U.S. 5th Circuit Affirms Dismissal of La.'s Challenge to Federal Rule Requiring Turtle Excluder Devices on Shrimping Vessels

La. State, ex rel. La. Dep't of Wildlife & Fisheries v. Nat'l Oceanic & Atmospheric Admin., 70 F.4th 872 (5 Cir. 2023).

The U.S. 5th Circuit Court of Appeals affirmed the dismissal, for lack of standing, of Louisiana's challenge to a National Marine Fisheries Service's (NMFS) Rule requiring shrimping trawler boats longer than 40 feet, including those that operate inshore, to install Turtle Excluder Devices (TEDs) that allow turtles to escape trawler nets.

On cross summary judgment motions, the District Court for the Eastern District of Louisiana granted NMFS's motion, holding that Louisiana failed to carry its burden to establish standing. On appeal, Louisiana cast a broad net and asserted that the rule impinged on Louisiana's sovereign, quasi-sovereign and proprietary interests because the rule: (1) preempted state laws regulating shrimp harvesting in state waters; (2) interfered with Louisiana's enforcement of its own wildlife laws; (3) encroached on the State's sovereign interest in shrimp in its waters as a resource; and (4) interfered with the State's regulation of its own marine resources.

The 5th Circuit disposed of the first and fourth grounds on account of the State's failure to raise them before the trial court. The State argued that neither ground was forfeited because it had alleged them in its complaint. Emphasizing the importance of substantiating allegations at the summary judgment stage, the 5th Circuit found those two grounds for standing were not properly preserved, explaining that a "nonmovant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Id.* at 881. Louisiana's assertion that "it 'had no reason to press the relevant argument[s] more specifically' at summary judgment because the district court had already determined that the State had standing in granting the preliminary injunction" was unavailing, especially because it was "on notice that NMFS was contesting [its] standing — and seeking summary judgment on that basis." *Id.* at 879-880.

Neither of the remaining preserved arguments held water. First, the State failed to provide sufficient proof that the rule would increase Louisiana Department of Wildlife & Fisheries' (LDWF) enforcement costs. The 5th Circuit found the declaration by a colonel with LDWF's enforcement division to be speculative, and the court noted that Louisiana could ask NMFS for increased funding to offset any increase in enforcement costs. Second, the State failed to produce evidentiary support for its contention that the rule inflicted injury on Louisiana's marine resources. The 5th Circuit reasoned that, under the rule, "less shrimp will be extracted from Louisiana waters and fewer turtles will ostensibly be caught inadvertently in shrimpers' nets." *Id.* at 880.

This decision provides a renewed caution to litigants to ensure that arguments at the trial court level are properly preserved for appeal and do not slip through the net.

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Contempt

Boudreaux v. Boudreaux, 22-0804 (La. App. 3 Cir. 7/5/23), ____ So.3d ____, 2023 WL 4341358.

Ms. Carpenter (formerly Boudreaux) appealed the trial court's judgment finding her in contempt for failure to pay private school tuition, arguing that there was no judgment that ordered her to pay the child's tuition at Hamilton Christian Academy, or to otherwise reimburse Mr. Boudreaux for any tuition that he paid after enrolling the child.

The appellate court reversed the trial court's judgment finding Ms. Carpenter in contempt, noting that the only judgment specifically addressing the obligation to pay private school tuition was the January 2018 consent judgment, which stated that "Amy will pay 100% of the tuition and fees due Life Christian Academy associated with the minor child's attendance there." Although the minor child was subsequently enrolled in Hamilton Christian Academy, not Life Christian Academy, the plain language of the consent judgment was clear and unambiguous, making the trial court's decision manifestly erroneous.

Partition

Peterson v. Peterson, 55,228 (La. App. 2 Cir. 8/9/23), ____ So.3d ____, 2023 WL 5069071

Ms. Peterson appealed the motion for summary judgment granted in favor of Mr. Peterson, awarding him $148,584.53 as reimbursement for mortgage payments made on the parties' co-owned property. Ms. Peterson argued that, as co-owners of the property, Mr. Peterson's only available remedy was an action for partition, which he failed to initiate. The appellate court reversed the trial court's judgment granting summary judgment in favor of Mr. Peterson, noting that his failure to file a petition for partition of co-owned property created a genuine issue of material fact that precluded summary judgment on the issue of reimbursement of mortgage payments.

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La. Environmental Whistleblower Statute Contains No Job Duty Exception, Protects Refusals

Menard v. Targa Resources, L.L.C., 23-0246 (La. 6/27/23), ____ So.3d ____, 2023 WL 4195779.

The U.S. 5th Circuit certified the following questions regarding the Louisiana Environmental Whistleblower Statute (LEWS), La. R.S. 30:2027, to the Louisiana Supreme Court: (1) whether an employee's refusal to participate in an environmental violation is a disclosure under the current version of LEWS; and (2) whether LEWS protects an employee whose job duties include reporting environmental violations. The Louisiana Supreme Court answered yes to both certified questions, confirming again that LEWS must be interpreted broadly to uphold the purpose of the Louisiana Environmental Quality Act, La. R.S. 30: 2001-2396, and the Louisiana Constitution's mandate that the environment shall be protected. *See* La. Const. of 1974, art. IX, § 1.

The defendant, Targa, employed the plaintiff, Kirk Menard, as an environmental safety and health specialist. During a conference call in which Targa District Manager Perry Berthelot participated, Menard stated that the total suspended solids in recent water samples exceeded regulatory limits. After the conference call, Berthelot allegedly instructed Menard to dilute the samples with bottled water. Menard refused and reported the order to dilute the samples to his direct supervisor. Six days later, Targa fired Menard, who sued for retaliatory discharge under LEWS.

Targa moved for summary judgment in federal district court, arguing that Menard had not engaged in protected activity. The district court concluded that LEWS did not protect Menard's report to his supervisor about the order to dilute samples. A job-duty exception applied, the district court reasoned, because Menard's responsibilities included reporting environmental violations. However, the district court ruled that Menard's refusal to dilute the samples did qualify as protected activity. The district court denied summary judgment and found in Menard's favor after a bench trial. Targa appealed, resulting in the 5th Circuit's certification request to the Louisiana Supreme Court.

In its opinion, the Louisiana Supreme Court first addressed whether an employee's refusal to participate in an environmental violation is protected activity. When the Legislature amended LEWS in 1991, it changed "reports or complains" to "discloses." La. R.S. 30:2027(A)(1). Targa argued that this change demonstrated legislative intent to narrow the application of LEWS. Targa also argued that the court's holding in *Cheramie v. J. Wayne Plaisance, Inc.*, 595 So.2d 619 (La. 1992), cannot apply to the current version of LEWS. In *Cheramie*, the court interpreted the pre-1991 version of LEWS in holding that "complain" included a refusal to participate in an environmental violation.

The court rejected Targa's arguments. Relying on *Cheramie* as well as *Borcik v. Crosby Tugs, LLC*, 16-1372 (La. 5/3/17), 222 So.3d 672, the court recognized that the purpose of LEWS is to further the constitu-

tional mandate to protect the environment and that a broad interpretation of LEWS is required to effectuate the constitutional and statutory directive and purpose. The court also found that legislative history indicated an intent to broaden LEWS in 1991.

The court consulted the Merriam-Webster dictionary, which defines "disclose" as "to make known or public." Noting that both "complain" and "disclose" contemplate expressive or communicative acts, the court found that "disclose" is expansive enough to encompass a refusal to participate. An employee's refusal to act or participate in a perceived environmental violation is an extreme form of communication, as previously explained in *Cheramie*. To hold otherwise would frustrate the purpose of LEWS and encourage environmental violations.

The court further rejected Targa's argument that because LEWS authorizes treble damages, it is a penal statute, necessitating strict construction of the entire statute. The court refused to permit the treble damages provision in Paragraph B of LEWS to be applied as an "unreasonable technicality" to defeat the constitutional mandate and undermine the statute's purpose.

As to the second certified question, the court responded that there is no job-duty exception under LEWS. The statute makes no distinction between employees whose job duties require reporting environmental violations and those whose duties do not. Judicially inserting a job-duty exception into LEWS would result in no protection for employees most likely to know about environmental violations. This too would frustrate the purpose of LEWS.

The court noted that federal cases interpreting federal whistleblower laws perpetuated the job-duty exception and formed the basis for two state appellate court decisions that incorrectly imported a job-duty exception into LEWS. The court made clear that reliance on that line of federal cases was misplaced. LEWS protects all employees.

Addressing Targa's argument that the court's decision violates Louisiana's public policy favoring at-will employment, the court cited federal and state employment laws barring discrimination based on race, religion, sex and other protected characteristics. Like other employment laws, LEWS is an exception to the at-will employment doctrine.

This case settles a long-running debate among employment lawyers about whether a job-duty exception, which does not appear in the text of LEWS, defeats a whistleblower-retaliation claim by an employee with environmental-reporting responsibilities. In addition, the court confirmed that a refusal to participate in an environmental violation remains protected activity under LEWS. Citing its prior decisions in *Cheramie* and *Borcik*, the court emphasized that courts must interpret LEWS broadly. To hold otherwise would frustrate the constitutional mandate, incentivize environmental violations and result in absurd consequences antithetical to the rules of statutory construction.

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Mineral Law

Court Interprets Indemnities in Purchase and Sale Agreement

In *Marathon Oil Co. v. LLOG-Expl. Co.,* No. 22-1295 (E.D. La. July 13, 2023), 2023 WL 4529090 (the Indemnity Litigation), the parties disputed the meaning of indemnity provisions contained in a purchase-and-sale agreement, and how those indemnity obligations might apply with respect to liabilities owed to third persons pursuant to a state court judgment as a result of a suit filed by third persons in state court (the *Pigeon Land* litigation).

Background

Plymouth Oil Company drilled and operated two wells on certain property in Iberia Parish, pursuant to mineral leases and surface agreements. In 1962, Plymouth transferred its interests to the Ohio Oil Company, which later became Marathon Oil Company. Marathon ceased operations on the property the same year but continued to hold its interests until 1991, when it sold its interests to LLOG Exploration Company, LLC.

The purchase-and-sale agreement from Marathon to LLOG (the assignment) contained reciprocal indemnities. The clause containing the indemnity from LLOG to Marathon (the LLOG Covenant) stated:

> [LLOG] . . . agrees to assume all responsibility for the interest(s) assigned hereby as of [January 1, 1991], and further . . . agrees to protect, defend, indemnify and save [Marathon] free and harmless from and against any and all costs, expenses, claims, debts, demands, judgments, causes of action, liens or liability of whatsoever kind, character or nature arising out of or incident to or in connection with in any way the making of this Agreement . . . or the ownership, operation, use, plugging, abandoning, and/or restoration of the above described land(s), lease(s), well(s), fixtures, equipment or other personal property from and after [January 1, 1991], regardless of whether the liability therefor is based upon some alleged act or omission of [Marathon], of [LLOG], or of some other party.

In turn, the clause containing the indemnity from Marathon to LLOG (the Marathon Covenant) stated:

> [Marathon] covenants and agrees to indemnify and save [LLOG] harmless from all claims, debts, liens (including discharge of all liens) and any liability of whatsoever kind, character or nature that may arise in connection or operations or events occurring before [January 1, 1991], except those expressly assumed by [LLOG].

In 2019, the owners of the land at issue filed the *Pigeon Land* lawsuit against Marathon, LLOG and other defendants, alleging that the defendants' oil and gas operations had damaged the land. Marathon and LLOG each made demands on the other for a defense and indemnity, relying on the contractual indemnities in the assignment. They each refused to provide a defense or indemnity to the other, and they each reached separate settlements with the *Pigeon Land* plaintiffs.

The Indemnity Litigation

After settling the *Pigeon Land* litigation, Marathon filed the indemnity litigation, seeking the defense and settlement costs it incurred in the *Pigeon Land* litigation, and basing its claim on the LLOG Covenant in the assignment. Marathon asserted that LLOG owned an indemnity because the claims in the *Pigeon Land* litigation were based on "the ownership, operation, use, plugging, abandoning, and/or restoration" of the premises subject to leases transferred from Marathon to LLOG in the assignment.

LLOG answered and filed a counterclaim, seeking its defense and settlement costs from the *Pigeon Land* litigation, based on the Marathon Covenant in the assignment. LLOG argued that it did not owe an indemnity because the *Pigeon Land* plaintiffs' claims were based on operations and activities that took place before the assignment. LLOG asserted that its obligation to indemnify Marathon related only to liabilities arising from activities occurring after the assignment, and that Marathon owed LLOG an indemnity for claims arising from pre-assignment activities. Marathon moved for a partial summary judgment recognizing that LLOG owed an indemnity for the *Pigeon Land* claims.

The federal district court noted that the LLOG Covenant provided that LLOG would defend and indemnify Marathon for liabilities arising from the "ownership, operation, use, plugging, abandoning, and/or restoration" of the assigned interests "from and after" the assignment. The court concluded that this did not require LLOG to indemnify Marathon for all claims asserted after the assignment, but instead obligated LLOG only to indemnify Marathon for claims arising from activities occurring after the assignment.

Further, the court noted that Louisiana law requires a contractual provision to be interpreted in light of other provisions of the contract. The Marathon Covenant required Marathon to indemnify LLOG for liabilities "that may arise in connection or operations or events occurring before" the assignment. Thus, the Marathon Covenant explicitly made Marathon responsible for liabilities arising from operations and activities occurring before the assignment. The court's interpretation of the LLOG Covenant as applying to liabilities arising from operations and activities occurring before the assignment would result in the indemnities contained in the Marathon Covenant and the LLOG Covenant working together to allocate liability based on the time of the conduct that gave rise to the liability.

Thus, although the *Pigeon Land* plaintiffs did not assert their claims until after the assignment, Marathon would not be entitled to an indemnity unless the claims arose from post-assignment activities. Because a factual dispute existed regarding whether pre-assignment or post-assignment activities caused harms alleged by the *Pigeon Land* plaintiffs, the federal court denied Marathon's motion for partial summary judgment.

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Professional Liability

Admissibility of Panel Opinions

Keller v. Touro Infirmary, 23-0830 (La. 6/17/23), 362 So.3d 403.

The Louisiana Supreme Court reversed a district court ruling that excluded at trial a medical-review panel opinion, contrasting the trial court's opinion with *McGlothlin v. Christus St. Patrick Hosp.*, 10-2775 (La. 7/1/11), 65 So.3d 1218, because the *Keller* panel did not find "any inconsistencies in the evidence or ma[k]e any credibility determinations. The medical review panel opinion is therefore admissible in its entirety."

The district court also had ruled that the defendants could call only one member of the medical-review panel as an expert witness. The Supreme Court similarly reversed this ruling, citing La. R.S. 40:1231.8(H), which the court wrote was "mandatory in nature, providing, 'either party **shall** have the right to call, at his cost, **any** member of the medical review panel as a witness.'" (Emphasis added by the court.)

Summary Judgment Article Amended

Numerous amendments were made to Louisiana Code of Civil Procedure article 966.

Article 966(A)(4)(a) adds to the list of documents that may be filed or referenced in support of or in opposition to summary judgment motions: "Certified copies of public documents or public records, certified copies of insurance policies, authentic acts, private acts duly acknowledged, promissory notes and assignments thereof . . . ."

966(A)(4)(b) provides the following:

> Any document listed in Subparagraph (a) . . . previously filed into the record of the cause may be specifically referenced and considered in support of or in opposition to a motion for summary judgment by listing with the motion or opposition the document by title and date of filing. The party shall concurrently with the filing of the motion or opposition furnish to the court and the opposing party a copy of the

entire document with the pertinent part designated and the filing information.

966(B)(1) states that "[e]xcept for any document provided for under Subparagraph (A)(4)(b) of this Article," a summary judgment motion and evidence in support must "be filed and served . . . not less than sixty-five days prior to the trial."

966(B)(2) requires that all evidence in support of an opposition to the motion, "except for any document provided for under Subparagraph (A)(4)(b)," must be filed and served "not less than fifteen days prior to the hearing on the motion."

966(B)(3) requires reply memoranda "be filed and served in accordance with Article 1313(A)(4) not less than five days inclusive of legal holidays notwithstanding Article 5059(B)(3) prior to the hearing on the motion."

966(B)(5) states that "[n]otwithstanding article 1915(B)(2), the court shall not reconsider or revise the granting of a motion for partial summary judgment on motion of a party who failed to meet the deadlines imposed by this Paragraph, nor shall the court consider any documents filed after those deadlines."

Article 966(D)(2) provides that a "court shall consider only those documents filed or referenced in support of or in opposition to the motion for summary judgment but shall not consider any document that is excluded pursuant to a timely filed objection," adding that the court must "specifically state on the record or in writing whether the court sustains or overrules the objections raised."

966(D)(3) adds a rule concerning expert witnesses:

> If a timely objection is made to an expert's qualifications or methodologies in support of or in opposition to a motion for summary judgment, any motion in accordance with Article 1425(F) to determine whether the expert is qualified or the expert's methodologies are reliable shall be filed, heard, and decided prior to the hearing on the motion for summary judgment.

Lastly, 966(G) formally forbids any reference to the negligence of a party dismissed on summary judgment. There remained a question concerning one defendant successfully opposing the motion when a plaintiff and other defendants did not. Would fault allocation to that defendant be beneficial only for the party who opposed the motion? The amendment clarifies that it now applies to all parties, with one exception:

> Evidence shall not be admitted at trial to establish the fault of that [dismissed] party or nonparty, except that evidence may be admitted to establish the fault of a principal when the party or nonparty acted pursuant to a mandate or procuration. …This Paragraph does not apply if the trial or appellate court's judgment rendered in accordance with this Article is reversed. If the judgment is reversed by an appellate court, the reversal is applicable to all parties.

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Challenge to Sales Tax Collection System Dismissed Under Tax Injunction Act

Halstead Bead, Inc. v. Richards, No. 22-30373 (5 Cir. July 7, 2023), 2023 WL 4399238.

Halstead Bead, Inc. is an Arizona company that sells products online throughout the country. Halstead argues that Louisiana's parish-by-parish sales-and-use-tax system is so costly to navigate that it runs afoul of the Dormant Commerce Clause doctrine and due process. Halstead sought declaratory and injunctive relief against the enforcement of the tax system, as well as nominal damages against various state and local governmental defendants. The district court dismissed the matter for lack of subject matter jurisdiction, reasoning that the Tax Injunction Act (TIA), 28 U.S.C. § 1341, barred it from hearing Halstead's claims. In the alternative, the district court refrained from exercising jurisdiction on grounds of comity. The court affirmed on the first ground and did not reach the second.

The TIA provides that the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

The court held the TIA bars federal jurisdiction over Halstead's lawsuit. The court found that Halstead's requested relief, if granted, would stop the collection of Louisiana sales-and-use taxes from remote sellers such as Halstead. The court found that Louisiana law permits declaratory-judgment actions in state court for these types of claims. It noted that the state Board of Tax Appeals (BTA) can hear Halstead's challenge to the constitutionality of the state's tax laws, and judicial review of such decisions was available.

Halstead asserted that it lacked an adequate state forum because state tribunals will hear only claims for refunds, which Halstead cannot do because it has not paid any Louisiana sales-and-use taxes. The court held Halstead was wrong because Louisiana law permits challenges to Louisiana tax laws to be heard in the BTA and in state court. Halstead failed to explain why it would be subject to any payment-under-protest requirement. Nor did Halstead persuasively explain why the refund process is inadequate even if it were applicable. The court affirmed the district court's dismissal of Halstead's lawsuit.

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Tax Developments from the 2023 Regular Legislative Session

Income and Franchise Tax

The Louisiana Legislature enacted a number of key income tax changes in the 2023 Regular Session impacting Louisiana taxpayers and those doing business in Louisiana. Although the Legislature enacted legislation that would have phased out, under certain conditions, the state's onerous tax on investment in the state — the franchise tax — this legislation was vetoed by the Governor. See L. 2023, SB1, SB3 (Act 435) and SB6. Other changes, however, are more likely to improve Louisiana's business climate, including the repeal of a corporate-income-tax sourcing rule that was likely unconstitutional and could have put the state in the position of having to defend expensive legal challenges. Specifically, the Legislature repealed the "throwout rule," a sourcing rule used to determine the sales factor for Louisiana corporation income tax apportionment and that previously excluded certain sales of intangible property from the both the numerator and denominator of the sales factor. *See* L. 2023 HB631 (Act 430).

With respect to individual income taxes, Louisiana law provides, under certain circumstances, that an individual may exclude the net capital gains arising from the sale or exchange of an equity interest or substantially all of the assets of a non-publicly traded corporation, partnership, limited liability company or other business organization commercially domiciled in Louisiana. The Legislature directed the Louisiana Department of Revenue to promulgate regulations to address two areas of concern with respect to the exclusion. When finalized, the regulations are expected to restrict eligibility for the exclusion where a majority of the physical assets of the business are located outside Louisiana or where a sale is between related parties. *See* L. 2023 SB89 (Act 242).

Also, impacting individuals, the Legislature has extended restrictions on the availability of a credit for net income taxes paid to another state. Pursuant to state law, (1) the credit is limited to the amount of Louisiana income tax that would have been imposed if the income earned in the other state had been earned in Louisiana, (2) the credit is not allowed for tax paid on income that is not subject to tax in Louisiana and (3) the credit is not allowed for income taxes paid to a state that allows a nonresident a credit for taxes paid or payable to the state of residence. Finally, Act 413 contains provisions to ensure that no double benefit is allowed in situations in which a deduction is claimed for another state's entity-level tax. Such deduction will be treated as in lieu of the credit and not in addition to the credit. The reciprocity requirement was also eliminated. *See* L. 2023 HB618 (Act 413).

Finally, the pass-through-entity tax exclusion (Louisiana's version of the "SALT cap workaround") has been extended to partnerships, estates and trusts, which will enable such entities to exclude net income or losses received from a related entity in which the partnership, estate or trust is a shareholder, partner or member, provided that payor entity properly filed an entity-level Louisiana tax return that included the net income or loss in question. *See* L. 2023 HB428 (Act 450).

Sales-and-Use Tax

The Legislature also modified the Louisiana threshold for a remote seller or marketplace facilitator to register, report and remit use tax (both state and local) by repealing the 200 transactions threshold while leaving the threshold of $100,000 in gross revenues intact. The new legislation also provides that only remote retail sales (and not excluded transactions such as resales) would be counted towards the $100,000 threshold for marketplace facilitators.

As a very important reform, the Legislature repealed the recent legislation that imposed interest on taxpayers where a collector prevails against an unsuccessful taxpayer in a suit in which the taxpayer has nonetheless paid the taxes under protest. The prior law that allowed local collectors to "double-dip" on interest was roundly criticized, in part, because the collectors could invest the disputed funds while the matter was pending resolution. The change restores parity to how both state and local taxes are treated under these circumstances. *See* L. 2023, SB8 (Act 249).

Nevertheless, if interest is payable on a refund of tax paid under protest (in situations where the taxpayer prevails), the interest rate has been reduced from 12% per annum to the judicial interest rate (currently, 6.5% per annum). As of 2015, if a parish collector deposits amounts paid under protest into an interest-bearing escrow account, the taxpayer in a successful refund action receives only interest actually earned and received by the collector.

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