



# LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2011:4

April 1, 2011

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## UPCOMING MEETINGS

|                   |   |        |
|-------------------|---|--------|
| 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](http://www.ladc.org) if registration is open at this time.)

\* - includes one credit for professional responsibility (ethics)  
# - includes one credit for professionalism

## BULLETIN BOARD

**ELECTION RESULTS:** The results of the 2011 LADC election are final. Thank you to all who participated. Please join us in congratulating the LADC's new directors and officers. The new Secretary-Treasurer, Bobby Gilliam, was elected. The other officers were elevated in rank from their prior positions. All new officers and directors will take office after President Ron Sholes's closing dinner at the Annual Meeting on April 16 in Nice, France. The next Board meeting will be at the Windsor Court Hotel in New Orleans on Thursday, Aug. 18, the day before the LADC Sizzlin' Summer Seminar. If you want to know more about LADC election procedures, please refer to the LADC bylaws, Articles VI & VII on the website: <http://ladc.org/wp-content/uploads/2010/01/2005-LADC-Bylaws.pdf>

### Officers

President: Ben Mayeaux (Laborde & Neuner)  
President Elect: Tom Buck (Blue Williams)  
First Vice President: Skip Philips (Taylor Porter)  
Second Vice President: Marta-Ann Schnabel (O'Bryon & Schnabel)  
Sec/Treasurer: Bobby Gilliam (Wilkinson, Carmody & Gilliam)  
Immediate Past President: Ron Sholes (Adams & Reese)

### Newly Elected Directors

Dist 1: Valerie Matherne (Law Office of Steven Witman); Tim Hassinger (Galloway, Johnson); John Baay (Geiger, Laborde); James A. Holmes (1 yr. term) (Christovich & Kearney)

Dist 2: David Bienvenu (Taylor, Porter); Glenn Farnet (Kean, Miller)  
Dist 3: Kenny Oliver (Oliver & Way)  
Dist 4: Chris Ieyoub (Plauche', Smith)  
Dist 5: Mark Watson (1 yr. term) (Stafford, Stewart); Greg Engelsman (Bolen, Parker)  
Dist 6: Reginald Abrams (Abrams & Lafargue)  
Dist 7: Jay Adams (Hudson, Potts)

**2011 DUES:** You should have received your 2011 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.

**LADC ANNUAL MEETING 2011 & 2012:** The 2011 Annual Meeting is in Lyon and Nice, France. Please watch for a listserv announcement to be sent out in April regarding the site and dates of the 2012 meeting.

**TRIAL ACADEMY:** The annual LADC Trial Academy is scheduled for Aug. 4-6 at Loyola University College of Law.

**SIZZLIN' SUMMER SEMINAR:** Before the hot summer begins, mark your calendars and register for this popular seminar on Friday, Aug. 19 at the Windsor Court Hotel. The seminar will offer 8 hours of CLE; the agenda will be announced shortly.

**BEAVER CREEK WINTER MEETING 2011 & 2012:** We had a great Winter Meeting at Beaver Creek with a big group. Please mark your calendars for the meeting in 2012. The meeting will be during the last week of January 2012 rather than during Mardi Gras week. Due to high room rates and expected large crowds (Presidents' Day weekend is the weekend after Mardi Gras) during the early Mardi Gras week, we have decided to take advantage of favorable room rates and smaller crowds on the slopes at the end of January. Please plan to join us. This meeting is a great opportunity to earn almost all your CLE hours for the year and ski.

### **NEW MEMBERS**

Beth S. Bernstein, New Orleans  
Andrew H. Chrestman, New Orleans  
Trevor M. Cutaiar, New Orleans

### **KEY DEVELOPMENTS**

#### Appeals

The Supreme Court rules that the only mechanism by which to challenge an adverse venue ruling is a supervisory writ. However, a trial court considering an exception of peremption must make an

independent venue ruling for the limited purpose of deciding the exception of peremption. Land v Vidrine, No. 2010-C-1342 (3/15/11)

### Arbitration

Under the plain language of the Federal Arbitration Act, a party seeking to confirm an arbitration award must provide the court with a copy of the arbitration agreement between the parties. Where the party seeking confirmation fails to proffer sufficient admissible evidence to make a prima facie case that the parties entered a valid agreement to arbitrate, the court cannot confirm the award. FIA Card Services, N.A. v Weaver, Supreme Court, No. 2010-C-1372 (3/15/11) (Guidry, J, dissents)

### Exceptions

The exception of prematurity is a dilatory exception which a court may not raise sua sponte; such an objection is waived unless it is pleaded in the exception. Thus a court errs in sustaining on its own initiative an “exception of no cause of action based on prematurity.” Moreno v Entergy Corp., Supreme Court, No. 2010-C-2268 (2/18/11) (Victory, J, concurs)

### Insurance: UM

The Fifth (La.) Circuit, applying Supreme Court decisions, concludes that a UM rejection form is not valid unless it is dated by the insured at the time of signature. Gullatt v Allstate Ins. Co., No. 10-CA-448 (2/15/11)

### Prescription

Despite the language of the Louisiana Citizens Property Insurance Corporation policy which mandates a one year suit limitation, a plaintiff’s lawsuit is timely filed because prescription was suspended upon the timely filing of a pending class action suit which included the plaintiff as a putative class member. Filing of a lawsuit designated as a class action pursuant to CCP Art. 591 suspends prescription as to all members of the putative class until the district court rules on the action to certify the class. Taranto v Louisiana Citizens Property Insurance Corp., No. 2010-C-0105 (3/15/10) (Ciaccio, J ad hoc, sitting for Kimble, CJ; Knoll, Weimer and Clark, JJ, concur; Victory and Guidry, JJ, dissent)

### Prescription: “Relating Back”

CCP Article 1067 provides an exception to prescription or peremption for incidental demands, including an intervention. Article 1067, and not CCP article 1153, applies to an exception to prescription or peremption for an intervention. Thus the court of appeal errs in applying Article 1153 and the factors provided in Giroir v South Louisiana Medical Center Div. of Hospitals, 475 So 2d 1040, to an action to intervene in a plaintiff’s petition. Stenson v City of Oberlin, Supreme Court, No. 2010-C-0826 (3/15/11)

### Products Liability

Reversing the Third Circuit (see NL 2010:12), the Supreme Court rules that the manufacturer of a pumping unit on an oil well pump should not have reasonably anticipated that a 13-year-old boy would climb onto the moving pendulum of the pump and attempt to ride the pendulum; thus the manufacturer is not liable because the damage did not arise out of a “reasonably anticipated use” of the product. R.S. 9:2800.54(A). Payne v Gardner, No. 2010-C-2627 (2/18/11)

### Removal

The U.S. Ninth Circuit has ruled that the 30-day time limit for filing a notice of removal runs separately as to each defendant, rather than from the time the first defendant receives a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based. Destfino v Reiswig, \_\_\_ F 3d \_\_\_ (2011)

### Subject Matter Jurisdiction

Husband and wife may not “split” damages for medical expenses stemming from one spouse’s injury so as to circumvent the maximum jurisdiction of a city court. Thompson v State Farm Mut. Auto. Ins. Co., Third Circuit, No. CA 09-1369 (2/9/11)

## **OTHER SIGNIFICANT DEVELOPMENTS**

### Appeals

Where a motion for appeal refers to a specific judgment denying a motion for new trial but the appellant exhibits a clear intention to appeal instead the judgment on the merits, the court should consider the appeal. Lozier v Elmer, Fifth (La.) Circuit, No. 10-CA-754 (2/5/11)

If an action by the appellate court will terminate the litigation and there is no dispute of fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictate that a non-appealable judgment should be converted to an application for supervisory writs. Favrot v Favrot, Fourth Circuit, No. 2010-CA-0986 (2/9/11)

Where jury instructions or interrogatories contain a “plain and fundamental” error, the contemporaneous objection requirement is relaxed and appellate review is not prohibited. Wegener v Lafayette Insurance Co., Supreme Court, No. 2010-C-0811 (3/15/11) (Guidry, J, concurs; Victory, J, dissents in part)

### Appeals; Summary Judgment

Review of the denial of a motion for summary judgment is properly taken under the appellate court’s supervisory jurisdiction. Gullatt v Allstate Ins. Co., Fifth (La.) Circuit, No. 10-CA-448 (2/15/11)

## Arbitration

Writes the Fourth (La.) Circuit: where the trial court determines there exists a valid arbitration agreement and there is a question as to which claims by which plaintiffs fall within the scope of the arbitration clause, and if the trial court “determines that all of an individual plaintiff’s claims are arbitrable, it shall order arbitration, deny the stay, grant the exception of prematurity, and dismiss the proceedings as to that plaintiff. If the trial court determines that none of an individual plaintiff’s claims are arbitrable, it shall deny the exception of prematurity and motion to stay. If the trial court determines that some but not all of an individual plaintiff’s claims are arbitrable, then it shall identify which claims are arbitrable and which are not, order the arbitration of the identified arbitrable claims, sustain the exceptions of prematurity as to those claims and deny it as to all others, and grant a stay of the proceedings as to the non-arbitrable claims pending conclusion of arbitration.” Bolden v FedEx Ground Package Systems Inc., No. 2010-CA-0940 (2/16/11)

## Attorneys; Discharge

The lack of communication between attorney and client is a basis for finding that the attorney was discharged for cause. Tran v Williams, Third Circuit, No CA 10-1030 (2/9/11)

## Attorneys; Discipline

The U.S. Fifth Circuit has struck down as unconstitutional the new disciplinary rules that (1) prohibit attorneys from referring to their past results, (2) depict a judge or jury in their advertisements, and (3) impose extensive disclaimer requirements in advertising attorney’s services. However the court upheld lawyer conduct standards that prohibit promises of results, using nicknames or mottos that imply an ability to obtain results, and require a disclaimer when a lawyer uses an actor or reenactment in his or her advertisements. Public Citizen Inc. v Louisiana Attorney Disciplinary Board, \_\_\_ F 3d \_\_\_ (2011)

## Damages

Consortium: \$20,000 is in “upper range” but upheld; couple’s sexual relationship “changed drastically” and was “virtually nonexistent” and husband had to perform housekeeping tasks and assist injured wife with cooking. Thompson v State Farm Mut. Auto. Ins. Co., Third Circuit, No. CA 09-1369 (2/9/11)

Eye: \$400,000 in general damages to plaintiff sustaining injury to the optic nerve resulting in glaucoma and loss of vision in one eye. Hall v Nix, Fourth Circuit, No. 2010-CA-1146 (2/23/11)

Wrist: \$300,000 in general damages “presses the upper limits of the discretionary range” but is upheld where plaintiff suffered a broken wrist that resulted in carpal tunnel syndrome and arthritis; because of a pre-existing heart condition, plaintiff was limited in use of pain medication and could no longer enjoy fishing and squirrel hunting. Williams v Ruben Residential Properties, LLC, Second Circuit, No. 46,040-CA (3/2/11)

### Damages; Causation

Mere possibility or even unsupported probability is not sufficient to support a finding that the defendant's product caused the plaintiff's harm; the plaintiff must establish his claim to a reasonable certainty. Lucas v Hopeman Brothers, Inc., Fourth Circuit, No. 2010-CA-1037 (2/16/11)

### Damages; Loss of Household Services

Cases awarding past and future lost household services have limited recovery to situations where substitute housekeepers were actually utilized or would be necessary because of the plaintiff's total incapacity to perform housekeeping services. Only in one case did the court award future damages for maid services even though the family did not hire a maid when the plaintiff was unable to perform any household chores. Davis v Foremost Dairies, Second Circuit, No. 45,833-CA (2/16/11)

### Debt Collection

Debt collection efforts, if extreme and outrageous, will support recovery for intentional infliction of emotional distress. However, seller's alleged threat that if debtor-buyer did not pay his note "we'll have to kick your ass out," if made, is "demeaning or abusive" but is a legal right that the creditor may have and does not rise to a level of extreme or outrageous. Derouen v Malahmeh, Third Circuit, No. CA 10-1002 (2/9/11)

### Employment Discrimination

The U.S. Fifth Circuit rules that 11 U.S.C. Sec. 525(b) does not create a cause of action against a private employer who discriminates in hiring on the basis of the applicant's bankruptcy status. Burnett v Stewart Title, Inc., \_\_\_ F 3d \_\_\_ (2011)

### Evidence; Judicial Confessions

The presence of consistent opposition by a plaintiff to the alleged confessed fact weighs against a finding of a judicial confession by the plaintiff. La Louisiane Bakery Company, Ltd. v Lafayette Ins. Co., Fifth (La.) Circuit, No. 09-CA-825 (2/8/11)

### Evidence; Privileges

When a client sues a law firm for malpractice, the attorney-client privilege protects the firm's internal "loss prevention" communications that took place after the possibility of a malpractice claim surfaced, although the documents were created before the firm withdrew from representation of the client. TattleTale Alarm Systems, Inc. v Salfee Halere & Griswold LLP, \_\_\_ F Supp 2d \_\_\_ (SD Ohio 2011)

### Insurance

Insured vehicle collided with a vehicle driven by A and pushed it from the roadway. The insured vehicle continued to slide on its side and collided with a car driven by B which had been traveling

several car lengths behind A. Held, the events resulted in a single accident under the terms of insured's policy, with one limit of \$5 million per accident. The collisions were not sufficiently separated by time and distance; Esparza v Eagle Express Lines, Inc., (ED Tex 2007), rejected as the reasoning of that case was flawed. Washington v McCauley, Second Circuit, No. 45,916-CA (2/16/11)

#### Insurance; Penalties

CC Article 1998 (damages for nonpecuniary loss only when obligor intended to aggrieve the obligee) does not apply to an insured's claim for mental anguish and emotional distress based upon violation of R.S. 22:1220 (damages for failure to timely and fairly adjust the claim). Wegener v Lafayette Insurance Co., Supreme Court, No. 2010-C-0810 (3/15/11) (Guidry, J, concurring; Victory, J, dissenting in part)

#### Insurance; Prescription

Act 43 of 2007, which extended the applicable prescriptive periods on specified types of insurance (R.S. 22:629 and 691(F)) from 12 months to 24 months, applies retroactively to a claim for fire loss which occurred before the act. Holt v State Farm Fire & Cas. Co., 627 F 3d 188 (5th Cir. 2010)

#### Insurance; UM Coverage

Since a new waiver does not have to be signed each year when a policy is renewing without any changes, a second invalid waiver on a renewal does not supersede an initial, valid waiver. Doyle v Allstate Insurance Co., Third Circuit, No. CA 10-1020 (2/2/11) (Saunders, J, dissents)

#### Medical Malpractice

A claim that a medical provider was negligent in failing to obtain proper consent to release decedent's body for organ removal and in failing to timely remove him from life support is a "medical service" under R.S. 40:1299.4. Pleasure v Louisiana Organ Procurement Agency, Fifth (La.) Circuit, No. 10-CA-294 (2/13/11)

#### Negligence; Slip and Fall

In Pryor v Iberia Parish School Board, the Supreme Court in a per curiam reverses the Third Circuit's decision allowing recovery to a 69-year-old plaintiff who fell while traversing bleacher steps containing an 18-inch gap; "plaintiff was aware of the open and obvious risk. She could have easily avoided any risk by using additional care (as she did when she first ascended the bleachers) or by choosing to sit on the west side of the stadium where suitable accommodations for persons with physical impairments were provided." No. 2010-C-1683 (3/15/11) (Kimball, CJ, concurring; Johnson and Knoll, JJ, dissenting)

## Removal

The presence of an international arbitration agreement or award that could “conceivably” affect the outcome of a plaintiff’s suit will confer removal jurisdiction under 9 USC Sec. 205 (if the subject matter of an action pending in state court relates to an arbitration agreement or award falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards). Infutura Global Ltd. v Sequus Pharmaceuticals Inc., \_\_\_ F 3d \_\_\_ (9th Cir. 2011)

## Summary Judgment

Where exhibits were previously introduced into evidence, they may be considered on a motion for summary judgment when attached to a memorandum in support of the motion. Arregui v Risk Management Services, LLC, Fifth (La.) Circuit, No. 10-CA-263 (2/15/11)

Litigant was misled by her attorney, and the trial judge refused to grant litigant more time to obtain the necessary document which was, based on the record, easily attainable. Held, the trial court abused its discretion in failing to allow litigant a reasonable amount of time to secure new counsel and obtain and present the evidence, rather than cutting off plaintiff at the summary judgment phase of the proceeding. Sims v Hawkins-Sheppard, Second Circuit, No. 46,145-CA (3/2/11)

## Worker Compensation

R.S. 23:1102 mandates that the employer receive a dollar for dollar credit against the full amount paid to the injured employee in compromise of a third party claim; the credit includes future medical expenses which are or may become due. City of Dequincy v Henry, Supreme Court, No. 2010-C-0070 (3/15/11)

## **MARITIME MATTERS OF NOTE**

The United States Supreme Court has granted writs in a case presenting the issue of liability under the LHWCA to outer continental shelf workers, i.e., if such a worker is injured on land, is he or she always eligible for compensation because his employer’s operations on the shelf are the “but for” cause of his injury, or never eligible because the OCSLA applies only to injuries occurring on the shelf, or is he sometimes eligible, depending on the nature of and extent of the factual relationship between the injury and the operations on the shelf. Pacific Operators Offshore v Valladolid, No. 10-507. Opinion below: 604 F 3d 1126. Compare Mills v Director, 877 F 2d 356 (5th Cir. 1989)

## **WRIT GRANTS OF INTEREST**

The Louisiana Supreme Court has granted writs in Fulmer v State, which overruled Kuebel v Department of Wildlife and Fisheries and held that the state waived its sovereign immunity to an action under the Jones Act and general maritime law for injury to a state employee injured while on a state-owned vessel. Opinion below: 50 So 3d 843.



The Court also has granted writs in Meaux v Wendy's International, Inc., where the court below held that an issue of material fact existed as to whether a building owner had constructive or actual notice of a hidden structural instability in a wall of the building where an employee of the contractor hired to repair the building was injured when the wall collapsed. (5th Cir. 2010)