Administrative Law

One-Day Lapse in SAM Registration During Government Contract Competition Can Make Offeror Ineligible

TLS Joint Venture, LLC, B-422275, 2024 U.S. Comp. Gen. LEXIS 117 (Comp. Gen. April 1, 2024).

In August 2023, the U.S. Navy issued a solicitation to procure custodial services for an office of the Naval Surface Warfare Center in West Bethesda, Md. Among other terms, the solicitation incorporated by reference Federal Acquisition Regulation (FAR) provision 52.204.7, System for Award Management (SAM), and advised potential offerors that to be considered eligible for award, they must comply with all material aspects of the solicitation, including regulatory requirements. Before the Sept. 15 deadline to submit proposals, the Navy received six offers, including from TLS Joint Venture, LLC and Silas Frazier Realty, LLC (Frazier). On Nov. 27, after conducting an initial evaluation of proposals, the Navy reviewed and noted that Frazier's SAM registration was "Active" through Dec. 11.

On Dec. 19, the Navy finalized its evaluation and determined Frazier's proposal was the best value for the government. It again reviewed Frazier's SAM registration and noted that it was "Active" as of Dec. 12. On Dec. 26, the Navy awarded the contract to Frazier and notified unsuccessful offerors, including TLS (the next-lowest-priced offeror), that their proposals were unsuccessful. On Dec. 29, TLS filed a bid protest with the Government Accountability Office (GAO) alleging one protest ground — that Frazier was ineligible for award because its SAM registration had lapsed during the solicitation period.

TLS argued that FAR provision 52.204-7 "requires an offeror to be continuously registered from the submission of its proposal, through contract award, and until final payment on any contract." *Id*. at *3. Specifically, TLS alleged that Frazier failed to complete the renewal process for its SAM registration prior to its expiration. *Id*.

In its response, the Navy argued that: (1) "FAR provision 52.204-7 does not impose a requirement that an offeror maintain its SAM registration between the close of the solicitation period and award of the contract" and (2) "Frazier's registration never lapsed because Frazier submitted its renewal information before the expiration of its registration." *Id*. at *3-4.

The GAO faced two central questions. First, does FAR provision 52.204-7 require an offeror to be continuously registered in SAM during the evaluation period, i.e., between proposal submission and the award of any contract? Second, if so, did Frazier maintain a continuously active SAM registration during the evaluation period?

Whether Offerors Must Maintain Continuous SAM Registration

FAR provision 52.204-7 unambiguously requires offerors to maintain continuous SAM registration during the evaluation period. Indeed, the GAO found that, when using regulatory interpretation rules, the ordinary and common meaning of the provision was clear — offerors are "required to be registered in SAM when submitting an offer or quotation, and shall continue to be registered until time of award." *Id*. at *6 (citing the exact language of FAR provision 52.204-7). While the Navy argued that regulatory history does not favor such an interpretation, the GAO noted that, when using regulatory interpretation rules, it relies on regulatory history as an interpretive aid only "when the regulation is ambiguous." *Id*. at *8 (citing *Coast to Coast Computer Products*, B-419624.2, 2021 Comp. Gen. Proc. Dec. ¶ 237 at 10). Here, the GAO found that the ordinary and common meaning of the language used in FAR provision 52.204-7 was not ambiguous. Thus, the GAO did not need to examine regulatory history as an interpretive tool. See also *Myriddian, LLC v. United States*, 165 Fed. Cl. 650 (2023) (finding similarly that FAR provision 52.204-7 requires offerors to continuously maintain their SAM registrations during the solicitation period by its plain language).

Frazier Did Not Maintain Continuous "Active" SAM Registration

The GAO found that Frazier did not maintain continuous "Active" SAM registration through the evaluation period; therefore, its SAM registration lapsed, and it was not eligible for award. Next, the GAO considered whether Frazier maintained continuous SAM registration during the evaluation period by completing the registration renewal process. In examining this matter, the GAO noted that the Navy provided two profiles recording Frazier's SAM registration in its agency report, one from Nov. 23 and another from Dec. 21. *TLS Joint Venture* at *11. In the Nov. 23 profile, the GAO found that Frazier's SAM registration had an "expiration date" of Dec. 11, 2023. *Id*. However, in the Dec. 21 profile, the GAO found that Frazier's SAM registration had an "activation date" of Dec. 12, 2023. *Id*. Additionally, TLS provided a copy of Frazier's representations and certifications — which are included in SAM — that indicated they expired on 9:34 a.m. on Dec. 11, 2023. *Id*.

In an attempt to understand whether there was a lapse, the GAO reached out to the General Services Administration (GSA), the agency that manages SAM, for its views.

Based on the GSA's response and the information in the record, the GAO found that Frazier's SAM registration expired on the morning of Dec. 11, 2023, but was not reactivated until a day later, at 9:48 a.m., Dec. 12, 2023. *Id*. at *14. This created a lapse in Frazier's SAM registration by one day that, as TLS pointed out, made Frazier ineligible for award pursuant to the terms of the solicitation.

Conclusion

Because Frazier did not maintain continuous registration in SAM between proposal submission and award of the contract as required by FAR provision 52.204-7, the GAO found that TLS suffered from competitive prejudice due to the Navy's failure to identify Frazier as ineligible for award. The GAO further found TLS would have had a substantial chance for award as one of the remaining offerors in the competitive field. *Id*. at *15. Consequently, the GAO sustained TLS' bid protest and recommended that it be awarded reimbursement of costs of filing and pursuing the protest, including reasonable attorneys' fees. This GAO decision provides a cautionary tale for industry in that even a one-day lapse in SAM registration during a government contract competition can lead to significant consequences. Additionally, this decision reminds agency counsel and acquisition professionals that, to protect the sanctity of their procurements, they must ensure the anticipated awardees have had continuous SAM registration from submission of offer to award.

Disclaimer: The views presented are those of the writer and do not necessarily represent the views of DoD or its components.

—Bruce L. Mayeaux
On Behalf of the LSBA
Administrative Law Section
Lieutenant Colonel, U.S. Army
Judge Advocate
Washington, DC 20310-2200

Family Law

Contempt

Fraino v. Fraino, 24-0173 (La. App. 5 Cir. 6/17/24), ____ So.3d ____, 2024 WL 3023249.

Mr. Fraino sought supervisory review of the trial court's judgment overruling his exceptions of no cause and no right of action regarding a rule for contempt that a CPA filed against him. The rule alleged that two consent judgments in the case provided for the CPA's appointment as a joint expert and ordered Mr. Fraino to pay 100% of the associated fees.

The 5th Circuit Court of Appeal granted Mr. Fraino's writ application, reversed the trial court's judgment overruling his exceptions, and dismissed the CPA's rule. The appellate court agreed with Mr. Fraino that the rule did not assert a cause of action against him because:

> (1) It failed to allege that he "intentionally, knowingly, and purposely" violated an order of the court;
>
> (2) It violated the purpose of a contempt proceeding under La. C.C.P. arts. 221 et seq. and La. R.S. 13:4611 to vindicate the authority and dignity of the court by improperly attempting to seek a money judgment in favor of the CPA; and
>
> (3) The consent judgments at issue did not specifically order Mr. Fraino to pay the CPA any particular invoices or amounts.

Additionally, the appellate court agreed with Mr. Fraino that, as a non-party, the CPA had no right of action to move for contempt, noting that while it is true that a judge may find a non-party in contempt of court for willful failure to abide by a lawful court order, the converse is not true.

Custody

Bridges v. Bridges, 23-0763 (La. App. 3 Cir. 7/3/24), ____ So.3d ____, 2024 WL 3281667.

Mr. Bridges appealed the trial court's judgment sustaining Ms. Bridges's exception of no cause of action and dismissing his motion to modify the physical custody schedule, arguing that the *Bergeron* standard does not apply when a party only seeks to modify the nature of the physical custody arrangement under a considered joint custody decree.

The 3rd Circuit Court of Appeal, sitting en banc due to prior conflicting decisions, affirmed the trial court's judgment sustaining Ms. Bridges's exception but reversed the portion of the judgment dismissing Mr. Bridges's motion.

The appellate court reasoned that the law regarding visitation espoused in the prior conflicting decisions did not apply to a parent awarded custody, because the time that a parent with joint custody is exercising with the child as part of a joint custody plan is physical custody, rather than visitation. Thus, the *Bergeron* standard applied to Mr. Bridges's motion because, as the parent granted joint custody by a considered decree, his action was to modify the existing physical custody arrangement already in place.

Further, the appellate court reasoned that while the allegations in Mr. Bridges's motion did not meet the Bergeron standard, he should have been allowed to amend his motion to remove the grounds for the objection.

—Elizabeth K. Fox
Member, LSBA Family Law Section and
LSBA Appellate Practice Section
Fox Law Firm, LLC
23422 Cypress Cove
Springfield, LA 70462

Labor and Employment Law

Legislature Reaffirms Wages Protected Under LWPA Cannot Be Extinguished or Forfeited

House Bill 352 of the 2024 Legislative Session added Section E to La. R.S. 23:631, the Louisiana Wage Payment Act (LWPA). The change became effective Aug. 1, 2024.

The legislative intent of subsection La. R.S. 23:631(E), as stated by the bill's author, Rep. Tarver, is to address three specific areas with regard to the timing for tendering an employee's commissions and non-discretionary bonuses. Generally, the LWPA mandates that an employer pay these wages "on or before the next regular payday or no later than fifteen days following the date of discharge, whichever occurs first." La. R.S. 23:631(A)(1)(a) & (b).

HB 352's author made clear that La. R.S. 23:631(E) in no way changes Louisiana law or public policy as to an employer's duty to pay an employee's commissions and non-discretionary bonus wages under the LWPA. *Hearing on H.B. 352 before the House Committee on Labor and Industrial Relations,* 2024 Leg., Reg. Sess. 2024 at 3:49:00 (La. April 11, 2024), *https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2024/apr/0411_24_LI*, last visited Aug. 1, 2024. Proposed changes to the duty to pay failed. For example, a proposed subsection was deleted because it contained language akin to a forfeiture clause that would allow an employer to keep an employee's incentive wages simply because the employee is no longer employed when the accounting is completed or paychecks are issued. Another amendment that failed attempted to remove the words "or extinguished" from the original version of La. R.S. 23:631(E)(1).

This is in line with existing law that prohibits an employer from creating company policies that seek to subvert the LWPA. The Louisiana Supreme Court has held that La. R.S. 23:634 applies whether a forfeiture provision is in an employment agreement or a company policy, signed or unsigned. *Beard v. Summit Inst. of Pulmonary Med. & Rehab., Inc.*, 97-1784 (La. 3/4/98), 707 So.2d 1233, 1235 ("clearly if an employer may not require an employee to sign a contract providing for forfeiture of wages upon termination or resignation, an employer cannot require an employee to forfeit wages simply by enacting a policy to that effect.").

The Legislature also amended subsection La. R.S. 23:631(E)(3) related to the payment timeline of non-discretionary bonuses. Non-discretionary bonuses, like commissions, have become a popular wage incentive used by companies to attract employees. Similar to commissions, these bonus wages are typically tied to the employer and/or employee's performance where the wage is earned in relation to a formula or calculation on a periodic basis. The Legislature added language that a "reasonable amount of time" to calculate and pay those wages to a former employee shall not "exceed one hundred twenty calendar days from the end of such periodic basis" where the bonus wages are "determined by financial information" that becomes available at later times after the employee separates.

As enacted, La. R.S. 23:631(E) requires a *written* policy modifying the timing of payment of incentive-based wages in three ways:

> 1. A policy providing for adjustments to the amount based on changes to the order generating a commission that affects the amount of the commission. La. R.S. 23:631(E)(2)(a).
>
> 2. A policy providing that a payment to the laborer or employee is not earned unless and until the employer has received the payment that generates the commission, incentive pay or bonus. La. R.S. 23:631(E)(2)(b).
>
> 3. In the case of a bonus, the amount of which is determined by financial information reflecting the employee's or employer's performance on an annual, quarterly or other periodic basis, a reasonable amount of time, not to exceed 120 calendar days from the end of such periodic basis, shall be allowed based on standard accounting practices used by the employer to make the determination as to whether a bonus is due and the amount of that bonus. La. R.S. 23:631(E)(3).

Subsection (E)(2)(a) addresses only commissions and comes into play in cases where a customer may increase, decrease or cancel an order related to a former employee's work, but only to the extent necessary to make the correct calculation to tender the wages.

Subsection (E)(2)(b) provides for a written policy allowing an employer to await receipt of the customer payments generating the incentive wages before the mandated timelines noted in La. R.S. 23:631(A)(1)(a) and (b) are triggered.

Subsection (E)(3) addresses only bonuses that are based on financial information on a periodic basis and requires payment of those bonus wages within a specified time for related payments due to the former employee.

—Kenneth C. Bordes
On Behalf of the LSBA Labor Relations and Employment Law Section
Law Office of Kenneth C. Bordes
4224 Canal St.
New Orleans, LA 70119

Mineral Law

Supreme Court Holds Doctrine of *Negotiorum Gestio* Does Not Apply to Unit Operators Selling Production Under La. R.S. 30:10(A)(3)

In *Self v. BPX Operating Co.*, 23-1242 (La. 6/1/24), 388 So.3d 366, unleased mineral owners (UMOs) in a forced drilling unit, represented by James and Wilma Self, brought a putative class action against operator, BPX Operating Company, seeking a declaration that BPX was not entitled to deduct post-production costs from their pro rata share of proceeds from the unit wells' production, among other relief. BPX removed the action to federal court and moved for a partial dismissal, arguing the post-production costs it incurred to market the unleased mineral owners' share in gas production from the forced drilling unit (as set forth in La. R.S. 30:10(A)(3)) are not improperly deducted per se given the doctrine of *negotiorum gestio* (as set forth in Louisiana Civil Code art. 2292). The Western District of Louisiana granted BPX's motion, holding the doctrine of *negotiorum gestio* provides the mechanism for an operator to recover post-production costs from UMOs.

The Selfs appealed to the U.S. 5th Circuit Court of Appeals, where the court found there was no controlling decision to determine whether an operator may seek reimbursement of post-production costs as a manager or *gestor*. Given the significance of the issue, the 5th Circuit certified the following question to the Louisiana Supreme Court: "Does La. Civ. Code art. 2292 apply to unit operators selling production in accordance with La. R.S. 30:10(A)(3)?" The Louisiana Supreme Court answered that question in the negative.

Louisiana law allows the commissioner of conservation to create pooled drilling units, name an operator of the unit and require the owners of mineral interests to share proportionally in unit production or proceeds from unit production. Section 30:10(A)(3) states:

> If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately sell or otherwise dispose of the share of such production attributable to such tract, and the unit operator sells or otherwise disposes of such unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale or other disposition of production within one hundred eighty days of such sale or other disposition.

The Selfs claimed BPX violated Section 30:10(A)(3) by failing to pay the unleased mineral owners the entirety of their pro rata share of proceeds (the gross amount free of deductions). BPX relied on the doctrine of *negotiorum gestio* to argue post-production costs incurred to market the unleased mineral owners' share of gas production could be deducted from the UMOs' share of proceeds. Article 2292 creates obligations arising from a quasi-contractual relationship when there is a management of affairs, i.e., "when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances." In such a case, the "owner whose affair has been managed is bound to fulfill the obligations that the manager has undertaken as a prudent administrator and to reimburse the manager for all necessary and useful expenses." La. Civ.C. art. 2297.

The Louisiana Supreme Court found the quasi-contractual relationship created between UMOs and unit operators under oil and gas conservation law "cannot not be applied consistently with the doctrine of *negotiorum gestio*." According to the court, these laws create distinct legal regimes with different requirements and different duties. One requirement of *negotiorum gestio* is that the party act without authority. Before 1995, *negotiorum gestio* required only that the party act "of his own accord." The court found this revision to article 2292 was intentional and made "clear that the requirement is not merely voluntariness but an 'absence of authority altogether,' including authority granted by statute." Self, 388 So.3d at 369. Because a unit operator is statutorily authorized under Section 30:10(A)(3) to sell a UMO's share of production when he or she has not made other arrangements, the court found *negotiorum gestio* inapplicable.

Chief Justice Weimer issued a robust dissent that carefully examined the history and purpose of the doctrine of *negotiorum gestio* and Section 30:10 and harmonized those provisions. Weimer recognized the case did not concern selling production but rather the processing, transporting and marketing of production for sale — post-production actions that must be taken for the commodity to have value and for the UMO to receive his or her share of proceeds. Because Section 30:10(A)(3) "is silent as to post-production costs, there is no inherent prohibition against a unit operator looking to the Civil Code for an available remedy … to recoup these expenses." *Id*. at 373. Weimer reasoned that the "without authority" prong of *negotiorum gestio* should be understood to mean a lack of authority *from the owner* whose interests are being managed such that a unit operator could recover expenses incurred as a manager where it had no legal obligation to act under Section 30:10. This interpretation is in accord with the "long-held understanding that *negotiorum gestio* involves a voluntary act by one who is under no obligation to take action by law or contract." *Id*. at 378.

—Keith B. Hall
Member, LSBA Mineral Law Section
Director, Mineral Law Institute
LSU Law Center
1 E. Campus Dr.
Baton Rouge, LA 70803-1000
and
Lauren Brink Adams
Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170-3600

Professional Liability

Prescription and Peremption

In re Med. Rev. Panel Proc. of Singleton, No. 24-0415 (La. 6/19/24), 386 So.3d 306.

A patient filed a medical-review-panel complaint concerning "neck" injuries incurred during a "cervical procedure." He amended his complaint more than three years after the date of the surgical procedure, substituting the words "lumbar" and "back" for cervical and neck. The trial and appellate courts deemed the case prescribed because it had not been filed within a year from the date of discovery.

The Louisiana Supreme Court found that a discussion of the one-year discovery date was irrelevant because the original complaint involved a cervical surgery, not a lumbar surgery. Thus, the amended complaint "was a substantive change and asserted a wholly different claim than that originally alleged." *Id.* at 307. As the amended complaint was filed more than three years from the claimed malpractice, the court ruled that "the amended complaint cannot relate back to the original complaint so as to be considered timely." *Id.* The exception of prescription was granted "because plaintiff's amended complaint was filed after the three-year period of repose set forth in La. R.S. 9:5628 elapsed . . . ." *Id.*

Constitutionality of LHEPA

Welch v. United Med. Healthwest-New Orleans, No. 24-0065 (La. App. 5 Cir. 6/13/24), ____ So.3d ____, 2024 WL 2972753.

The appellate court had earlier remanded this case to allow the plaintiffs to challenge the constitutionality of La. R.S. 29:771(B)(2)(c)(i), hereafter "LHEPA." On remand, the trial court denied the motion to declare LHEPA unconstitutional and the case was again presented to the appellate court.

The plaintiffs argued that LHEPA was unconstitutional because:

> 1. Their cause of action was a vested property right taken from them without due process and an adequate remedy;
> 2. The blanket immunity provided during the emergency period does not serve a compelling state interest;
> 3. It leads to absurd results;
> 4. It is not narrowly tailored to serve the objective of protecting citizens during the public health emergency;
> 5. There was no rational basis for providing immunity for negligent treatment unrelated to the public health emergency;
> 6. The patient's alleged negligent medical treatment was not COVID-19 related; and
> 7. The blanket immunity denied the patient an adequate remedy by due process.

The appellate court observed that the purpose of LHEPA was to protect public health during an emergency. During the pandemic, "the healthcare system was dangerously overburdened, affecting healthcare facilities and healthcare workers throughout the state." LHEPA alleviated the liability burden on healthcare providers, which was "the purpose" of the statute, and Welch's treatment was "during the early hectic and uncertain times" of the pandemic. Although Welch did not suffer from COVID-19, there may still have been a connection between her care and the COVID-19 pandemic "if the healthcare system during that time period was overburdened." The court decided that the statute is constitutional when applied to Welch's case, "as it is rationally related [to] the legitimate state purpose of providing healthcare" to Louisianians during a public health emergency.

The court rejected the plaintiffs' contention that they would be denied access to the judicial system, citing La. Const. art. III, §22 and the court's reliance on *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986), wherein the court decided that "the Constitutional Convention did not intend to limit the legislature's ability to restrict causes of action or to bar the legislature from creating various areas of statutory immunity from suit." *Id.* at 309-10.

Insofar as plaintiffs' contention that the immunity was overly broad and allowed for "absurd and unconscionable results" over the two-year period it was in effect, the court cited its comments from Welch's earlier appellate appearance wherein the court stated that immunity did not necessarily lead "to an 'absurd consequence,' in this case, especially considering the profound impact" of COVID-19 that caused Louisiana to experience "economic turmoil, a public health crisis, a substantial burden on the healthcare system, and a significant number of infections and deaths." *Welch v. United Med. Healthwest-New Orleans*, 21-0684 (La. 8/24/22), 348 So.3d 216, 222.

The plaintiffs posited that the statute created a prohibited "special class of tortfeasors" for every negligent healthcare provider, thus violating La. Const. Art. III, § 22(7), which states: "Prohibitions except as otherwise provided in this constitution, the legislature shall not pass a local or special law: . . . [g]ranting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity."

The court decided that LHEPA was not a special law that affected "only a fraction of persons or . . . grant[ed] privileges to some persons while denying them to others. A special law is one that confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law" and is "directed to secure some private advantage or advancement for the benefit of private persons." The court decided that LHEPA was "applicable to all healthcare providers equally."

The motion to declare LHEPA unconstitutional was denied.

—**Robert J. David**
Gainsburgh, Benjamin, David,
Meunier & Warshauer, LLC
Ste. 2800, 1100 Poydras St.
New Orleans, LA 70163-2800

Taxation

Prescription Drug Purchases Qualify for Local Sales Tax Exemption

Fresenius Med. Care Lake Forest, LLC v. Gariepy, BTA Docket No. L00814 (6/5/24).

Fresenius Medical Care Lake Forest, LLC (Fresenius) operates a Medicare-certified dialysis clinic in Orleans Parish. Fresenius orders prescription drugs for dialysis treatments through Fresenius Medical Care Holdings, Inc. d/b/a Fresenius Medical Care North America's (FMC) procurement system. FMC also makes centralized purchases of drugs to fulfill clinic orders.

AmerisourceBergen Drug Corporation sold prescription drugs to FMC through Amerisource's specialty-drug-distribution unit, ASD Healthcare. For every month during the tax periods May 1, 2017, through Dec. 31, 2021, ASD provided reports that included the purchasing clinic, the drugs purchased, the cost per unit of each drug, the quantity of each drug purchased and the total cost of each drug purchased.

Fresenius argued that it purchased prescription drugs for administration to Medicare patients under the provisions of Medicare. It asserted that, pursuant to La. R.S. 47:337.9(F) (Exemption), its purchases of prescription drugs are exempt from local sales tax as purchases of prescription drugs pursuant to Medicare Part B. The director of the New Orleans Department of Finance and the City of New Orleans argued that the Exemption can never apply to the purchases of supplies or drugs by a medical-care provider from a wholesaler. Under the City's view, the Exemption cannot apply to any purchases of prescription drugs by FMC from Amerisource.

Fresenius paid the local sales tax at issue under protest and sued in the Local Tax Division of the Louisiana Board of Tax Appeals (BTA). Fresenius moved for summary judgment, attempting to connect its prescription drug purchases to the administration of that drug to a Medicare patient and establish a reliable methodology to support such position.

The BTA found that it could not reconcile the rationale advanced by the City with the clear text of La. R.S. 47:337.9(F)'s exemption for purchases made under the provisions of Medicare Part B.

The BTA noted that Fresenius tracked the type and quantity of drugs administered, the patients to which they were administered and the patient's insurance provider. Fresenius' data collection occurred contemporaneously with the treatment of patients. Fresenius' patient data was robust enough for the doses administered to be calculated in consistent units of measurement. Likewise, FMC's accounting data showed the amount of drugs purchased in enough detail to enable it to calculate the doses purchased in equally consistent increments. The BTA found the connection between the purchase and the administration was quantifiable. Fresenius' Medicare ratio is derived from doses administered to Medicare patients and applied to the doses purchased. The BTA held Fresenius met the criteria to demonstrate the drug purchases were made under the provisions of Medicare Part B. The BTA found Fresenius was entitled to a refund on such purchases. The BTA partially granted Fresenius' motion for summary judgment based on this holding and granted a partial refund of the amounts paid under protest.

—Antonio Charles Ferachi
Chair, LSBA Taxation Section
Director of Litigation-General Counsel
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70802

U.S. Supreme Court Affirms Constitutionality of Mandatory Repatriation Tax, Ends Chevron Deference

In its recent session, the U.S. Supreme Court issued an important ruling in a case that garnered significant attention in light of the potential implications of an adverse decision. On June 20, 2024, the Court held 7-2 in favor of the federal government in *Moore v. United States*, 144 S.Ct. 1680 (2024). The Court held that the mandatory repatriation tax (the MRT) under I.R.C. § 965 is an indirect tax on income and thus is not subject to the apportionment requirement under the Direct Tax Clause of the Constitution (Art. I, § 9, cl. 4).

Charles and Kathleen Moore challenged the constitutionality of the MRT, a one-time transition tax on certain undistributed earnings of "specified foreign corporations," including United States-controlled foreign corporations, that was enacted by the Tax Cuts and Jobs Act of 2017. The taxpayers argued that the MRT was a direct tax on property that was unapportioned among the states, in violation of the Direct Tax Clause. The taxpayers also argued that the MRT could not be a tax on income under the 16th Amendment because income taxes require "realization" of income, and they had realized no income from undistributed corporate earnings.

The federal government countered that the MRT is an indirect tax on income that did not require apportionment and that "income" captures "all economic gains," whether or not realized. Both the district court (W.D. Wash.) and the 9th Circuit held for the government, with the latter opining that the Constitution did not have a realization requirement.

On certiorari, the majority held that the MRT was an indirect tax on income that did not trigger the apportionment requirement. The Court also determined that the MRT did not tax unrealized income because it attributed the realized (but undistributed) income of the foreign corporation to its shareholders (akin to the taxation of other pass-through entities) — thereby rendering moot the constitutional question on the realization requirement. The Court noted that a ruling for the taxpayers on that issue could jeopardize "vast swaths" of the Internal Revenue Code and lead to "fiscal calamity."

Justice Thomas, joined by Justice Gorsuch, dissented on the basis that the "attribution" doctrine relied on by the majority was unfounded in precedent.

Had the majority addressed the issue of whether unrealized income can be constitutionally taxed under the 16th Amendment, the decision could have impacted the fundamental underpinnings of the federal income tax and in turn the income tax base of most states, like Louisiana, which conform to the federal tax base.

In the same session, the Supreme Court also issued its landmark ruling in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, overruling the Chevron deference doctrine that determined when federal courts defer to an agency's reasonable interpretation of an ambiguous statute (including taxing statutes). Although the decision is expected to have more of a potential impact in states that adopted Chevron deference, it remains to be seen how judges in other states, like Louisiana, may be influenced by the Court's observations.

—Divya A. Jeswant
Member, LSBA Taxation Section
Kean Miller, LLP
Ste. 3600, 909 Poydras St.
New Orleans, LA 70112
and
Thomas J. Celles, CPA
JD Candidate, Tulane Law School
Law Clerk, Kean Miller, LLP