

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

October 7-8, 2016

Friday, October 7, 2016

Persons Present:

Adams, E. Pete	Levy, H. Mark
Adams, Marguerite (Peggy) L.	Medlin, Kay C.
Bergstedt, Thomas	Mohamed, Ahmed M.
Breard, L. Kent	Morris, Glenn G.
Burris, William J.	Norman, Rick J.
Carroll, Andrea	Popovich, Claire
Castille, Preston J., Jr.	Reed, Angelique
Chatelain, Mallory	Riviere, Christopher H.
Crawford, William E.	Robert, Deidre D.
Crigler, James C.	Scalise, Ronald J., Jr.
Cromwell, L. David	Sherman, Ed
Davidson, James J., III	Sole, Emmett
Davrados, Nick	Suprenant, Monica T.
Dawkins, Robert G.	Tate, George J.
Dimos, Jimmy N.	Thibeaux, Robert P.
Gregorie, Isaac M. "Mack"	Title, Peter S.
Hamilton, Leo C.	Tooley-Knoblett, Dian
Hebert, Christopher B.	Tucker, Zelda W.
Holdridge, Guy	Waguespack, Francis (Frankie)
Jackson, Katrina R.	Wilson, Evelyn
Johnson, Pamela Taylor	Yiannopoulos, A. N.
Knighten, Arlene D.	Ziober, John David
Kostelka, Robert "Bob" W.	
Lavergne, Luke	

On Friday, October 7, 2016 in the Hotel Monteleone in New Orleans, Louisiana, the President of the Louisiana State Law Institute, Mr. John David Ziober, called the meeting of the Council to order at 10:00 a.m.

The President began the meeting by informing those present where lunch would be served and that the morning session would last until 12:00 p.m. He then asked that those present state their name and their town of origin. He then informed the Council that Mr. L. David Cromwell, the Reporter of the Security Devices Committee, would present materials from the Security Devices Committee for an hour and be followed by an hour-long presentation by the Alternative Dispute Resolution (ADR) Committee. Mr. Ziober then yielded the floor to Mr. Cromwell.

Security Devices

Mr. Cromwell began his presentation by giving a brief review of the history of the Private Works Act and the Security Devices Committee's continuing work on it. He then asked those present to turn their attention to the document that was made available prior to the meeting. It was entitled, "Louisiana State Law Institute, Security Devices Committee, Revision of the Private Works Act, R.S. 9:4801 et seq., Avant-Projet No. 3, Prepared for Consideration by the Council, October 7, 2016, New Orleans, Louisiana".

He asked the Council to first view R.S. 9:4822, as found on page 39 of the document. He began by explaining, seriatim, Subsections (A) – (D)(1), which had been approved by the Council during its September 9, 2016 meeting. He then introduced Paragraph (D)(2) in conjunction with R.S. 9:4802(G)(2), found on page 7. He explained to the Council that both of these provisions had been enacted in the same act and that the Committee was recommending the deletion of both of them for numerous policy reasons. He summarized, however, the reasons that one of the special advisors to the Committee felt strongly that these provisions should remain in the Act. A motion was made to strike R.S. 9:4822(D)(2). This motion was seconded. A question issued from the Council, and Mr. Cromwell answered it. The motion to strike was revived and passed unanimously. Thereafter, a motion was made to remove the substance of R.S. 9:4802(G)(2) entirely from the Act, the Council having previously approved deleting it from its current location within the Act. This motion was seconded and also passed unanimously.

Mr. Cromwell then introduced edits to the current version of R.S. 9:4822(E)(2) that the Committee proposed be re-designated as R.S. 9:4822(D)(2). He explained that the edits offered no substantive change to current law. A motion was made to adopt the changes as shown on page 30, lines 32-35. This motion was seconded and unanimously approved. Thus, R.S. 9:4822(D)(2) was approved to read as follows:

§4822. Preservation of claims and privileges

* * *

~~E. D.~~ A notice of termination of the work:

* * *

(2) Shall be signed by the owner ~~or his representative~~, who contracted with the contractor or by that owner's representative. If, ~~or,~~ if the owner has transferred conveyed his rights in the immovable to another person, then the notice of termination of the work may instead be signed by the owner's successor ~~it may also be signed by the new owner,~~ or his representative.

Mr. Cromwell then introduced proposed language for Subsection E of R.S. 9:4822. He acknowledged that the Committee would draft additional language for the Subsection that would address a concern expressed by a Council member during the Committee's September 9, 2016 presentation to the Council. A motion was made to adopt the language as shown on page 40, lines 6-13. A question was directed to the Reporter asking whether the provision would apply to the owner's successor. He replied that he will bring the question to the Committee for it to consider whether it would favor the inclusion of a statement in

the act that would explicitly state that any reference to an "owner" includes his successor. Moreover, he suggested that if the Committee agreed to place such a statement in the act, it should apply throughout the entirety of the act. Following this discussion, the motion to adopt the proposed language for Subsection E was renewed and seconded. Revised Statute 9:4822(E) was generally approved to read as follows:

§4822. Preservation of claims and privileges

* * *

E. If the work has been substantially completed or has been abandoned by the owner, the owner shall file a notice of termination of the work no later than ten days after receipt of a request for its filing from the general contractor. If the owner fails to do so, the general contractor may institute a summary proceeding against him for a judgment decreeing that the work has been substantially completed or has been abandoned by the owner. Provided that the judgment contains the information required by Paragraph (D)(1) and identifies the owner, it shall have the effect of a notice of termination of the work from the time of its filing in the mortgage records.

The presentation then continued with Mr. Cromwell introducing the Committee's proposed edits to current Subsection R.S. 9:4822(F). He explained that the recommended modifications were intended to return the provision to its original meaning and effect, with the clarification that a notice of partial termination can be filed only as to geographical portions of the work site and not as to elements of the work. A motion was made to adopt the changes as shown on page 40, lines 14-25. This motion was seconded. A Council member then addressed a question to the Reporter regarding the term "substantial completion." After Mr. Cromwell addressed this concern, the Council unanimously approved R.S. 9:4822(F) to read as follows:

§4822. Preservation of claims and privileges

* * *

F. A notice of termination ~~or substantial completion~~ may be filed from time to time with respect to a specified ~~portion or~~ area of ~~work~~ an immovable. In that case, the time for preserving privileges or claims as specified in Subsection A or ~~C~~ B of this Section shall commence with the filing of the notice of termination ~~or substantial completion~~ as to amounts owed and arising from the work done on that ~~portion or~~ area of the work immovable described in the notice

of termination. This notice shall ~~identify~~ contain a complete property description of the portion or specified area of the land immovable and certify that the work performed on that ~~portion of the land is~~ substantially completed or has been abandoned. ~~Once the period for preserving claims and privileges has expired and no liens have been timely filed, the portion or area of work described in the notice of termination shall be free of the claims and privileges of those doing work on the area described in the notice of termination, as well as those doing work elsewhere on the immovable being improved.~~

Mr. Cromwell then introduced the Committee's recommended changes to R.S. 9:4822(G)(3) and (G)(5). A Council member, who is also a member of the Security Devices Committee, then commented upon the sufficiency of identifying an "owner" on a claim. Following this comment a motion was made to adopt the recommended changes to the two provisions as shown in the materials. The motion was seconded, and R.S. 9:4822(G)(3) and (G)(5) were approved to read as follows:

§4822. Preservation of claims and privileges

G. A statement of a claim or privilege:

* * *

(3) Shall ~~reasonably identify~~ contain a reasonable identification of the immovable with respect to which the work was performed or movables or services were supplied or rendered and the owner thereof.

* * *

(5) Shall identify the owner who is liable for the claim under R.S. 9:4806(B), but if that owner's interest in the immovable does not appear of record, the statement of claim and privilege may instead identify the person who appears of record to own the immovable.

Mr. Cromwell then spoke on Subsection H of R.S. 9:4822, and how its removal had already been approved by the Council during a prior presentation. He explained that the Council had similarly agreed to strike Subsection I. Having said this, he asked the Council to turn its attention to Subsection J. He briefly introduced this Subsection and the Committee's recommendation that it be struck. A motion was made to strike Subsection J, as found on page 41, lines 18-26. This motion was seconded and unanimously adopted.

He then explained that the Committee recommended that Subsections K and L be struck and that the proposed language for Subsections H and I be adopted in their places. A motion was made that the text found on page 42, lines 3-20 be struck and the text on pages 42, lines 21-35 and page 43, line 1-3 be adopted. This motion was seconded and passed unanimously. Thus, R.S. 9:4822(H) and (I) were approved to read as follows:

§4822. Preservation of claims and privileges

* * *

H. A person granted a claim and privilege under R.S. 9:4802 may give to the owner a notice expressly requesting the owner to notify that person of the substantial completion or abandonment of the work or the filing of notice of termination of the work. The notice shall state the person's mailing address and shall be given to the owner no later than:

(1) The filing of a notice of termination of the work; or

(2) The substantial completion or abandonment of the work, if a notice of termination is not filed.

I. If a person granted a claim and privilege under R.S. 9:4802 has given to an owner a notice complying with Subsection H, the owner shall notify that person within ten days after the substantial completion or abandonment of the work or the filing of notice of termination of the work. If the owner does not do so and if the person fails to file a statement of claim or privilege within the period provided by this Section, the failure shall not extinguish the person's claim against the owner granted by R.S. 9:4802(A), and the claim shall remain enforceable against the owner provided that an action for its enforcement is brought no later than one year after the expiration of that period. Nevertheless, the privilege arising in favor of the person under R.S. 9:4802(B) shall be extinguished by his failure to file a timely statement of claim or privilege, regardless of whether the owner has failed to give him notice when required under this Subsection.

Next, Mr. Cromwell spoke on the Committee's proposed movement of

Subsection M and adoption of the bracketed language found on page 34, lines 11-14. A motion was made to adopt this language and move current R.S. 9:4822(M) to a new location within the Revised Statutes. This motion was seconded and approved unanimously. The bracketed language, which would serve as "non-live text" on the bill, was approved to read as follows:

The Louisiana State Law Institute is hereby instructed to transfer and redesignate R.S. 9:4814, R.S. 9:4815 and R.S. 9:4822(M) as Subpart H of Part I of Chapter 2 of Code Title XXI of R.S. 9, entitled: Misapplication of Proceeds; Retainage. This redesignation is neither an amendment to nor reenactment of these Sections.

Having concluded his presentation of R.S. 9:4822, Mr. Cromwell asked the Council to turn its attention to R.S. 9:4833. He introduced Subsections (A)-(C), and a motion was made to accept the changes. This motion was seconded and approved unanimously. Thus, R.S. 9:4833(A)-(C) were approved to read as follows:

§ 4833. Request to cancel the inscription of claims and privileges;
cancellation; notice of pendency of action

A. (1) If a statement of claim or privilege is improperly filed or if the claim or privilege preserved by the filing of a statement of claim or privilege is extinguished, an owner or other interested person may require the person who has filed a the statement of the claim or privilege to give a written request for cancellation in the manner provided by law directing the recorder of mortgages to cancel the statement of claim or privilege from his records. ~~The request shall be delivered within ten days after a written request for it is received by the person filing the statement of claim or privilege.~~

(2) If a statement of claim or privilege identifies an owner who is not liable for the claim under R.S. 9:4806(B), that owner or another interested person may require the person who filed the statement of the claim or privilege to give a written request for cancellation in the manner provided by law directing the recorder of mortgages to cancel the statement of claim or privilege from his records insofar as it affects that owner and his interest in the immovable. Cancellation of the statement of claim and privilege as to an owner in accordance with this paragraph shall have no effect upon the person's privilege upon the interest of any other owner in

the immovable or upon the person's rights against any other owner, contractor, or surety.

(3) A request for cancellation required under either Paragraphs (1) or (2) of this Subsection shall be delivered within ten days after a written request for it is received by the person filing the statement of claim or privilege.

B. One who, without reasonable cause, fails to deliver a written request for cancellation in proper form to cancel the claim or privilege as required by Subsection A of this Section shall be liable for damages suffered by the owner or person requesting the authorization as a consequence of the failure and for reasonable attorney fees incurred in causing the statement to be cancelled.

C. A person who has properly requested a written request for cancellation shall have an action pursuant to R.S. 44:114 against the person required to deliver the written request to obtain a judgment declaring the claim or the privilege extinguished and directing the recorder of mortgages to cancel the statement of claim or privilege if the person required to give the written request fails or refuses to do so within the time required by Subsection A of this Section. If the written request for cancellation was requested under Paragraph (2) of Subsection A of this Section, the judgment shall declare the statement of claim or privilege to be extinguished, and shall direct its cancellation, only insofar as it affects the owner who is entitled to cancellation and his interest in the immovable. The plaintiff may also seek recovery of the damages and attorney fees to which he may be entitled under this Section.

A member of the Council then asked whether the word "exclusion," as found in the Reporter's Notes on line 30 of page 52 of the document, should be "exclusive." The Reporter agreed that the appropriate word should be "exclusive" and not "exclusion." He agreed to make the change in the materials. Mr. Cromwell then introduced Subsection E. He explained that some of the changes recommended by the Committee are semantic and others are intended to remove a "trap for the unwary." A motion was made to accept the recommended changes to the Subsection. This motion was seconded. One member of the Council then made a comment regarding cancellation and another queried as to the necessity of the seemingly redundant term "written signed," as found on page

52, line 15. The Reporter suggested that the term remain despite its redundancy as it merely tracks the language employed by Article 3367 of the Civil Code. This reply mollified the Council, and R.S. 9:4833(E) was unanimously approved to read as follows:

§ 4833. Request to cancel the inscription of claims and privileges;
cancellation; notice of pendency of action

* * *

E. The effect of ~~filing for~~ recordation of a statement of claim or privilege and the privilege preserved by it shall cease as to third persons unless a notice of pendency of action in accordance with Article 3752 of the Code of Civil Procedure, identifying the suit required to be filed by R.S. 9:4823, is filed within one year after the date of filing the statement of claim or privilege. In addition to the requirements of Article 3752 of the Code of Civil Procedure, the notice of pendency of action shall contain ~~a reference to the notice of contract, if one is filed, or~~ a reference to the recorded statement of claim or privilege ~~if a notice of contract is not filed.~~ If the effect of recordation of a statement of claim or privilege has ceased on account of the lack of timely filing of a notice of pendency of action, the recorder of mortgages upon receipt of a written signed application shall cancel the recordation of the statement of claim or privilege.

As the last item of business, Mr. Cromwell asked the Council to turn to Page 21 of the materials. He specifically asked them to examine the word "stipulated," as found on line 8. For the sake of consistency, he asked that the Council approve replacing the word "stipulated" with the word "stated," because the Council had previously approved changing the word "stipulated" in the existing text of Section 4812(B) to "stated." A motion was made to accept this change. The motion was seconded and passed unanimously.

Following this action, Mr. Cromwell returned the floor to the President of the Council, Mr. Ziober, at 10:58 a.m.

Alternative Dispute Resolution

At 10:59 a.m. the President of the Louisiana State Law Institute, Mr. John David Ziober, announced that the Alternative Dispute Resolution (ADR) Committee would be presenting their materials until the Council meeting broke for lunch. Mr. Ziober then handed the floor over to Mr. Emmett C. Sole, the Chair of the ADR Committee. Mr. Sole in turn introduced the Reporter of the ADR Committee, Dean Edward F. Sherman, and the Staff Attorney, Ms. Claire Popovich. The Chair then gave a brief history of the Committee and the changes it has undergone since its creation. He then stated that he believed that the Committee would like to present legislation for the 2018 regular session. Mr. Sole also spoke of Senate Concurrent Resolution 62 of the 2016 regular session. He informed the Council that the resolution had been assigned to the ADR Committee to co-ordinate with two other Law Institute Committees to produce the Law Institute's combined response to the Legislature. He then highlighted the

fact that the ADR Committee would not be broaching the issue of mandatory arbitration clauses in wills or trust documents during their current presentation; however, he stated that the Committee would have to return to the Council at a later date to receive approval for the report in response to SCR 62 that would be submitted to the legislature prior to February 2017. Following these introductory remarks, Mr. Sole turned over the floor to Dean Sherman.

Dean Sherman began his presentation by explaining why the ADR Committee was researching and modifying the Revised Uniform Arbitration Act (RUAA) of 2000. He then introduced the main materials for the presentation which were entitled, "Louisiana State Law Institute, Alternative Dispute Resolution Committee, Louisiana Version of the Uniform Law Commission's Revised Uniform Arbitration Act (RUAA), Prepared for the Meeting of the Council, October 7, 2016, New Orleans, Louisiana". He then stated that during the presentation he would not be seeking the Council's approval for any of the provisions in the materials; nonetheless, he did anticipate that the Committee would be submitting legislation during the 2018 regular session. Turning to the materials, Dean Sherman explained the origin of the "Reporter's Proposed Comments" and their intended function. He also explained the purpose of the document entitled, "Louisiana State Law Institute, Alternative Dispute Resolution Committee, Chart Showing Current Louisiana Law vis-à-vis Proposed RUAA Provisions, Prepared for the Meeting of the Council, October 7, 2016, New Orleans, Louisiana".

Dean Sherman began the substantive portion of his presentation by asking the members of the Council to turn their attention to Section 1, as found on page 4 of the main materials. He explained that the Committee is still debating the use of the word "neutral" in the definition of an "arbitration organization." A member of the Council revived the comment that he had from the Committee's last presentation to the Council: it is problematic to have the word "neutral" in the definition of an "arbitration organization" because there may be situations where the parties agree to have a "non-neutral" arbitrator. In that case that arbitrator would not fit the definition of an "arbitration organization" thereby possibly placing him outside of the operation of the act. The member suggested that the term "neutral"—as it relates to an arbitration organization—should be placed in a substantive portion of the act and not just the definitional section. Dean Sherman agreed to pass on this concern to the Committee and admitted that in order to accommodate this request the Committee may have to create a new provision in the act. Another member of the Council wondered whether a non-neutral "arbitration organization" would necessarily be outside of the act due to the fact that he or she would not fit the definition of an "arbitration organization." The Reporter then opened the floor to more questions on the Section. One member requested that the future materials for the Committee's presentation use coding to show how the Committee's version of the RUAA diverges from the official version of the act. The Chair and Reporter agreed with this suggestion.

Dean Sherman then introduced Section 2 to the Council. A member asked whether the act should require that notice be in writing in order to be effective. The Reporter responded that it is not necessary that notice be in writing. He then asked the Council to turn its attention to Section 3. He explained that this Section is "boilerplate." It failed to elicit any questions or comments. Dean Sherman proceeded to introduce Section 4. Again, no questions or comments were addressed to the Reporter. He then introduced Section 5 and spoke of how he had created the "Reporter's Proposed Comments," i.e., he modified the official comments to the provisions, as necessary, to make clear the changes the Committee had made to the uniform provisions and for what reason. He stated that the Committee will decide at a later date how it will deal with the uniform comments and whether they will be included in toto in the final bill. During the Reporter's examination of Section 5(b), a member commented that in Louisiana the proper terminology is "service of citation" rather than "service of summons," as shown in the comment to Section 5(b). Dean Sherman agreed with this edit and mentioned that he might

want to explain the difference between the two terms in his "Reporter's Proposed Comments".

The Reporter then asked the Council to turn its attention to Section 9. He explained how Subsection a is derived from the Federal Arbitration Act (FAA). A member then commented that the word "revocation," as found in Subsection a of Section 6, should be replaced with the word "rescission" to be in better accord with Louisiana legal terminology. Dean Sherman agreed to have the Committee review the act and replace any instances where Louisiana legal terminology should replace common law terms. He then explained how the Committee had added language to Subsection b of Section 6 and how he had referenced this modification in comment 5 of the Section. A member of the Council asked about the instance where there is an insurance contract that has an arbitration clause that the State refuses to sign because of the arbitration provision. Another Council member commented that the phrase "codal or statutory," as found in Subsection b of Section 6, should be struck. A member queried Dean Sherman as to when state contract law would apply. The Reporter answered this question. Then, another question issued from the Council: who decides whether a contract should be subject to rescission? After the Reporter answered this question, the President had the Council meeting break for lunch at 12:05 p.m.

LUNCH

The Council resumed its meeting at 1:30 p.m., at which time President David Ziober called on Professor Glenn Morris, Reporter of the Corporations Committee, to present the Committee's proposed revisions to provisions of the Louisiana Business Corporation Act.

Corporations Committee

Professor Morris began his presentation by directing the Council's attention to the proposed revision to R.S. 12:1-727, on page 1 of the materials. He explained that although this provision was enacted by the legislature last year on recommendation of the Law Institute, it used a phrase that was not defined. As a result, the Committee proposed that this phrase, shares entitled to vote, be replaced by a defined term, votes entitled to be cast. It was moved and seconded to adopt R.S. 12:1-727 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§ 1-727. Greater quorum or voting requirements

A. The articles of incorporation may provide for a greater voting requirement for shareholders, or voting groups of shareholders, than is provided for by this Chapter. The articles of incorporation may make a quorum requirement for shareholders, or for a voting group of shareholders, greater or lesser than that provided by this Chapter, but the requirement may not be lower than shares holding twenty-five percent of the ~~shares entitled to vote~~ votes entitled to be cast on a matter.

* * *

The Reporter then explained to the Council that in light of this decision, the definition of votes entitled to be cast in R.S. 12:1-140(25B), on page 2 of the materials, would need to be amended to include quorum requirements. It was

moved and seconded to adopt R.S. 12:1-140(25B) as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§ 1-140. Definitions

In this Chapter:

* * *

(25B) "Votes entitled to be cast", when used in specifying the proportion of votes required to provide a shareholder quorum or approval of an action, means the number of votes in a voting group that would be cast at a meeting at which all shares in the voting group were present and voting.

* * *

Next, the Reporter turned to the proposed revision to R.S. 12:1-728(A), on page 3 of the materials. Professor Morris explained to the Council that under the old corporations law, a provision existed that, in the event that a quorum was not present at a meeting called for the election of directors, allowed the shareholders who were present to adjourn the meeting to the next day, and whoever was present at that meeting would constitute a quorum for purposes of electing directors. He also explained that this provision existed to prevent the intentional blocking of director elections and that it was unintentionally deleted under the new law. The Reporter then provided the Council with several options concerning requirements for the day on which the meeting should be adjourned, including the next day, the next business day, or the next day that is not a legal holiday, and the Council agreed to use "the next day." He also explained that the meeting could be adjourned either at the same place and time as the original meeting or at any place and time specified in the motion to adjourn. Several Council members questioned why the meeting would need to be adjourned to the same time, and what would happen if the place was not available on the next day at the same time. When another Council member asked whether there were any "same time and place" restrictions under the old corporations law, the Reporter replied that there were not. The Council then debated whether to add "if available" after "same place and time," but after a great deal of discussion, Council members ultimately concluded that the place and time should simply be specified in the motion to adjourn. It was moved and seconded to incorporate the Reporter's second option, "place and time specified in the approved motion to adjourn," and the motion passed with no objection. It was then moved and seconded to adopt R.S. 12:1-728(A) as amended, and that motion also passed with no objection. The adopted proposal reads as follows:

§1-728. Voting Quorum and voting for directors; cumulative voting

A. Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present. If a quorum is not present at an annual meeting or special meeting called for the election of directors, the shareholders

present at the meeting in person or by proxy may, by a majority of the votes cast on the matter, adjourn the meeting to the next day, at the place and time specified in the approved motion to adjourn. The shareholders present in person or by proxy at the meeting to which the earlier meeting is adjourned shall constitute a quorum for the purpose of electing directors, even if a quorum is not otherwise present.

The Reporter then asked the Council to turn to proposed R.S. 12:1-742.3, on page 9 of the materials. He explained that when the Law Institute recommended enactment of the derivative proceedings provisions, it failed to also incorporate a venue provision, so the Committee simply proposed to specifically include in the context of derivative proceedings the general venue rule that would otherwise apply. It was moved and seconded to adopt R.S. 12:1-742.3 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§1-742.3. Venue in derivative proceeding

A derivative proceeding shall be brought in the parish where the registered office of the corporation is located.

Next, the Professor Morris directed the Council's attention to proposed R.S. 12:1-742.2, on page 7 of the materials. He explained that although he did not feel as though this provision was necessary, since Louisiana's long arm jurisdiction statute extends its jurisdiction to the greatest extent possible under the state and federal constitutions, the Committee also proposed to enact a specific provision allowing Louisiana courts to exercise jurisdiction over all nonresident directors of a Louisiana corporation. In light of the Committee's intent, he also suggested that "or has been" should be added between "is" and "a" on line 3 of page 7. One Council member then suggested specifying in a Comment that this provision does not extend personal jurisdiction further than is permitted by the state and federal constitutions, but the Reporter expressed that he felt as though such a Comment would be unnecessary. Another Council member then asked for examples of situations other than insider trading where a director would be in breach of duties owed directly to the shareholders rather than to the corporation, and the Reporter responded by saying that except in cases where the director refused to allow shareholders to inspect the books or did not provide notice of shareholder meetings, almost all of the director's duties would be owed to the corporation itself rather than directly to its shareholders. It was then moved and seconded to adopt R.S. 12:1-742.2 as amended by the Reporter, and the motion passed with no objection. The adopted proposal reads as follows:

§1-742.2. Jurisdiction over a director

A court may exercise personal jurisdiction over a nonresident who is or has been a director of a domestic corporation as to a cause of action arising from a breach by the nonresident of a duty owed to the corporation or its shareholders because of the nonresident's position as a director.

Next, the Council considered the proposed changes to R.S. 12:1-1435, on pages 10 through 13 of the materials. The Reporter explained that this issue was brought to the Committee in light of concerns about the oppression remedies as they applied to bank holding companies. He informed the Council that the purpose of bank holding companies is to provide financial stability to banks, and as a result, these types of corporations are governed by additional federal rules and regulations. One such regulation restricts a bank holding company from the repurchase of its shares once the transaction reaches a certain amount unless prior approval of the transfer is obtained from the Federal Reserve Board. Nevertheless, the oppression remedies under the LBCA may require the bank holding company to repurchase shares from an oppressed shareholder in a way that is violative of this federal regulation. As a result, the Committee proposed amendments on page 12 of the materials that would create an exception to the oppression remedy in R.S. 12:1-1435(I) to account for these other regulations applicable to bank holding companies as well as to other similar institutions, such as insurance companies. One Council member suggested that the phrase "applicable to the corporation" be moved to the end of line 19 of page 12, and the Reporter agreed. It was then moved and seconded to adopt R.S. 12:1-1435(I) as amended, and the motion passed with no objection. The adopted proposal reads as follows:

§1-1435. Oppressed shareholder's right to withdraw

* * *

I. A corporation's obligation to purchase of a withdrawing shareholder's shares under this Section or R.S. 12:1-1436 is subject to the rules on any limitation or requirement respecting a corporation's acquisition of its own shares provided in imposed by R.S. 12:1-631, and to the limitations on distribution imposed by R.S. 12:1-640, or other provision of state or federal law, including any order, plan, directive, or enforcement action issued by an administrative or regulatory agency pursuant to state or federal law, applicable to the corporation.

* * *

Professor Morris then explained that whereas R.S. 12:1-1435 provides the substantive remedy for oppressed shareholders, R.S. 12:1-1436, on pages 16 through 18 of the materials, sets forth the procedure applicable to the corporation's repurchase of the shares. He explained the Committee's proposal in light of the above amendment to R.S. 12:1-1436 to provide that if a shareholder obtains a judgment requiring a bank holding company to repurchase his or her shares, and the bank holding company proves that the judgment would violate some other applicable federal or state regulation, relief should instead be granted in compliance with the regulation but as close in value and effect to the original judgment as possible. A Council member then questioned the meaning of these vague words such as "feasible" and "contemplated," to which the Reporter responded that the use of "feasible" would allow the bank holding company to repurchase the shares over time if the Federal Reserve Board does not approve the amount as a single transaction. He also explained that the proposed language is more of a general statement of principle rather than a specific exception because it was simply not possible for the Committee to anticipate every issue that may arise under these provisions. Several substitutes were

suggested, including "reasonable," "practicable," and "possible," but no motion was made.

It was then moved and seconded to delete "as close in value and effect as feasible to that contemplated by Subsection D of this Section, but;" however, after discussion of the necessity of the language requiring the relief to be as close in value and effect as feasible, the motion failed despite a few votes in favor. A Council member then questioned whether this was uniform language, and the Reporter replied that it was not since the Model Act provides for involuntary dissolution of the corporation, which we did not want to include in the LBCA. He also expressed his hope that in these types of situations, the court will render something short of a final judgment pending resolution of the issue, such as a stay of the proceedings. It was then moved and seconded to adopt the proposed amendments to Subsections E and F of R.S. 12:1-1436 as presented, and the motion passed with no objection. The adopted proposals read as follows:

§1-1436. Judicial determination of fair value and payment terms for withdrawing shareholder's shares

* * *

E. If at the conclusion of the trial the court finds that the corporation has proved that ~~a full payment in cash of the fair value of the withdrawing shareholder's shares would violate the provisions of R.S. 12:1-640~~ its payment of a judgment rendered in accordance with Subsection D of this Section would violate a limitation or requirement described in R.S. 12:1-1435(I) or cause undue harm to the corporation or its creditors, the court shall not render the judgment specified in Subsection D of this Section, but shall instead render a final judgment that, does both of the following: by itself or in conjunction with earlier orders or partial judgments of the court, provides relief as close in value and effect as feasible to that contemplated by Subsection D of this Section, but adjusted as necessary to avoid the relevant violation or undue harm.

~~(1) Orders the corporation to issue and deliver to the shareholder within thirty days of the date of the judgment an unsecured negotiable promissory note of the corporation which is all of the following:~~

~~(a) Payable to the order of the shareholder.~~

~~(b) In a principal amount equal to the fair value of the withdrawing shareholder's shares.~~

~~(c) Bearing simple interest on the unpaid balance of the note at a floating rate equal to the judicial rate of interest.~~

~~(d) Having a term up to ten years, as specified by the court in its judgment as necessary to prevent a violation of R.S. 12:1-640 or undue harm to the corporation or its creditors.~~

~~(e) Containing such other terms, customary in negotiable promissory notes issued in commercial transactions, as the court may order.~~

~~(2) Terminates the shareholder's ownership of shares in the corporation upon delivery to the shareholder of the note required by the judgment issued pursuant to Paragraph (1) of this Subsection, and orders the shareholder to deliver to the corporation, within ten days of the delivery of the note, any certificate issued by the corporation for the shares or an affidavit by the shareholder that the certificate has been lost, stolen, destroyed, or previously delivered to the corporation.~~

F. If a withdrawing shareholder fails to deliver the certificate for a share covered by a judgment rendered under Subsection ~~C~~ or D or E of this Section, and a third person presents the certificate to the corporation after the shareholder's ownership of the share is terminated by the judgment, the shareholder shall indemnify the corporation for any dilution in value imposed on other shareholders as a result of the corporation's ~~obligations~~ obligation to recognize the person presenting the certificate as the owner of the shares represented by the certificate.

Professor Morris then asked the Council to consider the Committee's final proposals of the day, relating to the time limitations applicable to terminated or revoked corporations. He first explained that under the old corporations law, the board of directors of a corporation whose charter was revoked could still dispose of immovable property, and title lawyers were able to rely on this; however, the LBCA did not contain such a provision. As a result, an amendment to R.S. 12:1-1443 that was not proposed by the Law Institute was added during the 2016 Regular Session to allow the board of directors to dispose of immovable property owned by a terminated corporation, which solved the problem. The Reporter also explained that last year, the Council approved a temporary transitional rule for corporations revoked prior to the effective date of the LBCA's enactment to allow for reinstatement without regard to the normal three-year limitation imposed on

reinstatements. However, during that discussion, the Council also asked that the Corporations Committee take another look at the broader issue of imposing a time limitation on the reinstatement of a corporation whose charter had been terminated. The Reporter explained that although most of the concerns with respect to having no time limitation had been addressed this past Session through the transitional rule and disposition of immovable property legislation, and roughly half of the states do not impose any time limitation on reinstatement, the Committee ultimately concluded that the time limitation should simply be extended from three to five years rather than removed altogether. It was then moved and seconded to adopt the proposed amendments to R.S. 12:1-1444, on pages 21 and 22 of the materials, as presented, and the motion passed with no objection. The adopted proposals read as follows:

§1-1444. Reinstatement of terminated corporation

A. A terminated corporation may be reinstated if the corporation satisfies both of the following conditions:

* * *

(2) It requests reinstatement in accordance with this Section no later than ~~three~~ five years after the effective date of its articles or certificate of termination.

* * *

F. The secretary of state shall file the articles of reinstatement only if both of the following conditions are satisfied:

(1) The articles are delivered for filing to the secretary of state within ~~three~~ five years after the effective date of the articles or certificate of termination for the corporation.

* * *

Finally, the Reporter explained to the Council that in light of its decision to extend the time limitation for reinstatement, the length of time that a terminated corporation's name is reserved should also be extended from three to five years, which had been proposed by the Committee in R.S. 12:1-402, on page 26 of the materials. He explained that although the Secretary of State's office was initially concerned about reserving names for different lengths of time based on the type of entity, the Secretary's representatives and the Committee ultimately concluded that the reinstatement and name-reservation time periods applicable to corporations should be consistent. It was then moved and seconded to adopt the proposed amendment to R.S. 12:1-402 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§ 1-402. Reserved name

* * *

C. A terminated corporation's name is reserved by operation of law for ~~three~~ five years after the effective date of the corporation's termination.

At this time, Professor Morris concluded his presentation of the Corporations Committee's proposals, and President David Ziober called on Dean Sherman and Mr. Sole to continue their earlier presentation of materials from the ADR Committee.

Alternative Dispute Resolution

Following the conclusion of the Corporations Committee's presentation to the Council, the President turned over the floor to Dean Sherman so that he could resume his presentation of the materials from the ADR Committee. He began his presentation by asking those present to turn their attention to Section 22 of the materials, which can be found on page 34 of the document entitled, "Louisiana State Law Institute, Alternative Dispute Resolution Committee, Louisiana Version of the Uniform Law Commission's Revised Uniform Arbitration Act (RUAA), Prepared for the Meeting of the Council, October 7, 2016, New Orleans, Louisiana". He explained that the Committee modified Section 22 to introduce the FAA's one-year deadline to confirm an arbitration award. He also informed the Council that he had explained this modification—and its rationale—in his second comment to Section 22. The President then asked Dean Sherman what would be the result if a motion for confirmation of an arbitration award were filed with a court outside of the one-year limitation? The Reporter responded that he would research the issue and report his findings.

Dean Sherman then asked the Council members to return to Section 6. He explained that Subsection 6(a) is the crux of the RUAA and is similar to a provision in the FAA. He then agreed to strike the phrase "codal or statutory" from Subsection b. A member of the Council addressed a question to the Reporter, and he, again, agreed to remove the "codal or statutory" language from the Subsection. He then answered a question regarding the strength of an "agreement" vis-à-vis a contract. Another member questioned Dean Sherman as to whether the second comment to Section 6 was a correct statement of Louisiana law, i.e., is "valid consideration" necessary in Louisiana to modify a written contract by a subsequent, oral arrangement? He agreed to research this issue. There was then a comment from a Council member regarding the relevant differences between "common law consideration" and "civil law consideration."

The Reporter then progressed to Section 7 and informed the Council that, as a technical change, the "A" and "B," as found in Subsection b, should be replaced with a lowercase "a" and "b." The Council agreed with this edit.

Dean Sherman then introduced Section 8 and explained that it would allow for remedies that are currently not provided for in Louisiana law. After he and Mr. Sole jointly answered a question, Dean Sherman informed the Council that comment 3 of Section 8 allows a court to issue remedies preliminarily. The Chair then stated that an arbitrator can give a narrowly-tailored remedy without the parties having to go to court. A discussion between the Chair and the Reporter ensued. The Reporter decided that he may want to write a new comment for this Section addressing this issue. A member of the Council then asked whether the remedies enumerated in the Section give parties an idea of what provisional remedies they can seek. Moreover, he questioned whether it would allow for a "dual track" process wherein a party seeks to gain redress from an arbitrator and a judge.

Section 9 was the last Section to be introduced by Dean Sherman. He informed the Council that the Committee had looked at the issue of prescription and peremption and modified the uniform language of the Section. Mr. Sole commented how the title of the Section is "initiation of arbitration", but the body of

the Section speaks of the submission of a proceeding. The Director of the Law Institute, Prof. William E. Crawford, addressed a question to Dean Sherman regarding Section 1(7)(D); he was primarily concerned whether the provision was a complete sentence. The Reporter answered this question and replied that if the provision was non-uniform he could remove the phrase "when an agreement between the parties requires them to decide the matter by arbitration but does not specify an arbitration organization."

Following this statement the President of the Louisiana State Law Institute Council adjourned the Friday, October 7, 2016 meeting of the Council.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

October 7-8, 2016

Saturday, October 8, 2016

Persons Present:

Bergstedt, Thomas
Braun, Jessica
Breard, L. Kent
Burris, William J.
Castille, Preston J., Jr.
Chatelain, Mallory
Crawford, William E.
Dawkins, Robert G.
Dimos, Jimmy N.
Hamilton, Leo C.
Holdridge, Guy
Jackson, Katrina R.
Johnson, Pamela Taylor
Knighten, Arlene D.
Kostelka, Robert "Bob" W.
Lavergne, Luke
Levy, H. Mark
Lovett, John

Miller, Gregory A.
Mohamed, Ahmed M.
Molina, Luz
Norman, Rick J.
Riviere, Christopher H.
Roux, Robert J.
Sole, Emmett C.
Storms, Tyler
Tate, George J.
Thibeaux, Robert P.
Tooley-Knoblett, Dian
Tucker, Zelda
Wilson, Evelyn
Ziober, John David
Zucker, Erika A.

President John David Ziober opened the Saturday session of the October 2016 Council meeting at 9:00 AM on October 8, 2016 at the Monteleone Hotel in New Orleans, LA. During today's session, Professor John A. Lovett represented the Private Use of Levee Roads Committee and presented a draft of a report to the Senate regarding Senate Resolution No. 180 of the 2015 Regular Session and Professor Luz Molina represented the U n p a i d W a g e s Committee and presented a Revision of Louisiana's Wage Payment Act.

Private Use of Levee Roads:

1. The Reporter began by providing the background of Senate Resolution No. 180 of the 2015 Regular Session and thanking the Committee for its work. The Committee explored existing articles and statutes, case law, and attorney general opinions related to this matter and contemplated four courses of action. The Committee's final recommendation is that the Law Institute not make any proposed revisions to existing law for the five reasons explained in the report. After the Reporter walked the Council through those reasons, the Council approved the report to the legislature.

Unpaid Wages Committee




Revision of Louisiana's Wage Payment Act:

1. The Reporter began by thanking the Committee members in attendance and reminding the Council of the legislative directive to study all options and make recommendations for legislation to provide an effective remedy for unpaid wages without requiring expensive litigation.
2. The Reporter turned the Council's attention to proposed R.S. 23:631 and the definitions of "employer" and "wages" which were recommitted to the Committee at a previous Council meeting. With little discussion, these proposals were approved.
3. The Reporter next directed the Council to proposed R.S. 23:631(F) and noted that the Committee changed the term "amount" to "wages" because it is a defined term. The Council quickly approved this change.
4. Moving to proposed R.S. 23:631(H) on page 11, the Reporter explained that the term "employer" was removed to avoid any possible admission regarding status and the Committee clarified that unreasonable demands are not required to be met. The Council was concerned with proving receipt of a demand and whether the proposal should require certified mail. The discussion pointed out the existing body of law on mailing and the Committee's wish to defer to the Code of Civil Procedure. However, the Reporter agreed to bring this Subsection back to the Committee for further reflection on the practicality of the terminology used.
5. The final recommitted Subsection for review is proposed R.S. 23:631(K). The Reporter explained that this provision was suggested by the Workforce Commission and the goal is to eliminate the "he said, she said" due to the failure to keep required records. The Council questioned the use of the term "fine" and the threshold for a jury trial. They also discussed the motivation for the fine being encouragement to keep records and thereby reduce litigation costs for employees. The Council wondered if this authorizes employees to go beyond a claim for unpaid wages and pursue discovery related to all recordkeeping in an effort to punish employers. Another suggestion was to combine the fine and penalty provisions. The Reporter thanked the Council for raising these issues and agreed to take this Subsection back to the Committee for further review.
6. The Reporter next asked the Council to turn their attention to the new material beginning with proposed R.S. 23:631(J). This was adopted without discussion and the Reporter moved to Subsection (L) regarding retaliation. The Reporter noted that now that the Wage Payment Act will apply while a person is still employed, the burden to prove retaliation will be on the employee. The Council debated greatly the term "advises" and finally settled on "informs" instead. They were also concerned with when this will apply. The Council wondered if an employee generally causes trouble and is terminated would the employer be subject to a penalty. Does this also apply if an employee advises an employer that he is not engaging in proper recordkeeping? However, after much explanation, the Subsection was adopted.
7. Subsection M, the final Subsection of proposed R.S. 23:631, was quickly adopted because it merely rearranges present law.
8. For the first time, the Council began reviewing proposed R.S. 23:632. The Council briefly discussed the Fair Labor Standards Act computation of daily rate of pay and adopted Subsection A in its entirety.

9. The final topic today regards the preclusion of a good faith defense. R.S. 23:632(B)(2) list four instances and the Council was most concerned with the exclusion of the defense when paying wages in cash. Cash is legal tender and employees may request this method of payment because they don't have bank accounts. The Reporter and the Committee members explained that paying employees in cash is a very slippery slope due to proof and tax avoidance issues. It was also noted that federal law presumes that payment in cash is a way to misclassify employees. The Council approved the additional phrase "without written acknowledgment of receipt" to clarify that an employer will not lose the good faith defense if they obtain verification of the cash payment from the employee.

10. The Council next discussed the exclusion of the good faith defense if employees are misclassified. Members were concerned about the uncertainty in the law surrounding independent contractors. A Committee member explained that this provision offers much needed protection to disadvantaged employees. It was also explained that this encourages employers to raise the independent contractor issue at the time of demand and not just as a way to skirt penalty wages at the end of the litigation. Ultimately, the Reporter agreed to take these concerns back to the Committee, but the Council took a policy vote to retain this provision.

The Council adjourned.

 _____ Jessica Braun	<u>4-3-17</u> Date
 _____ Mallory Waller	<u>4/3/2017</u> Date
 _____ Claire Popovich	<u>4-3-17</u> Date