Plaquemines Parish Commission Council v. Delta Development Co.: Contra Non Valentem Applied to Fiduciaries

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A local parish governing authority brought an action against a corporation and individual defendants to be declared owner of, or to recover from them, certain mineral interests in parish-owned lands. The pertinent elements of the plaintiff's petition alleged that two of the individuals and their deceased father obtained the interests through breaches of their fiduciary duties as both public officials and attorneys. The corporate defendant's stock allegedly was wholly owned by either the heirs or the donees of the deceased public official. The defendants filed peremptory exceptions of prescription and admitted (for the resolution of the prescription issue only) the alleged breaches of fiduciary duties.

The trial court found the suit to be a personal action subject to a liberative prescription of ten years. Because the prescriptive period on an action to recover for the alleged breaches of fiduciary duties had begun to run over thirty years before the suit was filed and had not been interrupted or suspended, the trial court rendered judgment in favor of the defendants. The Fourth Circuit Court of Appeal affirmed.

The plaintiff then sought and was granted a writ of review by the supreme court, assigning as error, inter alia, that the lower courts erred in not applying the doctrine of contra non valentem agere nulla currit praescriptio to defeat the defendants' exceptions of prescription. The supreme court found that the doctrine was applicable, and thus, that the plaintiff's cause of action had not prescribed. Plaquemines Parish Commission Council v. Delta Development Co., 502 So. 2d 1034 (La. 1987).

The purpose of this paper is to review the various applications and the present status of contra non valentem in Louisiana. The noted case will then be analyzed to review the supreme court's application of the doctrine. Initially, a brief history of the doctrine is necessary.
In Louisiana, liberative prescription is a "mode of barring of actions as a result of inaction for a period of time." According to the Louisiana Civil Code, liberative prescription may, in certain instances, be either interrupted or suspended. However, the civil code also provides that "[p]rescription runs against all persons unless exception is established by legislation." Thus, it appears that unless provided for in the civil code or some other statutory provision, liberative prescription cannot be interrupted or suspended. Notwithstanding this conclusion, the Louisiana courts have adopted and further developed the doctrine of contra non valentem agere nulla currit praescriptio.

Of Roman origin, contra non valentem has long been recognized by the Louisiana courts to be an exception to the running of prescription. The frequently cited case of Reynolds v. Batson is important for two reasons. First, the court held that contra non valentem did not apply to suspend the running of acquisitive prescription. Second, and more importantly, the supreme court articulated three fact situations where the doctrine had been applied to suspend the running of liberative prescription:

[1] where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's
action . . .
[2] where there was some condition or matter coupled with the
contract or connected with the proceeding which prevented the
creditor from suing or acting . . .
[3] where the debtor himself has done some act effectually to
prevent the creditor from availing himself of his cause of action . . .

The above three categories have been cited and employed by numerous
courts. In addition to these three categories, the courts developed a
fourth category: "where the cause of action is not known or reasonably
knowable by the plaintiff, even though his ignorance is not induced by
the defendant." Although earlier cases had cited this reason for pre-
venting the running of prescription, Corsey v. State Department of
Corrections explicitly included this fourth category to accompany the
three others set forth in Reynolds.

This fourth category has been commonly referred to as the "dis-
covery rule." However, circumstances that would warrant the use of
the discovery rule are "generically somewhat distinguishable from the
earlier situations first recognized [in Reynolds] to justify exceptions to
prescription on the basis of contra non valentem." The basis of this
distinction is that in the first three situations, the cause of action has
accrued but the plaintiff cannot assert it because of some reason "ex-
ternal to his own will. . . ." On the other hand, the fourth fact situation
applies because "the cause of action does not mature (so prescription
does not begin to run) until it is known or at least knowable." It
should also be noted that the fourth category does not apply if the
plaintiff’s "ignorance is attributable to his own willfulness or neglect
. . . [because] a plaintiff will be deemed to know what he could by
reasonable diligence have learned."

The above is a brief discussion of the history and application of
contra non valentem in Louisiana. Next, specific applications of the
four fact situations where the doctrine has been considered will be
discussed.

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13. Id. (citations omitted).
15. Henson v. St. Paul Fire & Marine Ins. Co., 363 So. 2d 711 (La. 1978); Dean
16. Corsey, 375 So. 2d at 1322.
17. Id.
18. Id.
19. Id. and cases cited therein.
THE FIRST AND SECOND FACT SITUATIONS

The first and second fact situations set out by the court in 
Reynolds v. Batson have rarely arisen in the jurisprudence. These two situations are similar in that their use requires the existence of a condition or conditions not associated with either the plaintiff or the defendant.

The first fact situation, ""where there was some cause which prevented the courts or their officers from taking cognizance of the plaintiff's action,"" will rarely occur today because of increased accessibility to the courts. The Reynolds court cited two cases as justification for this exception to the running of prescription. Quierry's Executor v. Faussier's Executors applied contra non valentem to suspend prescription because of an act of the legislature which had closed the courts as a result of wartime conditions. Ayraud v. Babin's Heirs involved a plaintiff who could not bring his action for an order of seizure and sale because he was the only judge in that district who was authorized to adjudicate such an action and to issue the order of seizure and sale. Thus, the court held that contra non valentem would be applied to suspend prescription until the legislature passed an act that would authorize another judge to issue the order.

The only recent case that has used this exception is Saxon v. Fireman's Insurance Co., in which the court allowed the plaintiff to defeat prescription because the clerk of court's office was unexpectedly closed on the day that the cause of action was to prescribe. In an opinion authored by the late Judge Tate, the court held that the doctrine of contra non valentem would be applied to suspend the prescription until the clerk's office reopened.

The second fact situation is ""where there was some condition or matter coupled with the contract or connected with the proceeding which prevented the creditor from suing or acting."" As justification for this exception, the Reynolds court cited Landry v. L'Eglise and Flint v. Cuny. In Landry, it was alleged that a mortgage given on a promissory note was non-enforceable because the note had prescribed. However, a clause in the mortgage stipulated that it could not be enforced until an earlier security device on the land was cancelled. The court held that the presence of this clause was sufficient justification to apply contra non valentem to defeat the claim of prescription.

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21. 4 Mart. 609 (La. 1817).
22. 7 Mart. (n.s.) 471 (La. 1829).
23. 224 So. 2d 560 (La. App. 3d Cir. 1969).
25. 3 La. 219 (1832).
26. 6 La. 67 (1833).
In *Flint*, the trial court signed a judgment in favor of the plaintiff. The next day, the defendant's motion for a new trial was denied. Six days later the trial court amended its judgment. On appeal the supreme court held that a judgment could not be amended after it had been signed. Therefore, the second judgment was vacated. The court then applied *contra non valentem* to suspend the effect of the first judgment until the second one had been vacated.

This second fact situation has also been found in more recent cases. Perhaps the best example of this was in *Dalton v. Plumbers & Steamfitters Local Union No. 60*, which was a suit by a steamfitter against a labor union for wrongfully expelling him from the union and preventing him from working in his trade. The union regulations had mandated that Dalton first exhaust all his appeals to the union before filing suit. The supreme court held that prescription could not run during the period of time that the plaintiff could not file suit.

There are also recent cases, which use the second category, in which the courts have noted that prescription would be suspended due to a condition "connected with the proceeding." Where a plaintiff dismissed her attorneys, hired new ones to assert her cause of action and, at the same time, instituted a malpractice suit against her former attorneys, the latter suit was held to be premature. The court reasoned that the plaintiff might still prevail in her original cause of action. Therefore, her malpractice suit would be unnecessary. However, the court also noted that *contra non valentem* would be invoked if necessary to prevent the running of prescription on her malpractice claim.

When a property owner who was ordered by an injunction to close certain premises until health violations could be corrected was not allowed a suspensive appeal from the order, he argued that such a closing would end the nonconforming status of his premises. In opposing the order he claimed that the premises had been nonconforming since before the enactment of the health ordinance. The property owner argued that if he were forced to close the premises while appealing the injunction, he would lose his defense of the prior and existing nonconforming status of the property. The court, however, indicated that *contra non valentem* would operate so as to prevent the period of time that the premises were closed from being charged against the owner.

Lastly, the supreme court has noted that the rule on abandonment of actions

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27. 240 La. 246, 122 So. 2d 88 (1960).
30. La. Code Civ. P. art. 561 states: "An action is abandoned when the parties fail to take any steps in its prosecution or defense in the trial court for a period of five years. . . ."
is a species of liberative prescription. When one party alleges that the action is abandoned due to the other party's failure to take the necessary "steps in its prosecution or defense," the latter may raise in defense of this "prescription" claim that his failure to take action on the suit was caused by circumstances beyond his control. When this defense has been allowed, the courts have considered it to be the contra non valentem second fact situation.

**THE THIRD FACT SITUATION**

The third fact situation set forth by the court in Reynolds is "where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action." As authority for this situation, the court cited Boyle v. Mann, where a debtor on a promissory note had earlier fled the jurisdiction in order to avoid the creditor's claim. The Boyle court held that contra non valentem applied to suspend the prescriptive period of a suit to collect on the note. The Reynolds court also cited Martin v. Jennings, a case factually similar to Boyle. This third contra non valentem category has been the most frequently used of the three set out by the Reynolds court.

The most common application of this category requires the presence of some sort of fraud or intentional concealment on the part of the debtor. In some cases, usually involving automobile accidents, the courts have held that mere ignorance of the law by the plaintiff is no reason to suspend prescription, even if this ignorance is in some way attributable to the defendant's insurance adjuster, who has no legal duty to correctly inform the plaintiff of his rights. On the other hand, where the plaintiff is insured by the defendant insurance company which has intentionally withheld benefits that it is statutorily obligated to offer, the court has used contra non valentem to suspend the prescription to allow the insured to assert his cause of action. This apparent disparity can best be explained by the contractual nature of the latter obligation as opposed to the delictual nature of the former obligation.

34. 4 La. Ann. 170 (1849).
Other types of cases which involve the third *contra non valentem* situation are inheritance cases. In *West v. Gajdzik*, the decedent's daughter by his first marriage filed suit to reduce the excessive donation caused by her father's statutory will, which left his entire estate to the decedent's executrix, his fourth wife. The suit was filed a short time after the plaintiff learned of her father's death, but more than four years after the cause of action had statutorily prescribed. The defendant admitted that although she knew that the decedent had a daughter, she made no effort to contact her before obtaining the judgment of possession because "she did not want plaintiff to share in her father's estate." The *West* court held that the defendant "engaged in acts (amounting to concealment and ill practices) which tended to hinder, impede, and prevent plaintiff from asserting her cause of action." In addition, the court found that the plaintiff's delay in filing suit was "not willful, nor the result of her own negligence." Thus, the court reasoned, *contra non valentem* applied to suspend the running of prescription.

Three years later the same circuit which decided the *West* case addressed a similar question in *Matter of Filiation of Jones*. The plaintiff asserted that she delayed in filing suit until after the prescriptive period because she relied on representations made by her alleged uncles to the effect that they would give her her deceased father's share of her paternal grandfather's estate. However, the court held that there was no hindrance or impediment to prevent the plaintiff from filing suit. Thus, *contra non valentem* did not apply. These two cases indicate that the defendant's actions not only must be intended to prevent the plaintiff from filing suit, but also must actually be effective in doing so before the court will apply *contra non valentem*.

There have been situations where the courts have found the doctrine to be inapplicable. For instance, mere inability to ascertain whom to sue, without evidence of active concealment or fraud on the part of the defendant is not sufficient cause to invoke *contra non valentem*. Recently, however, the supreme court has held that when the plaintiff's inability to ascertain whom to sue is the result of the defendant's bad

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38. 425 So. 2d 263 (La. App. 3d Cir. 1982), writ denied, 428 So. 2d 475 (La. 1983).
40. *West*, 425 So. 2d at 268.
41. Id.
42. Id.
43. 463 So. 2d 961 (La App. 3d Cir. 1985).
faith, prescription will be suspended until the plaintiff has "a reasonable basis to pursue a claim against a specific defendant." This distinction is based on the *contra non valentem* third fact situation. In addition, where a civil action based on a criminal act has apparently prescribed, the courts have invoked *contra non valentem* to suspend the prescription because of acts of concealment of either the civil defendant/criminal or the criminal which were attributable to the State Department of Corrections.

The doctrine has also been used to allow a buyer to defeat prescription in his suit to avoid a sale because of redhibitory defects. At the time of the suit, the civil code stipulated that the applicable prescriptive period began to run from the date of the sale. However, because the seller did not deliver the thing sold until three months after the sale, the court held that the third fact situation applied, and prescription could not begin to run until delivery. The court did not indicate that it considered the defendant's actions fraudulent or intentionally concealing. It merely noted that the defendant had a "legal duty" to deliver the thing sold. Therefore, a breach of this duty was a sufficient "act effectually to prevent the creditor from availing himself of his cause of action."

The *Reynolds* third *contra non valentem* situation has also been used in attorney malpractice cases. When such an action is based upon a decision that is unsuccessfully appealed, the prescriptive period on a subsequent attorney malpractice action by the losing party does not begin to run until the attorney-client relationship ends. The reasoning behind this conclusion is based on the following paradox: An adverse judgment may be caused by the attorney's malpractice. In such a case,

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45. *Jordan v. Employee Transfer Corp.*, 509 So. 2d 420 (La. 1987). In *Jordan*, the purchasers of a house brought a redhibition action against the vendor, the real estate agents and the prior owners of the house. Although the real estate agent knew that the house was structurally damaged, he withheld this knowledge as well as an engineer's report that documented this damage. Thus, the vendor was held to be in bad faith. The court found that the plaintiffs were reasonable in not discovering whom to sue until the engineer's report was made available to them.


49. Id. at 83.

50. Id. at 82.

it is the attorney, not his client, who should have this knowledge. Clearly, if the attorney does not have this knowledge, neither would the client. Thus, the attorney should inform his client of his possible choices: either keep the attorney and risk letting the prescriptive period run out or end the attorney-client relationship and assert the attorney malpractice action. The absence of such a disclosure has been the basis for invoking contra non valentem to suspend the commencement of the prescriptive period until the end of the attorney-client relationship.

Although medical malpractice cases usually give rise to issues regarding the fourth fact situation,52 the supreme court has recently decided a case where the plaintiffs alleged the contra non valentem third fact situation in order to defeat the defendant’s plea of prescription. In Gover v. Bridges,53 children, whose mother had died following complications from surgery, filed suit against her doctor. The plaintiffs alleged that in a letter written by the doctor to explain the cause of death, the doctor made inaccurate and misleading statements which assured the plaintiffs that everything possible had been done to prevent their mother’s death. The supreme court held that the doctor’s statements did not “reach the level of either fraud or breach of duty to disclose”54 such that the contra non valentem third category would apply to defeat the defendant’s exception of prescription. Even though the court did not find that the prescription was suspended, by reviewing the sufficiency of the evidence, it implicitly indicated that the third fact situation could still be applied to medical malpractice cases.

In 1979, the supreme court applied the doctrine to two cases which involved the third fact situation.55 Nathan v. Carter involved a wrongful death action brought by the widow and children of a laborer who was accidentally killed while working at a shipyard. Named as defendants in the suit were the “executive officers, directors and supervisory employees . . .” and the “public liability and/or executive liability insurers of the officers and/or employees of [the shipyard].”56 The plaintiffs alleged that the claims manager at the shipyard told the widow that a full investigation of the accident would be made, and at the conclusion of this investigation, she would be given a large lump sum compensation settlement. In addition, the claims manager told the widow that if she were to hire an attorney, “workmen’s compensation benefits would be terminated, all benefits would be cut off while the matter was litigated

52. See infra text accompanying notes 66-72.
53. 497 So. 2d 1364 (La. 1986).
54. Id. at 1369.
56. Nathan, 372 So. 2d at 561.
in court, and the litigation might last five to seven years during which she would receive no benefits.\textsuperscript{57} Five years after the accident, when the plaintiffs were experiencing financial difficulties, the widow contacted an attorney who filed suit within one year. After conceding that the defendants' acts might be sufficient to suspend prescription, the lower courts nevertheless sustained the prescription plea and held that the plaintiffs had waited too long before filing suit. The supreme court reversed, invoking the \textit{contra non valentem} third fact situation and holding that the defendants' actions were a "continuing threat" which acted to suspend prescription.\textsuperscript{58} As noted by the court,\textsuperscript{59} the equitable nature of the circumstances warranted the conclusion.

In \textit{Corsey v. State Department of Corrections}, authored by Justice Tate, a prisoner at the state penitentiary sought recovery for personal injuries that he had received approximately two years prior to filing suit. These injuries allegedly resulted in the diminution of the plaintiff's mental capacity such that "he lacked any understanding of what had happened to him and of his possible legal remedies until [less than one year before the suit]."\textsuperscript{60} The lower courts dismissed the claim as prescribed because the injuries had occurred two years before the suit was filed. The supreme court, however, set forth a brief review of the acceptance and development of \textit{contra non valentem} in Louisiana, including the characterization of the "discovery rule" as a fourth fact situation to go along with the three others set out by the court in \textit{Reynolds v. Batson}.\textsuperscript{61} However, because the plaintiff's inability to file suit was caused by the defendant's tortious conduct, the court held that the third fact situation was applicable and his claim had not prescribed. It should be noted that in \textit{Corsey} there were no apparent affirmative or fraudulent acts of the defendant which tended to hinder, impede, or conceal the cause of action. Rather, it was the alleged tort itself which caused such an effect. Earlier cases which had applied the third fact situation, as noted above, involved such affirmative or fraudulent conduct.

\textbf{THE FOURTH FACT SITUATION - DISCOVERY RULE}

The \textit{contra non valentem} fourth fact situation, "[w]here the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant,"\textsuperscript{62} was labeled

\textsuperscript{57} Id. at 562.
\textsuperscript{58} Id. at 563.
\textsuperscript{59} Id.
\textsuperscript{60} Corsey v. State Dep't of Corrections, 375 So. 2d 1319, 1320 (La. 1979).
\textsuperscript{61} 11 La. Ann. 729 (1856).
\textsuperscript{62} Corsey, 375 So. 2d at 1322.
as such by the supreme court in Corsey. The application of this situation to defeat a plea of prescription also requires that the plaintiff’s ignorance not be willful or negligent. When deciding if this basis for the doctrine applies, the proper emphasis is on the reasonableness of the plaintiff’s ignorance in not knowing whom to sue, regardless of whether or not this ignorance was caused by the defendant. Lower courts had previously interpreted Cartwright v. Chrysler Corp. and its progeny as placing the focus on a “reasonable man” standard. By clarifying this point, the supreme court has emphasized the equitable nature of the doctrine.

Although the classification of the discovery rule as a contra non valentem exception to the running of prescription occurred less than ten years ago, the applicability of the fourth fact situation has been litigated many times. Perhaps the most frequent occurrence of the fourth fact situation has been in medical malpractice actions. For the most part, the plaintiffs in these cases have asserted the discovery rule by claiming that their causes of action did not begin to prescribe until they became aware of their injuries. The courts have had to balance two different policy considerations in deciding whether or not to apply contra non valentem.

Support for the plaintiffs’ position is found in the equitable nature of the doctrine. Thus, prescription should not be used to prevent a plaintiff from asserting a cause of action that does not arise until a considerable time after the defendant’s act. This conclusion is especially apparent in medical malpractice cases where the patient may not be able to detect the injury until sometime after it occurs.

Competing with the policy considerations favoring patient recovery is the legislative effort to control the rising cost of medical care. By the mid-1970’s, medical malpractice cases had dramatically increased the costs of health care. In an effort to control these costs, the legislature enacted Louisiana Revised Statute (La. R.S.) 9:5628 which provides that:

No action for damages for injury or death against any physician, chiropractor, dentist, or hospital duly licensed under the laws of this state, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission or neglect, or within one year from the date of discovery of the alleged act, omission or neglect; provided, however, that

even as to claims filed within one year from the date of such discovery, in all events such claims must be filed at the latest within a period of three years from the date of the alleged act, omission or neglect.\textsuperscript{66}

The main concern of the courts regarding this statute has been its possible effect in limiting the application of the discovery rule in medical malpractice cases.

As indicated by the statute, a suit must be brought within one year of the discovery of, but no later than three years of the "act, omission or neglect." The supreme court has held that this three year limitation is absolute.\textsuperscript{67} That is, the statute provides for a discovery rule of limited duration. After three years, if the patient has not discovered his injury, \textit{contra non valentem} may not be used to defeat a plea of prescription. The supreme court has also rejected various constitutional arguments that have been advanced in opposition to this conclusion.\textsuperscript{68}

Initially, some courts of appeal held that any medical malpractice claim brought after the effective date of La. R.S. 9:5628\textsuperscript{69} could be barred by the limitations imposed by the statute even if the "act, omission or neglect" occurred prior to the effective date.\textsuperscript{70} However, the supreme court has come to the opposite conclusion and allowed the application of the \textit{contra non valentem} discovery rule to suspend the running of prescription for more than three years on a medical malpractice action as long as the "act, omission or neglect" occurred before the effective date of the statute.\textsuperscript{71}

From the above discussion it is apparent that the application of the doctrine has, for the most part, been based on the equitable circumstances of the cases. As discussed below, this consideration is also present in the \textit{Plaquemines Parish Commission Council v. Delta Development Company} case, where the court applied the third fact situation. This use of \textit{contra non valentem} was based on the admissions and stipulations by the defendants, as well as the factual determinations. Because of their importance, the court extensively reviewed the facts in order to conclude that prescription would not bar the plaintiff's suit.

\textsuperscript{67} Chaney v. State Through Dep't of Health and Human Resources, 432 So. 2d 256 (La. 1983).
\textsuperscript{68} Crier v. Whitecloud, 496 So. 2d 305 (La. 1986).
\textsuperscript{69} Effective date September 12, 1975.
\textsuperscript{71} Maltby v. Gauthier, 506 So. 2d 1190 (La. 1987).
THE FACTS OF THE CASE

Plaquemines Parish Commission Council (hereafter PPCC), sued Delta Development Company, Inc. (hereafter Delta) and fourteen named individuals. The court divided the individual defendants into three groups for the purpose of the opinion. The first group (hereafter Group 1) consisted of Leander H. Perez, Jr. and Chalin O. Perez, former public officials in the parish who were the sons of the deceased public official, Leander H. Perez, Sr. (Judge Perez). Group 1 was sued for alleged breaches of fiduciary duties owed as public officials. The second group (Group 2) consisted of Judge Perez's four children who received proceeds and property from the mineral interests. The third group (Group 3) consisted of other individuals who also received proceeds or property from the mineral interests. The property or proceeds that the members of the two latter groups may have received were allegedly acquired through breaches of fiduciary duties by Judge Perez and his sons. Delta Development Company, Inc. is a Delaware corporation (formerly a Louisiana corporation) whose stock is either partially or entirely owned by the members of Group 2, who received such stock through acts of donation from their parents. PPCC's petition alleged that Judge Perez "acquired unrecorded and secret overriding royalties in parish minerals through . . . Delta; . . . acquired unrecorded and secret economic interests in parish minerals through the use of interposed parties, unrecorded documents and secret counter letters" and, furthermore, that these interests were acquired as a result of Judge Perez's breaches of his fiduciary duties. In addition, PPCC alleged that the Group 2 defendants "engaged in ongoing schemes to keep secret the breaches of duty and to conceal from the public knowledge of their personal gains."

The trial court sustained the defendants' exceptions of prescription, finding that prescription had commenced and continued to run uninterrupted from 1941 to 1951. In his reasons for judgment, the trial judge misconstrued the third and fourth fact situations in holding that "concealment . . . can only be an authoritative factor if it prevents discovery of facts to the extent that the inquirer is effectively prevented . . . from filing suit." Finding no reason why the plaintiff's predecessors could not have discovered these facts, he held that contra non valentem was inapplicable. The court of appeal adopted the trial court's conclusion and affirmed. On application to the supreme court for review, the

73. Id. at 1037.
75. Transcript of trial court reasons for judgment at 14.
76. 486 So. 2d 129 (La. App. 4th Cir. 1986).
PPCC assigned as error the lower courts’ failure to apply contra non valentem. The supreme court agreed and held that the third fact situation was applicable to the facts of the case. The supreme court’s opinion is rather lengthy because of the exceptional facts that gave rise to the plaintiff’s claim. The remainder of this section will be devoted to a summarization of these facts.

From 1924 to 1960, Judge Perez was the district attorney for the judicial district which included Plaquemines Parish. As district attorney, he was the exclusive legal advisor to the parish governing authorities within his district. In 1954, Leander, Jr. was appointed Assistant District Attorney by his father and six years later was elected District Attorney. He then appointed his father to the position of Assistant District Attorney. Judge Perez was elected to the Plaquemines Parish Commission Council in 1961 and served as President of the Council and Commissioner of Public Affairs until 1967, when his other son, Chalin, was elected to that position. Judge Perez died in 1969. Chalin held his office until 1983, and Leander, Jr. served as District Attorney until 1985.

The supreme court reviewed the “status and duties” of public officials. Because of the Louisiana courts’ lack of prior consideration of the nature and extent of the duties that are owed by public officials to the public, the court relied on other jurisdictions in concluding that “a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public.” Next, the court stressed the high degree of trust inherent in an attorney-client relationship as well as the attorney’s duty to disclose possible conflicts of interest. The court referred to these obligations as fiduciary duties that the public officials owed to their constituents.

Next, the court reviewed the facts regarding the defendant’s acquisition of the mineral interests. PPCC’s predecessors granted Delta three mineral “base” leases of public lands, one in 1936 and two in 1938. At that time, Judge Perez was the “ex-officio regular attorney and legal counsel” for the lessors. There is some dispute as to the exact ownership of Delta at that time. However, it was stipulated that most of the Delta stock was owned by Judge Perez’s wife by the end of 1938, at the latest. In addition, the court noted that “the record does not clearly show that Perez or his wife owned stock in Delta Development Company on August 24, 1936, when his employment agreement with Delta was executed, although it is almost certain that they did.”

77. Delta Dev., 502 So. 2d at 1039 (quoting Anderson v. City of Parsons, 496 P.2d 1333, 1337 (1972)).
78. Delta Dev., 502 So. 2d at 1041.
79. Id. at 1042 n.15.
Notices

In each of the base leases, PPCC's predecessor received a cash bonus and a 1/8th royalty interest. It should be noted that 1/8th was the statutory minimum that could be given to a to a political subdivision in granting a mineral lease. After Delta acquired the lease, it entered into the above mentioned employment agreement with Judge Perez whereby he was to represent Delta regarding the base leases and assist Delta in negotiating sub-leases. In return for his services, Judge Perez was to receive cash above a certain amount that was to be given as a bonus and any overriding royalty interests above 1/48th which he might negotiate for Delta. The existence of this employment agreement remained secret until PPCC filed suit and engaged in discovery. The court found that the agreement created a "clear conflict of interest . . . which aligned Judge Perez with the lessee, Delta . . . to the detriment of his statutory client, [PPCC's predecessor]."

In the sub-leases granted by Delta, the sub-lessees were willing to, and did, in fact, give up more than a 1/8th royalty interest. However, this additional royalty interest was acquired by Judge Perez and Delta by way of secret employment agreements and unrecorded counter letters. Also, because of the actions of Judge Perez and/or his sons, the PPCC or its predecessor lost out on possible claims for additional sums arising out of its leases in the disputed areas. Because the defendants had stipulated for the resolution of the prescription issue that these breaches of fiduciary duties had occurred, the court was not obligated to place so much emphasis on the above facts in order to reach its decision. However, its reason for doing so became apparent when it stated that "[a] review of the record clearly indicates the manner in which those breaches of fiduciary duty occurred, even though that was simply stipulated, and the case has not yet been tried on the merits." The effect of such a statement was to send a clear signal to the lower courts: Even though the defendants had stipulated the breaches of fiduciary duties, the supreme court set forth its factual determination of these breaches. A lower court would not be likely to derogate from these findings when the question arose during the trial.

Judge Perez's alleged improprieties did not end after the original granting of the mineral leases and the sub-leases. After the leases were granted, rumors began circulating and newspaper articles were written concerning the possible improprieties of Judge Perez. The lower courts were under the impression that the existence of these facts alone were sufficient cause not to apply contra non valentem. However, as noted

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80. 1928 La. Acts No. 66.
81. Delta Dev., 502 So. 2d at 1042.
82. Id. at 1044-45 n.17.
83. Id. at 1045-46.
above, this conclusion was based upon the fourth fact situation and was not determinative in the supreme court's resolution of the issue, which involved application of the third fact situation.

During the eight years following the granting of the leases, numerous attempts were made to substantiate the claims made against Judge Perez. Each time such an attempt was made, Judge Perez was successful in having them quashed. In doing so, however, Judge Perez represented to the courts that he was "ready and willing and [was] capable of representing [PPCC's predecessors] as their attorney" and "would advise them honestly, sincerely, and to the best interest of the Parish of Plaquemines." This statement clearly showed Judge Perez's willingness and desire to misrepresent his interests so that his true interests would remain concealed. This misrepresentation was accomplished by way of Judge Perez's status as a public official. After a lengthy portrayal of the above facts, the court went into its discussion of contra non valentem and how these facts could be used to defeat the defendants' pleas of prescription.

APPLICATION OF Contra Non Valentem TO THE FACTS OF THE CASE

After reviewing the facts of the case, the supreme court discussed the history and application of contra non valentem in Louisiana. The court noted the major distinction between the three Reynolds fact situations and the more recent fourth fact situation, the discovery rule. In attempting to defeat PPCC's reliance on the doctrine, the defendants pointed out that the recent amendment to La. Civ. Code art. 3467 indicated a legislative attempt to abolish the doctrine. The court reasoned that had this effect been intended, it would have been expressly stipulated in the revision. In addition, since the revision, the supreme court had recognized the doctrine in several other cases. However, these cases involved the fourth fact situation, whereas PPCC's claim was based on the third situation. Therefore, one important result of this case is that it reinforces the viability of the Reynolds fact situations.

As noted in the opinion and observed through a review of the various applications of contra non valentem, the underlying bases for applying the doctrine are equity and a sense of fairness. Whether it explicitly does so or not, each court that considers the applicability of the doctrine should consider these bases in making its determination. It

84. Id. at 1050.
85. See supra text accompanying notes 16-19.
86. See supra text accompanying note 8.
is submitted that these bases make the case "exceptional" under the terms of the comment to La. Civ. Code art. 3467. In a given lawsuit, if the plaintiff's claim is not conducive to a sense of equity and fairness, the doctrine should not be applied. This result can be achieved by distinguishing the particular facts of that case from the prior decisions where the doctrine has been upheld.

After a general contra non valentem discussion, the court concluded that the third situation was applicable to the facts. As noted above, this application was based on the fiduciary nature of the duties owed by the Perez's in their capacity as public officials. Because of this fiduciary nature, the PPCC and its predecessors were "effectually prevented" from asserting its claims against its fiduciary. The court also considered the underlying basis for applying the doctrine when it noted that "[t]his case presents a situation with probably more compelling considerations of equity, justice and fairness than any which can be found in the jurisprudence." This broad conclusion demonstrates the great weight given to policy considerations by the court in reaching its conclusion.

Next, the court considered the application of the doctrine to defeat the pleas of prescription of those defendants not in Group 1. As to Delta, the court concluded that because of the conduct of Judge Perez and his sons that gave rise to the above application of contra non valentem, the corporation should also be held responsible. This conclusion is based on the near identity of interests between the corporation and the Perez's which is discussed above. As to the other defendants, Groups 2 and 3, who received their proceeds or property interests by way of donations, the court concluded that the PPCC and its predecessors were also "effectually prevented" from asserting their claims against these defendants.

As noted in the beginning of this paper, the first and second fact situations rarely occur in the jurisprudence. However, Delta Development's reaffirmance of the applicability of the third situation after the adoption of La. Civ. Code art. 3467 implicitly reaffirms the applicability of the first two fact situations, should they occur.

At first glance, allowing PPCC to bring suit at this late date seems harsh. Upon further review of the applicability of contra non valentem and the specific facts of this case, however, this harshness is somewhat mitigated. Clearly from an equitable point of view, the result is correct. 90

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88. See supra note 8.
89. Delta Dev., 502 So. 2d at 1057.
90. In December of 1987, the Plaquemines Parish Council agreed to an out of court settlement of its claims against Delta Development Company and all but two of Judge Perez's descendants.