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LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2010:1

January 1, 2010

UPCOMING MEETINGS

January 24-28, 2010	LADC Winter Meeting, Beaver Creek, CO	10.0*#
February 5-6, 2010	LADC North Louisiana Defense Lawyers' Seminar, University Club, Shreveport	10.0*#
April 11-16, 2010	LADC Annual Meeting, Alvear Palace, Buenos Aires	8.0*#

(A registration form may be downloaded at www.ladc.org if registration is open at this time.)

*- includes one credit for professional responsibility (ethics)

- includes one credit for professionalism

BULLETIN BOARD

HAPPY NEW YEAR TO EVERYONE!

SKI BEAVER CREEK: Last call to sign up for the LADC Ski Seminar at The Charter at Beaver Creek! The trails at Beaver Creek opened on November 25. You can check the ski conditions by going to skireport.com. LADC is tax exempt for 2010. Therefore, accommodations are very affordable and we have been given an extension on our room hold through the end of the year. For information regarding LADC discounted room rates as well as discounted group lift tickets and equipment rental, please contact Heather Noonan: 504-214-5285 or you may email her: heather_noonan@yahoo.com.

NORTH LOUISIANA SEMINAR: Scheduled for February 5-6, 2010 at The University Club in Shreveport. Registration materials are available on the LADC website.

ANNUAL MEETING: Buenos Aires, Argentina, April 11-16, 2010. We have only three rooms remaining, and you are urged to register as soon as possible to hold a place. Our host hotel, the Alvear Palace (www.alvearpalace.com), is reputed to be the finest hotel in South America. The American Ambassador, Vilma Martinez, has agreed to greet us at our opening reception. A closing dinner at a private club is in the works, and a private fashion show has been arranged for

For the post trip to the Argentine lake district we have three lake view rooms remaining at the distinctive Llao Llao hotel in Bariloche (www.llaollao.com) April 16-19. For further information and registration, please contact Peter McLean at ptmclean@hotmail.com, telephone (985) 246-6828 or fax: (985) 249-5938.

DUES NOTICES: You should have received your 2010 dues notice. Please renew your membership. The LADC is one of the three largest state defense lawyers' organizations in the nation. We are proud of this, and we hope you are proud to be a member of the LADC. It is our goal to continue growing. Thank you for your continued membership, and please let us know how we can better serve you.

CONGRATULATIONS TO CHRIS LAWLER: LADC Immediate Past President Chris Lawler received an award from the DRI honoring him for his service to the defense bar.

NEWMEMBERS

Dawn A. Fertitta, Houston
Julie R. Johnson, Hammond

KEY DEVELOPMENTS

Insurance

A person who is not an insured for liability purposes is not an insured for uninsured motorist purposes; a driver who is excluded from liability coverage under an insurance policy, pursuant to R.S. 32:900(L), also is precluded from recovering under the policy's UM coverage. Filipski v Imperial Fire & Cas. Ins. Co., Supreme Court, No. 09-CC-1013 (12/1/09)

Insurance; Penalties; Discovery

The Fifth (La.) Circuit has concluded that a court may impose penalties under both CCP Arts. 863 and 1471 and under R.S. 22:1220. In the instant case, the court found that the defendant failed to name all relevant insurance policies on discovery, and that the insurer subsequently was found in violation of its duty of good faith and fair dealing by actions which suggested that the coverage afforded to plaintiff's claim was much lower than it actually was. Dufrene v Gauthreau Family LLC, No. 09-CA-153 (11/10/09)

Prescription; Interruption

The Supreme Court concludes that no fault medical payment provision in an insurance policy is payable irrespective of the defendant's liability in tort, and thus payment of the medical expenses only, without other acts by the insured, does not constitute an acknowledgment of general liability for damages. Titus v IHOP Restaurant, Inc., No. 09-CC-951 (12/1/09)

OTHER SIGNIFICANT DEVELOPMENTS

Abandonment

The amendment to CCP Article 561(A)(2) governing abandonment of claims where the failure to take a step in the prosecution or disposition was a direct result of hurricanes Katrina and Rita should not be applied retroactively where the three year period had not run on August 26, 2005, but had tolled before the July 9, 2007, effective date of the amendment. Henry v SBA Shipyard, Inc., Third Circuit, No. CW 09-426 (11/10/09) (en banc; Cooks, Saunders and Gremillion, JJ, dissent) See also Morgan v La. Dept. of Pub. Saf. & Corr., Third Circuit, No. CA 08-750 (11/25/09)

Arbitration

Under the Commercial Arbitration Rules of the American Arbitration Association, the arbitrator has the power to require one of the parties to pay the full deposit for the arbitration hearing. Such a ruling is left to the discretion of the arbitrator, and a court should not interfere with it. Dealer Computer Services Inc. v Old Colony Motors, Inc., ___ F 3d ___ (5th Cir. 2009)

The U.S. Fifth Circuit, en banc, has ruled that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is a treaty and not an act of Congress, and it applies to compel a Louisiana self-insurer to arbitrate its dispute with two reinsurance companies despite R.S. 22:629, which bars arbitration agreements in insurance contracts. Safety National Cas. Corp. v Certain Underwriters at Lloyd's London, ___ F 3d ___ (2009) (Clement, J. concurs; Elrod, Smith and Garza, JJ, dissent)

Attorneys

Can an attorney who receives electronic documents from opposing counsel, by discovery or otherwise, violate any ethics rules by searching for confidential metadata that may have been transmitted inadvertently in the documents? Vermont has said that the lawyer may violate the rules, but there is a split among states on the issue. See Vermont Bar Association Professional Responsibility Section, Opinion 2009-1.

Can lawyers have judges as Facebook friends? No, according to a Florida judicial ethics advisory panel. The panel opined that online “friendships” could create the impression that lawyers are in a special position to influence their judge “friends.” The issue remains unresolved in Louisiana.

The Louisiana Supreme Court imposed fully-deferred suspensions on two Louisiana lawyers for engaging in improper consensual relationships with their clients. See In re Adams, No. 09-B-2246, and In re Prendergast, No. 09-B-2346

The Vermont Supreme Court admonished a lawyer for lying about not taping a telephone call but commissioned study on whether rules of conduct should permit investigative

lying. In re PRB, Va. S.Ct. No. 2007-046.

Attorneys; CLE

Supreme Court Rule 3, Regulation 3.15 is amended to provide that no credit will be given for activities sponsored by law firms and corporate law departments for the sole or principal benefit of their own members or employees. However, credit may be awarded for activities presented by public entities for the sole or principal benefit of their own employees.

Class Actions

Where the definition of the class in class action B is such that it may impact upon the recovery of the members or potential members of pending class action A, the attorney for class action A may notify the members or potential members of class action A of the possible impact; a judge should not enjoin the attorney from making such notification. Orrill v AIG, Inc., Fourth Circuit, No. 2009-CA-0566 (12/9/09)

The Fourth Circuit upholds maintenance of a class action for damages from lead poisoning in a public housing project. The court points out that the injuries resulted from a common cause -- breach of duty to plaintiffs by allowing hazardous levels of lead to exist for years -- and the harm was caused by only one substance -- lead. Billieson v City of New Orleans, No. 2009-CA-0410 (11/12/09)

Comparative Negligence

70% to plaintiff who had stopped while waiting to make a left turn and was then in the process of executing the turn, and 30% to defendant, who was attempting to pass plaintiff and the van between them. Gohres v Dryer, First Circuit, No. 2009 CA 0473 (11/18/09) (Downing, J, concurs)

Evidence: Expert Witnesses

A court does not abuse its discretion in excluding expert testimony in the field of legal ethics, if the court feels it possesses sufficient knowledge in that area to come to a proper conclusion without such assistance. Oliver v Orleans Parish School Board, Fourth Circuit, No. 2009-CA-0489 (11/12/09)

May a judge properly exclude expert testimony regarding specific, as distinguished from general, causation? For a case concluding that the judge may do so, a dissenting opinion, and subsequent responses from a denial of rehearing, see Huss v Gayden, 571 F 3d 442 (5th Cir. 2009), and subsequent opinions at 10/14/09)

Exceptions

A court which sustains an exception of prescription should permit amendment of the

plaintiff's pleadings if the new allegations which the plaintiff proposes raise the possibility that the claim is not prescribed, although the ultimate outcome of the prescription issue, once the petition is amended, is uncertain. Wyman v Dupepe Construction, Supreme Court, No. 09-C-0817 (12/1/09)

Forum Non Conveniens

A successor in interest to a party to a contract is bound by a forum selection clause and forum non conveniens waiver in the contract. Aguas Lenders Recovery Group LLC v Suez SA, ___ F 3d ___ (2d Cir. 2009)

Insurance

The presumption that a contract must be interpreted against the party who furnished the text does not apply to an unambiguous insurance contract or where the insured is a sophisticated commercial entity that itself drafts or utilizes its agent to secure desired policy provisions. Six Flags, Inc. v Westchester Surplus Lines Ins. Co., ___ F 3d ___ (5th Cir. 2009)

The test of a liability insurer's duty to defend is not whether the allegations unambiguously fall within coverage but, rather, whether the allegations do not unambiguously prevent the conclusion that coverage could exist. Martco Limited Partnership v Wellons, Inc., ___ F 3d ___ (5th Cir. 2009)

In Martco Limited Partnership v Wellons, Inc., the U. S. Fifth Circuit, applying Louisiana law, rejects the contention that no construction defect can ever constitute an "occurrence" under a CGL policy. See Rando Top Notch Props., LLC, 879 So.2d 821 (4th Cir. 2004). ___ F 3d ___ (2009)

Medical Malpractice

In Encalde v West Jefferson Medical Center Ambulance Service, plaintiff alleged that the defendant emergency medical technicians failed to hurriedly get to the patient, stabilize the patient for transport, and quickly return him to the medical center, and also alleged that the medical center was negligent in failing to properly train the technicians. The Fifth (La) Circuit concludes that the allegations are of medical malpractice and review by a medical review panel is required. No. 09-CA-355 (11/24/09)

A "certificate of enrollment" is competent evidence to establish a prima facie case for the applicability of the medical malpractice law regarding claims against the party identified on the certificate. Roark v Liberty Healthcare Systems, LLC, Second Circuit, No. 44,913-CA (12/09/09)

Medical Malpractice: Prescription

In Smart v West Jefferson Medical Center, the Fifth (La.) Circuit determines that the

requirement of payment of a fee in connection with the request for a medical review panel is not unconstitutional, and the failure to timely pay such a fee makes the request invalid and of no effect on the running of prescription on the claim or any subsequent claim arising out of the same medical conduct. No. 09-CA 366 (11/24/09)

Removal

A diverse defendant can argue that a post-removal joinder is improper before the court grants the plaintiff leave to amend. But once a court permits post-removal joinder of a non-diverse defendant, the fraudulent joinder doctrine is not thereafter available; the court loses subject matter jurisdiction, and remand is required. Borden v Allstate Ins. Co., ___ F 3d ___ (5th Cir. 2009)

Torts; Malicious Prosecution

The action for malicious prosecution, which is not favored and applies only if there is strict compliance with all of its essential elements, does not apply to parties not named in the original action bringing a suit. McClanahan v McClanahan, Fifth (La.) Circuit, No. 09-CA-182 (10/13/09)

Worker Compensation

In Hughes v T. G. Mercer Consulting Services, the Second Circuit observes that in determining whether a contract to hire is a Louisiana contract of hire, the intent of the parties is paramount. Among the factors to be considered in making this determination are the domiciles of the parties and the nature of the work to be done. The place where employment was initiated is determined by looking at the facts of the case. The court concludes that in the instant case the WCJ was manifestly erroneous in finding that a teamster steward employed by the employer did not have apparent authority to hire, that he hired the claimant without any condition including the legally mandated drug test, and that the contract at issue was not made in Louisiana. No. 44,908-WCA (12/9/09) (Caraway, J, concurring)

Claimant did not list the fringe benefits issued under either 1008 and did not file a pretrial statement. Held, the WCJ did not err in excluding evidence regarding fringe benefits. Davis v State, Third Circuit, WCA 09-288 (11/10/09) (Thibodeaux, CJ, dissents)

Workers Compensation; Attorney Fees

In Williams v Tioga Manor Nursing Home, the Third Circuit increases from \$6,500 to \$15,000 the attorney's fee award where the attorney exerted "a degree of skill and ability in the furtherance of his representation and...obtained a very favorable result." No. WCA 09-417 (11/1/09)

In Poissenot v St. Bernard Parish Sheriff's Office, the Fourth Circuit, following the Second Circuit (Gandy v United Services Auto Assoc., 721 So 2d 34), reasons that it has

authority pursuant to CCP Art. 2164 to award attorney's fees on appeal to a claimant who did not file an answer to the appeal but whose attorney filed a brief and presented oral argument. No. 2009-CA-0636 (11/24/09)

MARITIME LAW DEVELOPMENTS

Death on the High Seas Act: A claim under DOHSA can be subject to dismissal premised on the forum non conveniens doctrine. Loya v Starwood Hotels & Resorts Worldwide Inc., ___ F 3d ___ (9th Cir. 2009)

Execution: The U.S. Second Circuit has ruled that an electronic funds transfer which is being processed by an intermediary bank is not subject to attachment under federal maritime rule B(1), and that the ruling applies retroactively. Shipping Corp of India Ltd. v Jaldi Overseas Pte Ltd., ___ F 3d ___; Hawknet, Ltd. v Overseas Shipping Agencies, ___ F 3d ___ (2009).

Indemnity: The "focus-of-the-contract" test is the appropriate test to apply in determining the situs of a controversy in contract cases. Thus where the contract that creates the indemnity obligation between the parties calls for a majority of the work to be performed on stationary platforms on the Outer Continental Shelf, the enforceability of the indemnity provision is determined by Louisiana law, and the Louisiana Oilfield Indemnity Act renders the indemnity agreement unenforceable. Grand Isle Shipyard Inc. v Seacorp Marine, LLC, ___ F 3d ___ (5th Cir., 2009) (en banc; Garza, Elrod, Southwick and Owen, JJ, dissenting)

Damages: Loss of society damages are not recoverable under DOHSA, the Jones Act or, under general maritime law, by non-seafarers killed within territorial waters. In Re Maryland Marine, Inc., 641 F Supp 2d 579 (ED La. 2009)

Insurance: Spouse obtained policy providing additional benefits if her spouse died in a common carrier accident. Policy provided that common carrier vehicles were those which operated on a regularly scheduled basis between predetermined points. Husband was killed in crash of helicopter ferrying him to work on an offshore platform. Held, the crash did not qualify as a common carrier accident. Smith v American Family Life Assur. Co. of Columbus, 584 F 3d 212 (5th Cir. 2009)