Can They Do That?

Creekstone Juban I, LLC v. XL Ins. Am., Inc., 20-0098 (La. App. 1 Cir. 12/7/20).

This insurance-coverage dispute arose out of a contract that contained a forum-selection clause providing that suit had to be brought in New York. When Creekstone Juban filed its petition in the 21st Judicial District Court in Livingston Parish, defendant XL Insurance filed an exception of improper venue.

Creekstone opposed the forum-selection clause as against public policy, and the trial court agreed, triggering XL to file a writ. The Louisiana 1st Circuit Court of Appeal denied the writ. XL then filed and was granted supervisory writs by the Louisiana Supreme Court, which reversed the trial court's determination that the forum-selection clause was unenforceable and remanded "for further proceedings pursuant to La. C.C.P. art. 121."

Back in the trial court, Creekstone moved to transfer its suit to New York. XL opposed the transfer on the grounds that article 121 did *not* permit Louisiana courts to transfer suits outright, and that it was instead mandatory that the suit be dismissed without prejudice so that it could be refiled in the proper venue.

The trial court granted the transfer, specifically ordering the clerk of court to transmit a certified copy of the entire record to the Chief Clerk of Court for the Bronx County Supreme Court in the 12th Judicial District of the State of New York. XL then appealed that decision, as well as applied for a writ.

XL asserted that the trial court had committed legal error in transferring the case to the New York court, claiming that Louisiana law lacked any legal mechanism by which the court could actually do so.

On this second review, and now bound to honor the forum-selection clause, the crux of the 1st Circuit's analysis relied on a plain reading of article 121: "When an action is brought in a court of improper venue, the court *may* dismiss the action or, *in the interest of justice, transfer it to a court of proper venue*." [Emphasis added]. Taken literally, the code grants the trial court discretion to transfer *or* dismiss, "tak[ing] into account the interests of justice." Moreover, the court noted, article 121 places no limitation on interstate transfers.

Furthermore, the 1st Circuit stated that, given "the passage of a significant amount of time" over the course of this case, dismissing and requiring Creekstone to re-file might actually be prejudicial to its rights. Thus, the interests of justice actually militated in favor of a direct transfer.

Lastly, specifically addressing procedural propriety, the court noted that the trial court committed no error by merely ordering the local clerk of court to request that the New York Clerk of Court file the suit according to the prevailing rules of procedure in that venue, rather than according to Louisiana rules.

The 1st Circuit ultimately affirmed the trial court's judgment ordering the transfer and denied the concurrent writ as moot.

—**Lawrence J. Centola**
Member, LSBA Civil Law and Litigation Section
Martzell, Bickford & Centola
338 Lafayette St.
New Orleans, LA 70130
and
Ashton M. Robinson
Beevers & Beevers, L.L.P.
210 Huey P. Long Ave.
Gretna, LA 70053

Recent Updates to the Louisiana Business Corporation Act

La. R.S. 12:1-709; La. R.S. 12:1-1005; La. R.S. 12:1-1105

On Oct. 12, 2020, the Louisiana Legislature passed Senate Bill No. 33, which provided for amendments to several sections of the Louisiana Business Corporation Act (LBCA) relating to virtual shareholder meetings and required approvals for corporate name changes and mergers. On Oct. 16, 2020, Gov. John Bel Edwards signed Senate Bill No. 33 into law, which then became Act No. 3 of the 2020 Second Extraordinary Session. Pursuant to Act No. 3, current Sections 12:1-1005(5) and 12:1-1105(A) and (C) of the LBCA have been amended and reenacted, and new sections 12:1-709(C) and 12:1-1105(D) were added to the existing text.

Section 12:1-709(C) allows for remote participation in annual and special meetings. Specifically, new subsection (C) states that unless a corporation's bylaws require shareholder meetings to be held at a physical place, the board of directors may determine that a shareholder meeting will be held solely by means of remote communication. This provision will permit Louisiana corporations to hold virtual-only shareholder meetings moving forward.

In addition, Act No. 3 amended Section 12:1-1005(5) to give a board of directors of a corporation broad authority to adopt amendments to the articles of incorporation relating to any change to a corporation's name without shareholder approval, unless the articles of incorporation provide otherwise. Specifically, Act No. 3 deleted a portion of the language (*i.e.*, "by substituting the word 'corporation', 'incorporated', 'company', 'limited', or the abbreviation, with or without punctuation, 'corp', 'inc', 'co' or 'ltd', or a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name") in old subsection (5) limiting the types of changes a board could make to a corporation's name without obtaining prior shareholder approval.

Further, Section 12:1-1105(A) has been amended to allow a domestic parent corporation that owns at least 90% of the voting shares of a subsidiary corporation to (1) merge such subsidiary into itself or into another subsidiary without shareholder approval from the shareholders of the parent corporation or the board of directors or shareholders of the subsidiary; or (2) merge itself into the subsidiary without approval at the subsidiary level. These actions are permitted only where the articles of incorporation of any of the corporations involved do not provide otherwise, or, when a foreign subsidiary is involved,

where approval is not required under the laws under which the subsidiary is organized. In addition, new language was added to Section 12:1-1105(C) to allow parent corporations to amend their articles of incorporation when a merger is effected under Section 12:1-1105. Additionally, because new language was added in subsection (C), old subsection (C) is now contained in new Section 12:1-1105(D).

—William R. Bishop
Member, LSBA Corporate and
Business Law Section
Phelps Dunbar, LLP
Ste. 2000, 365 Canal St.
New Orleans, LA 70130

EPA: When Groundwater Discharge is "Functional Equivalent" of Direct Discharge

The U.S. Environmental Protection Agency (EPA) issued a draft memorandum to provide guidance on applying the recent U.S. Supreme Court opinion *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020), to determine, on a case-by-case basis, whether a National Pollutant Discharge Elimination System (NPDES) permit is required for discharges of pollutants into groundwater. 85 Fed. Reg. 79489, available at: *https://www.epa.gov/npdes/releases-point-source-groundwater*.

Under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, an NPDES permit is required to discharge a pollutant from a point source into navigable water, *i.e.*, a water of the United States. The federal definition of "Waters of the United States" expressly excludes groundwater, 33 C.F.R. § 122.2. However, in *Maui*, the Supreme Court ruled that an NPDES permit is required for a discharge of pollutants from a point source that reaches waters of the United States after traveling through groundwater if that discharge is the "functional equivalent of a direct discharge from the point source." The Supreme Court provided a non-exclusive list of seven factors to consider when determining whether a discharge into groundwater is the functional equivalent of a direct discharge into waters of the United States:

(1) transit time;
(2) distance traveled;
(3) the nature of the material through which the pollutant travels;
(4) the extent to which the pollutant is diluted or chemically changed as it travels;
(5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
(6) the manner by or area in which the pollutant enters the navigable waters; and
(7) the degree to which the pollution (at that point) has maintained its specific identity.

The EPA draft guidance memorandum offers four primary points to help clarify if a discharge of pollutants into groundwater that ultimately reaches waters of the United States is a "functional equivalent" under *Maui* such that an NPDES permit is required.

First, as a threshold matter, there must be an actual discharge of a pollutant into waters of the United States. This discharge can be ascertained by conducting technical analysis, evaluating the flow path and fate and transport of pollutants from the groundwater to a water of the United States.

Second, the discharge of pollutants must be from a "point source." This statutory requirement remains applicable to any discharge that is the functional equivalent of a direct discharge. A point source is defined as "any discernible, confined and discrete conveyance." The EPA guidance does not modify this definition.

Third, an NPDES permit might not be required "if the pollutant composition or concentration that ultimately reaches the water of the United States is different from the composition or concentration of the pollutant as initially discharged." The EPA explained that many of the factors identified by the Supreme Court in *Maui* go to this point, such as the transit time, distance traveled, changes to the pollutant, etc. The EPA also clarified that if the pollutant reaches a water of the United States in the same or nearly the same chemical composition and concentration as its original discharge, the discharge of the pollutant is more likely to require an NPDES permit as a functionally equivalent direct discharge.

Finally, in addition to the seven factors identified by the Supreme Court, the EPA added an additional overarching factor to consider: the design and performance of the system or facility from which the pollutant is released. As explained by the EPA, the composition and concentration of discharges of pollutants directly from a pipe into a water of the United States with little or no intervening treatment or attenuation often differ significantly from the composition or concentration of discharges of pollutants into a system that is engineered, designed and operated to treat and attenuate pollutants or uses the surface or subsurface to treat, provide uptake of or retain water or pollutants. Thus, the system or facility can impact the pollutant composition and concentration, which may affect and inform all seven factors identified by the Supreme Court in *Maui*.

Public comment for the draft guidance closed on Jan. 11, 2021. However, at the time of writing, whether this guidance will be modified or adopted by either the outgoing or new administration is unknown. The Biden Administration may take a more expansive view of when an NPDES permit is required under *Maui*. If adopted, the EPA guidance is not binding and would not have the force and effect of law, but it would guide the regulated community and permitting authorities on incorporating *Maui* into existing NPDES permit programs and authorized state programs.

Louisiana's definition of "waters of the state" expressly includes groundwater. La. R.S. 30:2073. However, for pur-

poses of Louisiana Pollutant Discharge Elimination System (LPDES) permits, "waters of the state" are limited to surface waters. LAC 33:IX.2313. Nevertheless, how *Maui* is applied may affect which sources are required to have an LPDES permit, which can be enforced at the state or federal level.

—Court C. VanTassell
Member, LSBA Environmental Law Section
Liskow & Lewis, APLC
822 Harding St.
Lafayette, LA 70503
and
Emily A. von Qualen
Member, LSBA Environmental Law Section
Liskow & Lewis, APLC
701 Poydras St.
New Orleans, LA 70139

Protective Orders

Leal v. Olivier, 20-0181 (La. App. 3 Cir. 11/4/20), 2020 WL 6479294 (unpublished).

After Mr. Olivier whipped the parties' 9-year-old daughter with a belt, Ms. Leal filed a request for protective order. Although Mr. Olivier admitted that he had done so, the trial court denied the protective order. The court of appeal affirmed the denial of the protective order, finding that Mr. Olivier had the right to discipline his daughter with corporal punishment; however, it found the particular level of discipline here was unreasonable. Because he did not routinely use corporal punishment, the appellate court found that the trial court did not err in not granting the protective order. However, it enjoined Mr. Olivier "from using excessive corporal punishment to discipline his daughter in the future."

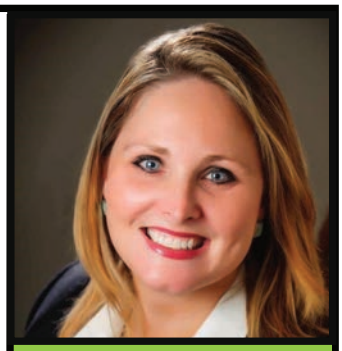
Launey v. Launey, 20-0072 (La. App. 3 Cir. 11/12/20), ____ So.3d ____, 2020 WL 6605271.

After Ms. Launey refused to return the children to Mr. Launey, he went to her home and pushed open the door in order to retrieve the children, even though it was clear that she told him to leave and not to enter her house. The trial court granted her a protective order, finding that Mr. Launey committed a simple battery against her; and the court of appeal affirmed. He argued that he did not intend to commit any crime but went to her home only to retrieve the children. The trial court and the court of appeal agreed that it was his turn to have the children, but also found that he had no right to go into her home to retrieve them. The appellate court found that his intent was irrelevant because "[s]imple battery is a general intent offense, and it is enough for purposes of that statute that [Mr. Launey], at the moment he did so, intended to use force upon [Ms. Launey] to enter the home." His use of force against her to enter her home constituted simple battery and was sufficient evidence to support the grant of a one-year protective order.

Custody

Cook v. Sullivan, 53,741 (La. App. 2 Cir. 11/28/20), ____ So.3d ____, 2020 WL 6750097.

During the same-sex relationship between Ms. Cook and Ms. Sullivan, Ms. Sullivan gave birth to a child. After the parties' relationship broke up, Ms. Sullivan withheld the child from Ms. Cook, who had had a visitation schedule with the child. Ms. Cook then filed a petition to establish parentage and for custody and support. The trial court found that Ms. Cook was a "legal" parent, awarded the parties joint custody and named Ms. Sullivan the domiciliary parent. Ms. Sullivan appealed. The court of appeal reversed, finding that Louisiana law did not allow for the designation of a "legal"



parent under these circumstances, as the parties were never married, and Ms. Cook did not adopt the child. It further determined that because there would be no substantial harm to the child if Ms. Sullivan were named custodial parent, Ms. Cook had no rights to see the child. The court of appeal found that the trial court erred in not analyzing the case under La. Civ.C. art. 133, which applies in custody matters between a parent and a non-parent. Although the appellate court found that Ms. Sullivan's treatment of Ms. Cook was "callous and controversial" and that she had credibility issues at trial, her fundamental rights as a parent prevailed, and since she was a "fit parent" and the child was doing well, it could not find that the child would suffer substantial harm in her care. The court distinguished the case from other same-sex parent cases with different facts. The court did not address a series of alleged procedural errors as it reversed on the above issues.

Coody v. Coody, 20-0071 (La. App. 3 Cir. 11/12/20), ____ So.3d ____, 2020 WL 6605833.

In this highly contentious custody case, the trial court denied the mother's request for sole custody and maintained her as the domiciliary parent, but designated the father as the domiciliary parent to make decisions regarding medical treatment and extracurricular activities. The court of appeal affirmed the trial court's ruling that Ms. Coody did not meet the *Bergeron* standard in order to modify the parties' joint custody to sole custody. The court rejected Ms. Coody's argument that the court's allocating legal decision-making authority between them violated *Hodges*' prohibition against co-domiciliary parents. The court noted that even in *Hodges*, the court stated that implementation orders were necessary to effect decision-making authority, and that the decision-making authority could be divided between the parents. Most importantly, the court stated: "Although there is a plethora of jurisprudence finding the higher *Bergeron* standard applicable to physical custody, we find such standard inapplicable to a change in the allocation of legal authority as provided in the implementation order." (Citation omitted). Further, the court of appeal noted that the trial court could use the implementation order to "diffuse the animosity between the parents and improve the communication between the parents, as well as the communication between [Mr. Coody] and his two sons." Finally, the appellate court noted that even if it had applied the *Bergeron* standard, the facts of the case were sufficient to establish a change of circumstances and to show that the continuation of the present decision-making authority arrangement was deleterious to the children, allowing it to divide the legal authority.

Contempt/Recusal

In Re: Commitment of M.M., 53,577 (La. App. 2 Cir. 9/23/20), 303 So.3d 1095.

After the trial judge became displeased with the actions of one of the attorneys, whom the judge believed intentionally violated his orders, the trial court set a contempt hearing against the attorney. The attorney filed a motion requesting an impartial judge, that is, a motion to recuse the trial judge from hearing the contempt rule and to have another judge hear it. The trial judge denied the motion. The court of appeal reversed, stating that the judge's prior comments throughout the proceeding showed that he had a bias against the attorney and believed that the attorney had violated his orders, all of which led to his finding the attorney in contempt. The court of appeal thus found that the trial judge should have recused himself and allowed another judge to hear the matter.

Attorney Discipline

In re Gorrell, 20-0993 (La. 11/10/20), 303 So.3d 1023.

The Supreme Court publicly reprimanded Mr. Gorrell for making statements outside the courtroom meant to intimidate a subpoenaed expert pediatric psychologist in a custody matter, in violation of the Rules of Professional Conduct. Mr. Gorrell apparently told her "I am going to get you," and made other statements that the psychologist stated intimidated her and made her feel physically afraid of Mr. Gorrell.

—David M. Prados
Member, LSBA Family Law Section
Lowe, Stein, Hoffman, Allweiss
& Hauver, L.L.P.
Ste. 3600, 701 Poydras St.
New Orleans, LA 70139-7735

Unjust Enrichment Claim by Unlicensed Contractor

Quaternary Res. Investigations, LLC v. Phillips, 18-1543 (La. App. 1 Cir. 11/19/20), ____ So.3d ____, 2020 WL 6797271.

Quaternary Resource Investigations, LLC, (QRI) entered into a construction contract with David Phillips and Angela Phillips (the Phillipses) to renovate and add a substantial addition to their home (the project). Prior to entering into the contract, QRI told the Phillipses that it had the necessary licenses to perform the work. After construction began, Mr. Phillips confronted QRI with concerns after discovering that it did not possess the license required for the work. Mr. Phillips was told that a permit had been issued and they were "covered," and work continued on the project. However, after becoming more dissatisfied with QRI's quality of work on the project, Mr. Phillips contacted the Louisiana Contractor's Licensing Board and learned that QRI still did not possess the required license. The Phillipses then terminated the contract.

QRI filed suit against the Phillipses claiming it was entitled to the contract balance remaining at termination. The Phillipses answered and filed a reconventional demand alleging that QRI made false and intentional misrepresen-

tations that led them to believe that QRI was licensed. They also alleged defective and incomplete work on behalf of QRI. The Phillipses also asserted that because QRI did not hold the required license, the contract was an absolute nullity and, therefore, void. As a result, they claimed that QRI should not be entitled to receive any profit or overhead and that they should be reimbursed for all profit, overhead and any other funds they had already paid to QRI. In response, QRI amended its petition to assert an alternative claim of unjust enrichment. The trial court rendered judgment in favor of QRI.

The 1st Circuit was tasked with several issues on appeal. First was whether the contract was rendered void due to QRI's failure to hold the required license. The court noted that during the entire time QRI undertook work on the project, it did not possess the necessary contractor's license. As a result, it found that the contract was an absolute nullity and void *ab initio.*

The court next looked to whether the New Home Warranty Act (NHWA) applied to QRI's addition to the Phillipses' home. However, the court did not reach a decision on this issue because it concluded that a valid contractor's license was a prerequisite to engage in any residential construction. Thus, because there was no license and the contract was void, the NHWA could not apply.

The court then examined QRI's entitlement to recovery in light of the fact that the contract had been declared null and void. The Phillipses argued that QRI's actions were fraudulent and prevented it from recovering under a theory of unjust enrichment. The court noted that courts generally limit the recovery of unlicensed contractors to the actual costs of their materials, services and labor in the absence of a contract or in the case of a null contract, with no allowance for profit or overhead. In determining what amounts should be awarded, the court closely examined *Hagberg v. John Bailey Contractor,* 425 So.2d 580 (La. App. 3 Cir. 1993), and *Dennis Talbot Const. Co. v. Private Gen. Contractors, Inc.,* 10-1300 (La. App. 3 Cir. 3/23/11), 60 So.3d 102. The court focused on exceptions to the general rule of recovery for unjust enrichment created in these decisions, which provide that if a contractor's actions fell into the "fraudulently obtained contract exception" or the "substandard work exception," it would not be entitled to recover its actual costs of materials, services and labor under an unjust enrichment claim.

The court noted that the Phillipses specifically pled incompetence, inexperience and fraud and concluded that QRI's actions fell under the "substandard work exception." As a result, the court held that QRI was not entitled to recover any further amounts under its unjust enrichment claim. Thus, the Phillipses were able to invoke the Contractors Licensing Law to prohibit recovery by QRI of its actual cost of materials, services and labor under a theory of unjust enrichment.

Finally, the court turned to damages. The court found that the Phillipses were not entitled to reimbursement for the amounts they had previously paid to QRI because they allowed QRI to continue work after they learned it did not have the required license. Further, the court determined that the Phillipses interfered with some of QRI's work on the project. The court concluded that "[t]he Phillips[es] did receive some value for the sums they paid to QRI, and with the damages awarded herein, the Phillips[es] should be made whole." The court then went on to award the Phillipses damages for several instances of defective work as well as expert witness fees.

—**Douglass F. Wynne, Jr.**
Member, LSBA Fidelity, Surety & Construction Law Section
Simon, Peragine, Smith & Redfearn, LLP
1100 Poydras St., 30th Flr.
New Orleans, LA 70163

World Trade Organization

United States-Tariff Measures on Certain Goods from China, WT/DS543/R (Sept. 15, 2020).

A WTO dispute-settlement panel has issued a ruling on whether U.S. tariffs on Chinese goods conform to WTO obligations. The Trump Administration imposed 25% tariffs on various Chinese goods in response to alleged Chinese violations of intellectual property norms, including forced technology transfer and other misappropriation of U.S. technology. The WTO dispute-settlement panel found that the U.S. tariff measures violated GATT 1994 Articles I and II insofar as they applied only to Chinese goods (violation of most-favored-nation clause) and were applied in excess of the tariff rates to which the United States bound itself in its Schedule of Concessions.

The United States asserted a "public morals" defense, arguing that the tariff measures are justified under GATT 1994 Article XX(a) as necessary to protect public morals regarding theft, misappropriation and unfair competition. The panel rejected the defense on the ground that the United States failed to demonstrate how the tariffs would contribute to achieving its public morals' objective. Accordingly, the panel ruled that the U.S. measures are inconsistent with its WTO obligations and that the United States should bring its measures into conformity with its obligations.

Under ordinary circumstances, the United States would likely appeal the panel's decision to the WTO Appellate Body. However, the Appellate Body is currently non-functional due to the lack of a quorum of judges. The United States has refused to consent to the appointment of new judges until various structural reforms are implemented by the WTO Dispute Settlement Body.

—Edward T. Hayes
Chair, LSBA International Law Section
Leake & Andersson, LLP
Ste. 1700, 1100 Poydras St.
New Orleans, LA 70163

Pretext Analysis in Employment Retaliation Cases

Anderson v. La. Dept. of Transp. & Dev., No. 20-30253, ____ F. App'x ____ (5 Cir. 12/7/20), 2020 WL 7658390.

The 5th Circuit recently clarified the proper approach to the pretext analysis in employment-retaliation cases, reversing and remanding a summary judgment order where temporal proximity, combined with other indicia of pretext, created a triable issue of fact.

The plaintiff, Crystal Anderson, was a member of a DOTD bridge crew that regularly worked four days a week, 10 hours a day, and usually had Friday off. One Friday, she was called in to work overtime, but she had a preexisting doctor appointment. Her supervisor, Dennis Rushing, told her she had to bring a doctor's note when she returned to work on Monday.

On her return, Anderson discovered that another employee had also taken off that Friday but had not been required to bring a doctor's note. Anderson, who is African-American, suspected a racial disparity and called Rushing's immediate superior.

Relations between Rushing and Anderson rapidly deteriorated, and Rushing made more than one comment suggesting he was looking to fire Anderson. Less than two months later, Anderson was told to either resign or be fired. She resigned.

The trial court granted summary judgment dismissing Anderson's retaliation claim. The 5th Circuit reversed, and first found a disputed issue of fact regarding whether Anderson engaged in protected activity by calling Rushing's superior. The defendant argued that Anderson was merely trying to "clarify" the Department's policies regarding doctor's

notes, and thus her case did not involve a claim of racially disparate treatment. The 5th Circuit disagreed, noting that Anderson's certified complaint directly contradicted this assertion. The court further held that a certified complaint constituted valid summary judgment evidence and so created a disputed issue of fact.

The court likewise found a disputed issue of fact regarding whether Anderson resigned of her own volition. Anderson testified that she was told to resign or be fired, and that criminal charges were even threatened if she refused. The 5th Circuit found that this kind of ultimatum may qualify as a "forced resignation" and thus give rise to a constructive discharge claim under *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

Finally, and perhaps most importantly, the 5th Circuit found evidence that the stated reason for the termination was pretextual. Although temporal proximity alone was not enough to show pretext, the court identified several types of evidence that, taken together, tended to show pretext: (1) there was temporal proximity between Anderson's report and her termination; (2) other employees engaged in similar behavior without reprimand; (3) the Department failed to follow its own disciplinary protocol in reprimanding her; and (4) Rushing harassed Anderson after she reported his behavior. Given these factors, summary judgment was reversed.

The *Anderson* decision reinforces the multi-faceted and individualized nature of the pretext analysis. As the 5th Circuit recognized, no single factor is necessary to establish pretext. Rather, a court must look to all facts in the case and determine whether those factors, combined, could lead a reasonable jury to determine that the defendants' stated reason for the termination was false.

Anderson also provides useful clarity on the question of temporal proximity in retaliation cases. Employers often argue that, while a close temporal proximity between a complaint and a termination may make a prima facie case, it is not relevant to the pretext analysis. As *Anderson* recognizes, temporal proximity is an important factor in the pretext analysis. Temporal proximity standing alone may not be enough to overcome summary judgment if the plaintiff offers no other evidence of pretext whatsoever. However, when combined with other indicia of pretext, temporal proximity can be a compelling factor in denying summary judgment.

—Charles J. Stiegler
Secretary, LSBA Labor and Employment Law Section
Stiegler Law Firm, LLC
Ste. 104, 318 Harrison Ave.
New Orleans, LA 70124

Partial Motion to Dismiss; Forfeiture Provision; Unleased Interest Owners

Dow Constr., LLC v. BPX Operating Co., Civil Action 20-9 (W.D. La. 11/24/2020), 2020 WL 6928320.

This case involved a force-pooled unit in Red River Parish, Louisiana. Dow is an unleased mineral-interest owner. BPX is the current operator of the Nichols well (Well). The issues in this case began when the prior operator — Petrohawk — failed to respond to a demand by Dow for an accounting of the costs it was charged in connection with the Well. Dow sent two requests for an accounting, but Petrohawk responded to neither.

As a result, Dow contended that BPX, Petrohawk's successor-in-interest, forfeited any contribution by the unleased owner or owners of any of the costs of the drilling operations of the Well, pursuant to La. R.S. 30:103.2. Dow also claimed that it was improperly charged post-production costs by Petrohawk. The statutes that are at issue — La. R.S. 30:103.1 and 30:103.2 — deal with who is responsible for certain costs associated with the drilling and operation of a well. Section 103.1 states that the unit operator has the responsibility to communicate and share information about costs (viz. an accounting) with the unleased mineral owners. Section 103.2 states that an operator forfeits the right to demand any contribution from the unleased owners for the costs of drilling operations if it does not provide an accounting.

Dow filed suit in the Western District of Louisiana alleging that BPX fell within the language of Section 103.2. BPX moved for partial dismissal under Rule 12, arguing that post-production costs are not included in 30:103.2's forfeiture provision. In analyzing Louisiana case law, the court noted that neither party fully briefed whether Section 30:10(A)(3) prohibits operators from charging post-production costs to unleased parties such as Dow. Section 30:10(A)(3), as interpreted by *Johnson v. Chesapeake La., LP*, 2019 WL 1301985 (W.D. La. 3/21/2019), provides that operators cannot charge unleased mineral-interest owners for post-production costs such as taxes, transportation, processing,

dehydration, treating and compression. Because the court felt that additional briefing was necessary on the issue of post-production costs and whether they were included in the forfeiture statute, the court denied BPX's motion for partial dismissal and deferred ruling until after the issue was properly briefed.

Act 312 Did Not Apply in Legacy Lawsuit

Petry v. R360 Envtl. Solutions of La. LLC, No. 2:20-CV-00820 (W.D. La. 11/4/20), 2020 WL 6494901.

The question presented by this case was whether "Act 312" (La. R.S. 30:29) applied to environmental litigation where plaintiffs alleged that defendants' waste-disposal operations at its Mermentau facility caused "hazardous and toxic oilfield waste" to migrate (and continue to migrate) onto plaintiffs' property, which was located adjacent to the waste facility. After successfully removing the litigation to federal court for the Western District of Louisiana, defendants prevailed on a Rule 12(b)(6) motion to dismiss, securing dismissal of half a dozen claims by landowner plaintiffs against the waste-disposal facility, including plaintiffs' trespass and Act 312 claims.

Plaintiffs maintained that defendants purposefully stored hazardous chemicals underground, knew of contamination by way of monitoring wells and test data at their facility and knew or should have known that contamination is migrating onto plaintiffs' property. Defendants, on the other hand, argued that (1) the trespass claim should be dismissed because defendants did not commit an affirmative, intentional and/or overt act to contaminate plaintiffs' property and (2) that Act 312 does not apply to this case because Act 312 applied only to litigation involving "oilfield sites" or "exploration and production (E&P) sites." Defendants further argued that the disposal or storage of wastes must have occurred on land that was used for oil or gas exploration, development or production in order for Act 312 to apply. Here, that was not the case.

Relying on the law and arguments cited in support of the motion to dismiss, the court found (1) trespass requires some specific, physical act directly on the plaintiff's property — not mere knowledge of a harm that could result from migration; and (2) that the defendants' oilfield waste-disposal facility did not constitute an exploration-and-production site under Act 312. The court dismissed with prejudice plaintiffs' claims for trespass and claims pursuant to Act 312. In response to the motion, plaintiffs had dismissed *with prejudice* their claims for solidary liability; punitive damages; strict liability under Louisiana Civil Code articles 667, 2317 and 2322; and fraud/concealment, and had amended their allegations pursuant to Louisiana's Groundwater Act.

Carbon Capture and Sequestration in Louisiana

In light of Sen. Sharon Hewitt's legislation (S.B. 353) passed during the 2020 Regular Legislative Session — now, Act No. 61, (*https://legis.la.gov/Legis/BillInfo.aspx?s=20RS&b=ACT61&sbi=y*) — setting forth a framework for carbon sequestration in Louisiana, the Louisiana Department of Natural Resources (LDNR) has formed an ad hoc committee of regulators and a law professor to evaluate and discuss with stakeholders from around the state a statutory and regulatory scheme to implement carbon sequestration in Louisiana. Further information relating to this ad hoc committee can be obtained by contacting Blake Canfield, Executive Counsel, LDNR, at (225)342-2710. Also of note is that LDNR is in the process of rulemaking for Class VI wells.

—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
Colleen C. Jarrott
Member, LSBA Mineral Law Section
Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170-3600

Collectibility Rule in Legal Malpractice

Ewing v. Westport Ins. Corp., 20-0339 (La. 11/19/20), ____ So.3d ____, 2020 WL 6789490.

Ewing sued her former attorney (Granger) and his insurer (Westport) because Granger allowed her automobile-tort claim against Melancon and his insurer to prescribe. The defendants filed a motion for partial summary judgment, asking the court to apply the "collectibility rule," *i.e.*, to find that Ewing was entitled only to the maximum she could have recovered in the underlying tort suit.

The parties stipulated that Granger was liable for legal malpractice and that the maximum insurance coverage available to the defendant driver was $30,000. The trial court then granted the motion, opining that, absent legal malpractice, the plaintiff could not have recovered more than the underlying auto-liability coverage, given Melancon's testimony that he was unable to pay an excess judgment. The case was then tried, and Ewing was awarded $30,000, with the trial judge commenting that the damages were "at least that amount," and declaring moot the issue of her actual damages in light of the granting of summary judgment on the collectibility issue.

The court of appeal reversed, reasoning that the defendants "cannot rely on a hypothetical situation of bankruptcy to limit Ms. Ewing's recovery. Collectibility could not be raised in the underlying lawsuit and should not be considered in Ms. Ewing's malpractice claim . . . ." The case was remanded for the trial court to consider the amount of damages suffered by Ewing.

The Louisiana Supreme Court granted the defendants' writ application. Its opinion first explained that the application of the collectibility rule "limits the measure

of a legal malpractice plaintiff's damages to what the plaintiff could have actually collected" but for the attorney's malpractice, irrespective of the value of the claim, seemingly asking why a plaintiff should collect more against the attorney than was possible against the underlying tortfeasor.

The Court cited legal journal articles and opinions from other jurisdictions that opined that collectibility was "an essential element of the plaintiff's legal malpractice case." Nonetheless, the Court noted a significant growing trend of courts that made the issue of collectibility an affirmative defense, thus shifting the burden of proof to the legal-malpractice attorney and treating "collectibility as a matter constituting an avoidance or mitigation of the consequences of the attorney's negligent act."

Noting that the relevance of collectibility in legal malpractice cases was a *res nova* issue in Louisiana and declining to follow any of the jurisprudence and authoritative texts it had earlier cited, the Court based its opinion on Louisiana jurisprudence, public policy and the lack of relevant authority and wrote: "[W]e hold the collectibility rule is not applicable in legal malpractice cases."

Prior to this case, the Court had disavowed the "case within a case" doctrine and had held that "[a]t the very least, [plaintiff] must establish some causal connection between the alleged negligence and the eventual unfavorable outcome of the litigation." *MB Indus., LLC v. CNA Ins. Co.*, 11-0303 (La. 10/25/11), 74 So.3d 1173, 1187. The Court reasoned:

> Thus, under our jurisprudence, Ms. Ewing was only required to prove she had an attorney-client relationship with Mr. Granger; that Mr. Granger's representation was negligent; and that Mr. Granger's negligence caused her some loss. The parties stipulated the first two elements were satisfied. Furthermore, Ms. Ewing satisfied her burden regarding the third element. Where the plaintiff proves that the negligence on the part of her former attorney caused the loss of the opportunity to assert a claim, she has established the inference of causation of damages resulting from the lost opportunity for recovery. Because the "case within a case" requirement no longer exists, there is no basis to burden a legal malpractice plaintiff with also proving she would have successfully been able to execute on the judgment in the underlying case or that the judgment was collectible. Collectibility is not an element of the plaintiff's legal malpractice claim in Louisiana (internal citations omitted).

The defendants' reliance on earlier cases concerning the maxim that the plaintiff should have no greater rights against her attorney than she had against the underlying tortfeasor were distinguished from *Ewing* because those cases involved the lack of evidence for the third prong of a malpractice claim (proof of loss or damages), *i.e.*, where a defendant attorney proves the plaintiff could not prevail on the merits of the underlying claim.

The Court concluded:

> A money judgment rendered against a tortfeasor has intrinsic value, regardless of collectibility of that judgment. . . . We will not allow a malpractice defendant to assert a defense based on the wealth or poverty of the underlying tortfeasor when a defendant in any other type of tort action could not assert a similarly based defense.

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

Third-Party Contracts Were Insufficient for Personal Jurisdiction

Jeopardy Prods., Inc. v. Robinson, 19-1095 (La. App. 1 Cir. 10/21/20), ____ So.3d ____, 2020 WL 6162836.

The Louisiana Department of Revenue filed a lawsuit against nonresident corporation, Jeopardy Productions, Inc., seeking to collect Louisiana income tax on royalty income earned by Jeopardy in Louisiana. Jeopardy filed an exception of lack of personal jurisdiction asserting that Jeopardy lacked the minimum contacts with the State of Louisiana for the court to exercise personal jurisdiction. The district court granted the exception. The Department appealed to the 1st Circuit.

Jeopardy is part of the television division of Sony Entertainment Group, which oversees game shows such as Jeopardy! Jeopardy's principal place of business is in Culver City, Calif., where the licensing and day-to-day business operations for the game show occur. The licensing and distribution agreements pertain to Jeopardy's intellectual property (copyrighted, trademarked and patented products). The agreements are between Jeopardy and various third parties that negotiate the broadcasting of the game show across the United States and agreements for merchandise reflecting the Jeopardy trademark or logo. Jeopardy's business decisions are made in California. Jeopardy is incorporated in Delaware and is registered to do business in California.

Jeopardy's source of revenue is from royalties from licensing and distribution agreements. The agreements at issue were between Jeopardy and: (1) CBS Television Distribution Group (CBS), who has the right to sublicense and distribute the Jeopardy! game show across the country; (2) International Gaming Tech (IGT), who has the right to place Jeopardy's trademark/logo on gaming machines in gaming venues across the country; and (3) other manufacturers and distributors of various merchandise. CBS contracted with seven television stations in Louisiana to broadcast the Jeopardy! game show. IGT contracted to place gaming machines with the Jeopardy logo at Louisiana casinos. During the tax years 2011-2014, Jeopardy earned $3,622,595 in royalty income from Louisiana from the activities noted above.

The court held that Jeopardy's contacts with Louisiana through unrelated third parties that CBS and IGT contracted with were not sufficient for Louisiana to have personal jurisdiction over Jeopardy. The Jeopardy licensing and distribution agreements gave CBS and IGT the sole authority to decide which states in which to license and/or distribute the Jeopardy! game show, trademark/logo and merchandise with unrelated third parties. Jeopardy had no control over where and with whom the licensees chose to market and negotiate distribution of the game show and merchandise. No intentional or direct contact with Louisiana was found. The court found the random, fortuitous and attenuated contacts with Louisiana was not enough to establish personal jurisdiction over Jeopardy in Louisiana. The court affirmed the granting of the exception of lack of personal jurisdiction.

—**Antonio Charles Ferachi**
Member, LSBA Taxation Section
Director of Litigation-General Counsel
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70821

Retirement Plan Changes Made by SECURE Act and CARES Act

The Setting Every Community Up for Retirement Enhancement Act (the SECURE Act) became law on Dec. 20, 2019, and the Coronavirus Aid, Relief and Economic Security Act (the CARES Act) became law on March 27, 2020. Both laws modified the rules relating to retirement plans.

The SECURE Act changed the law to require that minimum distributions in the event of the death of the participant be made over a period not longer than 10 years, except for certain eligible designated beneficiaries, which includes minor children, persons within 10 years of the age of the participant, the surviving spouse of the participant, and disabled and chronically ill individuals. Previous law permitted the creation of trusts and trusts with multiple beneficiaries that could receive distributions over an extended period of time. The Required Beginning Date for minimum distributions was changed to April 1 of the year following the year of attainment of age 72, instead of 70½. The CARES Act eliminated the required distribution for 2020.

The SECURE Act made certain safe-harbor 401(k) plans more flexible for employers. An employer that uses the nonelective safe harbor (3% of compensation for all nonhighly compensated employees) does not have to provide the notice of the safe harbor in advance of the year in which it applies, and the employer can choose up until 30 days before the end of the year whether to have the safe harbor apply for that year. The advance notice for the safe harbor for discretionary matching contributions was not changed.

Effective for tax years beginning after Dec. 31, 2020, employees who complete at least 500 Hours of Service per year for three years will be entitled to make elective deferrals under the 401(k) plan, which means that employers will have to permit these employees to make elective deferrals beginning in 2024.

The CARES Act permitted employers to change their plans for distributions and enhanced loans for "qualified individuals." A qualified individual is a participant whose health, job, childcare or business is affected by COVID-19.

Coronavirus-Related Distributions (CRDs) were made to qualified individuals until Dec. 31, 2020. Taxes will generally be spread over a three-year period, and tax may be avoided if the CRD is repaid to the plan or another qualified plan or IRA within three years of the CRD. The CRD is not subject to the early distribution penalty. Qualified individuals received loans by Sept. 23, 2020, up to $100,000 or 100% of his vested account balance, rather than up to the previous limit of $50,000 or 50% of the vested balance. A plan may permit the extension of the time to repay an existing participant loan for up to one year for payments which were due by Dec. 31, 2020.

—**Robert C. Schmidt**
Member, LSBA Taxation Section
Kean Miller LLP
II City Plaza
Ste. 700, 400 Convention St.
Baton Rouge, LA 70821