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LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2010:4 April 1, 2010

UPCOMING MEETINGS

April 11-16, 2010	LADC Annual Meeting, Alvear Palace, Buenos Aires	8.0*#
August 5-7, 2010	LADC Trial Academy, Loyola School of Law, New Orleans	21.0*#
August 13, 2010	LADC Sizzlin' Summer Seminar, Windsor Court, New Orleans	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

LADC ANNUAL MEETING: The meeting is in Buenos Aires April 11-16. If you are able to make last minute plans and attend, call Peter McLean at (985) 246-6828. At the closing dinner, Drake Lee will complete his year as LADC President and "pass the torch" to Ron Sholes.

LADC TRIAL ACADEMY: The twenty-sixth annual LADC Trial Academy is scheduled for Thursday, Aug. 5-Saturday, Aug. 7 at Loyola Law School. Registration materials are available at www.ladc.org.

LADC SIZZLIN' SUMMER SEMINAR, FRIDAY THE 13TH: One of the LADC's most popular seminars is the seminar formerly known as the Attorney-Client Seminar. This year the Sizzlin' Summer Seminar will be at the Windsor Court Hotel on Friday, Aug. 13. Don't take a chance by working on Friday the 13th. Come get 8 hours of CLE credit and enjoy good luck at the seminar. We have a reserved block of rooms and suites at the Windsor Court at a special rate. Additionally, if the hotel offers summer specials better than our rate, we will get the better rate. Make your hotel reservation by calling 1-800-262-2662. The CLE agenda will be announced soon, but one presentation is by popular demand. Every seminar, people suggest that we have a presentation on liens. Shane Craighead with Davenport, Files & Kelly has done excellent presentations on the topic at the LADC North Louisiana Seminar, and he has agreed to be on the

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Sizzlin' Summer Seminar program and present "Privileges, Liens, Subrogations & Other Snags." You will not want to miss this helpful presentation. Registration materials are available at www.ladc.org.

If you have not received the notice, please contact us at 225-928-7599 or ladefensecounsel@aol.com. If you have not yet renewed, please do so. Thank you for your continuing membership in and support of the LADC.

2010 LADC BOARD ELECTION: The LADC Board of Directors amended the bylaws in 2005 regarding the election of directors. Each year, eleven directors rotate off the Board and eleven continue. Before the 2005 amendments, the Nominating Committee nominated candidates for the director vacancies, and the members attending the Annual Meeting voted on the candidates. Under the 2005 amendments, the list of nominees will be sent to the entire membership, and members will have thirty days in which to vote for the nominees or to write in candidates. You should have received a ballot via the LADC listserve around March 25.

THANK YOU. This year we sent out a listserv announcement that the Nominating Committee had been named and was about to begin nominating directors and the secretary-treasurer. We asked members to submit recommendations. We received over twenty suggestions via e-mail. The Nominating Committee reviewed all of them. Thank you for your assistance.

NEW MEMBERS

John B. Dunlap, III, Baton Rouge
Jessica Finan, Covington
Keiffer Johnson, New Orleans
John C. Roa, Monroe
Christopher T. Victory, Shreveport

KEY DEVELOPMENTS

Appeals; Arbitration

Some adverse interlocutory rulings, such as the denial of an exception of improper venue, cannot as a practical matter be corrected on appeal after a final judgment. Failure to timely appeal a venue ruling may amount to a waiver of venue; a party should either seek supervisory review pursuant to CCP Art. 2201 or file an appeal under CCP Art. 2083(c) if it is expressly provided by law. The denial of a request for arbitration can be likened to a denial of an exception of improper venue in the sense that it would be difficult to correct the error once a final judgment has been rendered. However, in light of public policy favoring arbitration, the court reviews an appeal of the arbitration issue raised by an exception of no cause of action or no right of action, subject matter jurisdiction and prematurity. Tubbs Rice Dryers, Inc. v Martin, Second Circuit, No. 44,800-CA (2/24/10)

Arbitration

The doctrine of res judicata can and does apply to an arbitration award, but only to those issues actually presented and considered in the arbitration proceeding. Aucoin v Gauthier, First Circuit, No. 2009 CA 1245 (2/12/10) (Carter, CJ, and Pettigrew, J, concur)

Damages

In Smith v University Animal Clinic, Inc., the Third Circuit, observing that "emotional damage awards for loss or injury to animals...are few and far between," upholds an award of $800 (by waiver of charges) against a depository, an animal clinic, where the dog was delivered to another client and never found thereafter. No. CA 09-745 (2/10/10)

Insurance

Although insured may not have been able to read the UM waiver form which was printed in English, the insurance agent spoke with insured in Spanish at all relevant times; thus nothing prevented insured from asking questions if he felt he did not understand what he was signing. Held, summary judgment upholding the waiver was proper. Rizzo v Ward, Fourth Circuit, No. 2009-CA-1325 (2/24/10)

Insurance; Penalties

A litigant is entitled, and the court must award damages, if proven, under R.S. 22:1220(A) --insurer violating duty of good faith and fair dealing shall be liable for damages sustained as a result of the breach. However, a court has discretion to award or deny penalties in the event actual damages are sustained, under the provisions of R.S. 22:1220(C)--(claimant also is entitled to penalties in an amount not to exceed two times the damages sustained or $5,000, whichever is greater). Bennett v Laperouse and Son, Ltd., First Circuit, No. 2009 CA 1099 (2/12/10)

Medical Malpractice

The trial court may not remand to the medical review panel new claims of malpractice discovered after the medical review panel has rendered its expert opinion and suit has been instituted. A pre-suit review of any new claims of malpractice that are developed during the litigation of the medical malpractice action, which were not encompassed in the complaint and evidence considered by the medical review panel when it rendered its expert opinion, can only be presented for review by filing a new request for review with the Division of Administration. Abel v North Oaks Medical Center, First Circuit, No. 2009-CW-1186 (2/12/10)

Subject Matter Jurisdiction; Diversity

Under 28 U.S.C. Sec. 1332(c), a corporation for diversity jurisdiction purposes shall be

deemed a citizen of the state of its incorporation and the state where it has its principal place of business. “Principal place of business” is the place where the corporation’s high level officers direct, control and coordinate the corporation’s activities, sometimes called the corporation’s “nerve center,” which typically will be found at the corporation’s headquarters. The Hertz Corp. v Friend, __ U .S. ___ (2010)

Torts; Causation

Defendant lost control of his vehicle and collided with cars parked at plaintiff’s residence. One of the vehicles he struck then struck plaintiff’s house. Plaintiff was lying in bed at the time of the accident and immediately upon hearing the sound of the crash jumped from her bed, fell to the floor, and suffered injuries. Held, (1) at a minimum, genuine issues of material fact exist as to whether defendant’s actions were a legal cause of plaintiff’s injuries, and (2) there are material fact issues as to whether defendant’s conduct was use of an automobile, thus triggering application of plaintiff’s UM coverage. Bruno v Davis, Third Circuit, No. CA 09-928 (2/24/10)

Vicarious Liability; Limited Liability Corporations

The alter ego theory of corporate veil piercing applies to a Louisiana limited liability company where it appears that a member used the LLC as a shell and tried to avoid paying a legitimate debt of the LLC. ORX Resources, Inc. v MBW Exploration, L.L.C., Fourth Circuit, No. 2009-CA-0662 (2/10/10)

Wrongful Death; Damages

One has a claim for a loss of unearned, passive income against a tortfeasor for the wrongful death of a spouse if (1) the deceased spouse’s primary source of income is derived from interest, dividends, rents, royalties, etc., of the separate, as opposed to community, property of the deceased spouse; (2) the spouses were substantially, if not totally, living on the income derived from such sources, and (3) the income is community income and not the separate income of the decedent pursuant to a reservation of same. Reaching this conclusion in Iles v Ogden, the Fourth Circuit sets forth the factors to be used to determine the extent of the loss, and indicates that there may be recovery for loss of inheritance when the decedent dies due to the fault of another and before the decedent can execute a testament. In the instant case, plaintiff and the decedent were on their way to Houston for the decedent to sign a new testament when he was killed in the subject accident. No. 2009-CA-0820 (2/26/10)

OTHER SIGNIFICANT DEVELOPMENTS

Allotment of Cases

In an effort to reduce judge or forum shopping, the Supreme Court has amended Rule 9.4 of the Uniform Rules for District Courts to provide that all subsequent actions asserting the same claim by the same parties must be transferred to the division to which the first

case filed was allotted, whether or not the first case is still pending.

Civil Rights

An officer's knowing efforts to secure a false identification by fabricating evidence or otherwise unlawfully influencing witnesses constitutes a violation of the due process rights secured by the Fourteenth Amendment. Good v Curtis, __ F 3d ___ (5th Cir. 2010)

Court Rules

Mea culpa! The reference in the March newsletter to the new Uniform Rules of District Courts provision for default judgments should have been to Rule 9.19, not Rule 9.9.

Damages

Back: $65,000 (increased from $17,500) in general damages to plaintiff in her mid-thirties who suffered disc injuries which did not include any neurological deficits but she would continue to suffer chronic pain for the remainder of her life. Raimondo v Hayes, Third Circuit, No. CA 09-955 (2/17/10) (Thibodeaux, CJ, and Genovese, J, concur)

Default Judgments

A party seeking to confirm a default need no longer file a certificate by the clerk showing the date and type of service and the absence of a timely answer. By moving for a preliminary default, the attorney certifies to the court that the defendant has been properly served and has failed to answer within the time prescribed by law. Rule 9.1, Uniform Rules of District Courts (amendment effective 1/1/10).

Insurance

An insurer breaches its duty to timely pay an insured's claim if the insurer fails to do so within the specified time frame after it has adequate knowledge of the loss; thus a joint adjuster's report stating that the insurers owe an undisputed amount is sufficient. "The failure to pay an undisputed amount is a per se violation of the statute." Versai Management Corp. v Clarendon America Ins. Co., ___ F 3d ___ (5th Cir. 2010)

The "work product" exclusions reflect the intent of the insurance industry to avoid the possibility that coverage under a CGL policy will be used to repair and replace the insured's defective products and faulty workmanship. The CGL policy is not intended as a guarantee of the quality of the insured's products or work. Louisiana courts have consistently held that the "work product" exclusion eliminates coverage for the cost of repairing or replacing the insured's own defective work or defective product. The specific "your work" exclusion applies only to property within the "products-completed hazard," meaning that it is generally applicable after the work is complete. Sibley v Deer Valley Homebuilders, Inc., Second Circuit, No. 45,063-CA (3/3/10)

Jury Trials

In Thaler v Haynes, the Supreme Court holds that there is no decision of the Court which clearly establishes the categorical rule that a judge, in ruling on a Batson objection, must reject a demeanor-based explanation unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. ___ U.S. ___ (2010)

Medical Malpractice

Credentialing is not listed as a definition of malpractice in the Medical Malpractice Act. Plaintiff's allegations that a hospital should have suspended or revoked the physician's hospital privileges was because of his prior acts of malpractice, which could not be negligent credentialing, constitute a claim of negligent supervision, which is covered by the MMA. Dinnat v Texada, Third Circuit, No. W 09-665 (2/10/10)

Prescription

Plaintiff timely filed its claim against a tortfeasor and later filed a supplemental petition naming insurer, its UM carrier, as a party defendant; however, insurer did not file its cross clam against insurer until 10 months after it was served with the suit. Held, the 90-day grace period provided by CCP Art. 1067 had expired and thus the cross claim is prescribed. Stamps v Canal Indemnity Insurance, First Circuit, No. 2009 CW 1961 (3/1/10)

R.S. 9:5608, providing a one year statute of limitations for a claim against a home inspector, may be applied retroactively where the plaintiffs are still afforded over 11 months in which to assert their claims. Chumley v Magee, Second Circuit, No. 44,860-CA (2/17/10) (Williams, J, dissents)

Prescription; Contra Non; Products Liability

In Allstate v Fred's, Inc., the appellate court applied the doctrine of contra non valentem to prevent the running of prescription on a claim against a manufacturer who failed to label its product, holding that the failure did not allow the claimant to readily ascertain the manufacturer's identity. 18 So 2d 172 (2d Cir. 2009) The Supreme Court, in a per curiam, grants writs and holds that the appellate court erred in holding that the claimant's delay could not be attributable to its own neglect; there was a two year delay between claimant's discovery request and its motion to compel, and an additional year before it added the manufacturer to the suit. Claimant's conduct evidenced a lack of due diligence which precluded application of contra non. No. 2009-C-2275 (2/29/10) (Johnson and Weimer, JJ, would deny the writ)

Solidarity

Previously obtaining a consent judgment against one solidarily liable co-maker on a note does not defeat the creditor's cause of action against another co-maker for the entirety of the joint indebtedness. Amsouth Bank v Sessions, Fifth (La.) Circuit, No. 09-CA-504 (2/9/10)

Summary Judgment

When new evidence has been introduced after a denial of a motion for summary judgment, the court may reconsider the motion. Watkins v City of Shreveport, Second Circuit, No. 45,107-WCA (3/3/10) See also, Bozarth v State, First Circuit, No. 2009 CA 1393 (2/12/10) (denial of initial motion for summary judgment does not bar a second summary judgment motion under the doctrine of res judicata.) (Pettigrew, J, concurs)

Torts; Vicarious Liability

For cases holding that medical specialists (orthopedic surgeon and cardiologist) are independent contractors and thus not federal employees entitled to immunity under the Federal Tort Claims Act, see Creel v U.S., ___ F 3d ___ (5th Cir., 2010), and Peacock v U.S., ___ F 3d ___ (5th Cir. 2010).

Witnesses

In Gonzalez v Government Employees Insurance Company, the appellate court upholds the trial court's qualification of a long-time police officer as an expert accident investigator, and her testimony of a driver's condition (intoxication). Fifth (La.) Circuit, No. 09-CA-140 (2/9/10)

Worker Compensation

R.S. 23:1121(B), requiring suspension of medical benefits if the claimant refuses or fails to sign a choice of physician form, applies prospectively only. Grambling State University v Walker, Second Circuit, No. 44,995-WCA (3/3/10)

Under the test set forth in Kirkland (v Riverwood International USA, Inc., 681 So 2d 329), the question whether the work being performed by the employee of the subcontractor is part of the alleged principal's trade, business or occupation is based on the totality of the circumstances, taking into consideration all pertinent factors. The eight factors enumerated in Kirkland are not exclusive, and the presence or absence of any one factor is not determinative. The applicable standard of review of the application of the Kirkland test is the manifest error standard. Dominio v The Folger Coffee Company, Fourth Circuit, No. 2009-CA-1278 (2/10/10)

Worker Compensation; Compromise

Claimant settled his claim for a back injury but in the settlement reserved the right to claims for the alleged injury to his arm. Held, since there was no reservation of rights as to any claims for injury to claimant's back, that claim is precluded by the agreement. Payan v Francis Chimento Enterprises, Inc., Fifth (La) Circuit, No. 2009-CA-826 (2/23/10)

Worker Compensation; Subrogation

For a case in which the court divides the subrogated portion of the worker's third party recovery between the subrogated worker compensation insurer and the employer where the employer's insurance premium was to be determined under a retrospective rating plan providing for the calculation of the premium after the conclusion of the policy period, see Benton Specialties, Inc. v Cajun Well Service, Inc., Third Circuit, No. CA 09-506 (2/10/10) (five judge court; Gremillion, J, dissenting)

MARITIME MATTERS OF NOTE

Forum Non Conveniens: In Saqui v Pride Central America, LLC, ___ F 3d __ (5th Cir. 2010), the court holds that a Texas federal court properly dismissed a death claim by a Mexican citizen on an American vessel where the accident occurred off the coast of Mexico on an oil rig leased to a Mexican company, the victim was a citizen of and resided in Mexico and was an employee of another Mexican corporation, the vessel owner did not control operations or have any employees aboard the vessel, and most of the witnesses, and the key physical evidence, was located in Mexico.

WRIT GRANTS OF INTEREST

Arbitration: Is a district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act is unconscionable, even if the parties have clearly and unmistakably assigned the issue to the arbitrator for decision? Decision below: Rent-A-Center West, Inc. v Jackson, 581 F 3d 912 (9th Cir. 2009)

Prescription: Does FRCP Rule 15(c)(1)(C) permit an amended complaint to relate back when the amendment corrects a mistake concerning the party's proper identity? Opinion below: Krupski v Costa Cruise Lines NV, (11th Cir., 2009, unpublished)