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Repository Citation
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Recent Developments Affecting Louisiana's Discretionary Function Exception: Will Louisiana Follow Gaubert?

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I. INTRODUCTION

Louisiana's "discretionary function exception," formally adopted by the legislature in 1985, purports to shield Louisiana state and local governmental entities and their officers and employees from liability "based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties."1 Louisiana courts have indicated repeatedly that the Louisiana discretionary function exception is substantially similar, if not identical, in purpose and content to the federal discretionary function exception contained in the Federal Tort Claims Act.2 The Louisiana courts have therefore adopted federal jurisprudential standards for determining the applicability of the Louisiana discretionary function exception.3

The Louisiana jurisprudence, relying upon earlier federal court decisions, has drawn a distinction between acts performed or decisions made at the "operational" level of an agency or agency program, and those implemented at a "policy-making" or "ministerial" level.4 The

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4. Fowler, 556 So. 2d at 15.
Louisiana courts have held that the Louisiana discretionary function exception does not extend to protect discretionary actions, decisions, or judgments of state or municipal employees that are found to have been "operational" in nature. These decisions are marked by a tendency to limit the application of the Louisiana exception by finding that a variety of governmental decisions and actions were "operational" and therefore ineligible for discretionary function immunity.5

The Louisiana courts, while continuing to profess adherence to federal standards for application of Louisiana's discretionary function exception, have yet to consider the impact upon those standards of the United States Supreme Court's recent important decision in United States v. Gaubert.6 In Gaubert, the Court, in a comprehensive analysis of the federal discretionary function exception, clarified and arguably expanded the scope of the exception. The Court expressly rejected the "operational" distinction relied upon in earlier federal court decisions, holding that if the challenged official act or decision is discretionary in nature and grounded in the policy of the federal agency or program, the federal discretionary function exception immunizes that act or decision even though implemented at an "operational" or "managerial" level of the agency or program.7 The Court also enunciated a "strong presumption" that discretionary conduct allowed by regulation, agency policy, or internal agency guidelines is "grounded in the policy" of the agency and hence entitled to discretionary function immunity.8

This article examines recent developments in the jurisprudence construing and applying both the federal and Louisiana discretionary function exceptions and assesses the impact of the Gaubert decision upon both the federal and Louisiana exceptions. As suggested below, if the Louisiana courts were to follow the Gaubert analysis, the Louisiana exception could be extended to immunize a broad range of "operational" decisions, functions, and actions (including, merely by way of example, the design and maintenance of public buildings, roadways, and other

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5. E.g., Estate of Thomas v. State, 604 So. 2d 617, 624-25 (La. App. 2d Cir.) (determining that the decision on where to place highway signs was "operational"), writ denied, 608 So. 2d 167 (1992); Chaney, 583 So. 2d at 929-30 (stating that the decision regarding the type of warning device to install at a railroad crossing was "operational" because the legislature had already made the "policy" decision that the roadway should be maintained in a reasonably safe condition); Valet v. City of Hammond, 577 So. 2d 155, 167 (La. App. 1st Cir. 1991) (holding that the maintenance of a roadway was "operational"); Tenahaaf v. Quenqui, 571 So. 2d 898, 899 (La. App. 5th Cir. 1990) (finding that a parish's decision as to whether to enforce state statutes and parish ordinances requiring fire suppression and fire warning devices was not a "discretionary" or "policy-making" act).


7. Id. at 1275.

8. Id. at 1274-75.
public facilities) which have long been assumed to be lucrative grist for tort plaintiffs and their lawyers. In addition, this article briefly addresses recent, important developments affecting the constitutionality of the Louisiana discretionary function exception and assesses the continuing viability of the "public duty" doctrine in Louisiana law. The article concludes with a call for judicial action to resolve the many remaining uncertainties surrounding Louisiana's discretionary function exception.

II. FEDERAL LAW

A. Berkovitz

The federal discretionary function exception, 28 U.S.C. § 2680(a) of the Federal Tort Claims Act ("FTCA"), exempts the United States from tort liability under the FTCA for

[any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.]

The federal jurisprudence has recognized that the legislative purpose of the federal discretionary function exception is to "prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."

In Berkovitz v. United States, the Supreme Court formulated what have become the prevailing federal standards for application of the discretionary function exception:

In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an em-

ployee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. . . . The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.  

Applying these standards, the Court reversed the dismissal of a child's federal tort claim against federal agencies alleged to have negligently licensed a laboratory to produce a polio vaccine and to have negligently approved the release to the public of a particular lot of polio vaccine which caused the child to contract polio. The Court held that the petitioner's allegations, that the agencies had failed to comply with their own policies for testing vaccine lots and for preventing the distribution of non-complying lots, were sufficient to survive a motion to dismiss the suit. Because the petitioner's complaint was directed at alleged official activity that involved no policy discretion or judgment but rather violated established agency policy, the discretionary function exception did not require dismissal of the claim as pleaded.

The Berkovitz Court did not draw a distinction between discretionary functions and "operational" activities and gave no direct indication that discretionary acts or decisions at the "operational" level would fall outside of the protection of the federal discretionary function exception. The Court, however, cited and relied upon certain of its prior decisions that had referred to presumably unprotected "operational" activities and functions. Prior to Gaubert, several federal appellate courts, including the U.S. Fifth Circuit Court of Appeals, relied upon language in Berkovitz and these earlier Supreme Court decisions and held that a variety of official acts and decisions, though discretionary in nature, were not

13. Id. at 536-37, 108 S. Ct. at 1958-59 (citations omitted).
protected because they were implemented at an "operational level" within the particular agency or government program.\footnote{16}

B. Gaubert

In \textit{Gaubert}, the United States Supreme Court, while reiterating the \textit{Berkovitz} test, clarified and arguably expanded the scope of the federal discretionary function exception. Relying upon its earlier precedents, the Court confirmed that the exception applies to activity that is "discretionary in nature," involving "an element of judgment or choice,"\footnote{17} and that is "based on considerations of public policy."\footnote{18}

Where Congress has delegated the authority to an independent agency or to the executive branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs. In addition, the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected.

Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.\footnote{19}

After reciting these fairly well established standards, the Court enunciated a "strong presumption" in favor of application of the discretionary function exception when statute, regulation, or internal agency guidelines or procedures allow the particular agent or employee to exercise discretion.

\begin{itemize}
  \item \footnote{16} E.g., Arizona Maintenance Co. v. United States, 864 F.2d 1497, 1501 (9th Cir. 1989); United States v. Gaubert, 885 F.2d 1284, 1287 (5th Cir. 1989), \textit{rev'd}, \textit{Gaubert}, 111 S. Ct. at 1271; United States Fire Ins. Co. v. United States, 806 F.2d 1529, 1535-36 (11th Cir. 1986).
  \item \footnote{17} \textit{Gaubert}, 111 S. Ct. at 1273 (quoting \textit{Berkovitz}, 486 U.S. at 536, 108 S. Ct. at 1958).
  \item \footnote{18} \textit{Id.} at 1274 (quoting \textit{Berkovitz}, 486 U.S. at 537, 108 S. Ct. at 1959).
  \item \footnote{19} \textit{Id.} (citations omitted).
\end{itemize}
On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Not all agencies issue comprehensive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not others. In addition, an agency may rely on internal guidelines rather than on published regulations. In any event, it will most often be true that the general aims and policies of the controlling statute will be evident from its text.

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.20

The Court’s language, which does not appear in earlier decisions, seems to place the burden upon the plaintiff, at the pleadings stage, to allege facts that, if true, would be sufficient to rebut the presumption (created when the statute, regulation, or guideline allows the employee discretion) that the challenged discretionary conduct was grounded in the policy of the regulatory regime.21 Under a fair reading of the Court’s language, once the government has established the existence of a statute, regulation, or guideline allowing an employee discretion, the burden would shift to the plaintiff to prove facts sufficient to rebut the presumption in favor of discretionary function immunity.22

20. *Id.* at 1274-75.

21. It should be noted, however, that the Court, in footnote 7 of its opinion, recognized that certain acts, although discretionary in nature, are obviously not based upon or grounded in the policy or goals of the regulatory regime. “If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official’s decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.” *Id.* at 1275 n.7.

22. *But see* Prescott v. United States, 973 F.2d 696, 702 n.4 (9th Cir. 1992) (“Gaubert, of course, did not deal with the burden of proof question”).
The Gaubert Court also repudiated the "operational" test applied by the Fifth Circuit below and employed in earlier federal decisions. According to the Court, the Fifth Circuit had misinterpreted the Court's earlier references to "operational" actions\(^2\) as "perpetuating a nonexistent dichotomy between discretionary functions and operational activities."\(^24\) The Court denied that its earlier decisions had recognized or applied such an "operational" distinction or standard.\(^5\) The Court held that the discretionary function exception applies to acts or decisions at the "operational level" of an agency or program if those acts or decisions are discretionary in nature and grounded in the policy of the agency or applicable statute, regulation, or agency guideline.

In light of our cases and their interpretation of § 2680(a), it is clear that the Court of Appeals erred in holding that the exception does not reach decisions made at the operational or management level of the bank involved in this case. A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy making or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly require [sic] judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."\(^26\)

Applying these standards to the facts before it, the Gaubert Court reversed the Fifth Circuit and held that the challenged actions of the Federal Home Loan Bank Board in supervising the day-to-day operations of a troubled financial institution were discretionary functions and exempt from liability under the FTCA. The Court thus exempted from tort liability a broad range of day-to-day "operational" activities of bank board employees relating to the institution, including: (a) arranging for the hiring of consultants on operational and financial matters and asset management, (b) urging or directing that the institution convert from a state-chartered savings and loan to a federally-chartered savings and loan, (c) giving advice and making recommendations concerning whether, when, and how to place the institution's subsidiaries into bankruptcy, (d) mediating salary disputes between the financial institution and its senior officers, (e) reviewing a draft complaint in litigation that

\(^{24}\) Gaubert, 111 S. Ct. at 1275.
\(^{25}\) Id.
\(^{26}\) Id. (citations omitted).
the institution contemplated filing and other involvement in litigation matters, (f) intervening with state regulatory authorities regarding matters of supervision, and (g) other low-level decisions and actions relative to the operation of the institution.27 All of these actions, decisions, and functions, although "involving the day-to-day management of a business concern . . . at the operational level," were entitled to immunity because they were discretionary in nature and were presumed to have been undertaken for policy reasons of concern to the regulatory agency.28

C. Federal Jurisprudence After Gaubert

Notwithstanding the attention that legal scholars have given to the Gaubert decision,29 several federal circuit courts have discussed the decision only briefly, and others apparently have yet to take the full measure of the decision. The Ninth Circuit Court of Appeals, in Routh v. United States,30 mentioning Gaubert only briefly, held that the failure of a government officer to require a contractor to install safety equipment was not discretionary because, although under the government's contract the officer had discretion in determining whether particular safety equipment was necessary, the officer's judgments on such safety matters did not involve "policy decisions." And the Ninth Circuit, in Prescott v. United States,31 denied the government summary judgment, holding that there were issues of fact as to whether the government's acts in the administration of a nuclear testing program were discretionary functions and that the government bears the burden of proving the applicability of the discretionary function exception. The Ninth Circuit mentioned Gaubert only in a footnote.32 One would have thought that, after Gaubert, summary judgment would have been appropriate to dismiss claims predicated upon the federal government's administration of its nuclear testing program, but the Ninth Circuit held to the contrary, due in part

27. Id. at 1276.
28. Id. at 1278.
30. 941 F.2d 853, 856-57 (9th Cir. 1991).
31. 973 F.2d 696, 703 (9th Cir. 1992).
32. Id. at 702 n.4.
to the government’s failure to offer evidence that its acts were grounded in political, social, or economic policy.

However, in *Attallah v. United States*, the First Circuit Court of Appeals, with only a brief discussion of *Gaubert*, held that the decisions of customs agents as to whether to stop and search particular passengers, and as to the supervision of other customs agents, were discretionary decisions entitled to immunity under the discretionary function exception. The Eighth Circuit in *Tracor/MBA, Inc. v. United States*, engaging in a more detailed analysis of *Gaubert* and its presumption, held that government inspectors’ particularized decisions and actions when checking ventilation and flame-retardancy of clothing were within the discretion contemplated by applicable agency regulations and hence entitled to discretionary function immunity. Likewise, in *Kiehn v. United States*, the Tenth Circuit Court of Appeals held that the “failure to warn” and “negligent rescue” claims of an individual climbing on sandstone in Dinosaur National Monument should have been dismissed under the discretionary function exception. The court held that the plaintiff failed to allege facts to support a finding that the challenged governmental actions were not grounded in policy and therefore failed to overcome the *Gaubert* presumption. In *Daigle v. Shell Oil Co.*, the Tenth Circuit again applied *Gaubert*, upholding the dismissal of a claim against the government based upon decisions made in the cleanup of a CERCLA site.

The somewhat inconsistent analyses and results of the recent federal decisions indicate that the full impact of *Gaubert* has yet to be realized. In fairness, it should be observed that the application of the discretionary function exception is inherently fact sensitive, such that it cannot be expected that particular decisions will always be predictable or appear consistent with one another. With the passage of time, increased lower court adherence to the *Gaubert* rationale should lead to a greater uniformity of analysis and result, as well as to an expanded application of the federal discretionary function exception.

### III. LOUISIANA LAW

#### A. Pre-Gaubert Law

The Louisiana discretionary function exception, codified at Louisiana Revised Statutes 9:2798.1(B) and (C), provides, in pertinent part:

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33. 955 F.2d 776, 786 (1st Cir. 1992).
34. 933 F.2d 663, 667-68 (8th Cir. 1991).
35. 984 F.2d 1100 (10th Cir. 1993).
36. *Id.* at 1105.
37. 972 F.2d 1527, 1542 (10th Cir. 1992).
B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

C. The provisions of Subsection B of this Section are not applicable:

(1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policy-making or discretionary power exists; or

(2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct. 38

Although the Louisiana discretionary function exception is worded differently than the federal exception, the Louisiana courts have repeatedly indicated that the Louisiana exception is substantially similar, if not identical, to the federal exception in purpose, substance, and content. 39 The Louisiana Supreme Court and appellate courts have therefore adopted the federal Berkovitz test for application of the Louisiana discretionary function exception. 40

In Fowler v. Roberts, 41 a three-Justice plurality of the Louisiana Supreme Court, in a rehearing opinion rendered a little over one year before Gaubert was decided, embraced the two-part Berkovitz test.

38. The Louisiana statute, unlike its federal counterpart, immunizes not only the public entity but the individual officer or employee that exercised the discretionary function. One Louisiana appellate decision, however, contains language that could be construed to read out of the statute its protection of individual government officers and employees. See Akins v. Parish of Jefferson, 529 So. 2d 27, 30-31 (La. App. 5th Cir.) (“La. R.S. 9:2798.1 limits the liability of public entities, their employees, or their officers for acts reasonably related to the legitimate governmental objective for which the policy making or discretionary power exists. It does not address the individual liability of a public official or their officers or employees”), rev’d in part on other grounds, 533 So. 2d 970 (1988).


40. E.g., Fowler, 556 So. 2d at 15 (on rehearing); Estate of Thomas, 604 So. 2d at 624; Chaney v. National R.R. Passenger Corp., 583 So. 2d 926, 929 (La. App. 1st Cir. 1991); Verdun v. State, 559 So. 2d 877, 879 (La. App. 4th Cir. 1990).

41. Fowler, 556 So. 2d 1, 13 (on rehearing).
Berkovitz v. United States, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), held that there is a two step inquiry for determining whether the discretionary function exception applies in specific fact situations. A court must first consider whether the government employee had an element of choice. "[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." Berkovitz, 486 U.S. at 536, 108 S. Ct. at 1958-59, 100 L. Ed. 2d at 540-41. If the employee had no discretion or choice as to appropriate conduct, there is no immunity. When discretion is involved, the court must then determine whether that discretion is the kind which is shielded by the exception, that is, one grounded in social, economic or political policy. If the action is not based on public policy, the government is liable for any negligence, because the exception insulates the government from liability only if the challenged action involves the permissible exercise of a policy judgment.\(^{42}\)

The plurality, following the example of pre-Gaubert federal and state court decisions, also approved the "operational" test or distinction, stating that "the exception protects the government from liability only at the policy making or ministerial level, not at the operational level."\(^{43}\)

In a questionable application of these principles, the Fowler plurality held that the Louisiana Department of Public Safety's blanket waiver of the requirement that handicapped drivers submit updated medical reports in order to obtain renewed drivers' licenses was not entitled to protection under the Louisiana discretionary function exception. The plurality opined that, although the applicable statute permitted the department to waive the requirement of medical reports on handicapped persons applying for renewal licenses, the department's blanket waiver of medical reports in all cases constituted a total "failure to exercise any discretion," a "lack of policy" which was not entitled to discretionary function protection. The plurality found that, because the department failed to impose any standards for renewals of such licenses, its decision to issue a renewal without requiring a medical report was "operational" and hence not entitled to protection. The court also found that because the department had "advanced no rationale to justify its lack of policy," its failure to adopt a policy could not be regarded as a policy decision protected by the discretionary function exception.\(^{44}\)

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42. Id. at 15 (on rehearing).
43. Id. (citing Pendergrass v. State of Oregon, 675 P.2d 505, 507 (Or. App. 1984)).
44. Id. at 16 (on rehearing).
In vigorous dissents, three Justices maintained that the department's permissible and discretionary decision to waive in all cases the requirement of medical reports for renewed handicapped drivers' licenses was precisely the kind of discretionary judgment intended to be protected by the discretionary function exception. The dissenters found no rational basis for the plurality's opinion that the challenged departmental decision was "operational," and found that, because the challenged decision was expressly permitted by the controlling statute, it was a protected discretionary function.45

Justice Dennis, in a well-reasoned concurring opinion, agreed with the dissenting Justices' criticism of the plurality, opining that

"[t]he precedent set by the majority opinion's analysis may lead this court to second-guess the wisdom of law and policy adopted (or not adopted) by administrative agencies, the executive branch and the legislative branch in a multitude of future cases. This is not the proper role of the courts under the Constitutional separation of powers and the doctrine of governmental immunity which serves to protect that separation."46

As the dissenting and concurring Justices observed, the Fowler plurality's reasoning, that a state department, although granted discretion, may not claim exemption for a failure to exercise that discretion or to formulate policies or guidelines, is subject to serious question. The Louisiana discretionary function statute expressly provides that liability "shall not be imposed . . . based upon the exercise or performance or the failure to exercise or perform . . . policy-making or discretionary acts."47

The plurality's opinion, however, may find support in subparagraph C(1) of the Louisiana statute which provides, in part, that the Louisiana discretionary function exception is not applicable "[t]o acts or omissions which are not reasonably related to the legitimate governmental objective for which the policy-making or discretionary power exists." One could make a fair case that an agency's total abdication of discretion or its deliberate failure to implement any policies or guidelines for the exercise of discretion is not "reasonably related to the legitimate governmental objective for which the policy-making or discretionary power exists." Indeed, the language of subparagraph C(1) of the Louisiana statute, which is not contained in the federal statute, could be construed to

45. Id. at 18-19 (Marcus, J., dissenting); Id. at 19 (Cole, J., dissenting); Id. at 19-20 (Calogero, C.J., dissenting).

46. Id. at 18 (Dennis, J., concurring). Justice Dennis, although joining in the dissenters' criticism of the plurality's treatment of the discretionary function exception, concurred in the plurality's result, imposing liability upon the Department of Public Safety on other grounds.

empower a court to weigh the reasonableness of the agency's decision or act in determining whether or not that decision or act is entitled to discretionary function immunity. Surprisingly, neither the Louisiana Supreme Court nor lower appellate courts have yet to rely particularly upon subparagraph C(1) of the Louisiana statute. However, recent Louisiana appellate court decisions, relying upon the plurality opinion in Fowler, have appeared to assess the reasonableness of the policy justification accorded to the challenged official act or decision in determining whether to apply the Louisiana exception.48

B. Louisiana’s Post-Gaubert Jurisprudence

A little over one year after Fowler was decided, the United States Supreme Court handed down Gaubert. During the two years since Gaubert was decided, a number of Louisiana appellate courts, relying upon Fowler, have adhered to the federal Berkowitz standards, while also continuing to apply the “operational test” repudiated by Gaubert. These Louisiana decisions have not referred to Gaubert and have not applied its presumption that discretionary conduct permitted by statute, regulation, or guideline is grounded in policy and therefore entitled to immunity.49

A number of Louisiana decisions, for example, have held that governmental decisions and actions pertaining to the design and maintenance of public roadways and other public facilities, although involving particularized discretionary judgments, are “operational” in nature and thus not entitled to discretionary function immunity. In Chaney v. National Railroad Passenger Corp.,50 the Louisiana First Circuit Court of Appeal held that a city’s decisions on the type, number, sufficiency, and placement of warning devices at railroad crossings were “operational” in

48. E.g., Simeon v. Doe, 602 So. 2d 77, 82 (La. App. 4th Cir. 1992), aff’d, No. 92-C-2353, slip opinion (La. May 24, 1993) (holding that the decision of the Department of Health and Human Resources to publicize only to medical professionals, and not to the general public, the danger of raw shellfish to persons with immune deficiencies was a discretionary function, in part because the DHHR was able to provide a reasonable policy justification for its decision); Dubois v. McGuire, 579 So. 2d 1025, 1028-30 (La. App. 4th Cir.) (holding that a parish health department’s decision to return stray dogs with collar tags to owners, instead of impounding dogs or criminally prosecuting dog owners, was a discretionary function and emphasizing the policy justification offered by the parish health department), writ denied sub nom., Dubois v. Waterman, 587 So. 2d 696 (1991).


50. Chaney, 583 So. 2d at 929.
nature because the legislature had already made the "policy decision" that public roadways should be maintained in a reasonably safe condition. Under the Chaney court’s analysis, all discretionary judgments regarding the design, maintenance, and repair of a roadway, including method of construction, number and placement of signs and signals, and level of maintenance, would be "operational" decisions that would fall outside of the protection of the Louisiana exception. The court’s analysis indicates a view that the only decision applicable to a roadway that would be protected by the discretionary function exception would be the initial decision of whether to construct it or assume responsibility for it.\textsuperscript{51}

As of the date this article is submitted for publication, the Louisiana Supreme Court has not addressed the Gaubert decision or its impact upon the Louisiana exception.\textsuperscript{52} There are serious questions as to whether the Chaney line of decisions would survive scrutiny under the Gaubert presumption and its repudiation of the "operational" doctrine. Under the Gaubert analysis, so-called "operational" decisions regarding design and maintenance of buildings, roadways, and other public facilities, although involving technical and particularized discretionary judgments, could easily be presumed to have been grounded in the policies of state departments or agencies, or in departmental guidelines, regulations, or safety statutes. If the Louisiana Supreme Court’s continued adherence to federal standards were put to the test and the Gaubert standards followed, a broad and diverse range of state and municipal actions, decisions, and functions, heretofore considered "operational" in nature,
could be afforded protection under the Louisiana discretionary function exception.

Should the Louisiana courts adopt the *Gaubert* analysis and presumption, subparagraph C(1) of the Louisiana discretionary function statute could attain a greater significance in the Louisiana jurisprudence. The Louisiana courts could well resort to that subparagraph as the basis for imposing a standard of reasonableness upon discretionary acts or decisions which, although rooted in agency policy, are not "reasonably related to the legitimate governmental objective for which the policy-making or discretionary power exists."\(^{53}\) Subparagraph C(1) of the Louisiana statute may come to be employed by Louisiana courts as a basis for refusing to immunize governmental decisions that amount to exceedingly arbitrary, unreasonable, or bad policy. As discussed above, recent Louisiana appellate decisions, although not relying upon subparagraph C(1) particularly, appear to assess the reasonableness of the policy justification offered in support of the challenged governmental conduct or decision.\(^{54}\)

**IV. CONSTITUTIONAL ISSUES**

As observed by other commentators, there are serious questions concerning the constitutionality of the Louisiana discretionary function statute.\(^{55}\) The Louisiana discretionary function statute, passed in 1985, may well run afoul of Article XII, section 10(A) of the Louisiana Constitution of 1974. That provision constitutes a blanket waiver of the sovereign immunity of the state and its political subdivisions "from suit and liability in contract or for injury to person or property."\(^{56}\) In obvious anticipation of constitutional challenges based upon Louisiana Constitution article XII, section 10(A), the legislature, in subparagraph (D) of the Louisiana discretionary function statute, purported to explain that the statute was not intended to "reestablish any immunity based on the status of sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the Constitution of Louisiana." The legislature's proffered "explanation," however, may not hold water with the Louisiana courts. It will be for the judicial branch, and not the legislative, to determine whether the

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54. See cases cited *supra* note 48.
56. La. Const. art. XII, § 10(A).
Louisiana discretionary function statute impermissibly reinstates a conclave of sovereign immunity in violation of the Louisiana Constitution.\(^{57}\) Given that the discretionary function exception arose historically as an exception to the waiver of sovereign immunity, the constitutional uncertainties surrounding the Louisiana statute cannot be taken lightly.\(^{58}\)

These constitutional issues are underscored by two Louisiana Supreme Court decisions addressing the relationship between other statutes and Louisiana Constitution article XII, section 10(A). In *Segura v. Louisiana Architects Selection Board*,\(^{59}\) the court held that a pre-1974 statute exempting the state from payment of court costs was superseded by Louisiana's constitutional waiver of sovereign immunity in 1974. The court reasoned that “the consequence [of the statute] would be that the State was relieved of part of its liability. The Constitution makes no such concession.”\(^{60}\) In *Jones v. City of Baton Rouge*,\(^{61}\) the court held that the imposition of Louisiana Civil Code article 2317 strict liability upon municipalities was entirely consistent with Louisiana's constitutional waiver of sovereign immunity. The court stated,

> Article 12, § 10 of the 1974 Constitution states that “[n]either the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.” It is not the function of the courts to create an exception to this unequivocal constitutional rejection of the doctrine of sovereign immunity.\(^{62}\)

In *Fowler*, the plurality, on rehearing, pretermitted consideration of the constitutional challenges to the Louisiana discretionary function statute.\(^{63}\) However, in *Industrial Risk Insurers v. New Orleans Public Service, Inc.*,\(^{64}\) the federal district court, applying Louisiana law, upheld the

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57. *E.g.*, Robertson, *supra* note 55, at 869-72. As Professor Robertson points out, an unconstitutional statute cannot be salvaged by a legislative “explanation” that the legislature did not intend to violate the constitution. Under the most fundamental separation of powers principles, the judicial branch must determine whether a legislative act violates a provision of the Louisiana Constitution.

58. *Id.* at 870; *Kenneth C. Davis, Administrative Law Treatise § 27:11*, at 60-65 (2d ed. 1984); *W. Page Keeton et al., Prosser and Keeton On the Law of Torts § 131*, at 1039 (5th ed. 1984). Professor Robertson also believes that, because the Louisiana discretionary function statute “arguably treats governmental defendants differently from similarly situated private defendants,” it may be subject to equal protection challenges.

59. 362 So. 2d 498 (La. 1978).

60. *Id.* at 499.

61. 388 So. 2d 737 (La. 1980).

62. *Id.* at 740. *See also* Professor Robertson's discussion of the *Jones* and *Segura* decisions, *supra* note 55, at 863-64.


constitutionality of the statute, finding that it did not conflict with Article XII, section 10(A). The federal court predicated its holding upon the rationale of the Louisiana Supreme Court’s opinion on original hearing in Sibley v. Board of Supervisors of Louisiana State University.\textsuperscript{65} In Sibley, the court, on original hearing, held that a statute limiting the amount of a medical malpractice award against the state and state agencies did not violate Article XII, section 10(A) of the Louisiana Constitution. The court opined that Louisiana’s constitutional waiver of sovereign immunity in contract and tort was intended primarily to eliminate the requirement of legislative approval for the filing of suit against the state. The court believed that the drafters of Louisiana Constitution article XII, section 10 did not intend to prohibit the legislature from limiting or restricting tort recovery in particular types of suits.\textsuperscript{66}

The Sibley court, however, granted a rehearing. On rehearing, the court held that the plaintiff’s challenges to the statute under Article XII, section 10(A) were rendered moot by intervening amendments to the statute.\textsuperscript{67} Because the Sibley court’s grant of rehearing had the legal effect of vacating its original opinion, the court’s analysis of the intent of the drafters of Article XII, section 10(A) in its original opinion is not authoritative. For the same reason, the federal district court’s decision in Industrial Risk Insurers, predicated upon the Sibley court’s original opinion, is of questionable authority.

The rationale of the Sibley court’s original opinion, that Article XII, section 10(A) was intended to remove a bar to suits against the state, but not to prohibit the state from limiting or restricting recovery in particular cases, appears to be consistent with the legislative history of Article XII, section 10(A).\textsuperscript{68} The Sibley court’s original opinion, however, appears to conflict directly with the reasoning and holding of the court’s Segura decision, in which it held that a statute exempting the state from a particular element of recovery was contrary to Article XII, section 10(A).\textsuperscript{69} Until such time as the Louisiana Supreme Court accepts an invitation to rule on the constitutionality of the Louisiana

\begin{itemize}
\item \textsuperscript{65} 462 So. 2d 149 (La. 1985) (on original hearing).
\item \textsuperscript{66} \textit{Id.} at 154 (on original hearing).
\item \textsuperscript{67} Sibley v. Bd. of Supervisors of La. State Univ., 477 So. 2d 1094, 1109 (La. 1985).
\item \textsuperscript{68} \textit{E.g., Sibley}, 462 So. 2d at 154 (on original hearing) ("The transcripts [from the 1973 Constitutional Convention] indicate that the proponents of this waiver were primarily interested in eliminating the unnecessary, burdensome and costly first step of getting legislative approval in order to bring suit against the state or its subdivisions. . . . Therefore, we simply find no basis to support plaintiff’s contention that the Louisiana Constitution by denying the state immunity from suit in contract or tort or for injury to person or property, prohibits the Legislature’s limiting in any respect recoverable tort damages").
\item \textsuperscript{69} Segura v. Louisiana Architects Selection Bd., 362 So. 2d 498, 499 (La. 1978).
\end{itemize}
discretionary function statute, these very serious questions as to its constitutionality will persist.\footnote{70}

V. PUBLIC DUTY DOCTRINE

Before the legislature enacted the discretionary function exception in 1985, Louisiana courts had accorded state and local governmental entities and their employees a measure of governmental immunity through application of the "public duty doctrine."\footnote{71} Under the public duty doctrine, "if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution."\footnote{72} A few Louisiana courts have opined that the discretionary function exception contained in Louisiana Revised Statutes 9:2798.1 was but a codification of the public duty doctrine.\footnote{73} These courts held that Louisiana Revised Statutes 9:2798.1 should be applied retroactively because it was merely a codification of the existing jurisprudential public duty doctrine.\footnote{74} In Socorro v. City of New Orleans,\footnote{75} however, the Louisiana Supreme Court, with only brief discussion, held that Louisiana Revised Statutes 9:2798.1 cannot be applied retroactively because it "is a substantive law to be given prospective application only."\footnote{76} The supreme

\footnote{70. The same constitutional cloud hangs over other post-1974 Louisiana statutes that purport to exempt governmental entities from particular types of tort liability or elements of tort recovery. \textit{E.g.}, Louisiana Revised Statutes 9:2800 (enacted July 12, 1985, and exempting the state and its political subdivisions from Article 2317 strict liability for public things other than buildings); Louisiana Revised Statutes 13:5106 (amended in 1985 to impose a $500,000 ceiling on general damages, exclusive of medical care and loss of earnings, recoverable against the state, state agencies, and political subdivisions). \textit{See} Professor Robertson’s discussion, \textit{supra} note 55, at 871-73, 876-79.


74. \textit{E.g.}, \textit{Winstead}, 554 So. 2d at 1242. In \textit{Fowler}, the Louisiana Supreme Court, on rehearing, pretermitted consideration of the issue of the retroactivity of the Louisiana discretionary function statute. \textit{Fowler} v. Roberts, 556 So. 2d 1, 17 n.12 (La. 1989) (on rehearing).

75. 579 So. 2d 931 (La. 1991).

76. \textit{Id.} at 944-45.
court did not address whether the discretionary function statute merely codified prior jurisprudential doctrines, nor did it mention the legislature's explanation, provided in subparagraph D of the statute, that the "purpose" of the statute was "not to reestablish any immunity based on the status of sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws." The Louisiana Supreme Court has defined "substantive" laws as creating new legal principles and obligations, and procedural or interpretative laws as "relating to the form of the proceeding or the operation of the laws."\(^7\) The Socorro decision therefore could be read to recognize implicitly that Louisiana Revised Statutes 9:2798.1 purported to restore a substantive governmental immunity that had not existed after 1974.\(^8\)

In Fowler, the Louisiana Supreme Court, in its opinion on original hearing,\(^7\) referred to its earlier decision in Stewart v. Schmieder\(^8\) as repudiating the public duty doctrine as an absolute or categorical rule. The Fowler court on original hearing criticized the public duty doctrine as involving "the intellectually questionable concept that when a governmental body owes a duty to everyone, the result is a duty to no one."\(^8\) The court, however, recognized that the Stewart decision had stopped short of a total rejection of the "public duty" concept:

On the other hand, the Stewart decision did not hold (and we do not here hold) that a governmental body will be liable any time a person's injury could have been prevented by a public official's proper performance of an inspection or similar function. The existence of a duty and the scope of liability resulting from a breach of that duty must be decided according to the facts and circumstances of the particular case. We therefore conclude that governmental agencies in the performance of governmental functions may be subjected to the imposition of certain duties, the breach of which may result in liability for damages to those injured by a risk contemplated by that duty.\(^8\)

Because the Fowler plurality, on rehearing, reinstated the court's original opinion as supplemented by the rehearing opinion,\(^8\) the original opinion

\(^7\) E.g., Graham v. Sequoya Corp., 478 So. 2d 1223, 1226 (La. 1985); Socorro, 579 So. 2d at 944 n.12.

\(^8\) E.g., Robertson, supra note 55, at 869, in which Professor Robertson states his belief that "[t]he clear intent of section 9:2798.1 is to restore governmental units' immunity for a large range of their activities. It seems disingenuous to contend that the statute does not change the law."
can be viewed as authoritative of the plurality's position on the current viability of the public duty doctrine in Louisiana law.

The Fowler analysis appears to apply the public duty doctrine as an element of the duty-risk analysis. If the "public duty" alleged to have been breached encompassed the particular risk forming the basis of the plaintiff's suit, liability may be imposed upon the governmental agency or employee for breach of that duty.\(^8\)

Since Fowler was decided, Louisiana appellate courts have continued to apply or refer to the public duty doctrine in their opinions.\(^9\) While the continued viability of the public duty doctrine is unclear, recent decisions indicate that the Louisiana courts, perhaps following the language of Fowler on original hearing, are continuing to apply the public duty doctrine through the rubric of the duty-risk analysis. Under these cases, if the "public duty" alleged to have been breached is not found to have been designed to protect against the particular risk to the particular class of individuals of which the plaintiff is a member, the governmental defendant is exonerated.\(^10\) Because the public duty doctrine

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84. Id. at 7 (on original hearing).
85. E.g., Sunlake Apartment Residents v. Tonti Dev. Corp., 602 So. 2d 22 (La. App. 5th Cir.), writ denied, 607 So. 2d 558, 559 (1992); Persilver v. Louisiana Dep't of Transp., 592 So. 2d 1344, 1347 n.2 (La. App. 1st Cir. 1991) (citing numerous cases and authorities); Chance v. State, 567 So. 2d 683, 686 (La. App. 3d Cir. 1990) (citing other cases and authorities and stating that Stewart was possibly overruled by enactment of La. R.S. 9:2798.1).
86. E.g., Chance, 567 So. 2d at 686 (finding that, under the "public duty" doctrine, the general public duty owed by a policeman can form the basis for recovery by a particular plaintiff only if the general public duty was "transformed into a duty owed to the plaintiff personally due to the establishment of a one-on-one relationship through closeness and proximity of time," or a statute or ordinance setting forth the public duty "indicates by its language that the duty is designed to protect a particular class of individuals") (citing Zeagler v. Town of Jena, 556 So. 2d 978, 981 (La. App. 3d Cir.), writ denied, 560 So. 2d 14 (1990), citing Stewart v. Schmieder, 386 So. 2d 1351, 1358 (La. 1980)). The court exonerated a sheriff from liability to the Department of Transportation and Development (DOTD), finding that the sheriff's public duty was not owed to the particular class of individuals into which the DOTD fell); Sunlake Apartment Residents v. Tonti Dev. Corp., 602 So. 2d 22, 26 (La. App. 5th Cir.) (exonerating state and local fire and safety departments and officials of liability for an apartment fire, relying upon the Fowler opinion on original hearing), writ denied, 607 So. 2d 558, 559 (1992); Kniepp v. City of Shreveport, 609 So. 2d 1163, 1169 (La. App. 2d Cir. 1992) (exonerating a city from liability for police officers' handling of a riot), writ denied, 613 So. 2d 976 (1993). Although immunizing the city from liability under the discretionary function exception, the Kniepp court also stated that [because the duty of a policeman under these circumstances is not specifically delineated by statute, we find no one-to-one duty which constitutes an exception to the public duty doctrine. See Smith v. City of Kenner, 428 So. 2d 1171, 1174 (La. App. 5th Cir. 1983). Likewise, we find no personal or individual relationship between SPD and plaintiffs, and hence no transformation of the

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can be expressed easily through duty-risk principles, it is likely that the
courts will continue to apply "public duty" concepts as elements of the
duty-risk analysis.

VI. CONCLUSION

This area of the law is developing at an extremely rapid pace. As
discussed above, if Louisiana courts followed Gaubert, the Louisiana
discretionary function exception could be extended to immunize a broad
range of operational actions and functions of state and municipal entities
and employees that have in the past been held subject to tort liability.

There is, indeed, evidence that Louisiana jurisprudence is moving
toward extending the application of the Louisiana exception even without
reference to the Gaubert decision. In Kniepp v. City of Shreveport, the
Louisiana Second Circuit Court of Appeal held that city police
officers' handling of a violent riot, including their particularized decisions
as to crowd control, withdrawal of officers from the riot scene, and
other seemingly operational decisions, were "reasonably related to a
public policy-based governmental objective to protect life" and there-
fore entitled to discretionary function immunity. The Kniepp court relied
upon Fowler and federal jurisprudence, but made no reference to Gaub-
ert. Perhaps the appellate courts are awaiting the Louisiana Supreme
Court's ruling on the applicability of Gaubert.

Id. 87. Louisiana's discretionary function exception may be impacted by Senate Resolution
No. 44 of the legislature's regular session of 1992. That resolution purports to "create
and provide for the Tort Claims Study Commission to study and make specific recom-
mendations with respect to a procedure for tort claims against the state and political
subdivisions of the state." The resolution requires, in part, that the study commission
make recommendations to the Senate Committee on the Judiciary regarding the feasibility
of enacting a comprehensive Louisiana Tort Claims Act and to make other recommen-
dations regarding the consolidation of statutory limitations of liability, effects of judgments,
and other matters affecting the tort liability of Louisiana and its political subdivisions.
The resolution requires the commission to give recommendations and findings to the Senate
Committee on the Judiciary and the House Committee on Civil Law and Procedure by
Senate Committee on the Judiciary have informed the authors that the required written
report of findings and recommendations has not been submitted. The current status of
the study commission and its efforts, if any, remains uncertain.

Any such comprehensive tort claims act probably should be enacted by constitutional
amendment so as to avoid the constitutionality problems discussed in the text.

88. Kniepp, 609 So. 2d at 1163.

89. Id. at 1168. Judge Brown wrote a vigorous dissent, opining that the challenged
actions were operational in nature and therefore unprotected. Id. at 1170 (Brown, J.,
dissenting).
The jurisprudential tests and standards defining the scope of the federal and Louisiana discretionary function exceptions are fluid, amorphous, and difficult to apply. The discretionary function exception is commonly implicated in cases involving the most tragic of circumstances. Understandably, consistency of analysis and result may be harder to achieve in such difficult, emotionally wrought cases. The resulting uncertainty in the law, however, disserves both governmental and private interests. Judicial action is needed to resolve the legal issues discussed in this article and to calm the troubled waters of this difficult area of the law.

90. In Fowler v. Roberts, 556 So. 2d 1, 14 (La. 1989) (on rehearing), for example, an epileptic driver, after receiving a renewed driver's license without having submitted a medical report, suffered a seizure behind the wheel, killed two motorists, and seriously injured two more. In Berkovitz v. U.S., 486 U.S. 531, 533, 108 S. Ct. 1954, 1957 (1988), a child contracted polio and became almost totally paralyzed after ingesting a tainted polio vaccine which had been approved by a federal agency.