 21-0810 (La. 6/1/22), 345 So.3d 1005.

The Louisiana Supreme Court held that a stamped signature affixed to the required UM rejection form by the insured's president's administrative assistant did not meet the statutory requirements for valid rejection of UM coverage. However, the opinion written by Justice Griffin also includes three notable dissents.

In *Havard v. Jeanlouis*, the dispute over UM coverage stems from a motor vehicle accident between Johnny Havard and Ricky Jeanlouis. The tow truck driven by Havard was owned by his employer, Rick's Towing & Recovery Service, Inc. Havard filed suit against several parties, including State National Insurance Co. in its capacity as UM coverage provider for Rick's Towing. Notably, the UM rejection form in the State National policy was signed with a stamped signature bearing the name of Richard C. Baker, the owner and president of Rick's Towing.

After suit was filed, State National filed a motion for summary judgment arguing that UM coverage was waived because Rick's Towing properly completed and signed a UM form rejecting coverage. In support of this motion, State National included affidavits from Baker and Vickie d'Augereaux, Baker's administrative assistant, both attesting that Baker authorized d'Augereaux to stamp sign his signature and initial the UM form to reject coverage. Havard opposed the motion, arguing (1) that the stamped signature did not constitute a valid signature or, in the alternative, (2) that d'Augereaux lacked written authority to affix the stamped signature. The trial court granted summary judgment, and Havard appealed.

The Louisiana 3rd Circuit Court of Appeal then reversed the trial court's decision, holding that La. R.S. 22:1295 requires a waiver of UM coverage to be in writing, and Louisiana Civil Code article 2993 requires a written authorization for someone other than the corporation's legal representative to waive coverage. State National filed a writ application to the Louisiana Supreme Court that was granted.

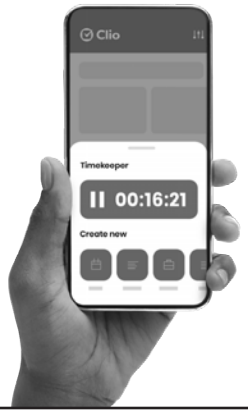
The issue before the Louisiana Supreme Court was whether UM coverage was validly rejected by Rick's Towing. La. R.S. 22:1295(a)(1)(ii) states, in pertinent part, that rejection of coverage "shall be made on a form prescribed by the commissioner of insurance that is provided by the insurer and signed by the name of the insured or his legal representative." While there was no dispute that a stamped signature may be used to sign a UM form, the issue before the court was whether d'Augereaux had the legal authority to affix his signature without a written authorization.

The Louisiana Civil Code states that the

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authority to represent another person may be conferred by law, contract or procuration. *See* La. Civ.C. arts. 2985, 2986 and 2987. A mandate is a contract by which a person, the principal, confers authority on another person, a mandatary, to transact one or more affairs for the principal. While a mandate is not required to be in any certain form, when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form. Therefore, where one individual signs a UM form on behalf of another individual and authority is not conferred by law, the Civil Code requires this authority to be in writing.

There is no dispute that Baker was the legal representative of Rick's Towing and authorized d'Augereaux to put his stamped signature on the UM form. The Louisiana Supreme Court held that this extension of such authority must be in writing to be valid. In doing so, the Court held that the rejection of UM coverage was invalid simply because the stamped signature was applied by an administrative assistant at the direction of the legal representative without written authorization.

Justices Weimer, Crain and McCallum issued separate dissents. They argued that the majority opinion requiring a written act of mandate was "hyper technical" and at odds with the language and intent of the UM statute. Justice Weimer could not subscribe to a result in which had Baker stamped the signature himself, instead of directing his assistant to perform the "exact menial task in the ordinary course of business," the rejection would be valid. *Id.* at 1010.

Justice Crain reasoned that stamping the owner's signature to a form at his request is no different than affixing an electronic signature to a document. Because it was applied at the owner's direction, the signature is attributable to the owner. Under these circumstances, stamping the document is a ministerial task performed in the normal course and scope of the assistant's employment. He argued that the relationship at play was one of an employer and employee — not a principal and a mandatary. He concluded that imposing a form requirement on such routine requests exceeds the scope of article 2993, needlessly complicates a simple task and serves no identifiable purpose. Justice McCallum noted that the majority opinion creates uncertainty and complexity where simplicity should prevail.

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Environmental Law

District Court Reserves LDEQ Issuance of Air Permits, Citing Public Trust Doctrine

In a decision issued Sept. 14, 2022, Judge Trudy M. White of the 19th Judicial District Court revoked air permits issued by the Louisiana Department of Environmental Quality (LDEQ) under Louisiana's Prevention and Significant Deterioration (PSD) to FG LA, a Formosa Plastics Group company, for a chemical manufacturing facility to be built in Welcome, an unincorporated community in St. James Parish. *Rise St. James v. La. Dep't of Envt'l Quality*, 694,029 (19th JDC 9/14/22). The court held that the LDEQ's decision to issue the permits violated the Clean Air Act (CAA) as well as the constitutional rights of the predominantly minority community of Welcome and, accordingly, the court vacated the permits and remanded the matter.

The court determined that the issuance of the permits violated the CAA based, in part, on the court's interpretation of the facility's modeling and reasoning that the LDEQ had failed to demonstrate that the facility's emissions would not "cause or contribute to" violations of federal air standards. Most notably, however, the court went on to find that LDEQ's handling of environmental-justice matters in the permitting of the proposed facility violated the public trust doctrine.

In Louisiana's seminal public trustee case, *Save Ourselves, Inc. v. La. Env'tl Control Comm'n*, 452 So.2d 1152, 1157 (La. 1984), the Louisiana Supreme Court interpreted the public trust doctrine to require an agency, before granting approval of a proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistent with the public welfare. In *Rise St. James*, the district court held that the Louisiana Constitution and *Save Ourselves* mandated an environmental-justice evaluation and required LDEQ to quantify and consider environmental, economic and social costs and benefits of the project. The LDEQ's environmental-justice analysis determined, in part, that because the proposed permits would meet regulatory emissions requirements, the residents would not be exposed to air pollution disproportionately, and, further, the relevant emissions in the area had actually decreased over time. The court disagreed, finding that LDEQ did not consider the effect the proposed project would have on the communities, and instead only focused on the current emissions in Welcome. The court went on to determine that the LDEQ did not adequately weigh the potential impacts of the FG LA emissions against purported benefits of the project and the added burden of these additional emissions to the predominantly minority community. The court reasoned that the community would be disproportionately affected by air pollution and held that LDEQ's environmental-justice analysis was arbitrary and capricious, and, as such, LDEQ did not fulfill its public trust duty. LDEQ subsequently filed a suspensive appeal on Sept. 27, which is pending at the time of writing this article.

This is Judge White's second attempt to remand this matter to LDEQ. The court's previous decision to remand was made prior to receipt of any merits briefing from LDEQ or FG LA and included an instruction to the LDEQ to conduct a more thorough environmental-justice analysis. The Louisiana 1st Circuit Court of Appeal reversed the trial court's prior remand, holding that it was an abuse of discretion and exceeded the court's statutory authority. *Rise St. James v. Louisiana Dep't of Env't Quality*, 21-0032 (La. App. 1 Cir. 3/15/21), 2021 WL 961098.

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Child Support

Dirteater v. Dirteater, 22-0266 (La. App. 1 Cir. 9/16/22), ___ So.3d ___, 2022 WL 4285830.

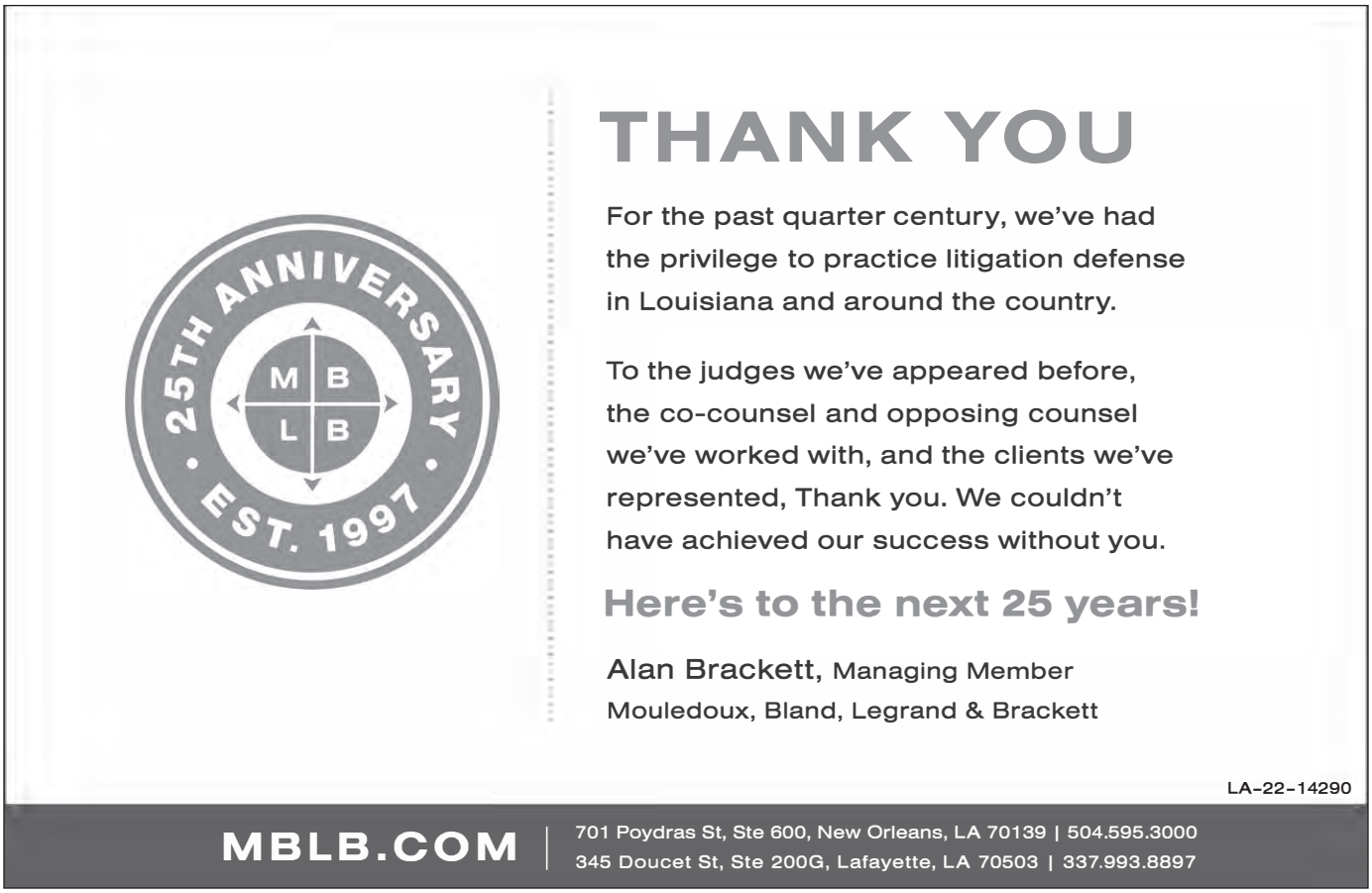
The trial court awarded Mr. Dirteater the right to claim the federal and state income-tax-dependency deductions for the parties' minor child in odd-numbered years, and to Ms. Dirteater in even-numbered years, and she appealed. The court of appeal affirmed the trial court, finding that, at the time ordered, no arrearages were owed, and the right to claim the benefit would substantially benefit him and would not significantly harm her. She argued that although the detriment to her was $3,250 per year and the benefit to him was $3,695, because his income exceeded hers, the net detriment was greater to her than the net benefit was to him as it was proportionally a larger percentage of her income. The court of appeal rejected that argument, finding that, first, the trial court alternated years; and, second, there was no great difference in the benefit and harm. Further, the trial court rejected her argument that the trial court was required to provide reasons for deviating from the child-support guidelines, as it found that this aspect of the child-support award did not directly concern a deviation from the guidelines support amount.

Custody

Baker v. Perret, 19-1692 (La. App. 1 Cir. 8/27/22), ___ So.2d ___, 2022 WL 4244470, *writ denied*, 22-1444 (La. 11/1/22), ___ So.3d ___.

The court of appeal affirmed the trial court's finding that Baker, the father, was a perpetrator of domestic violence under the Post-Separation Family Violence Relief Act (PSFVRA) and affirmed the trial court's granting Perret, the mother, sole custody of the minor children and awarding her attorney's fees. The court found that once the trial court determined that Baker had a history of family violence, there was a statutory presumption against his being awarded sole or joint custody of the children. He claimed that the trial court wrongfully applied the PSFVRA as it was not specifically pled. The court of appeal, however, found that because Baker did not object at trial to the allegations of abuse in the petition, the court did not err in applying the statute.

The dissent argued that because there had been allegations that Perret had also committed family violence, the trial court failed to comply with the mandatory provisions of La. R.S. 9:364(D) and Louisiana Civil Code article 133 because it failed to consider whether the award of sole custody to Perret would result in substantial harm to the children. Furthermore, if it did determine that the children could be safely placed with her, it was required to order her to complete a domestic-abuse-intervention program. Notably, Baker argued that the trial court erred in not enforcing a subpoena to the custody evaluator who failed to appear on the day of the hearing although a subpoena had been issued for his appearance. Apparently, he required a non-refundable deposit in order to appear, and Baker's counsel chose not to pay him, despite an order of the trial court



that if the expert was not called as a witness and arrangements were not made to secure his appearance, the custody-evaluation report would be admitted into evidence. Without addressing the hearsay nature of the report, the court of appeal found that the trial court did not err in allowing the report into evidence.

M.T. v. K.T., 22-0540 (La. App. 1 Cir. 9/26/22), 2022 WL 4476021 (unpublished).

The trial court did not err in awarding the mother sole custody of the three minor children and granting the father limited supervised visitation given his history of abusive and threatening behavior, disparagement of the mother, favoritism of one child over the other two and an extended period of absence from the children's lives. The court did not err in finding that treatment that he had allegedly obtained for anger issues was not "meaningful," and that his anger issues had not been resolved. The trial court did not err in accepting the testimony of one expert over the other, particularly because K.T., the father, did not provide that therapist with all the relevant information. Further, the trial court has great discretion in weighing the credibility of expert and lay testimony, and did so here, regarding extensive and conflicting testimony among all the witnesses.

However, the trial court did err in allowing one of the children to determine when she would be ready to visit with the father, and in allowing the therapist of the other child to determine when that child would be ready to visit with the father. Thus, the court of appeal remanded to the trial court to establish a review schedule for evaluations of the children's desires to visit with the father to take place, and for the court to review the visitation provisions in light of any updated information and evaluations regarding changes in the father's visitation with those two children. Importantly, the court stated in a footnote: "In making this finding, we note that the standard to modify visitation and to modify custody are separate and distinct. *Howze v. Howze*, 2017-0358 (La. App. 1st Cir. 9/28/17), 232 So.3d 606, 610. Visitation may be 'tweaked' without providing the heightened standard required by *Bergeron v. Bergeron*, 492 So.2d 1193, 1200 (La. 1986). *Melton v. Johnson*, 2018-0403 (La. App. 1 Cir. 12/12/18), 2018 WL 6571044, *6 n. 14 (unpublished)."

Community Property

Washington v. Washington, 22-0037 (La. App. 5 Cir. 9/28/22), ___So.3d___, 2022 WL 4492019.

Despite an injunction preventing the parties from obtaining funds from their retirement accounts prior to the time a Qualified Domestic Relations Order was submitted to divide the retirement accounts between the parties, Mr. Washington retired and began receiving payments from his pension fund. Approximately 18 years later, Ms. Washington filed a motion to obtain her share of the payments that he had been receiving. The trial court awarded her approximately $31,000, which the court of appeal affirmed. Mr. Washington's argument that his pension funds were exempt from seizure was rejected, because they were not being seized from the pension fund, but the order was directed to him personally. He further argued that she was not entitled to receive "back pay" because the Plan could pay her only after a QDRO was submitted, but that applied only to funds from the plan, not to a judgment against him individually. Finally, although she requested costs and attorney's fees for a frivolous appeal in her appellee's brief, the court of appeal could not consider that request as she failed to file her own cross-appeal or to answer his appeal.

Keo v. Heng, 22-0130 (La. App. 1 Cir. 9/26/22), 2022 WL 4477067.

This case arose out of a business lease agreement and business purchase agreement between Heng, the owner of a business, and Keo, the purchaser. First, the court found that Heng had agreed to sell the business to Keo. Heng belatedly argued that the trial court erred in ordering him to transfer 100% ownership of the business because it was a community enterprise between him and his wife, and he did not have legal authority to sell his wife's undivided interest in the business. The court first found that there was no evidence that the enterprise was a community enterprise, but, even if it were, he had the authority under Louisiana Civil Code article 2350 to alienate the business as the sole manager. However, the court erred in this analysis because Civil Code article 2347(A) requires concurrence of both spouses to alienate all or substantially all the assets of a community enterprise. Article 2350, which the court relied on, is qualified that the sole manager's ability to alienate movables is restricted where the law requires concurrence, as it does under article 2347(A). Nevertheless, because the lack of concurrence of one spouse creates a relative nullity, that relative nullity can be cured by tacit confirmation, and Heng's wife tacitly agreed to the sale of the entire enterprise.

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Federal Judge Rules Unlawful EEOC Guidance Applying *Bostock* to Bathrooms, Dress Codes, Locker Rooms

Texas v. Equal Emp. Opportunity Comm'n, No. 2:21-CV-194-Z, 2022 WL 4835346 (N.D. Tex. Oct. 1, 2022).

On Oct. 1, 2022, the Northern District of Texas in *Texas v. EEOC* ruled as unlawful the EEOC's guidance issued on June 15, 2021, which interpreted the U.S. Supreme Court's landmark decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020). In *Bostock*, the U.S. Supreme Court held that Title VII's protected characteristic of "sex" prohibits discrimination based on sexual orientation or gender identity. The EEOC's June 15 guidance stated that, according to *Bostock,* employers cannot prohibit transgender employees from dressing or using gender-specific bathrooms in accordance with the employee's gender identity. Also, the EEOC guidance states that using gender pronouns inconsistent with a transgender person's gender identity could constitute harassment under Title VII.

The district court held that the EEOC's guidance expanded the holding in *Bostock* beyond solely the "status" of employees based on their sexual orientation or gender identity, to the "correlated conduct" of employees — the bathroom the employees used, clothes they wore and pronouns they preferred. According to the court, *Bostock* addressed only adverse actions *for being* of a different sexual orientation or gender identity. The court cited repeatedly to language in *Bostock* that distinguished "status" from "conduct" and deferred to later cases any discrimination regarding conduct related to sexual orientation or gender identity.

Texas argued, and the court agreed, that the EEOC overstepped by issuing this guidance, which amounted to rulemaking, because it created new rules beyond the text of the *Bostock* decision. The

EEOC argued that the distinction asserted by Texas between "status" and "conduct" is a distinction without a meaning because any adverse actions in response to an employee's "conduct" related to sexual orientation or gender identity would necessarily be an adverse action based on the "status" of the employee as having a different sexual orientation or gender identity. However, the court disagreed and ultimately struck down the guidance.

After this decision, employers and employees are left with uncertainty regarding how to apply dress codes, bathroom policies and locker-room policies post-*Bostock*. Despite this ruling, the EEOC's stance is clear — applying such policies inconsistently based on sexual orientation or gender identity will increase the likelihood of a discrimination claim under *Bostock*. So, employers should continue to be wary of applying dress codes, bathroom policies and locker-room policies inconsistently based on an employee's sexual orientation or gender identity.

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Mineral Law

Recent Developments Curb the "Pause" on Federal Oil and Gas Leasing

In response to President Biden's Executive Order 14008, which "paused" federal onshore and offshore oil and gas leasing, multiple states and industry organizations filed suit to enjoin government officials from halting federal lease sales, otherwise promoted through federal legislation like the Outer Continental Shelf Lands Act (OCSLA). *See, e.g., Am. Petroleum Inst. v. U.S. Dep't of Interior*, No. 21-cv-2506 (W.D. La. Aug. 16, 2021); *Wyoming v. U.S. Dep't of the Interior*, No. 04-cv-56 (D. Wyo. Mar. 24, 2021); *Louisiana v. Biden*, No. 21-cv-778 (W. D. La. Mar. 24, 2021). In the latter action, 13 states, including Louisiana, moved for a preliminary injunction, claiming that the President exceeded its authority under the OCSLA and Mineral Leasing Act (MLA) and that agency officials violated the Administrative Procedure Act (APA). In a June 15, 2021, decision, the Western District of Louisiana granted a preliminary injunction, enjoining several departments, bureaus and related federal officials from "implementing the Pause of new oil and natural gas leases on public lands or in offshore waters as set forth in Section 208 of Executive Order 14008 . . . as to all eligible lands" and from "implementing said Pause, with respect to Lease Sale 257, Lease Sale 258, and to all eligible onshore properties." *Louisiana v. Biden*, 543 F.Supp.3d 388, 396 (W.D. La. 2021); Order, Rec. Doc. No. 140.

Lease Sale 257 and 258 were part of the 2017-2022 Five-Year Oil and Gas Leasing Program approved by the Obama Administration under OCSLA. Lease Sale 257 encompassed the Western and Central Planning Areas and Eastern Planning Area of the Gulf of Mexico, while Lease Sale 258 encompassed the Alaskan Cook Inlet.

Based on the court's preliminary injunction, Lease Sale 257, which offered some 80 million acres of federal waters in the Gulf of Mexico for lease, was held on Nov. 17, 2021, becoming one of the largest federal offshore lease sales in history. By then, however, environmental groups — Friends of the Earth, Healthy Gulf, Sierra Club and the Center for Biological Diversity — had sued the Department of Interior and Bureau of Ocean Energy Management (BOEM) in D.C. federal court, alleging violations of the National Environmental Policy Act (NEPA) and the APA based on BOEM's alleged failure to adequately consider the impact of the lease sale on climate change. While the court vacated the sale on Jan. 27, 2022, (*Friends of the Earth v. Haaland*, 583 F.Supp.3d 113 (D.D.C.2022)), the Inflation Reduction Act of 2022, passed by Congress and signed by President Biden on Aug. 16, 2022, directed the reinstatement of Lease Sale 257, as well as the holding of additional lease sales for areas in the Gulf of Mexico and the Alaskan coast in an apparent effort to legislatively overrule the court's opinion and to avoid further NEPA challenges (which apply only if the government action is discretionary, not mandatory).

On the heels of the Inflation Reduction Act, on Aug. 17, 2022, the United States 5th Circuit addressed the sufficiency of the Western District of Louisiana's preliminary injunction, holding the order lacked the specificity

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required by Federal Rule of Civil Procedure 65 because the "pause" was not clearly defined. According to the court, the injunction must be vacated because it was not ascertainable "what conduct — an unwritten agency policy, a written policy outside of the Executive Order, or the Executive Order itself — is enjoined." *Louisiana v. Biden*, 45 F.4th 841, 843 (5 Cir. 2022).

The next day, on Aug. 18, 2022, the Western District of Louisiana rendered summary judgment, which granted a permanent injunction in favor of the states. *Louisiana v. Biden*, 2022 WL 3570933, at *7 (W.D. La. Aug. 18, 2022). Addressing the 5th Circuit's decision, the court described the action being enjoined as "the Stop," defined as the "cessation of the leasing process of eligible federal lands" based on Executive Order 14008. Undertaking an in-depth analysis, the court found (1) the executive order was beyond the authority Congress delegated to President Biden; and (2) agency actions to stop federal lease sales violated the APA because they were contrary to the OCSLA and MLA, arbitrary and capricious, and undertaken without notice and comment. Given the success of the APA (and other) claims, the court granted a permanent injunction, considering the substantial threat of irreparable injury, the equities and the public interest. According to the court, the activity risked by the injunction is "Government Defendants would simply be doing what they are statutorily required to do under the OCSLA and the MLA." In contrast, denying the injunction risked "millions and possibly billions of dollars" in the form of reduced government funding, lost jobs in the oil-and-gas sector, lost funds for coastal restoration, higher gas prices and damage to the economy.

The court thus enjoined President Biden, the Department of Interior, Bureau of Land Management, Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement and related officials from "implementing a Stop, referred to in Executive Order 14008 as a Pause, of eligible oil and natural gas leases in public lands or in offshore waters . . . as to eligible lease sales cancelled or postponed prior to March 24, 2021, and involving the . . . States." Rec. Doc. No. 220.

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LSBA Encourages Notification about Deceased Members

As a means to keep the membership database accurate and up-to-date, the Louisiana State Bar Association is encouraging members to notify staff about deceased members (either from colleagues or the families of the deceased members). Members who become aware of a deceased colleague who may still be listed in the membership rolls as eligible are encouraged to email the LSBA Membership Department at processing@lsba.org.



Legislative Changes

Legal Malpractice

The amount of a client's recovery for damages in a legal malpractice case is again limited to the maximum the client could have collected in the underlying action in which he was represented by the defendant attorney. Recently enacted La. R.S. 9:5605.2 overrules the Louisiana Supreme Court's holding in *Ewing v. Westport Ins. Corp.*, 20-0339 (La. 11/19/20), 315 So.3d 175, that collectability of damages against the lawyer in the underlying lawsuit is not an affirmative defense to a legal malpractice action. The new law became effective on July 1, 2022.

Wrongful Death and Survival Actions

In a second overruling of Louisiana Supreme Court precedent, *Rismiller v. Gemini Ins. Co.*, 20-0313 (La. 6/30/21), 330 So.3d 145, amendments to La. Civil Code articles 2315.1(D) and 2315.2(D) add back as proper plaintiffs for wrongful death and survival actions children, brothers or sisters given in adoption.

Post-Panel Evidence

Broussard v. Univ. Hosp. & Clinics, 21-0153 (La. App. 3 Cir. 11/17/21), 330 So.3d 723.

A medical-review panel found that a hospital breached the standard of care but that the breach did not affect the patient's disease or chance of survival. Following rendition of the panel opinion, the hospital deposed two of its oncology nurses after providing them with information that "was allegedly missing from the medical records reviewed by the medical review panel." *Id.* at 726. The panelists were also presented with the "newly acquired evidence," causing them to change their opinions from breach to no breach. *Id.* at 727. The hospital then moved for summary judgment, contending that the plaintiff could not produce expert medical evidence of malpractice. The plaintiff's opposition included testimony of an expert oncologist, and the plaintiff moved for summary judgment against the hospital.

The trial court granted the hospital's motion and denied the plaintiff's. On appeal, the hospital claimed the affidavits shifted the burden of proof to the plaintiff because there was no longer any evidence of a breach. The appellate court decided that the new affidavits from the panelists and depositions from the nurses, in themselves, created issues of fact, even though the depositions of the nurses were "admittedly taken to cure deficiencies" in the medical records and would have exonerated the hospital if initially submitted to the panel. *Id.* at 730. The court noted:

> [G]enerally, "a supplemental or a subsequent affidavit in contradiction to prior deposition testimony is not sufficient to create an issue of fact precluding summary judgment without some explanation or support for the contrary statements." … Under the present facts, this court

finds that the subsequent deposition testimony of the nurses and the panelists' changed opinions are insufficient to establish that there is no genuine issue of material fact regarding a breach in the standard of care when countered with the medical records that do not support the nurses' late recollection of the events.

Id. at 730-31.

Proper Party Claimant

In Re Med. Rev. Panel Claim of Babin, 21-0198 (La. App. 5 Cir. 12/15/21), 335 So.3d 332, *writ denied*, 22-0092 (La. 3/22/22), 334 So.3d 755.

Six months after her death, a medical-review-panel request was filed naming no claimant other than Mrs. Babin. More than a year after her death, the defendants moved to dismiss the panel because it named no claimant; thus, it did not meet the MMA requirements for a valid panel request as she died prior to the filing of the complaint. One day later, Babin's survivors were named as claimants, following which the defendants filed peremptory exceptions of prescription, claiming that the claim by the survivors could not relate back to the original filing request that was "legally invalid as it did not name a proper party claimant." The trial court sustained the defendants' peremptory exceptions of prescription and dismissed the panel proceedings.

The appellate court primarily relied on *Guffey v. Lexington House, LLC*, 18-1568 (La. 5/18/19), 383 So.3d 1001. In *Guffey*, as in *Babin*, the issue was whether a person other than a patient can be considered a "proper party" pursuant to the MMA. The *Guffey* request was filed by the decedent's granddaughter, who identified herself as "Claimant." More than a year after Guffey's death, the granddaughter supplemented the panel request by adding the decedent's sons as claimants.

The court considered the meaning of "claimant" and "representative" as defined in the MMA as:

> only those persons with a right of action to seek damages or the representative specified in La. R.S. 40:1231.1(A)(18) may qualify to be a "claimant" within the meaning of the Medical Malpractice Act. … Further, the Supreme Court found that when the legislature enacted La. R.S. 40:1231.8(B)(2), it was made clear that a "claimant" must possess a right of action to seek damages to make a valid request for a medical review panel.

Id. at 338 (footnotes omitted). The *Guffey* court decided the granddaughter was not a "representative" of the decedent and could not be a representative of the patient, who was already deceased and made no claim under the MMA prior to her death. The appellate court decided that the initial panel request did not name a proper claimant and, therefore, did not suspend prescription. The panel request filed more than a year after Babin's death was prescribed.

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Late Filed Refund Claims Barred by Prescription

Boxill v. Dep't of Revenue, BTA Docket. No. 12603C (5/5/22).

Herbert J. Boxill (taxpayer) appealed the Louisiana Department of Revenue's issuance of four separate denials of individual income-tax refunds for 1999, 2000, 2001 and 2002 to the Louisiana Board of Tax Appeals (BTA). In response, the Department filed an exception of prescription. At the hearing on the Department's exception, the Department entered the denials into evidence. The denials referenced the taxpayer's Individual Income Tax Return (on which the refund claims were asserted) mail date of Aug. 20, 2020.

The taxpayer was a victim of the infamous Madoff Securities Ponzi scheme. In a prior case, the BTA ruled the distributions from the Ponzi scheme were not income, and thus were not taxable. *Boxill v. Robinson*, BTA Docket No. C05778A (3/11/20). Taxpayer now claimed the BTA's decision entitled him to refunds of individual income tax for the additional years at issue. However, the current issue is purely procedural: did the taxpayer timely file his refund claims under the law?

The Department filed an exception of three-year prescription under La. R.S. 47:1623(A). That statute bars a taxpayer's refund claim after three years from the 31st day of December of the year in which the tax became due, or after one year from the date the tax was paid, whichever is later. The taxes for the Tax Periods would have become due long before the Aug. 20, 2020, mail date of the returns claiming the refunds at issue.

BTA noted the taxpayer made his refund claims after the expiration of three years from Dec. 31st of the year in which the tax became due. The taxpayer did not establish an exception to the prescription rules. The BTA sustained the Department's exception of prescription and dismissed the taxpayer's case.

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Recent Developments in Federal and Local Taxes

The federal Corporate Transparency Act (CTA) became law in January 2021. On Sept. 29, 2022, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued a Final Rule that provides guidance on implementing the new requirements under the CTA. The CTA requires that, effective Jan. 1, 2024, "reporting companies" identify and report beneficial ownership information to FinCEN. "Reporting companies" include many domestic entities, even foreign business entities, that have registered to do business in the United States. According to FinCEN, most of the estimated 32,000,000 companies that will be subject to the new reporting requirements are small businesses, single-owner limited liability companies and other entities with four or fewer beneficial owners. The purpose of the CTA is to aid the federal government in its fight against money laundering. The new rule does contain exemptions, primarily but not exclusively, for large companies, but also includes inactive entities. Failure to comply with the new reporting requirements may result in civil and criminal penalties, including a civil penalty capped at $10,000, and up to two years of imprisonment.

In *Goldring v. United States*, 15 F.4th 639 (5 Cir. 2021), the 5th Circuit created a split in the circuits on the issue of how interest should be computed on the underpayment of a deficiency when the taxpayer has paid enough over in tax to the Internal Revenue Service, even if the taxpayer has designated excess payments to other tax years through "credit-elect transfers," to cover the liability for the tax year at issue. A credit-elect transfer involves allocating a tax refund in the current year to a future tax period and is distinguishable from making a deposit against a potential tax liability. The 5th Circuit agreed with the taxpayers, adopting the dissenting position in the earlier case of *FleetBoston Fin. Corp. v. United States*, 483 F.3d 1345 (Fed. Cir. 2007), to the effect that "[u]nder the use-of-money principle, a taxpayer is liable for interest only when the Government does not have the use of money it is lawfully due." *Goldring*, 15 F.4th at 647.

The opinion in *Bio-Med. Applications of La., LLC v. Crowe*, 22-0250 (La. App. 1 Cir. 9/16/22), ___So.3d___, 2022 WL 4286624, continues the saga of medical providers and pharmacists being subjected to local taxes on drugs administered to patients covered by Medicare. In this case, the 1st Circuit affirmed a lower court's dismissal of the sales-tax-refund claim made by a dialysis facility operator for tax paid on the provider's purchase of certain prescription drugs for administration at its facility to its Medicare patients. While the dismissal was based on the terms in an Agreement to Abide to which the taxpayer had consented, the court noted approvingly its earlier decision that the providers were not entitled to a tax refund. Nevertheless, the Legislature has, in Act 79 of the 2022 Regular Session, now expanded the local sales-and-use tax exemption available for prescription drugs to include medications injected in an out-patient clinic that are used to treat an enhanced list of medical conditions, including cancer, Alzheimer's disease and dementia.

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