Contempt

Zaorski v. Usner, 22-1326 (La. App. 1 Cir. 10/31/23), ____ So.3d ____, 2023 WL 7175773.

Ms. Zaorski appealed the trial court's judgment finding her in contempt of court on 10 acts or omissions arising from the parties' consent judgment. Ms. Zaorski argued that the trial court committed legal error in applying the wrong burden of proof in a criminal contempt of court proceeding, and in finding her in contempt of court, where no proof beyond a reasonable doubt was established as to each element of criminal contempt regarding the 10 acts or omissions. Conversely, Mr. Usner argued that the trial court did not commit legal error because Ms. Zaorski was held in contempt of court in a civil contempt proceeding, rather than a criminal contempt proceeding.

The 1st Circuit Court of Appeal affirmed in part and reversed in part the trial court's judgment, finding that it correctly held Ms. Zaorski in contempt of court on six of the 10 acts or omissions. Further, the appellate court found that the contempt proceeding was civil, rather than criminal, in nature because the trial court suspended the sentence of 15 days of imprisonment and payment of a fine on the conditions that (1) Ms. Zaorski pay Mr. Usner's attorney fees and court costs associated with the contempt filing; and that (2) Ms. Zaorski not be found in contempt again.

Willrige v. Willrige, 23-0047 (La. App. 3 Cir. 11/2/23), ____ So.3d ____, 2023 WL 7204343.

Mr. Willrige appealed the trial court's judgment granting Ms. Willrige's rule for contempt without considering his objection to the hearing-officer-conference report. Mr. Willrige argued that the trial court should have considered his timely filed objection and held a contradictory hearing on the allegations contained in Ms. Willrige's rule for contempt. He reasoned that Appendix 35.5(E) for the 16th Judicial District Court conflicts with La. R.S. 46:236.5 and Louisiana District Court Rule 35.3 by depriving him of his right to a contradictory hearing based on his failure to appear at the scheduled hearing-officer conference.

The trial court adopted the hearing officer's recommendation finding Mr. Willrige in contempt of court. The 3rd Circuit Court of Appeal reversed the trial court's judgment and remanded the matter to the trial court to conduct a hearing on Mr. Willrige's objection.

Appendix 35.5(E) provides that a party that fails to appear for a hearing-officer conference waives the right to file an objection to the recommendations "unless the Hearing Officer has excused the failure to appear." The appellate court noted that Appendix 35.5(E) impermissibly expanded the authority of the hearing officer to issue judgments without the proper oversight by a district court judge where a party timely files an objection to the recommendations of the hearing officer. The appellate court also noted that La. R.S. 46:236.5(C) provides that when a party timely files an objection to the hearing officer's recommendations, "the objection shall be heard by the judge of the district court to whom the case is assigned." Thus, pursuant to *Rodrigue v. Rodrigue*, 591 So.2d 1171 (La. 1992), the appellate court found that Appendix 35.5(E) was null and unenforceable because it conflicted with La. R.S. 46:236.5(C).

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A View of the NLRB's *Cemex* Decision from 40,000 Feet

On Aug. 25, 2023, the National Labor Relations Board (NLRB) issued *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023). The underlying rationale behind the Board's decision in the case is "representation delayed is often representation denied" and "employees are harmed by delay."

In *Cemex*, the Board adopted a new standard and framework for determining when employers are required to bargain with unions without a representation election. Under *Cemex*, an employer may be confronted with a verbal or written demand for recognition. The unit for which the union is claiming majority support and demanding recognition should be clearly stated to an employer's representative or agent. The demand does not need to be made on any particular officer or registered agent of an employer so long as it is on a person "acting as an agent of an employer" under Sections 2(2) and 2(13) of the Act, as defined by the Board. *See Longshoremen & Warehousemen Local 6 (Sunset Line & Twine Co.).*

To properly analyze the validity of the bargaining demand under *Cemex*, regions are to apply existing Board law on the sufficiency of the bargaining demand. *See, e.g., Al Landers Dump Truck*, 192 NLRB 207, 208 (1971) (holding that a valid request to bargain "need not be made in any particular form, or in *haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit"), enfd. sub nom. *NLRB v. Cofer*, 637 F.2d 1309 (9 Cir. 1981).

Thus, a union's demand for recognition may take many forms, including the filing of an RC petition as long as the union checks the request for recognition box on line 7a of the NLRB petition form and notes in section 7a of the form that the petition serves as its demand. *See Alamo-Braun Beef Co.*, 128 NLRB 32, 33 n.5 (1960); *see also*, *MGM Grand*, 28-RC-154099, 2015 WL 6380396 (2015); *Advance Pattern Co.*, 80 NLRB 29 (1949).

Once confronted with a verbal or written demand for recognition under *Cemex*, an employer may:

1. Agree to recognize a union that enjoys majority support;
2. Promptly, within 14 days, file an RM petition to test the union's majority support and/or challenge the appropriateness of the union; or
3. Await the processing of an RC petition if one has been previously filed.

If a *Cemex* demand is made and an election petition is filed by the employer and/or the union, and the employer commits an unfair labor practice(s) during that time period, the Board found a recent or pending election is a less reliable indicator of current employee sentiment than a current alternative nonelection showing. At this point, the petition(s) — whether filed by the employer and/or the union — will be dismissed and the employer will be subject to a remedial *Cemex* bargaining order.

With respect to potential unfair labor practices committed by an employer, it is important to note that *Cemex* has retroactive application. The *Cemex* Board, agreeing with the General Counsel's position, overruled *Linden Lumber Division, Summer & Co.*,190 NLRB 718 (1971), *rev'd sub nom. Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *aff'd*, 419 U.S. 401 (1974), because it found that the scheme under that case for remedying unlawful failures to recognize and bargain with employees' designated representatives was inadequate to safeguard the fundamental statutory right to organize and bargain collectively.

Unfair labor practice(s) occurring before the filing, as well as after the filing, of a petition will be considered when determining whether the election was invalidated. *See Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130, fn. 84 (2023) (*citing Alumbaugh Coal Corp.*, 247 NLRB 895, 914, fn. 41 (1980) (Board considers all unfair labor practices, not just those during critical period), *enfd. in relevant part*, 635 F.2d 1380 (8 Cir. 1980).

The *Cemex* Board advised that its new standard would likely result in finding an unlawful refusal to recognize and bargain based on fewer (even one) and less serious (non-"hallmark") violations of Section 8(a)(1) and (3). An election will be set aside when an employer violates Section 8(a)(3) of the Act during the critical period. An election will also be set aside based on an employer's critical period violations of Section 8(a)(1) unless the violations are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results. In deciding whether a *Cemex* bargaining order should issue, the Board will consider all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one is held), the proximity of the misconduct to the election date and the number of unit employees affected.

The law regarding the new standard to issue *Cemex* bargaining orders is still very unsettled. Since *Cemex* issued in August 2023, the Board has not addressed *Cemex* in any of its decisions. Only two NLRB administrative judges have issued rulings in which the Board sought the remedial bargaining orders. One judge ordered the employer to bargain. But the second judge refused the Board's request for a *Cemex* order.

The first and only *Cemex* bargaining order to date was granted in *I.N.S.A.* (Cases 01-CA-290558 *et. al.*), issued on Sept. 21, 2023. The judge ordered the cannabis company to recognize and bargain with the union because the employer fired key supporters after a majority of employees at a Massachusetts store signed a letter and presented management with a demand for recognition.

Bargaining orders are even becoming a part of informal settlement agreements. In *Point Management d/b/a Shangri-La* (Cases 14-CA-324836 et. al.), a Missouri cannabis dispensary, the parties signed an informal settlement agreement that included the employer bargaining pursuant to a *Cemex* bargaining order.

These developments should be carefully followed as there is certainly more to come given the unsettled nature of these issues.

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Courts Consider Meaning of "Drilling for Minerals" in Louisiana Oilfield Anti-Indemnity Act

La. R.S. 9:2780, the Louisiana Oilfield Anti-Indemnity Act (LOAIA), generally invalidates contractual indemnities for personal injury and death claims in contracts "related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state." *QBE Syndicate 1036 v. Compass Minerals Louisiana, Inc.*, 83 F.4th 986 (5 Cir. 2023), involved a fatality in a subsurface salt mine. The critical question in the case was: If a subsurface mining operation involves drilling,

can LOAIA apply even if the drilling involved does not relate to the drilling of a well?

Factual Background

An electrician employed by MC Electric, LLC was electrocuted while working in a subsurface salt mine in St. Mary Parish that is owned by Compass Minerals Louisiana, Inc. In the mine, Compass uses a "drill-and-blast" process in which the company breaks up solid salt by drilling holes in the face of the salt, then filling the holes with explosives that are subsequently detonated.

At the time of the fatal accident, MC Electric was performing work for the owner of the mine, Compass, pursuant to a contract that required MC Electric to defend and indemnify Compass against any claims and liabilities that might arise from the death or injury of one of MC Electric's employees.

The electrician's survivors sued Compass and Fire & Safety Specialists, Inc. (FSS), alleging that an FSS employee erroneously told the electrician that the electrical lines for a fire suppression system had been "de-energized." The electrician died after contacting one of those lines, which was still energized. At the time, FSS was performing work for Compass pursuant to a contract that required FSS to indemnify Compass for personal injury and death claims that might arise from FSS's work.

Relying on the contractual indemnities in the purchase orders with MC Electric and FSS, Compass sought a defense and indemnity from QBE Syndicate 1036, a company that provided commercial general liability insurance policies to MC Electric and FSS. In response, QBE sought a declaratory judgment that Compass was not entitled to a defense or indemnity because LOAIA makes the contractual indemnities unenforceable.

Background Law

LOAIA provides that "an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it . . . provide[s] for defense or indemnity . . . against . . . liability . . . arising . . . from death or bodily injury." LOAIA also states:

> The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals . . . means any agreement . . . concerning any operations . . ., including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral.

District Court's Analysis

Compass argued that LOAIA does not apply because the case did not relate to a well. In contrast, QBE argued that LOAIA applies because Compass' work involves "drilling" as part of the "drill-and-blast" process and because salt is a mineral. Thus, according to QBE, Compass was "drilling for minerals." QBE further argued that drilling need not relate to a well for LOAIA to apply. The Western District of Louisiana rejected this argument, concluding that the mere fact that drilling is involved in an operation is not sufficient to trigger application of LOAIA. Rather, the drilling must be for a well. Because it was undisputed that the drilling involved did not relate to a well, the district court granted summary judgment for Compass, holding that the contractual indemnities are enforceable.

5th Circuit's Decision

QBE appealed. The U.S. 5th Circuit acknowledged that several prior decisions have stated that, for LOAIA to apply, the contract containing the indemnity at issue must relate to the drilling of a well. However, those statements were made in the context of parties disputing whether LOAIA would apply to contracts for the maintenance of oil-and-gas pipelines or oil-and-gas platforms. In those cases, the courts merely concluded that a nexus to the oil-and-gas industry is not sufficient to trigger the application of LOAIA if the contract does not relate to work involving a well.

The 5th Circuit concluded that those cases did not answer the question of whether LOAIA's reference to "drilling for minerals" relates only to the drilling of a well, as opposed to drilling into the rock face in a subsurface mine. The 5th Circuit certified to the Louisiana Supreme Court the following: (1) whether agreements that pertain to "drilling for minerals" in a subsurface mine, but which do not relate to the drilling of a well, are covered by LOAIA; and (2) whether LOAIA invalidates indemnification and additional insured provisions contained in contracts for fire suppression and electrical work in a salt mine.

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Emergency Immunity

Sebble ex rel Estate of Brown v. St. Luke's #2, LLC, 23-00483, (La. 10/20/23), ____ So.3d ____, 2023 WL 6937352.

The plaintiff filed a request for the formation of a medical-review panel against multiple health-care providers regarding care rendered to the decedent from June 17, 2020, to June 24, 2020. Prior to the alleged malpractice, a state of public-health emergency was declared on March 11, 2020, related to the COVID-19 pandemic. Because the treatment at issue occurred during a declared state of public-health emergency, the emergency-immunity provisions of the Louisiana Health Emergency Powers Act (LHEPA) were triggered: "During a state of public health emergency, no health care provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct." La. R.S. 29:771(B)(2)(c)(i).

After filing a request for review, the plaintiff filed a petition for declaratory judgment, seeking the following declaration from the trial court:

> [T]he qualified immunity extended to health care providers during a declared state of public health emergency under the [LHEPA] should not be considered or applied in the medical review panel proceedings conducted pursuant to the Louisiana Medical Malpractice Act (LMMA) in formulating the medical review panel's opinion as to whether the applicable standard of care was breached.

The plaintiff "further sought a declaration that the medical review panel may consider only the applicable medical standards of care without regard to legal standards or affirmative defenses" when rendering its opinion. In response, the defendant alleged that La. R.S. 29:771(B)(2)(c)(i) modifies the applicable standard of care for health-care providers during a public-health emergency from negligence to gross negligence, rather than creating an affirmative defense. The defendant claimed that a medical-review panel cannot consider treatment rendered during a public-health emergency without also considering the gross-negligence standard established by La. R.S. 29:771(B)(2)(c)(i). The defendant likewise sought a declaratory judgment "confirming that the modified standard of gross negligence as set forth in the LHEPA is applicable for any medical treatment occurring during a declared state of public health emergency, and the medical review panel's opinion must take into consideration and analyze the allegations in accordance with [that] standard." The parties filed cross-motions for summary judgment on their respective requests for declaratory judgment, and the trial court found in favor of the plaintiff. The defendant appealed, and the appellate court affirmed the trial court's decision.

After a thorough review of both the LMMA and the LHEPA, the Louisiana Supreme Court drew a distinction between a medical standard of care and a legal standard of care:

> The medical standard of care is a determination made by the medical review panel, *medical experts*, whose duty it is to apply their medical expertise and opine on whether the defendant health care provider failed to adhere to the appropriate medical standard. By contrast, the LHEPA sets forth a legal standard of care, which is a determination left to the trier of fact, lay persons, who consider all of the evidence, including the medical review panel's opinion, in making a determination of whether the defendant health care provider's conduct was grossly negligent. In other words, a finding by a medical review panel that there was a breach in the standard of care is a "baseline" determination; the degree of that breach is a judicial determination by the trier of fact.

In referencing its previous opinion in *McGlothlin v. Christus St. Patrick Hosp.*, 10-2775 (La. 7/1/11), 65 So.3d 1218, which discussed the limitations on a medical-review panel's statutory authority, the court explained that a medical-review panel "applies its medical knowledge to determine whether a health care provider adhered to the medical standard and if there was a breach thereof. The standard of care applied by a medical review panel in rendering their expert opinion is limited to their expertise relative to a medical standard of care, not a legal one." In regard to gross negligence, the court held "it is the trier of fact that determines whether the defendant health care provider was negligent or grossly negligent along with the other necessary elements for the imposition of civil liability." While recognizing that the attorney chair is required under the LMMA to advise the panel on applicable law, the court clarified that this duty applies only to law within the panel's statutory authority, which does not include the gross-negligence standard.

The court considered the defendant's proposed two-step process in which a medical-review panel is first asked to evaluate the treatment at issue under the negligence standard before also ruling on the gross-negligence standard. Finding no statutory authority for this process in the LMMA, the court rejected the defendant's proposal. The court similarly rejected the defendant's argument that the LHEPA simply modifies the standard of care, finding instead that the statute creates an affirmative defense to be raised only in an answer to a civil proceeding. Because it would be "procedurally improper to inject the affirmative defense of statutory immunity pursuant to the LHEPA into medical review panel proceedings," the court held that La. R.S. 29:771(B)(2)(c)(i) "shall not be considered or applied in medical review panel proceedings," affirming the decisions of the lower courts.

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Taxpayer Failed to Meet All Requirements of Bad Debt Refund Statute

Higbee Lancoms, LP v. Robinson, 23-0185 (La. App. 1 Cir. 11/3/23), ____ So.3d ____, 2023 WL 7269448.

Higbee Lancoms, LP, and Higbee Louisiana, LLC, subsidiaries of Dillard's Inc. (Dillard's), filed bad-debt-refund claims with the Louisiana Department of Revenue pursuant to La. R.S. 47:315 (Bad Debt Statute) for unpaid balances on accounts due to Wells Fargo Bank, N.A. Wells Fargo extended credit to Dillard's customers to finance the purchase price and sales tax related to their purchase of goods at Dillard's stores by using a Dillard's credit card. Wells Fargo wrote off all bad debt on these credit cards on its federal tax returns. The only recourse available to Wells Fargo against Dillard's for this bad debt was with respect to a profit-sharing agreement whereby the amount of revenue used in the calculation of profit was impacted by the bad debt.

In order to qualify for a refund under the Bad Debt Statute, Dillard's had to prove: there was an unpaid debt on an account due to the dealer; the unpaid balance constituted "bad debt" as defined by federal law; the dealer has previously paid the tax on the sale that became bad debt; the bad debt had been charged off for federal-income-tax purposes; and the lending institution had full recourse against the dealer/seller for any unpaid amounts.

The Louisiana Board of Tax Appeals (BTA) interpreted the Bad Debt Statute and its regulations as taxation laws that must be liberally interpreted in favor of the taxpayer and strictly construed against the levying authority, with any doubt or ambiguity resolved and construed in favor of the taxpayer. The BTA looked to whether Wells Fargo had full recourse against Dillard's for any unpaid amounts. The BTA found that recourse for any amount was sufficient and ordered the Department to refund Dillard's its profit-share percentage of its refund requested. The BTA found that the Bad Debt Statute does not require the bad debt to be written off on the dealer's federal tax return. The Department appealed.

The 1st Circuit unanimously reversed the BTA. The 1st Circuit held the BTA committed legal error when it interpreted the Bad Debt Statute and its regulations in favor of Dillard's. The 1st Circuit held it was mandated to follow the controlling precedent that bad-debt refunds are a matter of legislative grace and, as a result, had to be strictly construed against the taxpayer. The 1st Circuit held this standard of interpretation applies equally to tax regulations, which have the full force and effect of law.

In addition, the 1st Circuit found that the bad debt was not due to the dealer. The 1st Circuit also found that the requirement of full recourse required Dillard's to claim a bad-debt refund of sales tax financed by Wells Fargo only if Dillard's was required to reimburse Wells Fargo for the whole or complete amount that Dillard's customers did not pay on their credit card accounts.

Based on the above holding, the 1st Circuit held that the BTA erred in not granting the Department's motion for summary judgment.

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District Court Lacks Jurisdiction over Constitutional Challenge to Solar-Tax-Credit Limits

Gross v. State, 23-0142 (La. App. 1 Cir. 9/15/23), 2023 WL 6014144.

In 2016, Sarah Gross filed a class action petition in the 19th Judicial District Court, challenging the constitutionality of 2019 Act 131's limits on the Solar Tax Credit (STC) provided for in La. R.S. 47:6030. At the time that she filed her petition, the BTA lacked jurisdiction over a facial constitutional challenge to a tax statute. Gross obtained judgment in her favor from the district court. However, the Louisiana Supreme Court reversed, holding that the Legislature cured and rendered moot any constitutional issue by providing additional STC funding through 2017 Act 413. *Ulrich v. Robinson*, 18-0534 (La. 3/26/19), 282 So.3d 180.

On remand, in January 2022, Gross amended her petition to allege consequential damages due to delayed payment of the STC. Gross further amended her motion for class certification

to exclude taxpayers who were denied the STC and either failed to appeal to the BTA, or who appealed to the BTA unsuccessfully. The district court heard the matter on Dec. 5, 2022. After the hearing, the district court granted class certification and again rendered judgment in favor of Gross. The Department appealed to the 1st Circuit, arguing that amendments to La. R.S. 47:1407 divested the district court of jurisdiction over any constitutional challenge to a tax statute.

On appeal, the 1st Circuit vacated the judgment. The court held that La. R.S. 47:1407, as amended by 2019 Act 365, grants the BTA jurisdiction over "[a]ll matters related to state or local taxes or fees" and "petition[s] for declaratory judgment or other action[s] relating to any state or local tax or fee . . . or relating to contracts related to tax matters; and including disputes related to the constitutionality of a law . . . concerning any related matter or concerning any state or local tax or fee." Moreover, the court stated that this is a grant of exclusive subject matter jurisdiction to the BTA for matters "such as those brought by Ms. Gross." Consequently, the court held that the district court lacked jurisdiction when the hearing occurred in December 2022. Further, the court stated that Act 365's jurisdictional changes are procedural in nature and retroactive.

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YOUNG LAWYERS SPOTLIGHT

Jami Lacour Ishee Lafayette


Jami Lacour Ishee

The Louisiana State Bar Association's Young Lawyers Division Council is spotlighting Lafayette attorney Jami Lacour Ishee.

Ishee is a partner in the firm of Davidson, Meaux, Sonnier, McElligott, Fontenot, Gideon & Edwards, LLP, with a defense practice focused in premises liability, products liability, general insurance defense, and the defense of railroads in damages, personal injury, derailment and FELA claims. She has obtained numerous favorable summary judgment rulings and settlements for her clients and, in only nine years of practice, has had the opportunity to bring multiple high-value cases to verdict in state jury trials. Many of these cases involved multiple millions of dollars in claimed damages, resulting in favorable defense verdicts. She also represents plaintiffs in personal injury claims and has volunteered her time to provide pro bono representation in various family law matters.

She currently serves as president of the Lafayette Bar Association Young Lawyers Section, is a member of the board of directors for the Louisiana Association of Defense Counsel and is a subcommittee chair for the Young Lawyers Section Steering Committee for the Defense Research Institute. She was a two-time Louisiana Association of Defense Counsel Frank L. Maraist Award finalist and, most recently, received the 2023 Hon. Michaelle Pitard Wynne Professionalism Award, presented by the Louisiana State Bar Association's Young Lawyers Division. This is recognition from her peers, an honor she is most proud of, and a virtue she strives to demonstrate to herself, young lawyers and more seasoned attorneys through her daily litigation practice.