

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #046

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **21st day of October, 2022** are as follows:

BY Hughes, J.:

2022-CQ-00364

MARK WIGHTMAN, DOCTOR OF DENTAL SURGERY; COURTNEY WIGHTMAN, DOCTOR OF DENTAL SURGERY; WIGHTMAN FAMILY DENTAL, L.L.C VS. AMERITAS LIFE INSURANCE CORPORATION; DENTEMAX, L.L.C.

CERTIFIED QUESTION ANSWERED. SEE OPINION.

Crichton, J., concurs in the result and assigns reasons.
Crain, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2022-CQ-00364

**MARK WIGHTMAN, DOCTOR OF DENTAL SURGERY;
COURTNEY WIGHTMAN, DOCTOR OF DENTAL SURGERY;
WIGHTMAN FAMILY DENTAL, L.L.C**

VERSUS

AMERITAS LIFE INSURANCE CORPORATION; DENTEMAX, L.L.C.

**ON CERTIFIED QUESTION FROM
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

HUGHES, J.

As stated in **Wightman v. Ameritas Life Insurance**, 22-00364 (La. 4/12/22), 335 So.3d 831, we granted certification of the following question, presented to this court by the United States Court of Appeals, Fifth Circuit, in **Wightman v. Ameritas Life Insurance**, No. 21-30148, 2022 WL 610795 (5th Cir. 2022) (per curiam): “Are claims arising under the Louisiana’s Preferred Provider Organization Act, La. R.S. 40:2203.1, delictual or contractual for prescriptive purposes.” For the reasons below, we answer that, since claims under La. R.S. 40:2203.1 arise out of “preferred provider organization” contracts, the applicable liberative prescriptive period is, as stated in La. C.C. art. 3499, ten years.

FACTS AND PROCEDURAL HISTORY

The plaintiff/dental providers entered into a preferred provider organization contract with DenteMax, L.L.C. (“DenteMax”) in 2009, wherein the plaintiffs agreed to discount their fees for dental services and treatment when providing dental care to persons eligible to use a DenteMax PPO network. In 2012, Ameritas Life

Insurance Corporation (“Ameritas”) “leased” the DenteMax PPO network by entering into a PPO “network agreement” with DenteMax, which purported to extend to Ameritas access to DenteMax’s network of dental services providers at the discounted rates DenteMax negotiated with the plaintiff/dental providers.¹ By this means, Ameritas contends it was allowed to reimburse the plaintiff/dental providers for dental services provided to Ameritas’s insureds, at the discounted rates negotiated by DentaMax with those dental providers.

Although Ameritas gave notice to the plaintiffs of its agreement with DenteMax, the benefit cards issued by Ameritas to its insureds (for presentation to the dental providers) allegedly did not adequately identify Ameritas’s intent to access DenteMax’s discount network.

After Ameritas insureds obtained dental services from the plaintiffs, who billed Ameritas at the full rate rather than the discounted rate it billed for DenteMax patients, Ameritas refused to pay the non-discounted dental fees billed and, instead, tendered payments based on DenteMax’s negotiated discounted rates. Thereafter, the plaintiffs filed suit in federal district court for violations of La. R.S. 40:2203.1, alleging entitlement to enforce the statutory provisions against Ameritas and DenteMax (who appears to have been subsequently dismissed as a defendant); and statutory damages and attorneys’ fees for non-compliance with La. R.S. 40:2203.1 were also sought.

After due proceedings, the federal district court ruled in favor of the defendants, based on the plaintiffs’ admission that they filed suit over two years after the defendants had last violated La. R.S. 40:2203.1, finding that plaintiffs’ claims under La. R.S. 40:2203.1 had prescribed. The federal district court also held that the plaintiffs failed to allege facts sufficient to support a claim that Ameritas is a “group

¹ There is no indication that Ameritas had any direct contractual relationship with the plaintiffs.

purchaser” within the meaning of La. R.S. 40:2203.1(G). Therefore, the federal district court entered a final judgment dismissing plaintiffs’ claims against Ameritas with prejudice.

Plaintiffs subsequently appealed to the U.S. Fifth Circuit Court of Appeals, who then certified the question – “Are claims arising under the Louisiana’s Preferred Provider Organization Act, La. R.S. 40:2203.1, delictual or contractual for prescriptive purposes” – to this court. **Wightman v. Ameritas Life Ins.**, No. 21-30148, 2022 WL 610795 (5th Cir. 2022).

MOTION TO STRIKE

After the filing of briefs in this court, the plaintiff/dental providers filed a motion to strike portions of Ameritas’s brief(s), requesting this court strike arguments on issues that had not been raised by the certified question and/or that seek to “revisit the merits of the underlying federal court ruling currently on appeal and the Fifth Circuit per curium opinion.” Specifically, the plaintiff/dental providers object to arguments in Ameritas’s brief(s) related to: whether the plaintiffs have asserted third-party beneficiary claims against Ameritas; whether Ameritas is a “group purchaser” under the PPO Act; whether the PPO Act applies to *dental* providers like the plaintiffs; and whether the second sentence of La. R.S. 40:2203.1(A) (“The provisions of this Section shall not apply to a group purchaser when providing health benefits through its own network or direct provider agreements or to such agreements of a group purchaser.”) exempts Ameritas from any liability for penalties under the PPO Act.

At the oral argument of this matter, a ruling on the motion to strike was referred to the merits. We now grant the motion to strike to the extent Ameritas’s arguments seek a factual determination from this court and raise legal issues not within the scope of the certified question, as plaintiffs’ motion to strike suggests.

Louisiana Supreme Court Rule XII and La. R.S. 13:72.1 govern certified

questions to this court; these authorities provide (in pertinent part):

RULE XII. CERTIFIED QUESTIONS FROM FEDERAL COURTS

Section 1. When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana ***for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law.*** This court may, in its discretion, decline to answer the questions certified to it.

* * *

§ 72.1. Declaration of state law to federal courts

A. The supreme court of this state may, by rule of court, provide that when it shall appear to the Supreme Court of the United States, or to any court of appeals of the United States, that there are involved, in any proceeding before it, questions or propositions of the laws of this state, which are determinative of the said cause, and there is no clear controlling precedent in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state ***for instructions concerning such questions or propositions of state law,*** which certificate the supreme court of this state may, by written opinion, answer.

B. The supreme court of this state is hereby authorized and empowered to collaborate with any and all other courts of last resort of other states and of the United States in the preparation and approval of uniform rules of court to make effective this and similar laws.

(Emphasis added.)

On a certified question from a federal court, based on Rule XII, this court may only render a judgment or opinion concerning such questions or propositions *of Louisiana law*, not resolve factual issues. See **Borcik v. Crosby Tugs, L.L.C.**, 16-1372, pp. 1-2 (La. 5/3/17), 222 So.3d 672, 673 (“We decide certified questions on the facts as presented to us by the Court of Appeals.”); **MCI Communications Services, Inc. v. Hagan**, 11-1039, p. 1 (La. 10/25/11), 74 So.3d 1148, 1149 (“We decide this certified question on the facts as presented to us by the Court of Appeals.”).

Accordingly, this court will address only the legal issue presented and reserve

to the federal courts resolution of legal and factual issues not encompassed within the certified question.

LIBERATIVE PRESCRIPTION APPLICABLE TO R.S. 40:2203.1

The Preferred Provider Organization Act (“PPO Act”) (La. R.S. 40:2201 et seq.) authorizes contractual agreements for the payment of discounted rates for the provision of health care. **Broussard Physical Therapy v. Family Dollar Stores, Inc.**, 08-1013, p. 8 (La. 12/2/08), 5 So.3d 812, 817. The PPO Act authorizes any “**group purchaser**”² to “**contract** with any **provider**”³ in “any **contractual agreement** or agreements to form a **preferred provider organization**.”⁴ La. R.S. 40:2203(A) (emphasis added). Section 2203.1 of the PPO Act states: “Except as otherwise provided in this Subsection, the requirements of this Section shall apply to all **preferred provider organization agreements** that are applicable to **medical services** rendered in this state and to group purchasers as defined in this Part. The provisions of this Section shall not apply to a group purchaser when providing health benefits through its own network or direct provider agreements or to such

² A “**group purchaser**” is defined by La. R.S. 40:2202(3) as “an organization or entity which **contracts with providers for the purpose of establishing a preferred provider organization**.” (Emphasis added.) A “group purchaser” may include: “(a) Entities which contract for the benefit of their insured, employees, or members such as insurers, self-funded organizations, Taft-Hartley trusts, or employers who establish or participate in self-funded trusts or programs. (b) Entities which serve as brokers for the formation of such contracts, including health care financiers, third party administrators, providers, or other intermediaries.” La. R.S. 40:2202(3).

³ A “**provider**” is defined by La. R.S. 40:2202(6) as “one or more entities which offer **health care services** and shall include but not be limited to hospitals, individuals, or groups of physicians, individuals or groups of psychologists, nurse midwives, ambulance service companies, and other health care entities. Any health care entity which is specifically covered by a group purchaser’s insurance policy, employee benefits, self-funded organization or Taft-Hartley trust benefits or plan shall be construed to be a “provider” for purposes of consideration under this Part.” (Emphasis added.)

⁴ A “**preferred provider organization**” is defined by La. R.S. 40:2202(5)(a) as “a contractual agreement or agreements **between a provider or providers and a group purchaser or purchasers** to provide for **alternative rates of payment** specified in advance for a defined period of time in which: (i) The provider agrees to accept these alternative rates of payment offered by group purchasers to their members whenever a member chooses to use its services. (ii) There is a tangible benefit to the provider in offering such alternative rates of payment to the group purchaser.” (Emphasis added.)

agreements of a group purchaser.”⁵ (Emphasis added.)

In addition, La. R.S. 40:2203.1(B) requires that a PPO’s “alternative rates of payment ***shall not be enforceable or binding*** upon any provider ***unless*** such organization is clearly ***identified on the benefit card issued*** by the group purchaser or other entity accessing a group purchaser’s contractual agreement or agreements ***and presented to the participating provider*** when medical care is provided....” (Emphasis added.) Further, La. R.S. 40:2203.1(D) declares: “In no instance shall any provider be bound by the terms of a preferred provider organization agreement that is in violation of this Part.”

The penalty provisions of La. R.S. 40:2203.1 are set forth in Paragraph (G), which states: “***Failure to comply*** with the provisions of Subsection A, B, C, D, or F of this Section ***shall subject a group purchaser to damages payable to the provider*** of double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorney fees to be determined by the court....” (Emphasis added.)

Prerequisite factual determinations for application of La. R.S. 40:2203.1 include: whether the plaintiffs’ dental services and/or treatment constitute “medical services” for purposes of the PPO Act, and the related question of whether the plaintiffs are “providers” who “offer health care services” as set forth in La. R.S. 40:2202(6); whether Ameritas is a “group purchaser,” as defined by La. R.S. 40:2202(3); and whether the contract between the plaintiffs and DenteMax is a “preferred provider organization agreement,” as defined by La. R.S. 40:2202(5)(a),

⁵ Revised Statute 40:2203.1 was added to the PPO Act by 1999 La. Acts, No. 1274, and Section 2 of Act 1274 states: “This Act shall apply to ***preferred provider organization agreements*** issued, renewed, or amended in any form after January 1, 2000. Existing preferred provider organization agreements shall conform to the provisions of this Act no later than January 1, 2001.” (Emphasis added.)

which did not prohibit “lease” by DenteMax to Ameritas.⁶ As indicated hereinabove, such factual determinations are the province of the trier-of-fact, while this court granted certification to resolve only the certified question of law. The limited issue presented to this court for resolution is whether the remedies set forth in La. R.S. 40:2203.1 are subject to the liberative prescriptive period applicable to delictual obligations or contractual obligations.

“Delictual actions are subject to a liberative prescription of one year.” La. C.C. art. 3492. “Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.” La. C.C. art. 3499. See also **Smith v. Citadel Insurance**, 19-00052, p. 6 (La. 10/22/19), 285 So.3d 1062, 1067; **Roger v. Dufrene**, 613 So.2d 947, 948 (La. 1993).

When the statute at issue does not set forth the applicable prescriptive period, the nature of the duty breached determines whether the action is in tort or in contract. See **Smith v. Citadel Insurance**, 19-00052 at pp. 6-8, 285 So.3d at 1067-68; **DePhillips v. Hospital Service District No. 1 of Tangipahoa Parish**, 19-01496, p. 6 (La. 7/9/20), 340 So.3d 817, 821; **Gunderson v. F.A. Richard & Assoc.**, 09-1498, p. 6 (La. App. 3 Cir. 6/30/10), 44 So.3d 779, 784.

In **Gunderson v. F.A. Richard & Assoc.**, the Louisiana Third Circuit Court of Appeal examined the PPO Act and, recognizing that the Act does not set out a prescriptive period for bringing an action for violation of La. R.S. 40:2203.1, found that such an action is personal in nature as defined by La. C.C.P. art. 422 (“A

⁶ We note the recent passage of the Network Leasing Act (enacted by 2021 La. Acts, No. 26, effective August 1, 2021), consisting of La. R.S. 22:1171 and La. R.S. 22:1172, which expressly governs “dental services” (“services for the diagnosis, prevention, treatment, or cure of a dental condition, illness, injury, or disease” and which “does not include services delivered by a provider that are billed as *medical* expenses per the terms of a health insurance plan”) and “dental benefit plans” (“a benefit plan which pays or provides dental expense benefits for covered dental services and is delivered or issued for delivery by or through a dental carrier on a stand-alone basis”). (Emphasis added.) The Network Leasing Act provides, inter alia: “A contracting entity may grant a third party access to a provider network contract or a provider’s dental services or contractual discounts pursuant to a provider network contract if ... [t]he contract specifically states that the contracting entity may enter into an agreement with a third party allowing the third party to obtain the contracting entity’s rights and responsibilities as if the third party is the contracting entity....”

personal action is one brought to enforce an obligation against the obligor, personally and independently of the property which he may own, claim, or possess.”). **Gunderson v. F.A. Richard & Assoc.**, 09-1498 at p. 6, 44 So.3d at 784. Because La. C.C. art. 3499 provides that personal actions are subject to a ten-year prescriptive period “unless otherwise provided by legislation” and prescription on the PPO Act claim at issue therein was not “otherwise provided by legislation,” the **Gunderson** court found no error in the trial court’s determination that a ten-year prescriptive period applied to the action. **Id.**, 09-1498 at p. 6, 44 So.3d at 784.

We agree with **Gunderson** and, after reviewing our decisions in **Smith v. Citadel Insurance** and **DePhillips v. Hospital Service District No. 1 of Tangipahoa Parish**, we conclude that these prior decisions support our holding herein.

In **Smith v. Citadel Insurance**, 19-00052 at p. 1, 285 So.3d at 1064, this court granted a writ application to determine whether a first-party bad faith claim against an insurer, pursuant to La. R.S. 22:1973 (for the alleged violation of an insurer’s statutory duty “to adjust claims fairly and promptly and to make a reasonable effort to settle claims”), is a delictual action subject to a one-year prescriptive period or whether it is a contractual claim subject to a ten-year prescriptive period. The **Smith** tortfeasor, in the 2010 automobile accident case at issue, assigned her rights against her insurer for her claim under La. R.S. 22:1973 to the tort victim. The tort victim thereafter filed suit in 2017 against the tortfeasor’s insurer, asserting via subrogation the tortfeasor’s La. R.S. 22:1973 claim for the insurer’s bad faith failure to fairly and promptly settle the damage claim. **Id.**, 19-00052 at pp. 1-2, 285 So.3d at 1064. We noted in **Smith** that the classic distinction between damages *ex contractu* and damages *ex delicto* is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons. **Id.**, 19-00052 at p. 6, 285 So.3d at 1067. In the

absence of the contractual obligations created between the **Smith** insurer and the tortfeasor, the duty of good faith would not have existed. **Id.**, 19-00052 at p. 10, 285 So.3d at 1069 (also citing La. C.C. art. 1759 (“Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.”); La. C.C. art. 1983 (“Contracts have the effect of law for the parties.... Contracts must be performed in good faith.”)). Thus, the affirmative duty to exercise good faith in settlement negotiations was inferred in the contract between the parties and memorialized in the statute at issue (La. R.S. 22:1973, providing a penalty for violation of the insurer’s stated duty “to adjust claims fairly and promptly and to make a reasonable effort to settle claims”). Because we found in **Smith** that an insurer’s bad faith failure to settle was a breach of its contractual obligation and interrelated fiduciary duty, we held the insured’s cause of action was personal and subject to a ten-year prescriptive period. **Id.**

In **DePhillips v. Hospital Service District No. 1 of Tangipahoa Parish**, 19-01496, p. 5 (La. 7/9/20), 340 So.3d 817, 821, at issue was the Balance Billing Act, La. R.S. 22:1871, et seq., which prohibits a “contracted healthcare provider” from collecting or attempting to collect amounts from an insured patient in excess of the contracted reimbursement rate paid by his healthcare insurer. The Balance Billing Act does not set forth a prescriptive period; therefore, in order to determine the applicable prescriptive period, this court examined the nature of the duty breached in order to determine whether the action was *contractual*, falling within La. C.C. art. 3499, or *delictual*, falling within La. C.C. art. 3492, by assessing the distinction between damages *ex contractu* and damages *ex delicto* (i.e., that the former flow from the breach of a special obligation contractually created by the will of the parties, while the latter flow from the dereliction of duties created by the law and imposed upon a party regardless of his will). **DePhillips**, 19-01496 at p. 6, 340 So.3d at 821-22 (citing **Smith v. Citadel Insurance**, 19-00052 at p. 6, 285 So.3d at 1067; **Roger**

v. Dufrene, 613 So.2d at 948). We concluded in **DePhillips** that, because the healthcare provider had not contractually assumed either an express or implied obligation to forgo balance billing and the obligation not to balance-bill was a general one created by law, damages for the breach of the duty imposed by law arose *ex delicto* and were extinguished by the prescription of one year. **DePhillips**, 19-01496 at pp. 6-8, 340 So.3d at 821-22. We rejected the **DePhillips** plaintiffs' claims that since the circumstances arose in the context of one or more contractual relationships the cause of action was contractual, reasoning that none of the alleged contracts were the basis for the wrongdoing party's liability (only the occasion for the commission of that party's tort). Rather, the breach at issue was of a statutory duty not related to any duty arising out of the contractual provisions, thus, the cause of action was found to be delictual in nature, and the one-year delictual prescriptive period was found applicable. **DePhillips**, 19-01496 at pp. 10-13, 340 So.3d at 824-26.

In the instant case, assuming the parties meet the definitional prerequisites of La. R.S. 40:2203.1 and are thus entitled to the benefits of this statute, performance in good faith of the parties' respective obligations under the "preferred provider organization" contract at issue would be implied even if not directly stated therein, under Louisiana's obligations laws, as we similarly held in **Smith v. Citadel Insurance**, *supra*. See La. C.C. art. 1759 ("Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation."); La. C.C. art. 1983 ("Contracts have the effect of law for the parties.... Contracts must be performed in good faith.").⁷ Therefore, the damages and other penalties set forth in

⁷ See also La. C.C. art. 1984 ("Rights and obligations arising from a contract are heritable and assignable unless the law, the terms of the contract or its nature preclude such effects."); La. C.C. art. 2003 ("An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure. If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence."); La. C.C. art. 2008 ("An obligor whose failure to perform the principal obligation is justified by a valid

La. R.S. 40:2203.1 arise out of the implied contractual obligation of good faith in the performance of the contract between the parties, as well as with respect to their lawful assignees and/or lessees, which includes the provision of notice necessary to the accomplishment of the parties' performances under the contract. The contractual nature of the duties at issue mandates our conclusion that the prescriptive period for claims on the related statutory remedies provided in La. R.S. 40:2203.1 is that set out in La. C.C. art. 3499, ten years.

DECREE

We have answered the certified question as set forth in this opinion. Pursuant to Rule XII, Supreme Court of Louisiana, the judgment rendered by this court upon the question certified shall be sent by the clerk of this court under its seal to the United States Court of Appeals for the Fifth Circuit and to the parties.

excuse is also relieved of liability for stipulated damages."); La. C.C. art. 2053 ("A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties."); La. C.C. art. 2054 ("When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose."); La. C.C. art. 2055 ("Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another. Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation."); La. C.C. art. 2642 ("All rights may be assigned, with the exception of those pertaining to obligations that are strictly personal. The assignee is subrogated to the rights of the assignor against the debtor."); La. C.C. art. 2674 ("A lease of a thing that does not belong to the lessor may nevertheless be binding on the parties."); La. C.C. art. 2713 ("The lessee has the right to sublease the leased thing or to assign or encumber his rights in the lease, unless expressly prohibited by the contract of lease. A provision that prohibits one of these rights is deemed to prohibit the others, unless a contrary intent is expressed. In all other respects, a provision that prohibits subleasing, assigning, or encumbering is to be strictly construed against the lessor.").

SUPREME COURT OF LOUISIANA

No. 2022-CQ-00364

MARK WIGHTMAN, DOCTOR OF DENTAL SURGERY' COURTNEY
WIGHTMAN, DOCTOR OF DENTAL SURGERY; WIGHTMAN FAMILY
DENTAL, L.L.C

VS.

AMERITAS LIFE INSURANCE CORPORATION; DENTEMAX, L.L.C.

On Certified Question from the United States Court of Appeals for the Fifth Circuit

Crichton, J., concurs in the result and assigns reasons:

I agree with the Court’s rulings in this case. Preliminarily, I concur in the decision to grant the providers’ motion to strike portions of the defendant’s brief. *See Borcik v. Crosby Tugs, L.L.C.*, 2016-1372, pp. 1-2 (La. 5/3/17), 222 So. 3d 672, 673 (“We decide certified questions on the facts as presented to us by the Court of Appeals.”).

As to the certified question posed, I concur in the Court’s finding that claims arising under Louisiana’ Preferred Provider Organization Act, La. R.S. 40:3303.1, are contractual for prescriptive purposes. In this Court’s recent opinion, *DePhillips v. Hospital Service District No. 1 of Tangipahoa Parish*, we upheld the longstanding principle that “[t]he classic distinction between damages ex contractu and damages ex delicto is that the former flow from the breach of a *special obligation contractually assumed by the obligor*, whereas the latter flow from the *violation of a general duty owed to all persons*.” 2019-1496 (La. 7/9/20), 340 So. 3d 817, *reh’g denied*, 2019-01496 (La. 9/9/20) (emphasis in original). In determining whether damages flow from “a special obligation,” we must be mindful of “a fundamental principal of interpretation” in determining whether fault is ex contractu; that is, “a contract binds the parties not only to its express provisions but also to whatever the

law, equity or usage regards as implied in a contract of that kind or as necessary for such a contract to achieve its purpose.” 6 Saul Litvinoff & Ronald J. Scalise Jr., La. Civ. L. Treatise, Law of Obligations § 16.13 (2d ed.). In other words, a duty imposed can be “conventional in origin” even if not expressly written into the contract itself.

In *DePhillips*, unlike the case here, the obligations binding health care providers under the Balanced Billing Act, La. R.S. 22:1871, *et seq.*, did not arise out of any agreement between the defendant-health care provider and the plaintiff-insured. *DePhillips*, 340 So. 3d at 824 (noting the insured failed to point to any contract with the defendant-health care provider). The Court thus distinguished the *DePhillips* facts from *Smith v. Citadel Ins. Co.*, 2019-052 (La. 10/22/19), 285 So. 3d 1062, 1066-67, where we held a claim is contractual if it “emanates from the contract between the parties.” *Smith*, 285 So. 3d at 1069; *DePhillips*, 340 So. 3d at 824. Relying on this Court’s prior decisions establishing that the insured’s right of action arises out of the Balance Billing Act and not out of a contractual relationship with the healthcare provider, our *DePhillips* opinion reasoned that the obligations breached were not contractual because the parties to the lawsuit were not parties to a contract to which the law imposed obligations by default. *DePhillips*, 340 So. 3d at 823, citing *Emigh v. West Calcasieu Cameron Hosp.*, 2013-2985 (La. 7/1/14), 145 So. 3d 369.

Unlike the claims in *DePhillips*, the existence of a contract from which special obligations are imposed and from which damages may arise under La. R.S. 40:2203.1, is evident in the record. Not only does the contract clearly exist, but it must exist for La. R.S. 40:2203.1 to apply. *See* La. R.S. 40:2203.1(A), 40:2202(3). Accordingly, I agree with the majority and find the obligations set forth in La. R.S. 40:2203.1 are conventional in origin such that a ten-year prescriptive period applies to a provider’s cause of action against a group purchaser’s failure to comply with the obligations therein imposed. *See* La. C.C. art. 3499.

SUPREME COURT OF LOUISIANA

No. 2022-CQ-00364

**MARK WIGHTMAN, DOCTOR OF DENTAL SURGERY' COURTNEY
WIGHTMAN, DOCTOR OF DENTAL SURGERY; WIGHTMAN FAMILY
DENTAL, L.L.C**

VS.

AMERITAS LIFE INSURANCE CORPORATION; DENTEMAX, L.L.C.

On Certified Question from the United States Court of Appeals for the
Fifth Circuit

CRAIN, J. dissents and assigns reasons.

I respectfully disagree with the majority’s conclusion that claims arising under the Louisiana’s Preferred Provider Organization Act, Louisiana Revised Statutes 40:2203.1, arise out of contracts, and, thus, carry a ten-year prescriptive period. The analysis, and ultimately the outcome, are controlled by *DePhillips v. Hospital Service District No. 1 of Tangipahoa Parish*, 19-01496 (La. 7/9/20), 340 So.3d 817. While the majority refers to *DePhillips*, they fail to use its analysis and, consequently, reach a result that it does not support.

As stated in my concurring opinion in *DePhillips*, the initial inquiry in determining an action’s prescriptive period is whether the action is “real” or “personal.” As an action “brought to enforce an obligation against the obligor, personally and independently of the property which he may own, claim, or possess,” this action is a “personal” action. Louisiana Code of Civil Procedure article 422. The default provision for all “personal” actions is found in Louisiana Civil Code article 3499 and provides, “Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.” Thus, the search for legislation, if any, that shortens this prescriptive period ensues. A “delictual” action provided for in Louisiana Civil Code art. 3492, which is subject to a one-year prescriptive period, is one such exception to the ten-year default.

The source of the obligation is determinative of how the action is categorized. *Roger v. Dufrene*, 613 So.2d 947, 948 (La. 1993). When an action arises out of the ‘breach of a duty *imposed by law*, the damages [arise] *ex delicto*, and [are] extinguished by the prescription of *one year*.” *Lagrone v. Kansas City So.Ry. Co.*, 157 La. 559, 102 So. 669, 670 (La. 1925). (emphasis in original). *See also DePhillips*, 340 So. 3d at 821 (“damages *ex delicto*. . . flow from the violation of a general duty owed to all persons.”)

To determine what prescriptive period applies to claims brought under Louisiana Revised Statutes 40:2203.1(G), we must ask what the duty is and from where it arose. The plaintiffs allege Ameritas did not adequately identify the DenteMax PPO on its benefit cards or failed to provide advance written notice of its intent to access DenteMax’s discount network. Thus, they claimed a breach of Louisiana Revised Statutes 40:2203.1, the duty being to provide the benefit card with the statutorily required content. Failure to comply with the provisions of that statute subjects group purchasers to a penalty. La. R.S. 40:2203.1(G). The plaintiffs’ claim against Ameritas is to recover this penalty, which is statutorily provided for. The right to this penalty is not created by a contract between the plaintiffs and Ameritas. Indeed, there is no contract between the plaintiff and Ameritas. Rather, the obligation to pay the penalty arises from a duty imposed by law for failure to follow that law. Said another way, the obligations being breached are created by statute (“the provisions of Subsection A, B, C, D or F”) and the punitive consequence is also created by statute (“[f]ailure to comply. . . shall subject a group purchaser to damages payable to the provider of double the fair market value of the medical services provided”). Another way of viewing it is that before the enactment of the statute, there was no general duty to provide a benefit card containing statutorily required content. Without the statute, that duty did not exist in any form or to any degree. It is solely a creature of statute, enacted to address an

industry-wide problem. Thus, both the underlying obligations and the penalty due if those obligations are breached are statutory, regardless if any of these provisions have been memorialized in a contract between the plaintiffs and a third-party, DenteMax.

DePhillips correctly found a one-year prescriptive period applied to claims under the Balance Billing Act because a statute was the basis of the duty not to balance bill. That was a duty imposed by law and owed to all, regardless that contractual relationships surrounded, and often, housed that duty.¹ But for the statute, the duty did not exist. As I pointed out in my concurrence in *DePhillips*, not only did the obligation not to balance bill not pre-date the statute, but balance billing was allowed. The prohibition and the penalty for breaching that prohibition were created by statute. Thus, we correctly concluded that the one-year prescriptive period for statutorily created rights applied. Similarly, but for Louisiana Revised Statutes 40:2203.1(G), the obligation to provide a benefit card with specific content and to pay a penalty for failure to comply with that requirement does not exist.

The duty here is created by statute (imposed by law and owed to all). It is delictual in nature and subject to a one-year prescriptive period. Thus, I dissent.

¹ See *Loew's, Inc. v. Don George, Inc.*, 237 La. 132, 145, 110 So. 2d 553, 557-58 (1959), citing to *Sizeler v. Employers' Liability Assurance Corporation*, La. App., 102 So. 2d 326, 328 ("There are, in certain relationships, duties imposed by law, and a failure to perform these obligations is considered as a tort though the relationships themselves may be created by contract encompassing the same subject.