LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2011:3 March 1, 2011

UPCOMING MEETINGS

March 9-13, 2011	LADC Winter Meeting, The Charter, Beaver Creek, CO	10.0*#
April 10-17, 2011	LADC Annual Meeting, Southern France	8.0*#
August 4-6, 2011	LADC Trial Academy, Loyola Law School	21.0*#
August 19, 2011	LADC Sizzlin' Summer Seminar, Windsor Court Hotel	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

DUES NOTICES: You should have received your 2011 dues notice. Please renew your membership by April 1st. 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.

BEAVER CREEK WINTER MEETING 2011: The winter meeting and ski trip to The Charter at Beaver Creek will be during Mardi Gras week, Wednesday, March 9 - Sunday, March 13. To insure the rooms that you want, please contact Peter McLean at ptmclean@hotmail.com. Tel. 985-246-6828. Our discounted LADC reserved units and suites at The Charter at Beaver Creek are all tax-free for LADC members. Any non-LADC friends, relatives, etc. who may wish to join their friends may also receive the LADC unit/suite discount and tax exemption. The more, the merrier! Discounted ski/snowboard rental equipment and discounted ski lift tickets will also apply to relatives and guests. Please be sure to book directly through Peter McLean in order to receive our LADC group discount.

LADC ANNUAL MEETING 2011: Join us April 10-17 in Lyon and Nice, France. During our stay we will tour the city, visit the 800 year-old city of Perouges and dine at Michelin 3-star restaurant Paul Bocuse. In Lyon we have

changed hotels and are now in the 4-star Sofitel Lyon Bellecour in the Presque Isle district. We are near the pedestrian zone with the good shops and many of the fine restaurants that have earned the city the title of Gourmet Capital of France. The hotel has a Michelin star restaurant on the top floor, a brasserie and fitness center, and one can walk to nearly everything. In Nice our hotel on the Promenade des Anglais faces the blue-green waters of the Mediterranean and is adjacent to the pedestrian zone and the old quarter. We will enjoy street life, museums, shops and galleries second only to Paris, explore the flower market, venture to the hilltop town of St. Paul de Vence, and have a farewell dinner overlooking the harbor in Villefranche-sur-Mer. Post trips will be available to Paris. There are very few rooms remaining. For details, contact Peter McLean at ptmclean@hotmail.com. Tel. 985-246-6828.

TRIAL ACADEMY: The annual LADC Trial Academy is scheduled for Aug. 4-6 at Loyola University College of Law. The program will provide approximately 21 hours of CLE, including ethics and professionalism. You may download a registration form at www.ladc.org.

DIVERSITY CONCLAVE: The LADC is co-sponsoring the LSBA Fourth Annual Conclave on Diversity in the Legal Profession at the New Orleans Marriott at the Convention Center on March 18, 2011. For more details, contact Kelly McNeil Legier at 504-619-0129.

2011 DRI PRODUCT LIABILITY CONFERENCE: Wednesday, April 6-Friday, April 8 at the Hilton New Orleans Riverside. More information and registration is available at http://www.dri.org/open/SeminarDetail,aspx?eventCode=20110200.

NEW MEMBERS

Michelle Bergeron, Metairie
Amy D. Hotard, New Orleans

KEY DEVELOPMENTS

Compromise

Correspondence between the attorneys for the parties does not effect a settlement. The requirement that there must be a writing to effect a compromise (CC Article 3072) must be a writing signed by the party unless there is express authorization for the attorney to effect the compromise (CC Article 2997); the general authority of an attorney in the contract of employment authorizes the attorney to negotiate a settlement but not effect the compromise. Sims v US Agencies Cas. Ins. Co., First Circuit, No. 2010 CA 1120 (12/22/10)

A "high/low" agreement is not a compromise under the language of the prior version of CC Art. 3071 (a compromise is an agreement by parties who, for preventing or putting an end to a lawsuit, adjust their differences in a manner which they agree upon and which

they prefer to the hope of gaining, balanced by the danger of losing). (The 2007 version of Article 3071 provides that compromise is a contract whereby the parties, through concessions, settle a dispute or an uncertainty concerning an obligation). Ryan v State Farm Mut. Auto Ins. Co., First Circuit, No. 2010 CA 0961 (12/22/10) (Hughes, J, concurring)

Damages

It is not necessarily error to separate elements of general damages on jury forms. However, for such separation to be appropriate, there must be a conceptual difference between the elements being separated. "Loss of love, affection, and companionship" can be listed as a separate line from general damages on a jury verdict form, but those elements should not be broken down further to separate out "grief and anguish." Hardy v Augustine, Third Circuit, No. CA 10-946 (2/2/11)

Exceptions

CCP Art. 929 provides that declinatory exceptions, "when pleaded before or in the answer shall be tried and decided in advance of the trial of the case." Thus a judge's dismissal of a claim by sustaining an exception of lack of subject matter jurisdiction without holding a hearing and giving the plaintiff an opportunity to be heard is an improper ex parte order. Plastic Surgery Associates v The Nacher Corp., Third Circuit, No. WCA 10-930 (2/2/11)

Where the grounds for the exception of res judicata do not appear from the petition, and neither party introduces any evidence in support thereof, the trial court errs in granting the exception. Although the parties attached documentary evidence to their memoranda in support of or in opposition to the exception, the documents are not properly before the court for review by the appellate court. Rudolph v D.R.D. Towing Company LLC, Fifth (La) Cir., No. 10-CA-629 (1/11/11))

Insurance

Under R.S. 32:900(L), the "statutory omnibus clause," requiring omnibus coverage for drivers who use the insured's vehicle with permission, is incorporated into every policy of insurance to which it is applicable. Under R.S. 32:900, the legislature has allowed certain exceptions to omnibus coverage (certain commercial policies, a policy which excludes coverage of the named insured and the spouse of the named insured, and excluding coverage of any other named person who is a resident of the same household as the named insured). Since an automobile business exclusion is not one of the enumerated exceptions, an automobile business exclusion is not allowed. Sesebe v Canal Indemnity Co., Supreme Court, No. 2010-C-0703 (1/28/11) (Guidry, J, dissenting in part)

Medical Malpractice

After the appellate court remanded for a determination of whether a medical malpractice crisis existed when R.S. 9:5628 was passed in 1975, the Supreme Court granted writs, reversed and reinstated the trial court judgment upon the constitutionality of the three year prescriptive period, "in light of this court's prior findings concerning the existence of a medical malpractice insurance crisis in the 1970s." Russo v Kraus, No. 2010-C-2463 (1/28/11)

Venue

Where two parties file "mirror-image" suits in different district courts, the "first to file" is only a factor in determining a motion for change of venue under 28 USC Sec. 1404(a). Research Automation, Inc. v Schrader-Bridgeport International Inc., ___ F 3d ___ (7th Cir. 2010)

Worker Compensation

Under R.S. 23:1221(3)(a), a claimant is required to prove by a preponderance of the evidence that a work related injury resulted in his inability to earn wages equal to 90% or more at the time of the injury. Louisiana law does not require that a plaintiff be unable to engage in the same or similar occupation as when he was injured in order to qualify for SEBs. Poissenot v St. Bernard Parish Sheriff's Office, Supreme Court, No. 2009-C-2793 (1/19/11) (Johnson, J, concurs; Knoll, J, dissents)

OTHER SIGNIFICANT DEVELOPMENTS

Attorneys; Sanctions

The U.S. Ninth Circuit has held that sanctions which are imposed on an attorney for unreasonable prolonging of federal litigation pursuant to (27 USC Sec. 1927) may include attorney's fees, costs and expenses incurred by the opponent while pursuing the award of the sanctions. Norelus v Denny's Inc., __ F 3 d___ (2010)

Class Actions

The U.S. Fifth Circuit has ruled that a certification of a limited fund mandatory class action under FRCP Rule 23(b)(1)(B) and approval of a final class settlement are improper where the settlement fails to provide a procedure for distribution of the settlement fund that treats class claimants equitably amongst themselves and the settlement is not fair, reasonable and adequate because its proponents fail to show that the class members will receive some benefit in exchange for the divestment of their due process rights in a mandatory class settlement. In Re Katrina Canal Breach Litigation, ___ F 3d ___ (2010)

The Louisiana Third Circuit rules that the trial court did not abuse its discretion in certifying a class for damages caused by contamination of the soil despite the extremely long period of time over which the plaintiffs may claim harm, there were multiple owners of the land, and it is likely that inclusion of both past and current landowners will result in conflicts among the very same class members whose interests should be aligned; "[t]he trial court's decisions regarding definition of the class and its overall decision to certify the class are not chiseled in stone....The trial court can, at any time before a decision on the merits of the common issues alter the class...or even recall the class certification all together." Price v Martin, No. 10-599 (2/2/11)

Compromise

A matter of compromise is not an issue raised by the pleadings unless raised in an affirmative defense in the answer or in an exception of res judicata. Gulf Coast Bank and Trust Co. v D'Orville, Fourth Circuit, No. 2010-CA-1237 (1/26/11).

Concursus

Concursus cannot be used to determine a potential tortfeasor's exposure to an excess judgment, as the tortfeasor is not a proper plaintiff in concursus. Concursus can only be used to implead a personal injury claimant by a casualty insurer which admits liability for the full amount of the coverage. Collins v Universal Cas. Co., Third Circuit. No. CA 10-844 (2/2/11)

Insurance

The "claims made" period of a "claims made" policy is not extended by the "relating back" concept of CCP Article 1153. Wright v Willis-Knighton Medical Center, Second Circuit, No 45,810-CW (1/19/11) (Gaskins, J, dissents)

The statutes that are controlling with respect to nonrenewal of homeowner's insurance policies are RS. 22:636, 22:636.1 and 22:636.6. These statutes require mailing of notice of nonrenewal by the insurer; noticeably absent is language requiring that the notice of nonrenewal be received. Where insurer establishes mailing, the burden shifts to the insured, and a mere denial of receipt cannot create a genuine issue of material fact in a suit for damages under the policy. Collins v State Farm Ins. Co., Fourth Circuit, No. 2010-CA-0769 (1/26/11)

Insurance; UM Coverage

The anti-stacking statute, R.S. 22:1295(1)(c), bars stacking of two UM coverages where the policies were purchased by husband and wife, both "insureds" under both policies. Hardy v Augustine, Third Circuit, No. CA 10-384 (2/2/11)

Where the only evidence regarding the offending driver's policy limits is a stipulation at the beginning of trial that plaintiff received $10,000 from the "at fault" liability carrier,

the plaintiff has failed to meet the burden of proving the underinsured status of the offending driver permitting recovery against the UM provider. Lozano v Brown, Fifth (La.) Circuit, No. 10-CA-489 (1/25/11)

A policy provision which restricts "economic only" UM coverage to damages which are "incurred" and "documented" is invalid under R.S. 22:1295(1)(a)(i); the policy provision narrows statutorily mandated coverage. Hoagboon v Cannon, First Circuit, No. 2010 CA 0909 (12/22/10)

A tender made to the registry of the court is an unconditional tender. An insurer may make an unconditional tender to the registry of the court and thereby avoid the imposition of penalties and attorney fees in cases where there are competing claimants for the policy proceeds. Where there are competing claims and there is no question that the insurer is liable for the full amount of available coverage, there is no impediment to the insurer invoking the concursus by depositing at least the undisputed amount of coverage into the registry of the court. Jones v Johnson, Second Circuit, No. 45,847-CA (12/15/10)

Judicial Estoppel

In deciding whether judicial estoppel applies a court considers (1) whether the party's later position is clearly inconsistent with his earlier position, (2) whether the party has succeeded in persuading the court to accept that party's earlier position and (3) whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment upon the opponent. Save Our Springs Alliance, Inc. v WSI (II) Cos., L.L.C., ___ F 3d ___ (5th Cir. 2011)

Jurisdiction Over the Person

In Eldred v Fleming, the Fourth Circuit rules that operation by a Louisiana defendant of a passive website in Louisiana does not provide in personam jurisdiction over a claim over him in California by a Californian who merely views the website in California. No. 2010-CA-0794 (1/20/11) (Tobias, J, dissents)

Medical Malpractice

The dissenting opinion of a member of the medical review panel stated that "the outcome could have been different if the patient had taken antibiotics (sic) as prescribed by" the doctor. Held, that comment should not be considered. The panel or a panel member is authorized to opine on the fault of the physician, not the patient. In Re Dunjee, Fourth Circuit, No. 2010-CA-1217 (1/26/10)

Issues of whether the defendant breached the applicable standard of care and whether the breach caused the plaintiff's injuries will turn on complex medical issues, including the significance of fluctuating fetal heart tones, questions regarding the interpretations of readings from an ultrasound, a heart rate monitor and an FSE, a decision regarding the fetus' viability and questions regarding whether an immediate C-section was appropriate,

are beyond the province of a lay person to assess without the aid of expert testimony; this is not a Pfiffner (v Correa, 643 So 2d 1228) case of obvious negligence which requires no expert testimony to prove the elements of plaintiff's malpractice claim. Schultz v Guoth, Supreme Court, No. 2010-CC-03243 (1/19/11) (Johnson and Weimer, JJ, dissent)

Partnerships

The theory of "piercing the corporate veil" applies to limited liability companies and not just to corporations. Bottom Line Equipment L.L.C. v BZ Equipment, L.L.C., Fifth (La.) Circuit, No. 10-CA-830 (1/25/11)

Torts; Right of Privacy

A plaintiff cannot establish an invasion of privacy in requiring DNA testing where he consents to the tests and the consent was not vitiated pursuant to CC Art. 1948 (defendant did not make any misrepresentations to plaintiff with the intention either to obtain an unjust advantage for itself or cause a loss or inconvenience to plaintiff). Tate v Woman's Hospital Foundation, Supreme Court, No 2010-C-0425 (1/19/11)

Worker Compensation

Writes the Supreme Court: "the court of appeal correctly found the OWC erred in including annual and sick leave to increase (claimant's) average weekly wage. The annual and sick leave actually used by (claimant) during the four weeks preceding the accident became taxable when used, and already were included in the calculation of his average weekly wage. To the extent the annual and sick leave hours were merely accrued and not used these benefits are not taxable, and therefore should not be included in the determination of the average weekly wage under R.S. 23:1021(12)(f)." Hargrave v State, No. 2010-C-1044 (1/19/11)

The Third Circuit sustains the WCJ's determination that a claimant was a credible witness despite two surveillance videos, a conviction for carnal knowledge of a juvenile, and inconsistencies of the claimant's testimony with regard to a child support lien, in Broussard v Country Club Auto Repair, Inc., No. WCA 10-1116 (2/2/11)

The Supreme Court reverses the OWC and the appellate court in their findings that in an "unwitnessed accident" the plaintiff proved a work-related injury where there was no objective evidence to corroborate the plaintiff's account of the accident, and ample indicia that when considered together discredited or cast serious doubt on his account, including his initial denial of an accident, his long delay in reporting the claimed work-related injury, and his inconsistent accounts of why he delayed reporting the accident. Ardoin v Firestone Polymers, L.L.C., No. 2010-C-0245 (1/19/11)

The Second Circuit affirms the WCJ's determination that the claimant committed fraud to obtain benefits in violation of R.S. 23:1208; claimant's doctor testified that claimant had asked him to change his story so that claimant could recover benefits, and claimant's

testimony was replete with contradictions. Daniels v Hemphill Construction Co., No. 45,946-WCA(1/26/11)

Worker Compensation; Penalties

Defendant failed to reimburse plaintiff for his medical and pharmacy bills, failed to approve physical therapy, failed to approve x-rays and therapy, recommended by another doctor, and failed to pay compensation benefits. Held, each of these incidents constituted a claim and thus a penalty of $6,000 was proper. Cox v Port Aggregates, Inc., Third Circuit, No. WCA 10-707 (2/2/11)

MARITIME MATTERS OF NOTE

LHWCA: The U.S. Ninth Circuit has held that the test for determining liability in multiple employer occupational disease cases is a sequential analysis, starting with the last employer, under which the first employer found responsible for the employee's injuries is liable for the payment of benefits. Albina Engine & Machine v Director, ___ F 3d ___

WRIT GRANTS OF INTEREST

The U.S. Supreme Court has granted writs in a case presenting whether the FELA (45 USC Sec. 51, et seq) requires proof of proximate causation in order to impose liability on a covered employer, Opinion below, CSX Transportation, Inc. v McBride, 598 F 3d 388 (7th Cir.), and in cases involving the liability of a manufacturer of a generic drug for labeling, PLLIVA Inc. v Mensing, 588 F. 3d 603 (8th Cir.), Actavis Elizabeth LLC v Mensing, 588 F 3d 603, and Actavos, Inc. v Demahy, 593 F 3d 428 (8th Cir.)