

Spousal Support

***Shannon v.* Shannon,** 24-0140 (La. App. 4 Cir. 10/25/24), 2024 WL 4579142.

The Shannons were married in September 1993 and divorced in September 2006. On Feb. 11, 2013, Mr. Shannon and Ms. Shannon executed a consent judgment regarding final spousal support. The consent judgment regarding spousal support provided cash spousal support and life insurance payments for a policy on Mr. Shannon, with Ms. Shannon listed as the beneficiary. Further, that consent judgment contained a non-modification clause and a termination clause, which stated:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above-mentioned spousal support and other payments shall not terminate upon the occurrence of Julia Westrich Shannon cohabiting with another man or her remarriage. These payments are only subject to termination upon the death of either party, or if Julia Westrich Shannon should inherit, be gifted, or in any other manner receive a sum of money equal to or in excess of $1,000,000 from any third party other than Jack Shannon within a two-year period.

On July 17, 2020, Mr. Shannon filed a motion to modify and/or terminate spousal support, alleging a material change in circumstances since the consent judgment. Ms. Shannon moved for summary judgment, which the trial court granted in part, finding that the consent judgment was enforceable according to its terms and stating that "the provision of the consent judgment relating to the receipt by Ms. Shannon of $1,000,000 over a period of two years was not addressed by the Court."

On Jan. 12, 2022, Mr. Shannon filed an amended motion to modify and/or terminate spousal support, alleging that spousal support should be terminated retroactive to a date in 2013 that had yet to be determined because the termination clause in the consent judgment had been triggered. Additionally, Mr. Shannon asserted that Ms. Shannon had intentionally withheld the material facts related to her receipt of the funds.

Mr. Shannon's amended motion was tried on three non-consecutive days. After the close of the first day of trial, on June 2, 2022, Ms. Shannon filed peremptory exceptions. Mr. Shannon responded, alleging that the exceptions were untimely. On the second day of trial, Oct. 25, 2022, the parties agreed that the trial court could defer ruling on Ms. Shannon's exceptions until the trial was completed. On the third day of trial, Nov. 25, 2022, the trial court took the matter under advisement.


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On March 31, 2023, the trial court rendered judgment granting Mr. Shannon's amended motion, finding that Ms. Shannon's receipt of $1,650,000 on April 25, 2013, from her boyfriend Mr. Emmett triggered the termination clause in the consent judgment, but terminated spousal support retroactively only to Jan. 12, 2022, and awarded Mr. Shannon reimbursement from that date. Further, the trial court overruled Ms. Shannon's exceptions as untimely.

Ms. Shannon appealed, arguing that the trial court erred (1) in summarily dismissing her peremptory exceptions; (2) in finding that the termination clause was triggered by her receipt of $1,650,000 on April 25, 2013, from Mr. Emmett; and (3) in terminating spousal support without first making a finding as to Ms. Shannon's necessitous circumstances. Mr. Shannon answered the appeal, arguing that the trial court erred in applying La. R.S. 9:321(C) rather than the rules on contract interpretation and payment of a thing not due when determining the retroactivity of termination and reimbursement.

The 4th Circuit Court of Appeal affirmed the trial court's judgment. The appellate court found that:

► Ms. Shannon's first assigned error was without merit because the matter was a summary proceeding governed by La. C.C.P. art. 2592 and 2593, which require that exceptions to summary proceedings be filed before the trial begins, and she had not done so;

► Ms. Shannon's second assigned error was without merit because the trial court's decision to credit Mr. Shannon's expert was not manifestly erroneous, where the expert determined that there was no objective evidence to corroborate Ms. Shannon's claim that she had purchased a one-half interest in Mr. Emmett's home in New York and that the $1,650,000 was a return on her investment;

► Ms. Shannon's third assigned error was without merit because the terms of the consent judgment governed and directly addressed modification, such that Ms. Shannon was not entitled to an evidentiary hearing as would occur under the default rules for termination of spousal support under the Louisiana Civil Code; and

► Mr. Shannon's assigned error was without merit because the more specific rule, La. R.S. 9:321(C), applied over the more general rules on contract interpretation and payment of a thing not due.

Community Property

Bajewski v. Bajewski, 23-5520 (La. App. 5 Cir. 10/9/24), 2024 WL 4447831.

While married, Mr. Bajewski conveyed his undivided interest in a separate property home to himself and Mrs. Bajewski jointly by quitclaim deed signed April 19, 2007, by the Bajewskis, two witnesses and the notary. The Bajewskis divorced on March 1, 2013. Nearly one year later, Mr. Bajewski filed a petition for revocation of donation inter vivos for ingratitude, seeking, among other things, the return of his interest in the home. Mr. Bajewski later amended his petition to claim that the quitclaim deed was absolutely null because it was executed and witnessed outside the notary's presence.

When the trial finally occurred on May 1, 2023, the only outstanding issue was the validity of the quitclaim deed. The trial court rendered judgment dismissing Mr. Bajewski's claim with prejudice, finding that Mr. Bajewski failed to present clear and convincing evidence sufficient to overcome the presumption that the quitclaim deed was properly executed and notarized.

The 5th Circuit Court of Appeal affirmed the trial court's judgment, noting that Mr. Bajewski had not provided any objective evidence to support his claims or to contradict the testimony of Ms. Bajewski and the notary that the parties' signatures were properly witnessed and notarized. Further, the trial court's decision to credit the testimony of Ms. Bajewski and the notary over Mr. Bajewski and the witnesses was reasonable because the testimony was not so inconsistent or implausible that a reasonable factfinder would not credit it.

Noel-Potier v. Potier, 24-0194 (La. App. 3 Cir. 10/30/24), 2024 WL 4610764.

Ms. Noel-Potier appealed the trial court's judgment granting Mr. Potier's rule to show cause why his detailed descriptive list should not be deemed to constitute a judicial determination of the community assets and liabilities. The 3rd Circuit Court of Appeal affirmed the trial court's judgment, finding that Ms. Noel-Potier had no good cause for failing to timely file her detailed descriptive list. While Ms. Noel-Potier was not specifically ordered to file her detailed descriptive list within 45 days of service of Mr. Potier's petition for divorce, La. R.S. 9:2801(A)(1)(a) provides a statutory deadline. Ms. Noel-Potier did not seek clarification of the deadline, did not ensure her untimely detailed descriptive list would be filed by paying the necessary fees, and did not verify that it was filed before the hearing on Mr. Potier's rule to show cause.

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U.S. International Trade Commission

Frozen Warmwater Shrimp from Ecuador, India, Indonesia and Vietnam (Nov. 19, 2024).

The U.S. International Trade Commission (ITC) voted affirmatively on Nov. 19, 2024, to impose antidumping and countervailing duties on imported shrimp from Ecuador, India, Indonesia and Vietnam. The ITC vote confirms that the domestic shrimp industry is being materially harmed by imported shrimp that is illegally dumped and/or subsidized. The U.S. Department of Commerce previously issued affirmative determinations finding margins ranging from 2.24% to 221.82%. The four countries were responsible for more than $5 billion worth of imported shrimp in 2023 and will now have to pay duties before their shrimp may enter the U.S. market.

U.S. Court of International Trade

Ventura Coastal, LLC v. United States, ____ F.Supp.3d ____, 2024 WL 4799469 (CIT Nov. 7, 2024).

In one of what some predict will be many cases addressing trade-agency statutory interpretations under *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the U.S. Court of International Trade (CIT) recently rejected the U.S. Department of Commerce's (Commerce) definition of the term "partner" under the U.S. antidumping statute. The case involves a request by Ventura Coastal, LLC, to impose antidumping duties on certain lemon juice imported from Brazil. Commerce entered a negative final determination finding, *inter alia*, that respondent Louis Dreyfous Company was not affiliated with a supplier as a "partner" for purposes of calculating dumping margins under the antidumping statute. Commerce found their relationship market-based, with arm's length transactions not relevant to its dumping calculation. Ventura Coastal appealed Commerce's final determination on the "partner" issue.

The CIT reviewed Commerce's interpretation under the direction of the U.S. Supreme Court's decision in *Loper Bright*. Accordingly, the court analyzed interpretation of the statutory term "partner" without deference to a reasonable agency interpretation. The CIT rejected Commerce's definition, finding it impermissibly restrictive, finding that the term statutory term "partner" may include not only those who jointly own things or engage in joint selling activities (as Commerce found), but also situations involving those who jointly share risk and reward. Congress enacted the statute to identify affiliate

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relationships ("partners") that impact price. Accordingly, Commerce's definition impermissibly limits the number of relationships that might impact price in the calculation of antidumping margins.

U.S. 5th Circuit Court of Appeals

Texas Truck Parts & Tire, Inc. v. United States, 118 F.4th 687 (5 Cir. 2024).

The U.S. 5th Circuit Court of Appeals recently addressed the definition of "importer" under the Internal Revenue Service regulatory code. The case involved an IRS claim against tire retailer Texas Truck for approximately $1.9 million in delinquent excise taxes related to its purchase and sale of automobile tires from several Chinese manufacturers. The Chinese companies imported the tires through their U.S.-based affiliates, which then arranged transportation of the tires to Texas Truck in Houston for retail sale. The IRS sought the payment, claiming Texas Truck was the beneficial owner of the tires.

The district court ruled that Texas Truck was not the "importer" under IRS regulations because the Chinese-affiliated companies entered the goods as the importers of record. The 5th Circuit reversed, reasoning that even though Texas Truck did not import the goods, it was the beneficial owner of the goods, making it the "importer" of the goods under the IRS regulatory scheme. The court rejected the district court's reliance on the U.S. Customs and Border Protection's definition of importer, finding only Treasury's definition applicable and relevant. Treasury's use of the phrase "any person who brings such an article into the United States …" broadly includes nominal importers that induce the importation and derive future benefits from the good. The Chinese importers were importers in name only for purposes of the Internal Revenue Code and Texas Truck is the nominal importer that owes the excise tax.

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NLRB Plans to Prosecute Non-Competes and "Stay-or-Pay" Agreements

On Oct. 7, 2024, Jennifer A. Abruzzo, general counsel for the National Labor Relations Board (NLRB), issued Memorandum GC 25-01, "Remedying the Harmful Effects of Non-Compete and 'Stay-or-Pay' Provisions that Violate the National Labor Relations Act" (GC Memo 25-01). NLRB General Counsel Memoranda are issued to provide policy guidance to the agency's field offices, *www.nlrb.gov/guidance/memos-research*.

Previously, on May 30, 2023, Abruzzo issued Memorandum GC 23-08, "Non-Compete Agreements that Violate the National Labor Relations Act," which explained "that, except in limited circumstances, the proffer, maintenance, or enforcement of non-compete provisions" limiting an employee's ability to work for a competitor is violative of the NLRA because these provisions "tend to chill employees in the exercise of Section 7 rights," including the right to "organize and act together to improve working conditions[,]" and undermine employee bargaining power in labor disputes because of the limited "ability to quit or change jobs" or work "with a local competitor to obtain better working conditions[.]" *pp. 2-4*.

GC Memo 25-01 builds on that position and explains that, for the same reasons, "stay-or-pay" provisions are "presumptively unlawful" under the NLRA as well. *Id.* at pp. 5. "Stay-or-pay" provisions typically require repayment to the employer if an employee leaves his/her



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position within a certain timeframe after receiving sign-on or relocation bonuses, repayment for moving expenses, or money for education or training, or ask for reimbursement for an employer directly providing training to the employee (training repayment agreement provisions, or TRAPs). Some agreements also require a departing employee to pay the employer for the employer's "business costs or losses," including the "costs of hiring and training a replacement, lost profits caused by the employment vacancy." *Id.*

Stay-or-Pay Provisions Must Be Narrowly Tailored

GC Memo 25-01 explains that "stay-or-pay" provisions are unlawful unless "narrowly tailored to minimize any interference with Section 7 rights." *Id.* An agreement is narrowly tailored if it "(1) is voluntarily entered into in exchange for a benefit; (2) has a reasonable and specific repayment amount; (3) has a reasonable 'stay' period; and (4) does not require repayment if the employee is terminated without cause." *Id.* at pp. 8-9.

Voluntariness: An agreement for a cash payment is "voluntary" if the employee has "the option between taking an up-front payment subject to a stay-or-pay or deferring receipt of the same bonus until the end of the same time period." An agreement to pay for training is "voluntary" where the training is optional, and the employee could choose to pay out-of-pocket to do that training with a third party if he or she wishes to do so. *Id.* at pp. 9-11.

Reasonable and Specific: GC Memo 25-01 explains an agreement must be reasonably limited to "no more than the cost to the employer of the benefit bestowed." Reasonableness is also assessed based on the "cost of the benefit bestowed, its value to the employee, whether the repayment amount decreases over the course of the stay period, and the employee's income." *Id.* at pp. 11-12. The amount to be repaid must be "specified up front" so that the employee knows the "exact amount of debt owed."

Termination Without Cause: Finally, "the provision must effectively state that the debt will not come due if the employee is terminated without cause." GC Memo 25-01 explains that this is because this "could include termination for an unlawful reason," causing "fear of engaging in union activity and other concerted advocacy … ." *Id.* at pp. 12-13.

December 2024 Deadline

GC Memo 25-01 provides ample guidance on how to draft new stay-or-pay agreements moving forward, and Abruzzo states she "will exercise [her] prosecutorial discretion to decline to issue complaint, absent settlement" for a 60-day window from the date of memorandum's issuance to "cure any preexisting stay-or-pay provisions … ." Further, if the only violation is that "the stay-or-pay provision was not entered into voluntarily," or the amount of the debt was not specified, the NLRB "will not issue complaint" so long as the amount is later specified. Further, Abruzzo will also "decline to prosecute any preexisting stay-or-pay arrangement if the employer cancels the debt," ends collections efforts, and notifies employees by the deadline. *Id*. at pp. 15-17.



Remedies

Employees with unlawful stay-or-pay agreements in place can seek the NLRB's assistance by filing an unfair-labor practice charge within 180 days of the unlawful act. The NLRB may order the employer "to rescind and replace it with a lawful provision" and "notify employees that the 'stay' obligation has been eliminated and that any debt has been nullified and will not be enforced … ." If an employer already attempted or enforced an unlawful "stay-or-pay" and non-compete provision, the remedy is to "make employees whole for any financial harms resulting from its attempted enforcement." These make-whole remedies are expansive and include the repayment amount, lost employment opportunities, reimbursement for legal fees and costs expended to defend a claim by the employer, correction of credit ratings and other losses. *Id.* at pp. 13-15.

As the new administration transitions into the White House, there may be changes to how these types of charges are prioritized and prosecuted, and updated Memoranda may take a new approach in the future.

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Revisions to Louisiana Oilfield Site Restoration Law

Revisions to the Louisiana Oilfield Site Restoration Law (La. R.S. 30:81, et seq.) were approved by the Legislature during the 2024 Third Special Legislative Session through House Bill No. 23 and are expected to become law upon approval by Gov. Landry.

The Louisiana Oilfield Site Restoration Law establishes procedures for the restoration of *orphaned* and *unusable* oilfield sites and related funding. An oilfield site may be declared "orphaned" where (1) it has no continued useful purpose for oil and gas exploration, production and development; (2) the site was not closed or maintained in accordance with law or it constitutes a danger or potential danger to public health, the environment or an oil-and-gas formation; and (3) no responsible party can be located, or such party has failed or is financially unable to restore the site. La. R.S. 30:82, 30:91. An oilfield site may be declared "unusable" where a responsible party can be located but (1) the site has no continued useful purposes for the exploration, production or development of oil or gas; and (2) the responsible party fails to undertake site restoration. La. R.S. 30:82, 30:89. Once an oilfield site is declared orphaned or unusable, the commissioner may enter contracts and expend funds to plug and abandon wells, close pits, remove oilfield equipment and perform other site remediation and restoration. La. R.S. 30:84, 30:86, 30:89, 30:92, 30:93.

The Oilfield Site Restoration Committee (OSR), consisting of 10 members, is granted authority to administer the Oilfield Site Restoration Fund and oversee site-specific trust accounts. La. R.S. 30:83. The oilfield-site restoration fees consist of (1) a fee of 1½ cents for each barrel of crude oil produced in the state if the price of oil is at or below $60 per barrel, 3 cents per barrel if the price of oil is above $60 and at or below $90 per barrel, 4½ cents if the price of oil is above $90 per barrel; and (2) a fee on natural gas produced in the state in the amount of 3/10 of 1 cent for each thousand cubic feet ,with special rules governing stripper wells and incapable wells. La. R.S. 30:87.

House Bill No. 23 creates a new governing body to oversee the Oilfield Site Restoration Fund and site-specific trust accounts and increases the fees for oil



and natural gas production. First, the bill replaces the OSR with a Natural Resources Trust Authority to administer funds with oversight by the State Mineral and Energy Board and perform functions traditionally afforded to the Commission. This includes setting priorities for annual site restoration, pledging revenues and securing bonds, approving contractors to conduct assessments and restoration, approving cooperative-endeavor agreements, reviewing site-restoration activities and assessments, administering and managing the fund and all site-specific trust accounts, and performing other functions authorized by law.

Second, House Bill No. 23 increases the fees under La. R.S. 30:87. For crude oil produced in the state, the fee is increased to 2 cents per barrel if the price of oil is at or below $60, 4 cents per barrel if the price of oil is above $60 and at or below $90 and 6 cents per barrel if the price of oil is above $90. For natural gas, the fee is increased to 3/10 of 1 cent per thousand cubic feet if the price of gas is at or below $2.50 per thousand cubic feet, 4/10 of 1 cent per thousand cubic feet if the price of gas is above $2.50 and at or below $4.50 per thousand cubic feet, and 5/10 of 1 cent per thousand cubic feet if the price of gas is above $4.50 per thousand cubic feet.

Revisions to State Property Leasing Laws

The Legislature approved House Bill No. 24 to expand the powers and authorities of the State Mineral Energy Board pursuant to La. R.S. 30:121, et seq. and revise and enact new laws related to the lease of state property for energy-related purposes.

First, House Bill No. 24 allows the State Mineral and Energy Board to lease state lands "for the development and production of minerals, oil, gas, or alternative energy sources and for the purposes set forth in R.S. 30:148.2" and makes clear that payments to the state are a tax as opposed to rent for purposes of the bankruptcy code (11 U.S.C.A § 503).

Second, House Bill No. 24 provides that no mineral lease shall contain more than 5,000 acres, and no lease for solar-energy production shall exceed 35 acres unless the Senate and House Committees approve a larger acreage (up to 5,000 acres).

Third, the bill increases fees collected by the State Mineral and Energy Board and the Office of Mineral Resources to reflect agency costs. The mineral board may charge a $175 fee to cover transfer/assignment costs and a $100 fee for lease applications. Additionally, 25% of revenues collected from any operating agreement must be credited to the Mineral and Energy Operation Fund.

Last, House Bill No. 24 revises R.S. 30:129 to clarify that Pugh clauses are required for mineral leases (but not other leases) granted under R.S. 30:129.

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Informed Consent

Lucas v. Ochsner Clinic Found., 24-0628 (La. App. 4 Cir. 10/10/24), ____ So. 3d ____, 2024 WL 4457155.

During intubation of aortic-reconstruction surgery, a nasal-gastric tube created a tear in the patient's esophagus. The tear was repaired, despite which blood loss and other complications led to her death.

The patient's surviving relatives sued the hospital and the anesthetist. The plaintiffs filed a motion *in limine* requesting that the consent form and all evidence concerning "informed consent" be excluded from evidence because they had not raised the issue of informed consent, and thus the issue was irrelevant. They also argued that, irrespective of any relevance, "the balance required by La. C.E. art. 403 demands its exclusion because of the high probability of prejudice." The defendants countered that the informed consent agreement formed a portion of the patient's certified medical records and was therefore admissible, adding that there was no risk of undue prejudice if the consent was admitted. The trial court denied the patient's motion in limine.

The appellate court noted that the issue of the admissibility of a consent form is "part of a relatively new body of law in our state," adding that there was "no broad ruling from the Louisiana Supreme Court" concerning the admissibility or exclusion of consent forms in medical malpractice cases "when informed consent is not part of the claim presented."

The court noted that under Louisiana Code of Evidence article 402, the general rule is that "all relevant evidence is admissible," but Louisiana Code of Evidence article 403 tempers that general rule. Accordingly, the court recognized that, under article 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

The court observed that in *Matranga v. Parish Anesthesia of Jefferson, LLC*, 14-0448 (La. App. 5 Cir. 5/14/15), 170 So.3d 1077, a trial court allowed the issue of informed consent to be placed before the jury. The appellate court reversed, commenting that during trial the defendants "highlighted" the dangers of the surgery "and evaluated those risks to the dangers/risks of her intubation." The *Matranga* court commented that the argument "could easily lead to the conclusion that Ms. Greathouse acquiesced to her injury and subsequent death," leaving the court to conclude that the "informed consent evidence most likely caused confusion to the jury," and a defense verdict was reversed. The court noted that the "common thread" of the issue of informed consent evidence is "jury confusion."

The appellate court concluded that "[l]ogic and La. C.E. art. 403 dictate that [consent form] evidence should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice[and confusion] and often results in a waste of time." There being no evidence that informed consent was relevant to the alleged negligence, the court granted the plaintiffs' writ requesting removal of informed consent from evidence.

Abandonment

Sylvester v. Santone, 24-0310 (La. App. 4 Cir. 7/16/24), ____ So.3d ____, 2024 WL 3422614.

Three events in the prosecution of a claim occurred in 2019, the last of which were discovery requests to plaintiff. The plaintiff's lawyer withdrew as counsel of record in 2020. Discussions between the plaintiff and defendant concerning settlement occurred over the next two years, and on June 1, 2022, former counsel Smith emailed Ochsner stating: "[P]lease see attached supplemental IRS records for Paul Sylvester for 2013-2020," with plaintiff's tax records attached. The subject line email was "Paul Sylvester case 2019-09379."

In December 2023, Sylvester sent written discovery to Ochsner, which then filed a motion to dismiss based on abandonment. Sylvester responded to the motion, claiming that at the October 2021 meeting, Ochsner asked for supplemental responses to the 2019 discovery requests with tax records, which were provided, and which were "formal discovery and thus a step for abandonment purposes." Thus, the three-year abandonment would not have occurred until June 2025. The trial court agreed with the plaintiff's argument.

Ochsner's first argument was that the correspondence concerning the tax records was part of settlement negotiations, was informal correspondence and was an "extrajudicial effort—not formal discovery," and, moreover, the lawyer who sent the email was not enrolled as attorney of record. The plaintiff countered that the documents produced were responsive to defendant's request for production made in 2019. The appellate court opined "that the Email was a response to the informal requests" made by defendant's counsel during negotiations and did not constitute formal discovery.

Ochsner also posited that Smith was not an attorney of record when he sent the email, supporting that argument with reference to Louisiana Code of Civil Procedure article 1420(A), which provides that all discovery requests and responses are required to be signed by an attorney of record if the party is represented by an attorney. The court of appeal stated: "Generally, discovery not signed by an attorney of record cannot be formal discovery for purposes of being a step in the prosecution of the action. Such is the case here." The court concluded that it thus was "not a step for abandonment purposes pursuant to La. C.C.P. art. 596(B)." Smith's judgment was reversed.

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Discounted and Complimentary Items Notice by the Louisiana Department of Revenue

The Louisiana Department of Revenue issued a sales-and-use-tax notice (Department Notice) on discounted and complimentary items provided by a casino, pari-mutuel facility or gaming establishment.

For purposes of Louisiana state sales tax, the sales price of discounted items and complimentary items provided by a casino, pari-mutuel facility or other gaming establishment as an incentive to the patrons of that casino, pari-mutuel facility or gaming establishment, and its affiliates, and those similarly situated, shall be the actual cash amount paid, if any, by the patron specifically for the discounted items and complimentary items at the time it is provided to the patron. Any "theoretical win" or casino winnings actually realized by the casino, pari-mutuel facility or gaming establishment will not be imputed as consideration given for any of the items, and no state sales or use tax is due on the complimentary items.

For purposes of the Department Notice, complimentary and discounted items include, but are not limited to, rooms, cabanas, meeting space, meals, priority services, VIP experiences, admissions to entertainment venues, audio/visual equipment, parking/valet and other like goods and services.

The Department Notice does not apply to sales or use tax levied on the purchase or use of tangible personal property by a casino, pari-mutuel facility or gaming establishment, including meals and beverages, used as a complimentary incentive or inducement, or to any other sale or use otherwise subject to Louisiana sales-and-use tax. For instance, the casino, pari-mutuel facility or gaming establishment is required to remit use tax on food purchased from its vendor using a resale certificate if that food is later provided as a discounted or complimentary meal to a patron.

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BTA Rules on Scope of Sales and Use Tax Manufacturing Exclusion

Kellogg Brown & Root, LLC v. Jefferson Par. Sheriff's Office, BTA Docket No. L01016 (9/30/24).

Kellogg Brown & Root, LLC (KBR) entered into a contract with Dyno Nobel Louisiana Ammonia, LLC (DNLA) for construction of an ammonia plant in Jefferson Parish. Pursuant to the contract, KBR would act as DNLA's agent to procure equipment required for the plant's construction and eventual operations. DNLA was the holder of a Manufacturer's Exemption Certificate issued by the Jefferson Parish Sheriff's Office Bureau of Revenue and Taxation (JPSO) in accordance with the exclusion for manufacturing machinery and equipment under La. R.S. 47:301(3)(i) and (13)(k). DNLA also designated KBR as its mandatary for purposes of claiming the exclusion, based on which KBR made nontaxable procurements of equipment to construct the plant.

JPSO audited both KBR and DNLA and issued proposed and/or final assessments on the basis that the exclusion did not apply. KBR and DNLA then filed petitions before the Board of Tax Appeals, and JPSO filed a petition for recovery of delinquent taxes, which were consolidated. The parties filed cross-motions for summary judgment to determine the applicability of the exclusion.

Before the Board, JPSO argued the exclusion did not apply for four reasons. First, DNLA did not qualify as a manufacturer during the construction of the plant since manufacturing operations had not yet commenced. The Board disagreed, ruling that such an interpretation would nullify the exclusion in "almost all applications," particularly if the purchases were made by new businesses that the exclusion was meant to attract.

Second, JPSO argued KBR could not claim the exclusion because it was not a manufacturer but a contractor. The Board rejected that argument, relying on legal principles surrounding agency as well as regulations promulgated under the sales-tax statute that permit a mandatary to be appointed for purposes of the exclusion.

Third, the Board considered whether the exclusion applies only to machinery/equipment that physically touches and changes raw materials during the manufacturing process. The Board held the exclusion had no such requirement, and as long as an item has a "direct and immediate effect" on the manufacturing process, it could qualify for the exclusion.

Fourth, JSPO argued that the exclusion applied only to Jefferson Parish use tax (and not sales tax, which was at issue in this case) because the local ordinance in question provided for an exclusion from "cost price" and not "sales price." The Board noted that the ordinance seemed to use those terms interchangeably and held that the exclusion should be interpreted to apply to both sales and use tax, consistent with the sales-tax statute and consistent with sales and use tax being complementary. Any other interpretation would result in only intra-parish purchases by manufacturers being taxed, which would put Jefferson Parish businesses at a competitive disadvantage.

Based on the above findings, the BTA partly granted KBR's motion for summary judgment, leaving certain genuine disputes of material fact regarding whether specific items qualified for the exclusion to be determined at trial.

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