When Conflicts of Interest Go Digital: How Social Media Relationships May Create an Ethical Issue for Arbitrators and Mediators

Connections may be brief and fleeting, but for mediators and arbitrators, they may be a big issue. Connections are vast and wide-ranging, and the possibilities and opportunities for connections have only grown with the rise of social media platforms. Like real-life connections, not all social media connections equate to equal levels of relationship. "*Following"* someone on a platform may indicate a wish to keep up with a person's life. "*Liking*" a person's post may show acknowledgment of the person's content, while sharing or commenting on a post may evidence a deeper personal connection or resonance with the content shared. Further complicating social media connections are the platforms themselves. The popular professional social media site LinkedIn is a common platform for professionals to connect and share their vocational accomplishments, while platforms like Instagram are often used for sharing personal activities in someone's life. The different common functions of the various sites mean a *follow request* on LinkedIn can have a different meaning than a *follow request* on Instagram. These connections have the potential to cause problems for mediators and arbitrators, especially with conflict-of-interest issues.

Mediators and arbitrators are guided by ethical codes that outline their duties pertaining to conflicts of interest. For arbitrators, the 2004 revised Code of Ethics for Arbitrators in Commercial Disputes states as its Canon II, "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." Ruth V. Glick & Laura J. Stipanowich, *Arbitrator Disclosure in the Internet Age*, 67 APR Disp. Resol. J. 1, 2 (Feb./Apr. 2012). Similarly, the Model Standard of Conduct for Mediators states in Standard III Conflicts of Interest (A), "A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that raises a question of a mediator's impartiality."

Conflicts of interest concerning

social media are a new and emerging issue. There is no case law specifically pertaining to social media and conflict of interest issues for arbitrators or mediators; however, there has been one prominent United States Supreme Court case pertaining to arbitrator disclosure. In *Commonwealth Coatings v. Continental Casualty Co*., the court created the impression of possible bias test for determining whether an arbitrator's nondisclosure has resulted in "evident partiality" under the FAA. 393 U.S. 145, 147 (1968). A plurality decision of the Court held that the arbitrator should disclose to the parties any dealings that might create "an impression of possible bias." *Id.* at 149.

Despite the lack of case law specifically for arbitrators and mediators pertaining to social media and conflicts of interest, there is case law for judges. Because judges, arbitrators and mediators all have duties to avoid conflicts of interest and appear impartial, the case law for judges can be relevant when attempting to predict the future of social media conflicts of interest for mediators and arbitrators. In an "ethics opinion by the Florida Supreme Court's Judicial Advisory Committee," the committee decided on re-review that "judges could join social networks, post comments, and other materials (provided they do not reveal information about pending cases), but it continued to be concerned about 'friending' a lawyer on Facebook or a similar Web site." Glick & Stipanowich, *supra*, at 3.

The Florida Supreme Court Judicial Advisory Committee opinion was not the only prominent legal move to come out of Florida relating to this topic. In September 2024, a petition was filed to amend the Florida Rules for Certified and Court-Appointed Mediators by adding section "g" that states, "Mediators may create connections with mediation participants or their counsel on a social networking site (*e.g.*, 'friends' on Facebook, 'followers' on X, formerly known as Twitter). However, mediators who do so must recognize that such designations may create the appearance of a conflict and may only mediate disputes involving such mediation participants or their counsel consistent with subdivisions (a) and (b) above." *In re Amendments to Fla. Rules for Certified and Court-Appointed Mediators*, 393 So.3d 583 (Fla. 9/12/24). Florida has taken steps to address this issue by amending their mediator code, though other states have yet to follow suit. Florida shows a move toward acknowledging that social media can cause conflict of interest issues for mediators.

While there is generally not much legal precedent for this issue, the ethics codes mentioned above could logically lead to the conclusion that arbitrators and mediators should err on the side of disclosing social media relationships between themselves and the parties or the party's counsel. This disclosure is especially encouraged when the social media relationship arose out of "the affirmative conduct by the arbitrator." Mitchell E. Zamoff & Michelle Skipper, *Transparent Connections: Arbitrators, Attorneys, Parties and Social Media Disclosures*, Am. Arbitration Ass'n (June 16, 2024), https://www.adr.org/blog/transparent-connections. Affirmative conduct can look like the arbitrator requesting to follow a party on social media. While such an action may seem silly to disclose, "social networking relationships involving affirmative conduct might create an appearance of partiality from the perspective of the parties" and therefore "should be disclosed." *Id*.

Ruth Glick suggested this language for a disclosure:

> I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn profile, but I do not maintain a database of all these professional contacts and their connections, which now number over 500. LinkedIn also features endorsements, which I do not seek and have no control over who may endorse me for different skills. The existence of such links or endorsements does not indicate any depth of relationship other than an online professional connection, like connections in other professional organizations.

Despite there being no bright-line rule in most states, disclosure appears to be the best and safest practice for an arbitrator or mediator who uses social media and encounters parties or attorneys with whom they have a social media relationship.

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Environmental Law

D.C. Circuit Reviews the Reach of FERC Pipeline Permits

Citizens Action Coalition of Ind., Inc. v. FERC, 125 F.4th 229 (D.C. Cir. 2025).

"As night follows day, an environmental challenge follows the approval of a natural gas pipeline." *Id.* at 235. With this opening truism also common in Louisiana, Judge Rao, writing for the D.C. Circuit Court of Appeals, began a consequential opinion on matters related to the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). Because it can also be said that as to many technical regulatory decisions, "as goes the D.C. Circuit, so go the other federal courts," this case, though not from Louisiana, is worthy of review as prescient of future cases elsewhere.

The Federal Energy Regulatory Commission (FERC) approved an interstate natural-gas pipeline that is intended to support the State of Indiana's efforts to move toward renewable energy sources. Specifically, Indiana plans to shut down a coal-fired facility and replace it with solar and wind alternatives. As a backup to renewable resources, Indiana proposed natural gas for periods when the solar and wind sources were insufficient to serve the state's needs. FERC reviewed and approved the permit for the interstate pipeline that is intended to support Indiana's efforts. It was this federal action on which Citizens Action based its federal claim. In particular, Citizens Action alleged that FERC failed to consider non-gas alternatives to the gas backup before it approved the Indiana permit.

Rejecting this challenge, the D.C. Circuit observed that, while FERC was granted pipeline permitting authority and the authority to promote the development of those pipelines, Congress "left the choice of energy generation to the States." *Id*. In other words, while FERC was the proper agency to analyze the technical specifications of pipeline development and to conduct the appropriate and necessary environmental reviews under laws such as NEPA, it had no authority to question whether Indiana could opt to use natural gas as a renewable energy backup. Whether and how to bolster the state's existing energy grid is, as the D.C. Circuit opined, a wholly state matter.

FERC's refusal to conduct an analysis to identify whether natural gas was the best choice for the environment or whether other alternatives are better did not leave that issue completely unconsidered. Indeed, the court recounted some of the state-level permitting requirements for the partially natural gas-supported energy utility. As is the case in Louisiana, the D.C. Circuit noted that Indiana law requires utility companies to "adequately consider of alternatives to natural gas." *Id.* at 236; *compare Save Ourselves, Inc. v. La. Envtl. Control Comm'n.*, 452 So.2d 1152, 1160 (La. 1984) (Louisiana analogue to the alternatives analysis). This analysis, one that the permittee in Indiana originally had not done, required a reworking of the state-level plan to include additional renewable sources and a smaller reliance on natural gas. The D.C. Circuit observed that "NEPA does not require FERC to consider non-gas alternatives that are outside of FERC's jurisdiction…."*Id.* at 237. In support of its holding that FERC properly constrained its NEPA analysis, the court observed that the question of whether the use of natural gas was advisable or in the public interest was not before FERC. Instead, that question had already been answered by Indiana, and FERC was limited to reviewing only the pipeline and not the appropriateness of the reason for the pipeline. Moreover, the court observed that the NGA also limited FERC's authority in this matter. In this regard, the court observed that the NGA "does not permit FERC to regulate the energy generation facilities [that FERC-permitted] pipelines supply." *Id.* at 238. Pointedly, the court stated that "FERC cannot define the purpose of a

project so broadly that it usurps the policy choices Congress left to the States." *Id.*

Though not the thrust of the case, the D.C. Circuit also rejected Citizens Action's argument that, in an arbitrary and capricious review of agency action, an agency must use certain specific words in its findings. To this argument, the court responded that its job was not parsing the word choices of an agency, but rather, under NEPA and the Administrative Procedure Act, the court's job is to, "consider whether [the agency] reasonably explained its environmental assessment, not whether it used certain magic words." *Id.* at 242. This observation is an issue that Louisiana courts have grappled with in the application of the state's public-trust doctrine in environmental cases, and such dicta represents sound guidance from the D.C. Circuit.

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Child Support

Louisiana, ex rel. Reed v. Ralph, 24-0233 (La. App. 1 Cir. 11/22/24), ___ So.3d ___, 2024 WL 4863253.

Mr. Ralph appealed the trial court's judgment adopting the special master's recommendation that child support be made retroactive to January 2012, the date on which the Louisiana Office of Child Support Enforcement filed a petition to establish paternity and child support. He argued that the trial court erred in doing so where it had already determined that the special master lacked authority to address retroactivity and where there was no showing of good cause for retroactivity.

The 1st Circuit Court of Appeal affirmed the trial court's judgment, noting that nothing in La. R.S. 13:4165, in any consent judgment or in any judgment of the trial court prohibited the special master from addressing the issue of retroactivity. Additionally, the 1st Circuit noted that good cause existed for the retroactivity of child support, considering that no evidence existed in the record establishing the basis for the hearing officer's award made in April 2013 and that Mr. Ralph had an already-existing obligation to support his child in accordance with his true income.

Domestic Abuse Assistance Act

Boudreaux v. Webster, 24-0692 (La. App. 1 Cir. 11/13/24), ___ So.3d ___, 2024 WL 4762697.

Ms. Webster appealed two trial court judgments, one designating Mr. Boudreaux as the domiciliary parent and one awarding him attorney fees for the frivolous filing of her petition for protection from abuse.

The 1st Circuit Court of Appeal noted that it could not review the trial court's judgment designating Mr. Boudreaux as the domiciliary parent because the record did not contain the transcript or any

evidence adduced at trial. Additionally, the 1st Circuit affirmed the trial court's judgment awarding attorney fees to Mr. Boudreaux for the frivolous filing of Ms. Webster's petition for protection from abuse, noting that contrary to her assertions otherwise, the trial court made an express finding that the filing was frivolous.

Johnson v. Payne, 24-0290 (La. App. 1 Cir. 12/20/24), ___ So.3d ___, 2024 WL 5182269.

Ms. Payne appealed the trial court's judgment granting Mr. Johnson's petition for protection from abuse, arguing that her actions did not constitute domestic abuse under La. R.S. 46:2131 et seq. and that Mr. Johnson failed to show good cause for the issuance of the protective order.

The 1st Circuit Court of Appeal reversed the trial court's judgment granting Mr. Johnson's petition, finding that the trial court abused its discretion by granting him a protective order where he made no allegations of physical or sexual abuse. The court further found he failed to bear his burden of proving an offense against him as defined in the La. Criminal Code. Although Mr. Johnson presented evidence and testified that he filed the petition because Ms. Payne was harassing him, such harassment "does not arise to the level of an offense against a person and is not within the ambit of the Domestic Abuse Assistance Act."

Interspousal Donations

Gilberti v. Gilberti, 24-0308 (La. App. 4 Cir. 11/25/24), ___ So.3d ___, 2024 WL 4885888.

During Ms. Ackerman's marriage to Mr. Gilberti, she executed an act of donation giving him one-half of her interest in an immovable property that became the matrimonial domicile. On Aug. 19, 2020. Ackerman filed a petition for revocation of donation, alleging that Mr. Gilberti "committed grievous injury by committing adultery during the marriage, habitually using drugs, verbally abusing her …, threatening bodily harm, misusing community funds," and stealing and using her separate property without her consent. *Id.* at *1.

In response, Mr. Gilberti filed exceptions of no right of action, no cause of action and prescription, which the trial court appears to have referred to the merits. After trial on the revocation petition, the court granted Mr. Gilberti's exception of prescription in part and dismissed Ms. Ackerman's petition for revocation of donation with prejudice. Ms. Ackerman appealed.

The 4th Circuit Court of Appeal affirmed the trial court's judgment granting Mr. Gilberti's exception of prescription, noting that Ms. Ackerman's trial testimony acknowledged that she was aware of Mr. Gilberti's acts of adultery, drug use, verbal abuse and threats of bodily harm, which occurred in April, May and August 2019, more than one year before she filed her petition.

Further, the 4th Circuit affirmed the trial court's judgment denying Ms. Ackerman's petition on the remaining claims, agreeing that she failed to submit sufficient evidence.

Bergmann v. Nguyen, 24-0093 (La. App. 4 Cir. 12/30/24), ___ So.3d ___, 2024 WL 5244765.

During her marriage to Mr. Bergmann, Ms. Nguyen donated to him one-half of her interest in an immovable property that became the matrimonial domicile. In March 2019, Mr. Bergmann filed a petition for protection from abuse. Ms. Nguyen then filed a petition for divorce and a petition for protection from abuse. She also filed a petition to revoke donation the inter vivos, alleging cruel treatment under La. C.C. article 1557 because he assaulted her on Dec. 30, 2018, and obtained a court order that caused her to be temporarily evicted from her home and denied access to her children for three weeks.

The trial court granted judgment revoking the donation and decreeing that the immovable property was her separate property. The court also ordered Mr. Bergman to pay her attorney fees associated with the petition. Mr. Bergmann appealed, arguing that the trial court abused its discretion and committed reversible error in revoking the donation because the court should not have found her to be a credible witness. He also argued that the trial court abused its discretion in awarding Ms. Nguyen attorney fees.

The 4th Circuit Court of Appeal affirmed the trial court's judgment, concluding that it was not manifestly erroneous in finding her to be the more credible witness because a review of the record showed that conclusion was reasonable. The 4th Circuit did not address Mr. Bergmann's assignment of error regarding attorney fees because he abandoned it by failing to brief the issue.

Partition

Simmons v. Simmons, 24-0162 (La. App. 5 Cir. 01/29/25), ___ So.3d ___, 2025 WL 323355.

Ms. LaFontaine (formerly Simmons) appealed the trial court's judgment adopting the special master's recommendations on the partition of community property and overruling her objection to the special master's testimony. The 5th Circuit Court of Appeal affirmed, noting that (1) under La. R.S. 13:4165(C), the trial court was required to adopt the special master's recommendations because Ms. LaFontaine failed to timely object within 10 days of service of the notice of filing of the report, and (2) the consent judgment appointing the special master expressly stated that either party could call him to testify regarding his report.

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United States

Presidential Executive Order 14150, Jan. 20, 2025 "America First Trade Policy" (90 Fed. Reg. 8337).

Presidential Executive Orders 14193 (90 Fed. Reg. 9113) "Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border"; 14194 (90 Fed. Reg 9117) "Imposing Duties to Address the Situation at Our Southern Border"; and 14195 (90 Fed. Reg. 9121) "Imposing Duties to Address the Synthetic Opioid Supply Chain in the People's Republic of China."

As expected, and in line with campaign promises, President Donald Trump issued numerous executive orders pertaining to international trade and economic issues. The first Executive Order of Jan. 20, 2025, establishes a "robust and reinvigorated trade policy" to address unfair and unbalanced trade. The wide-ranging order directs numerous executive branch offices to initiate trade investigations in various fields, with reports due to the President beginning April 1, 2025. Following is an outline of a few of the America First Trade Policy directives.

► The Secretary of Commerce shall investigate the causes of our large and persistent annual trade deficit in goods and the national security implications therein.
► The Secretary of Treasury shall determine the feasibility of establishing an External Revenue Service to collect tariffs, duties, and other foreign trade-related revenues.
► The United States Trade Representative shall review and identify any unfair trade practices by other countries and recommend appropriate remedies.
► The United States Trade Representative shall commence the public consultation process in preparation for July 2026 review of the United States-Mexico-Canada Agreement, including an assessment of the agreement's impact on American workers, farmers, ranchers, service providers and other businesses.
► The Secretary of the Treasury shall review foreign trade policies regarding the rate of exchange between currencies.
► The Secretary of Commerce shall review policies and regulations pertaining to the application of U.S. antidumping and countervailing duty laws, including transnational subsidies, cost adjustments, affiliations and zeroing.

Twelve days after releasing the America First Trade Policy, President Donald Trump executed three executive orders utilizing the International Emergency Economic Powers Act (IEEPA) to impose sweeping tariffs on imports from Canada, China and Mexico. The IEEPA authorizes the President to take certain actions "to deal with any unusual and extraordinary threat with respect to which a national emergency has been declared." 50 U.S.C. § 1701.

President Donald Trump's executive orders assert a national emergency and extraordinary threat posed by illegal aliens and drugs, including fentanyl, coming into the United States from Canada, China and Mexico. The orders direct new *ad valorem* tariffs on imports of goods from Canada (25%), China (10%) and Mexico (25%). As of this writing the President paused implementation of tariffs from Mexico for one month. The orders apply to "all articles" except for certain Canadian energy exports that are subject to 10% duties rather than 25%. The orders also suspend access to the U.S. Section 321 customs *de minimis* entry process that eliminates customs duties on imports valued below $800.

There is one reported U.S. case examining an emergency trade action under the IEEPA's precursor statute, the Trading

with the Enemy Act. In a 1975 decision, the now-defunct U.S. Court of Customs and Patent Appeals reviewed President Nixon's Proclamation 4074 declaring a national emergency related to a severe balance-of-payments deficit caused by the "prolonged decline in the international monetary reserves of the United States." *U.S. v. Yoshida Int'l*, 526 F.2d 560, 567 (U.S. Cust. & Pat. App. 1975). The proclamation imposed a 10% tariff on all dutiable articles to address the balance-of-payments crisis.

Yoshida International was a U.S. importer of zippers from Japan that were subject to the 10% tariff. Yoshida challenged the constitutional validity of the statutory delegation of power and Presidential proclamation. The lower court granted Yoshida's motion for summary judgment, finding the statute does not delegate power to regulate international commerce. Id. at 568-69. The sole issue on appeal was whether the Customs Court erred in holding that the proclamation was *ultra vires* based on the delegated authority in the statute.

The Court of Customs and Patent Appeals conducted an extensive analysis of the statute before concluding that the delegation was constitutional.

"The power in peace and in war must be given generous scope to accomplish its purpose." … Though such a broad grant may be considered unwise, or even dangerous, should it come into the hands of an unscrupulous, rampant President, willing to declare an emergency when none exists, the wisdom of a congressional delegation is not for us to decide.

Id. at 583-84 (footnote omitted). *Yoshida* establishes a high Constitutional watermark for challenges to Presidential economic action during times of emergency.

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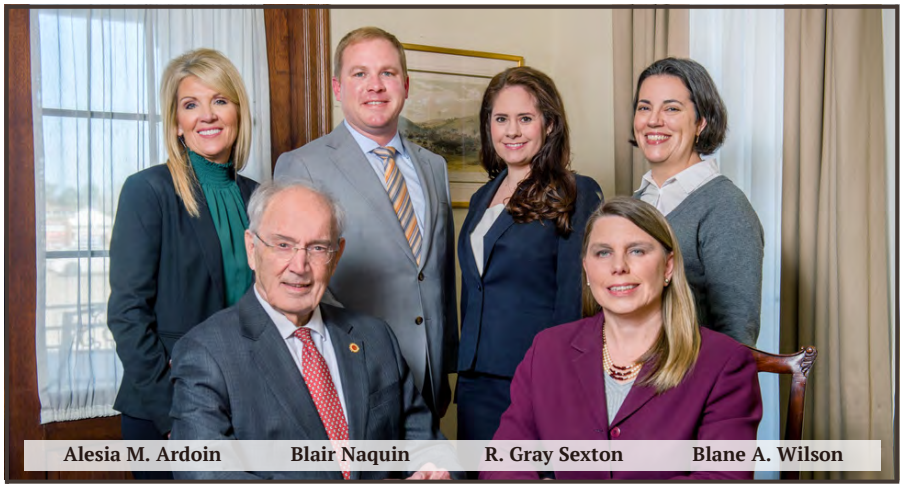

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Exhaustion Requirements and "Discrete Acts" of Discrimination

As is well known, a plaintiff filing an employment claim arising under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA) or the Age Discrimination in Employment Act (ADEA) is required to have first exhausted administrative remedies by timely filing an EEOC charge. *See, e.g., Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 337 (5th Cir. 2021). In addition, the substance of the claim must be reflected in the charge, such that the claim can be said to "arise out of the plaintiff's EEOC charge." *Id.*

But disputes may arise. Where the charge has omitted allegations that appear in the complaint, does the latter still "arise out of" the former? On this question, a recent decision of the U.S. District Court for the Eastern District of Louisiana, *Weber v. McDonough*, is clarifying. No. CV 23-1200, 2024 WL 5246610 (E.D. La. Dec. 30, 2024).

In *Weber*, the plaintiff submitted an EEO complaint (the public-sector equivalent of an EEOC charge) alleging discrimination based on age, color, reprisal and disability in the defendant's non-selection of the plaintiff for two positions and issuance of a reprimand. *Id.* at *1. However, when the plaintiff filed his complaint, he additionally alleged that the defendant had denied him a telework accommodation, denied him training opportunities, disclosed his protected health information, removed him from his position and caused issues with his unemployment benefits after the removal. *Id.* at *1-2.

The *Weber* court began its exhaustion analysis by noting the Fifth Circuit's instructions that an EEO charge should be "construed liberally," that a court should "look slightly beyond its four corners" and that a complaint may include allegations

"like or related to allegation[s] contained in the [EEO] charge and growing out of such allegations during the pendency of the case before the Commission." *Id.* at *4 (citations omitted). Still, the *Weber* court cautioned that a "discriminatory act alleged in a lawsuit but not included in an [EEO] charge is not 'like or related to' acts that are alleged in an [EEO] charge simply because both are based on the same type of discrimination," and more is required than merely the "fact that both [allegations] involve the same employer and the same general type of discrimination." *Id.* (citations omitted).

To resolve this tension, the *Weber* court invoked the U.S. Supreme Court's holding in *National R.R. Passenger Corp. v. Morgan*, which distinguished between "discrete acts" of discrimination and "continuing violations." *Id.* at *5 (citing 536 U.S. 101, 114 (2002). Discrete acts of discrimination include "termination, failure to promote, denial of transfer, or refusal to hire," each of which "constitutes a separate actionable 'unlawful employment practice.'" *Id.* (citing *Morgan*, 536 U.S. at 114). In contrast, continuing violations – which over time amount to the creation of a hostile work environment – by "[t]heir very nature involve repeated conduct," a single act of which "may not be actionable on its own." *Morgan*, 536 U.S. at 115.

In *Weber*, this distinction was the key to the court's exhaustion analysis. Discrete acts of discrimination must appear in a timely filed EEOC charge to satisfy the exhaustion requirement. *See Weber,* 2024 WL 5246610, at *5. Accordingly, because the plaintiff's complaint included multiple alleged discrete acts of discrimination for which no charge had been timely filed, the court granted the defendant's motion to dismiss the claims related to these discrete acts. *Id.* As such, while not binding authority, *Weber* is instructive to both defense attorneys seeking to dismiss claims beyond the scope of a plaintiff's administrative charge and plaintiff attorneys seeking to draft administrative charges that preserve all potential claims.

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Lease Maintenance Dispute

In *J. Calhoun One, L.L.C. v. Jeems Bayou Production Corp.*, 55,997 (La. App. 2 Cir. 12/18/24, ___So. 3d ___, WL 5150456, the plaintiffs owned land in DeSoto Parish that was included in a mineral lease granted in 1982. The plaintiffs sued several defendants in 2011, seeking a judgment recognizing that the lease had terminated. The plaintiffs' land includes about 80 acres in Section 35, Township 13 North, Range 13 West, DeSoto Parish, and about 80 acres in Section 36.

Paragraph 20 of the mineral lease stated:

> This lease shall terminate at the end of the primary term, or within 60 days following cessation of drilling operation of [sic] such operations are commenced before the end of the primary term and thereafter contined [sic] as provided hereinabove, as to any acreage covered hereby that is not assigned to an oil well or wells on the leased premises, or included in any gas unit formed hereunder capable of producing gas in paying quantities.

The court characterized this provision as "a Pugh clause." The Section 35 tract was included in a voluntary unit declared in 1985. The Section 36 tract was included in a drilling unit created by the Office of Conservation in 1984.

The defendants filed an exception of prescription, arguing that the plaintiffs' claim was a personal action that was subject to a 10-year liberative prescription and that the plaintiffs had not filed suit within 10 years of an alleged breach of lease. The plaintiffs opposed the exception by arguing that they were not suing for a breach of the lease. Rather, they were arguing that the lease had terminated by its own terms. The district court denied the exception and the Louisiana Second Circuit affirmed, agreeing with the plaintiffs' characterization of their claims.

The plaintiffs filed a motion for partial summary judgment that the lease had terminated as to both the Section 35 Tract and the Section 36 Tract. The district court granted the motion.

On appeal, the Second Circuit first addressed the Section 35 Tract. The plaintiffs argued that the lease had terminated as to the Section 35 Tract because the lessee did not commence drilling activities before the end of the primary term. The defendants disputed that, offering evidence that they had begun work clearing the drill site before the end of the primary term. The defendants stated that this site work qualified as drilling operations under Louisiana jurisprudence and that they had eventually drilled a productive unit well.

Further, the defendants offered evidence that they had paused their work because of rain and then held off restarting work because of the lessors' request that they hold off until the land had dried. The district court granted the plaintiffs' motion, but the Second Circuit reversed. The Second Circuit stated that the defendants' evidence created a genuine issue of material fact regarding when drilling operations began, and this precluded summary judgment as to the Section 35 Tract.

The Second Circuit then addressed the Section 36 tract. The plaintiffs asserted that the lease had terminated as to the Section 36 tract because it was undisputed that there had been three months-long gaps in production. The defendants presented evidence that they timely began reworking the wells in Section 36 after they ceased production and that these reworking operations restored production. The defendants argued that this was sufficient to maintain the lease. The Second Circuit reversed the district court's grant of partial summary judgment in favor of the plaintiffs, holding that an issue of material fact existed regarding the reworking operations that precluded summary judgment as to the Section 36 tract.

Subsequent-Purchaser Doctrine Defeats Some Claims, but Others Survive

In *Levert v. Union Texas International Corp.*, 23-0534 (La. App. 1 Cir. 12/23/24), ___ So.3d ___, 2024 WL 5199152, the plaintiff asserted legacy litigation (oilfield

contamination) claims against several defendants, including certain defendants that the appellate court collectively referenced as the "ARCO Defendants." The district court dismissed all claims against the ARCO Defendants, relying on the subsequent-purchaser doctrine. The plaintiff appealed.

The Louisiana First Circuit noted that, under Louisiana law, a claim for damage to property is a personal action, not a real action. Thus, if a person sells property without assigning (to the purchaser) any claims that the seller might have against third persons for existing damage to the property, the claims against those third persons remain with the seller. This is the subsequent-purchaser doctrine. In *Levert*, the First Circuit affirmed the dismissal of the plaintiff's claim for damages that allegedly occurred prior to the plaintiff's acquisition of the property at issue. The First Circuit reasoned that those claims were barred by the subsequent-purchaser doctrine.

However, the First Circuit reversed the dismissal as to claims for damages that allegedly occurred after the plaintiff acquired ownership of the property. The ARCO Defendants had assigned their interest in the lease to other persons by the time those alleged damages occurred. The court noted, however, that unless the lessor releases a lessee, the lessee who assigns the lease is solidarily liable with the assignee for post-assignment breaches of the lease. The First Circuit held that the ARCO Defendants could be liable on that basis.

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Prescription

South v. Olinde, 55,770 (La. App. 2 Cir. 7/17/24, ____ So. 3d ____, 2024 WL 3434578, *writ denied*, 24-1036 (La. 11/14/24), 396 So.3d 62.

The plaintiffs filed a panel request against a hospital (St. Francis) and a kidney treatment center (Fresenius). Over three years later, they filed an amended request adding two physician defendants who had treated the patient at the earlier named facilities.

The medical-review panel rendered an opinion finding there were departures from the standards of care by each physician, but none by Fresenius or St. Francis. The plaintiffs then filed suit against only

the two physicians and made no claim that the physicians were agents or employees of the originally named facilities.

The physicians filed exceptions of prescription contending that because they were not timely named in the panel complaint and were not employees of St. Francis or Fresenius, there could be no joint or solidary liability. The plaintiffs then attempted to amend their petitions to add Fresenius and St. Francis as defendants, but the district court denied their motion because the plaintiffs were "fully aware of the part played by [Fresenius and] St. Francis, but chose to sue only the doctors, and did not try to join [them] until after the 90-day window." *Id.* at *2. The court also ruled that the physicians were not employees of the hospital.

The court of appeal recognized that a timely suit against one joint or solitary obligor interrupts prescription against all other obligors. However, the court quoted La. C.C. art. 1788 to explain that a joint obligation requires that "different obligors owe together just one performance to one obligee, but neither is bound for the whole." Conversely, article 1794 provides that in a solitary obligation, "each obligor is liable for the whole performance." The court added that under article 2324(A): "Solidary liability occurs only when one person conspires with another person to commit an intentional or willful act."

Here, the timely filed panel request named only the two defendant facilities, neither of which were timely named in the lawsuit. As the physicians were not employees, the judgment sustaining the exception of prescription was affirmed.

Intentional Tort

Riley v. Paramount Healthcare Consultants, LLC, 24-0127 (La. App. 3 Cir. 10/30/24), 396 So.3d 470.

Lloyd and Timothy Riley appealed a trial court judgment granting an exception of prematurity in favor of Paramount Healthcare Consultants, L.L.C. and DSRM Lafayette OPCO, LLC d/b/a Cornerstone at the Ranch. The Rileys contended that Paramount failed to establish itself as a qualified healthcare provider under the Louisiana Medical Malpractice Act (LMMA) and that their claims against Cornerstone involved intentional fraud, which falls outside the LMMA.

Faye Riley resided at Cornerstone from Nov. 3, 2021, to April 24, 2022, under the management of Paramount. On April 24, she was found unresponsive and transported to a hospital, where she was diagnosed with septic shock, dehydration, malnutrition and bacteremia. She died on April 30, 2022.

The Rileys filed suit alleging negligence and fraud. Paramount and Cornerstone responded with an exception of prematurity, asserting LMMA protection. The trial court sustained the exception, dismissing the case without prejudice. The Rileys appealed.

Exception of Prematurity

Paramount introduced a PCF certificate as evidence of qualification, but the document was uncertified and bore an illegible signature. The appellate court found that, under La. C.E. articles 902 and 904, the certificate was inadmissible and Paramount failed to establish its LMMA qualification. The exception of prematurity in Paramount's favor was reversed.

Intentional Tort Exception

The Riley claims included intentional misrepresentation and fraud, which the LLMA does not cover. The LMMA applies only to *unintentional* torts arising from medical malpractice, while intentional torts fall outside its scope and are governed by general tort law. The Rileys alleged that Cornerstone knowingly misrepresented its ability to provide adequate staffing and care for Ms. Riley at the time of her admission, violating the Nursing Home Residents' Bill of Rights under La. R.S. 40:2010.8(A)(7). They contended that these fraudulent assurances led to Ms. Riley's admission to the facility despite it being understaffed, resulting in her injuries and death.

Under *Coleman v. Deno*, 01-1517 (La. 1/25/02); 813 So.2d 303, one of the key factors in determining whether a claim sounds in medical malpractice is whether the alleged conduct was intentional. Fraudulent misrepresentation meets the definition of fraud under La. Civil Code article 1953, requiring proof of (1) misrepresentation, suppression or omission of truth, (2) intent to gain an unjust advantage or cause harm and (3) inducement of error influencing consent.

The appellate court found that the Rileys' allegations sufficiently supported a claim of fraud and intentional tort, which does not require submission to a medical-review panel under the LMMA. Therefore, the trial court erred in sustaining Cornerstone's the exception of prematurity.

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Purchase of Corvette Was a Non-taxable Sale for Resale

C & C Performance Constr. v. Dept. of Rev., BTA Docket No. 13159B (12/5/24).

C & C Performance Construction, LLC (C&C) is an LLC owned and operated by Charles Malveaux. C&C is in the automobile resale business. It is a registered used car dealer that possesses a used-car-resale certificate. C&C had a pattern of business activity of purchasing vehicles wholesale and then reselling those vehicles to dealerships. C&C purchased a new 2022 Corvette and resold it to Platinum Leasing of Orlando Inc., a dealer in Florida. After purchasing the Corvette, Malveaux had it transported by truck to Platinum and did not drive or otherwise use the Corvette.

Through an error caused by an agent whom Malveaux used to assist in purchasing the Corvette, title was applied for as though C&C were buying the Corvette for its own use, and the title was issued to C&C as if it were the

ultimate consumer. The agent accidentally took the title application to a retail license location, instead of taking it directly to the Office of Motor Vehicles (OMV).

Malveaux asserted the purchase of the Corvette was a sale for resale, which is not a taxable sale at retail in Louisiana. As a result, Malveaux asserted he was entitled to a refund of the state and local sales tax paid at the time the title application for the Corvette was processed. The OMV and the La. Department of Revenue denied the refund, asserting sales tax was due by C&C as C&C titled the vehicle in its name and had not strictly complied with rules and regulations to establish a valid non-taxable sale for resale. C&C appealed the denial to the Louisiana Board of Tax Appeals (BTA).

The BTA factually noted that C&C was in the business of purchasing vehicles at wholesale for resale to dealerships, C&C was not the ultimate consumer of the Corvette and Malveaux purchased the Corvette as a new vehicle and resold it as a new vehicle.

The issue before the BTA focused on whether the apparent error of C&C's agent in the application for title as a consumer renders the transaction taxable. The BTA held there was no need for C&C to obtain title to the vehicle, C&C had previously complied with the rules and regulations for making a sale for resale with only a Manufacturer's Certificate of Origin, and the error of the agent of Malveaux in processing title to the Corvette did not nullify strict compliance with the rules and regulations applicable to have a valid non-taxable sale for resale. The BTA held C&C's original purchase of the Corvette was a non-taxable sale for resale. The BTA ordered the Department to refund the state sales tax and the OMV to refund the local sales tax paid on the purchase.

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Louisiana Enacts Sales-and-Use Tax Laws Affecting Digital Products

House Bill 8/Act 10 passed during Louisiana's 2024 Third Extraordinary Session on "tax reform" introduced provisions under the sales-and-use tax statute related to the taxation of "digital products." As a result of the amendments, state and local sales-and-use tax apply to digital products effective Jan. 1, 2025.

The term digital products covers digital audiovisual works, digital audio works, digital codes, digital applications and games, digital periodicals and discussion forums and digital books, each of which are themselves defined terms. In addition, digital products covers any other otherwise taxable tangible personal property that is transferred electronically. It is immaterial whether the product is digitally delivered, streamed or accessed and whether it is purchased singly, by subscription or in any other manner.

Certain items have been specifically excluded from the scope of digital products. These include intangible property such as copyrights; internet-access services; work product in electronic form resulting from a professional service, such as an engineering report, telecommunication services; cable television services; certain satellite services; video-programming services; and products where the purchaser holds the intellectual property and uses the product solely for commercial purposes.

The various provisions of the statute that previously applied to tangible personal property have generally been extended to digital products. "Sale" and "use" in relation to digital products have been modified to mean the "first act" within the state by which the consumer, views, accesses, downloads, possesses, stores, opens, manipulates or otherwise uses or enjoys the product.

In addition, specific exclusions and exemptions have been enacted for digital products. First, an exclusion applies where a digital product becomes an ingredient or component of a new product or taxable service. Second, digital products made available free of charge (where the recipient is not required to provide anything of significant value in exchange for the product) are also excluded from tax. Third, a business-use exemption applies to digital products that are purchased or licensed exclusively for commercial purposes, used by the purchasing business directly in the production of goods or services for sale to its customers, *and* where the goods or services produced and sold by the business are subject to sales-and-use tax or to the insurance-premium tax. In addition, a use-tax exemption applies to digital products created by a business for its own use so long as they are not the type of digital products the business offers for sale.

The amendments also address potential nexus issues created by in-state digital products of an out-of-state business, providing that the department shall not consider a person's ownership of, or rights in, digital products residing on servers located in Louisiana in determining whether the person has substantial nexus with the state for sales-and-use tax purposes.

In addition to the amendments introduced by Act 10, it is worth noting that House Bill 10/Act 11 contains new sets of norms related to sourcing sales to Louisiana, as well as to the taxation of bundled transactions, that also apply to digital products.

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