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Judge (00:07):

Okay, you can come on up to the podium. Let's just let everyone get settled for a minute. Okay, Mr. Preis. Is it Preis?

Phillip Preis (00:26):

Preis.

Judge (00:27):

Preis, I'm sorry. Alright.

Phillip Preis (00:27):

Not the first time it's been said that—good morning, your honor. My name is Philip W. Preis, and I represent the New Orleans Firefighters Municipal Retirement Association and—and the firefighters of Louisiana. And probably as the court is aware, the claim is a complex claim. It's been before this court now on a number of occasions, but it primarily relates to a $100 million investment that the three funds made. Now the part of the case up here today relates to the claim that the firefighters have, or that the Louisiana funds have, against Grant Thornton. Grant Thornton was the auditor for a company we call Leveraged with a "D," and they were the company that provided the audit for Leverage during 2007 and 2008. And really before that, we had filed a claim against them. And this case is a procedural quagmire, which this is just part of originally in 2015, the case was up here on the question of whether it would be remanded to state court, which resulted in delay in the proceedings, which was ultimately resolved in the summer of 2015.

Phillip Preis (01:53):

This case is before this court, based upon the fact that the Louisiana funds appealed at a termination, that should be—that the case—the filing was premature, and it should be referred to the Louisiana accountancy board. And they, in turn, filed a claim saying, "Well, it's not timely based upon the fact that it wasn't filed with the accountant board within a certain period of time. And so, if I may, I would like to address the cross appeal because I think it's fairly easy to deal with. First of all, the district court specifically stated—in the magistrate's ruling, specifically stated that they're not ruling on the prescription issue.

Phillip Preis (02:44):

The second thing is that the fraudulent concealment issue as to when we should have reasonably discovered this is a question that has been decided on multiple occasions by the fifth circuit. And in all instances, it basically says that it's a question of fact to be determined by our trier of fact. Now, the interesting thing about this case is the Lamont Supreme Court decision that was decided in 2015 by the Louisiana Supreme Court. And they essentially said that when a professional is involved in a concealment of a negligent act, in that case—our case is not that, but they say, "Of a negligent act." Then it goes outside the accounting statute, which provides for a three-year preemptive provision or what we call in the Louisiana three-year dropped dead. In other words, no matter the circumstance, you—if you don't file your case within three years of the act, then you're—you're lost.

Phillip Preis (04:02):

But the Lamont case said, “Okay, if it involves fraudulent concealment by a professional, then the three—absolute three-year rule does not apply.” And we then apply the general tort standards in Louisiana of *contra non valentem*, which makes it really Louisiana’s version of what exceptions exist to the one-year prescription rule. And there—there are a number of them that have listed. Now what’s important about this? None of these issues have been argued. They weren’t argued to the magistrate, and they weren’t argued to the district, or they were argued to the district court, but not ruled upon because the district court adopted the decision of the magistrate. And the footnote and the magistrate’s opinions specifically said, “We’re not ruling on this issue.” Now, what I expect counsel for Grant Thornton will say, “Well, court, you need to consider this because the facts are essentially uncontested,” but there is no record of any depositions in this case.

Phillip Preis (05:25):

And the whole fact of the matter is, is that we’ve alleged in our complaint the facts that need to be considered here by the court today. And the first one is that Grant Thornton, at the time that we were considering making the purchase, they were also advising the issuer on a $27 million purchase. It was never disclosed to us that the auditors were wearing two hats, that they were the auditor and that they were also the investment advisor to the company to make an acquisition. And why is that important in this case? Because what came out of the transaction, which they served as investment advisor to, was what we call the IEP note, which ended up being valued initially at face value at $27 million, and then subsequently was reduced in value by subsequent auditor down to $10 million. Now, why is that important? Because it would’ve given us a right of redemption on our shares of the stock.

Phillip Preis (06:47):

The part that I’m telling you is very complex, but it doesn’t come through when you look at the cross appellee brief. And this is what we’ve alleged, which we’ve got—want to have discovery on is in their 2008 audit, which has been restated in submission that it wasn’t right, that the 2008 audit was restated. And that note is in that audit, but it’s no valuation wherever done in such a clear conflict of interest, given the fact that the auditor and the investment advisor on the transaction that it arose from. Now, their case is essentially, look, in January of 2011, we issued restated financial statements. When we issued restated financial statements, total absolution. It’s not so. They didn’t deal with it at all when they issued the restated financial statements in 2011. But two important issues: number one, evaluation of the IP note and the fact that $50 million of the proceeds had been misused.

Phillip Preis (07:58):

So even at that point in time that the restated financial statements were issued, there’s not—it wasn't disclosed. Now, what does not come through in the brief is a reason why the financial statements were restated. It’s not because they were good guys, it is because the SEC commenced an investigation during that time period. The other thing that doesn’t come through in their brief is it was solely the United States personnel of Grant Thornton that were performing these audits and performing these services and Matt Lutenger, who was a gentleman that signed the affidavit, says as much. So I think from the perspective of the fraudulent concealment, it is a question of fact. There’s no question about it that it needs to be decided based upon a record and depositions, and further, there was no ruling on it at the district court level. And finally, this issue has been briefed in the discovery proceeding that was filed by our firm. After we did file the complaint with the Louisiana accountancy board. Now—

Judge (09:17):

What—what is your position—I think this would be a yes or no question—as to whether this matter under state law needed to be submitted to the accounting board?

Phillip Preis (09:29):

Your honor, the situation arises mostly, and the best case that I can give you on the point is in the case of Kater. And so it was not filed for the Louisiana accountancy board. And on the principle of law, Katar says that the accountancy board, whether the form that should be decided in is a substantive law issue and the issues of which we complained of the audit itself did not occur in Louisiana.

Judge (10:10):

So, your answer—I hear you giving a long-winded answer of, no, it did not have to be submitted to the accountancy board.

Phillip Preis (10:17):

It—it was not because of the fact that the law of Louisiana did not apply to the audit per se. Now, here's—here's clearly what—what the question is, and that's the issue that they faced in Katar. We can—they can test that issue. And for three years, we argued back and forth as to whether they had contacts with the Louisiana as to which law would be applicable. And if you'll look in their brief and we—we cite it in ours, they pretty much admit. They say plaintiffs were required to seek panel review and acknowledge the preconditions to filing suit. GTUS chose to wait to invoke the panel review, because it did not want to create grounds for the plaintiffs to argue, to compromise its personal jurisdiction. That's exactly what happened. For four years, they never raised in any pleading the panel review.

Phillip Preis (11:16):

Not only did they not raise it, we had three pretrial conferences where jurisdiction wasn't—or not—or the conferences where one of the issues to be discussed was the jurisdiction of the court. It was never raised. When they removed the case from state court to federal court, they never raised the issue. So I think that we all acknowledged the fact that the reason why they never raised the issue was because they wanted to be able to maintain that they had—Louisiana had no personal jurisdiction. Now see that issue changed when the fifth circuit ruled in 2015 that this case was related to the New York bankruptcy, and that's a whole 'nother issue, but what happened was we—

Judge (12:09):

So on the question of the accountancy board, is it—is it true that Louisiana statute says that a review panel can be waived only quote—quoting it by written agreement of both parties?

Phillip Preis (12:22):

It does state that, but that implies, first of all, that the provision is applicable. In other words, the substantive law of Louisiana is applicable to it based upon Katar. And then the second issue is, is that you need a court of competent jurisdiction as we cite under 37108. And until you have a court of competent jurisdiction to look at the exact issues that we're looking at here, you can't make that decision and not just what was being contested. And it's basically my position that what they did is that the issue of whether a court of competent jurisdiction issued based upon the service of process, there was never any ruling on that. And until there is, the accountancy review process is premature. Now, I think that—that the conduct of the defendants is what is unique about this case, because they don't contest the fact as to why they didn't raise the issue, because they wanted to keep the personal jurisdiction issue alive, nor do they ever concede the fact that they had anything to do with Louisiana based upon the affidavit of Mr. Lutenger. I mean, he comes into the federal court and files an affidavit and said he has nothing to do with Louisiana.

Phillip Preis (14:00):

So the bottom line on the only thing is, is what harm would have they have suffered? We filed the lawsuit timely based upon the trustees report, and the trustee prepared a major report, which is cited in the record, outlining what Grant Thornton did that was not correct. Within two months of receiving that

report, we filed the lawsuit in Louisiana, and then as a result of a filing and what was going on in what we called the Citco case determined whether it was going to be in federal court or state court, it sat up until the fall of 2015, because of a stay that was issued. Never in any pleading did they raise the accountancy board. And only when the magistrate asked him to brief it in 2017 that did it occur. So it's—if you look at the natural results, it's not fair. I mean, that's ultimately what it comes down to. They had knowledge of the claim and knew exactly what they were doing to create a waiver issue, and they did nothing.

Judge (15:22):

All right. Thank you, Mr. Preis. You've saved time for rebuttal.

Phillip Preis (15:24):

Thank you.

Judge (15:25):

Mr. Palmore?

Joseph Palmore (15:35):

Thank you, your honor. May it please the court. I'm Joseph Palmore here on behalf of Grant Thornton. It's been a lot of—a lot of arguments, a lot of dates swirling around in this case, but I'd like to start with describing what I think is a fairly straightforward path to a disposition here. And it's really only in two analytical steps. The first is as the district court correctly held, plaintiffs were obligated to file first with the accountant review panel. And the second is that at the time the district court made that judgment, it was too late for plaintiffs to do that. And therefore the disposition below should have been, instead of without prejudice, it should have been a judgment of dismissal with prejudice, so that the parties and the review panel wouldn't embark on a feudal act to consider a time bar proceeding. This disposition requires the court to consider only one date really.

Joseph Palmore (16:27):

It's the date that the plaintiffs say they were fully apprised of their claim. That's the date that the bankruptcy trustee issued its report that was November 25th, 2013. As I'll discuss in a moment, we think they actually had—were on inquiry notice well before that, but I concede them that point for purposes of this argument. If you assume that they knew in November 2013, that they had a claim and they have the roadmap for that claim, under Louisiana law, they had one year to bring that claim. Yet, in 2017, they still hadn't done that. In 2017, when the district court dismissed this action, they were years too late from even the date triggered by what they claim they knew. And it's also clear as we pointed out in our brief that under Louisiana law—this is the Bernard case,—there is no tolling. If a plaintiff mistakenly goes into court first and doesn't comply with the mandatory requirement that it seek review before an accountant—accountant review panel. What Bernard says is there is no tolling. This is a period that cannot be interrupted or suspended. And then the subsequent action filed before the accountant review panel is untimely. We may—

Judge (17:50):

We have two peremptory periods here, a one-year and a three-year.

Joseph Palmore (17:56):

Correct.

Judge (17:58):

Am I correct that under your date schedule and your position just announced that it would be preempted

under both the one- and the three-year?

Joseph Palmore (18:11):

Absolutely, your honor. It would be preempted even ceding them for purposes of this argument that they didn't know until November 2013. In fact, you could cede them that they didn't know until they filed suit in 2014 and January 2014, and the result would be the same. They would be both barred by the one-year discovery period and the three-year absolute cutoff because at the time the district court ruled, it was 2017. It was four years later. So the—with respect to the first step of this, that it was that they had to file before the accountant review panel, Louisiana law couldn't be any clearer on this point. And the statute even says, "This is not to be deemed optional." They had to file there. They've never really mustered a meaningful statutory argument as to why they didn't have to do it. Today, Mr. Preis talked about the Katar case, but that case involved a choice of law question and a claim brought, and the district court's decision under Illinois law and what the district court said, "Well, if you have a claim that's brought under the substantive law of another state, then you don't have to comply with this exhaustion requirement."

Judge (19:25):

He also mentioned the Lamont case from Louisiana.

Joseph Palmore (19:29):

Yes, your honor. The Lamont case is, on the path that I'm talking about is—it is completely beside the point because we can cede them that they didn't know until the trustee report. We can cede them, in fact, that they didn't know until they actually filed the complaint in this case. And the review panel proceeding is untimely. And they had to go there because they brought a Louisiana claim. If you look at the complaint, these are all Louisiana counts. This is not a case—a complaint brought under the law of Illinois or New York or any other state. And if they bring a Louisiana claim, they are obligated to comply with Louisiana law. Personal jurisdiction is another question altogether. So there's, again, there's no explanation really of why they didn't have to comply with the statutory argument. Instead, what plaintiffs have said in their briefs and here today is that there somehow was a waiver of this mandatory requirement.

Joseph Palmore (20:28):

Judge Smith, as you pointed out, Louisiana law says that the exhaustion requirement can be waived only by written agreement of the parties. It's uncontested here that there was no written agreement. In their briefing, they relied on the Louisiana court of appeals decision, which was a two:one decision that said under extreme circumstances, there can be a waiver through litigation conduct. The Louisiana Supreme Court has never addressed that question and hasn't tried to square it with the plain text of the statute, which says the waiver can be done only by written agreement of the parties. But even putting that aside, the conduct there was completely different than what we have here. The party, the defendant there had filed two answers. There'd been extended discovery. Here, as the magistrate judge recognized in rejecting this waiver argument, the case was still at the earliest stages, despite the fact that it had been pending for some time. The reason it had been pending for some time was because there was litigation initiated by plaintiffs who were trying to remand it back to state court. And then there was an appeal to this court in the related case. And everything kind of was on hold for a long time, but then this—it was the plaintiffs themselves as part of the briefing on the threshold, 12(b)6 motion to dismiss—