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LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2015:4 April 1, 2015

UPCOMING MEETINGS

April 16, 2015	**Associate Skills Set Seminar: Written Discovery New Orleans and Shreveport**	**2.0**
May 13-17, 2015	**Annual Meeting, Place D'Armes, Montreal**	**8.0*#**
June 18, 2015	**Associate Skills Set Seminar: Fact Depositions New Orleans and Shreveport**	**2.0**
July 10-11, 2015	**Women's Retreat, Ritz-Carlton, New Orleans**	**4.0**
July 30-Aug. 1, 2015	**Trial Academy, Loyola Law School, New Orleans**	**21.0*#**

(You may register online 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

ANNUAL MEETING 2015: Join us in Marvelous Montreal for a fun and affordable adventure! Don't miss the opportunity to rediscover a community of colleagues and participate in quality CLE. A number of judges and a Louisiana Supreme Court Justice will be joining us. An extension trip to Quebec City is also available. Register NOW at ladc.org because space is limited, and this is turning out to be a very popular trip. If you have any questions, feel free to call Marta Schnabel or Kimberly Zibilich for more information.

ASSOCIATE SKILLS SET SEMINARS: The LADC's Young Lawyers Committee is sponsoring a six-pack of skills-focused seminars throughout 2015—one every other month. These seminars, taught by judges and experienced lawyers, provide excellent training opportunities for associates. The April 16 seminar on the topic of written discovery will be held at the offices of Bradley Murchison Kelly & Shea in New Orleans and Shreveport. Mark Neal of Monroe will make a presentation followed by group discussion led by judges and attorneys. The seminar will be simulcast. Register on the LADC website.

PRACTICE GROUPS: The LADC will be initiating several specialty practice groups within the next month or so. The first three such groups will be medical malpractice, construction and commercial litigation, and employment. These groups will give our members an additional opportunity to be active in the LADC, and they should enrich our newsletter and CLE seminars. Watch for details.

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QUESTIONS REGARDING SEMINARS OR TRIPS: We are working with Kimberly Zibilich at Event Resources New Orleans: phone 504-208-5510; email Kimberly@eventresourcesnola.com.

NEW MEMBERS

Michelle Beaty, Metairie
Amy Gonzales, Hammond
Jessica Lehman, New Orleans
R. Heath Savant, New Orleans
Jonathan Stokes, Alexandria
Katherine Wells, New Orleans

KEY DEVELOPMENTS

Arbitration

"[W]hether an accountant, serving as an arbitrator, exceeded his arbitral authority." The arbitrator awarded more than was specified in the unresolved exceptions to an audit report, and he based the award on employment documents that he ordered produced. The oilfield operator argued that the arbitrator exceeded his authority by awarding more than was attributable to the unresolved exceptions to the audit report. To prevail on that argument, the operator would have to prove that the parties contracted to limit the arbitration to the unresolved exceptions to the audit report and to the values assigned to each exception. The Louisiana Civil Code refers to an agreement to arbitrate as a "submission." See La. C.C. art. 3099. The Civil Code indicates that the "[p]arties may submit either all their differences, or only some of them in particular; and likewise they may submit to arbitration . . . generally every thing which they are concerned in, or which they may dispose of." La. C.C. art. 3102. In the dispute between oilfield owners and oilfield operator regarding costs charged, the arbitrator had both the statutory authority under La. R.S. 9:4206 ("parties . . . shall produce evidence as the arbitrator may deem necessary") and a contractual basis pursuant to the parties' Procedural Agreement ("[a]rbitrator is not required to apply the rules of evidence used in judicial proceedings, but may do so if deemed appropriate") to order that documents be produced during the arbitration for the arbitrator's consideration of the merits of the dispute. "When, . . . parties submit their dispute for resolution by arbitration, the role of the courts in reviewing the outcome is limited. As we have previously explained, '[a]rbitration is a substitute for litigation,' and '[j]udges are not entitled to substitute their judgment for that of the arbitrators chosen by the parties.'" Mack Energy Co v Expert Oil and Gas, L.L.C., Supreme Court, No. 2014-C-1127 (1/28/15)
at http://www.lasc.org/opinions/2015/14C1127.opn.pdf

Discovery; Summary Judgment

"[T]here is no absolute right to delay action on a motion for summary judgment until discovery is complete"; "all that is required is that the parties have a fair opportunity to carry out discovery and to present their claim." Where defendant filed a motion for summary judgment eighteen months after the suit was brought, and plaintiff made no attempt to obtain discovery during the two-month period before her response to the motion and did not attempt to conduct discovery until just days before the scheduled hearing date, the district court did not abuse its discretion in declining to permit additional discovery

and in granting summary judgment in favor of defendant. McCastle-Getwood v Professional Cleaning Control, First (La.) Circuit, No. 2014 CA 0993 (1/29/15)
at http://www.la-fcca.org/opiniongrid/opinionpdf/2014%20CA%200993%20Decision%20Appeal.pdf

Recusal

When a party seeks recusation of a judge based on allegations of bias or prejudice, Louisiana jurisprudence requires not only a finding of actual bias or prejudice, but that the bias or prejudice "must be of a substantial nature and based on more than conclusory allegations." Alleged bias or prejudice which "emanates from testimony and evidence set forth in the proceedings" is not of an extrajudicial nature and is therefore insufficient to merit recusal. "Where the motion to recuse does not contain a valid ground for recusation, the trial court may deny the motion without referring it to another judge for determination." The appellate court found that the allegations regarding bias were conclusory and were based on the judge's rulings that were adverse to the party moving to recuse. Accordingly, the trial court did not err in denying the motion without a hearing. David v David, Third (La.) Circuit, No. CA 14-999 (2/4/15), at http://la3circuit.org/Opinions/2015/02/020415/14-0999opi.pdf

Wrongful Death

The Louisiana Supreme Court relied on its decision in Udomeh v. Joseph, 11-2839 (La. 10/26/12), 103 So 3d 343, to hold that a putative father's allegations of biological paternity of his decedent child, in a wrongful death action, provide notice to the defendant that paternity is an issue in the case and can be reasonably construed as stating an action for filiation. "Within the context of a wrongful death and survival action, the putative father's allegations of biological paternity of the decedent child can be reasonably construed as stating an avowal action, as there was no other purpose an allegation of paternity could have served." Miller v Thibeaux, Supreme Court, No. 2014-C-1107 (1/28/15) (Clark and Guidry, JJ, and Crichton, Justice ad hoc, dissenting)
at http://www.lasc.org/opinions/2015/14C1107.opn.pdf

OTHER SIGNIFICANT DEVELOPMENTS

Admiralty; Seaman

The Third Circuit addressed whether plaintiff, a sandblaster/painter on various rigs and platforms located in the navigable waters of the Gulf of Mexico, was a seaman for purposes of his personal injury claim under the Jones Act. The United States Supreme Court has explained that the employee's duties must contribute to the function of the vessel or to the accomplishment of its missions and that a seaman must have a connection to a vessel in navigation (or an identifiable group of such vessels) that is substantial in terms of both duration and nature. All those who work at sea in the service of a ship are eligible for seaman status. The inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This emphasis gives "'substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and [is] helpful in distinguishing land-based from sea-based employees.'" Plaintiff and crew performed their sandblasting/painting functions on the platform, but slept, ate, attended meetings, took breaks, tended to their equipment, and performed housekeeping functions such as laundry and the stocking of groceries aboard the vessel. While the plaintiff had no operational duties aboard the M/V *Brody Paul,* the court

does not find that it can be said, as a matter of law, that the plaintiff did not have a substantial connection to the vessel in terms of duration and nature. Where, although the plaintiff may have rendered less than thirty percent of his time in the service of the vessel, other factual circumstances may support a reasonable fact-finder's determination that he should be afforded seaman status. Baldwin v CleanBlast, LLC, Third (La.) Circuit, No. CA 14-1026 (2/4/15)
at http://la3circuit.org/Opinions/2015/02/020415/14-1026opi.pdf

Appeals

"Even when an appeal lacks serious legal merit, frivolous appeal damages [under La. C.C.P. art. 2164] will not be awarded unless the appeal was taken solely for the purpose of delay or the appellant's counsel is not serious in the position he advances." Any doubt regarding whether an appeal is frivolous must be resolved in the appellant's favor. Miralda v Gonzales, Fourth (La.) Circuit, No. 2014-CA-0888 (2/4/15), at http://www.la4th.org/opinion/2014/373086

Appeal; Worker's Compensation

In worker's compensation cases, the appropriate standard of review to be applied by the appellate court to the OWC's findings of fact is manifest error. When, however, legal error interdicts the fact-finding process in a worker's compensation proceeding, the de novo, rather than the manifest error, standard of review applies. Tubre v Automobile Club of Southern California, Fourth (La.) Circuit, No. 2014-CA-0859 (2/4/15) (Bagneris, J, concurring with reasons)
at http://www.la4th.org/opinion/2014/373142_1.pdf

Arbitration

Writes the Louisiana Supreme Court: "The upshot of both the court of appeal's reasoning and the arguments of [plaintiff] is that the panel just got it wrong on the law. We reiterate our long line of jurisprudence that an error of fact or law will not invalidate an otherwise fair and honest arbitration award. . . . [Plaintiff] has failed to establish any proof of dishonesty, bias, bad faith, willful misconduct, or any conscious attempt of the panel to disregard Louisiana law. . . . [A]rbitrators are not guilty of misconduct merely because a different award could have been rendered." Crescent Property Partners, LLC v American Manufacturers Mutual Ins. Co., No. 2014-C-0969 c/w 2014-C-0973 (1/28/15) (Johnson, CJ, concurring), at http://www.lasc.org/opinions/2015/14C0969cw14C0973.opn.pdf

Attorneys; Malpractice

The timeliness of a legal malpractice claim is measured by La. R.S. 9:5605. This measure of timeliness is a peremptive – not prescriptive – period of time. Section B of the statute provides that "'[t]he one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.'" La. R.S. 9:5605(B). The proper procedural mechanism to raise an exception of peremption under La. R.S. 9:5605 is a peremptory exception. See La. C.C.P. art. 927A(2). At a hearing on a peremptory exception pleaded before trial of the case, "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." In 2008, the Louisiana Legislature amended La. C.C.P. art.

927 to add peremption to the list of enumerated objections that may be raised by peremptory exception. "The jurisprudence has held that the one-year peremptive period under La. R.S. 9:5605 (A) commences when ―a client knows or should have known that a lawyer's actions or inactions may cause the client to incur damages, thereby creating a legal cause of action." The jurisprudence has identified three factors to be evaluated in determining whether a plaintiff's actions or inactions were reasonable. The first factor is the plaintiff's statements reflecting his dissatisfaction with, or suspicions of, the attorney's actions, and whether the plaintiff investigated his accusations or suspicions. The second factor is the plaintiff's hiring of another attorney. The third factor is the issuance of an adverse judicial ruling. The three-year peremptive period is simply a cap on the one-year discovery period. Plaintiff knew or should have known of the events supporting his malpractice claims over one year before he filed suit. Accordingly, the trial court was not manifestly erroneous in finding his claim barred by peremption under the one-year peremptive period set forth in La. R.S. 9:5605(A). As defendant correctly points out, the court has held that post-malpractice, fraudulent concealment does not constitute fraud as contemplated by the fraud exception codified in La. R.S. 9:5605(E). Louisiana courts of appeal have consistently rejected the idea that the concealment of legal malpractice constitutes fraud under La. R.S. 9:5605(E). Miralda v Gonzalez, Fourth (La.) Circuit, 2014-CA-0888 (2/4/15), at http://www.la4th.org/opinion/2014/373086.pdf

Damages

Writes the Third Circuit: We agree where plaintiff was awarded 100% of her requested mileage to and from medical appointments, she should have also been awarded 100% of the medical expenses. We agree with the trial court that "loss of educational benefit" should not be considered a separate item of damages on the verdict sheet. Although we agree with the plaintiffs that the impact of the accident on homeschooling should be recognized, we believe it was recognized as an element within the children's loss of consortium claim. Barras v Progressive Security Ins. Co., No. 14-898 (2/11/15), at http://www.la3circuit.org/Opinions/2015/02/021115/14-0898opi.pdf

Employment; Whistleblower

The whistleblower statute provides in pertinent part: "[a]n employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law…[d]iscloses or threatens to disclose a workplace act or practice that is in violation of state law." La. R.S. 23:967(A)(1) The Louisiana Employment Discrimination Law, La.R.S. 23:302(2), defines "employer," in pertinent part, as:

> [A] person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state receiving services from an employee and, in return, giving compensation of any kind to an employee. The provisions of this Chapter shall apply to an employer who employs twenty or more employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

The Third Circuit declined to apply the twenty-or-more-employees definition of the employment discrimination statute (23:302) to the whistleblower statute (23:967). The court explained its reasons: "(1) the purpose of Chapter 3-A is to prohibit discrimination; (2) the terminology

contained in La.R.S. 23:302 limits its application to Chapter 3-A; (3) the intent of Section 967 is to provide a remedy to employees whose employers retaliate against them for exercising their individual right to report the employers' violations of state law, and (4) nothing in Chapter 9 or Section 967 indicates that the legislature intended to define employer for purposes of those provisions by the definition contained in Section 23:302." Hunter v Rapides Parish Coliseum Authority, Third (La.) Circuit, No. 14-784 (2/4/15) at http://www.la3circuit.org/Opinions/2015/02/020415/14-0784opi.pdf, reh'g denied 3/11/15, at http://www.la3circuit.org/Opinions/2015/03/031115_Rehearing/14-0784reh.pdf

Immunity

"Louisiana law is clear and unambiguous that a court-appointed expert enjoys absolute immunity from suit for services provided pursuant to that appointment." Faust v Pesses, Fourth (La.) Circuit, No. 2014-CA-0788 (2/11/15) (Tobias, J., concurs), at http://www.la4th.org/opinion/2014/373530.pdf

Insurance

When a party seeks penalties as a result of an insurer's failure to pay a settlement within 30 days, the party need not prove the insurer was "arbitrary, capricious, or without probable cause" in failing to pay; rather, the party need only show that the insurer's failure was "knowingly committed." While the compromise must be made in writing and evidenced by documentation signed by both parties, there is no requirement that the compromise be contained in a single document. However, a letter written by one party memorializing their understanding of an oral argument was insufficient to satisfy the "in writing" requirement of La. C.C. art. 3072, and thus there was no agreement of the parties triggering the penalties for non-payment set forth in La. R.S. 33:1973. Barnes v West, Third Circuit, No. CA 14-1018 (2/4/15), at http://www.la3circuit.org/Opinions/2015/02/020415/14-1018opi.pdf

Insurance Agent

The Supreme Court has held that an insurance agent owes a duty of "reasonable diligence" to his customer. The duty of "reasonable diligence" is fulfilled when the agent procures the insurance requested. As to whether the insurance agent's duty of "reasonable diligence" includes the duty to notify a customer of an insurer's decision not to renew an insurance policy, La. R.S. 22:636(H) is clear. The insurance agent has no additional or independent duty to inform the insured of the insurer's decision not to renew. Collins v State Farm Insurance Company, Fourth (La.) Circuit, No. 2014-CA-0419 (2/4/15), at http://www.la4th.org/opinion/2014/372988.pdf

Insurance; Uninsured Motorist

The law imposes UM coverage unless validly waived despite the policy language, the parties' intentions, or the presence or absence of payment or a premium charge. A waiver form failing to meet the formal requirements is not a valid rejection of UM coverage. A valid UM waiver form which must be complied with by the insurer, requires the following six formalities:

> (1) the insured must initial the selection or rejection chosen to indicate that the decision was made by the insured; (2) if lower limits are selected, then the lower limits are entered on the

> form to denote the exact limits; (3) the insured or legal representative must sign the form evidencing the intent to waive UM coverage; (4) the form must include his or her printed name to identify the signature; (5) the insured dates the form to determine the effective date of the UM waiver; and (6) the form must include the policy number to demonstrate which policy it refers to.

The declarations page in this instrument stated the insured as "GRIMES, FLOYD & GRIME[S], FRANK DBA GRIMES TRUE VALUE HDW STORE. . ." Floyd signed the UM waiver. Floyd is still a named insured since "'[d]oing business under another name does not create an entity distinct from the person operating the business.'" Melder v State Farm Mutual Auto Ins. Co., Third (La.) Circuit, No. 14-934 (2/11/15) (Cooks, J., dissents and assigns written reasons)
at http://www.la3circuit.org/Opinions/2015/02/021115/14-0934opi.pdf

Judicial Confession

A judicial confession is "a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it…." La. C.C. art. 1853. This court has held that "[a] judicial confession is a party's explicit admission of an adverse factual element and has the effect of waiving evidence as to the subject matter of the confession from issue." Collins v State Farm Insurance Co., Fourth (La.) Circuit, 2014-CA-419 (2/4/15), at http://www.la4th.org/opinion/2014/372988.pdf

Judgments

A judgment against Husband was obtained a year and a half before a supplemental and amending petition was filed adding Wife as a defendant. Consequently, the trial court lacked continuing jurisdiction to allow the supplemental and amending petition to be filed against Wife. Without the requisite subject matter jurisdiction, the judgment of default rendered against Wife was absolutely null and had no legal effect. Because an absolutely null judgment may be collaterally attacked, Wife's petition alleging wrongful seizure of her separate property was permissible. Wells v Fruth, Jamison & Elsass, PLLC, Third (La.) Circuit, No. CA 14-826 (2/4/15)
at http://www.la3circuit.org/Opinions/2015/02/020415/14-0826opi.pdf

Medical Malpractice; Prescription

La.Civ.Code art. 3462 prohibits the application of a general codal article such as La.Code Civ.P. art. 1153 to a medical malpractice case. The Supreme Court has explained within the context of a medical malpractice case that "determination of when prescription commences under the discovery rule depends on at least two primary factors: (1) the date on which the plaintiff gained actual or constructive knowledge of 'facts indicating to a reasonable person that he or she is the victim of a tort,'…and (2) the date on which the 'tortious act actually produces damages.'" The Supreme Court noted that "[b]oth knowledge and damages must be present for prescription to commence. Where the petition alleged the dates of the negligent acts but did not allege discovery of those acts and the record did not clarify the point of discovery, the petition against the original defendants had prescribed where the petition was filed more than one year from the negligent acts. Therefore, the filing of the original medical malpractice suit neither interrupted nor suspended the prescriptive period against even later added

defendants. In Re: Medical Review Panel Claim of Don Clayton Wright v Christus Health Center Louisiana, Third (La.) Circuit, No. 14-970 (2/4/15)
at http://www.la3circuit.org/Opinions/2015/02/020415/14-0970opi.pdf

Considering plaintiff's education and intelligence, her continuing pain from the time of the January 21, 2012 rollover accident, the confirmation by doctor after reviewing the MRI on February 27, 2012, that she had a compression fracture at L-1, without any intervening incident, and the fact that she had not previously suffered back pain at this location, the trial court was not manifestly erroneous in finding that plaintiff had constructive knowledge on February 27, 2012 that the defendant had failed to properly diagnose her back injury on January 21, 2012. In Re: Medical Review Panel Proceeding of Donna M. Hickman, Third (La.) Circuit, No. 14-779 (2/4/15)
at http://www.la3circuit.org/Opinions/2015/02/020415/14-0779opi.pdf

Negligence

Broussard v State Ex Rel Office of State Buildings, 12-1238 (La. 4/5/13), 113 So. 3d 175, did not involve summary judgment practice nor did court's discussion infer that issues involving unreasonable risk of harm must be determined by a trial. Further, Bufkin v Felipe's La., 14-0288 (La. 10/15/14), demonstrated "our jurisprudence does not preclude the granting of summary judgment in cases where the plaintiff is unable to produce factual support for his or her claim that a complained-of condition is unreasonably dangerous." Here, church defendants produced evidence in the form of affidavits, depositions and photographs that the parking area in which the accident occurred had been used by congregants for decades without incident and that the complained-of condition—the unpaved grassy parking area—was obvious and apparent to anyone who encountered it. Plaintiff failed to produce any evidence in response or demonstrate how the alleged defects caused the accident. Therefore, there was no genuine issue as to whether the parking lot was unreasonably dangerous, and thus the church defendants were entitled to summary judgment in their favor. Allen v Lockwood, Supreme Court, No. 2014-CC-1724 (2/13/15), at www.lasc.org/opinions/2015/14CC1724.pc.pdf

Sanctions

A request for sanctions was made at a hearing in which neither the opposing party nor his counsel was present. Because there was nothing in the record indicating that the party or his attorney was provided with notice of the issue of sanctions and thus neither the party nor his attorney had an opportunity to present arguments on the imposition of sanction, the award of sanctions was subject to reversal. David v David, Third Circuit, No. CA 14-999 (2/4/15)
at http://www.la3circuit.org/Opinions/2015/02/020415/14-0999opi.pdf

Workers Compensation

The only requirements for forfeiture of benefits under La.R.S. 23:1208 are: (1) a false statement or representation, (2) willfully made, and (3) for the purpose of obtaining workers' compensation benefits. Section 1208 applies to false statements or representations regarding prior injuries; it applies to statements made to insurance investigators and physicians alike; and it imposes no requirement that the employer show prejudice. Under Section 1208.1, there is no forfeiture of benefits unless the false answer relates to a medical condition for which benefits are claimed or it affects the employer's

reimbursement from the second injury fund. The evidence overwhelmingly shows prior accidents, injuries, pain and treatment involving claimant's low back and neck, which he repeatedly denied. The repeated false statements, misrepresentations, and omissions were made in relation to, and after he reported to his employer, a job-related injury on October 24, 2012. This evidence shows that claimant made the false statements willfully in order to obtain workers' compensation benefits, meeting all three criteria of La.R.S. 23:1208. Edwards v Southeastern Freight Lines, Inc., Third (La.) Circuit, No. WCA 14-871 (2/4/15), at http://www.la3circuit.org/Opinions/2015/02/020415/14-0871opi.pdf

An employee is entitled to receive TTD benefits only if he proves by clear and convincing evidence, without any presumption of disability, that he is physically unable to engage in any employment or self-employment. An employee is no longer eligible for TTD benefits when "the physical condition of the employee has resolved itself to the point that a reasonably reliable determination of the extent of disability of the employee may be made and the employee's physical condition has improved to the point that continued, regular treatment by a physician is not required. Moreover, an injured employee who is able to return to work, even if in pain, is no longer eligible for TTD benefits. In order to qualify for SEBs, an employee is required to prove, by a preponderance of the evidence, that a work related injury resulted in "his inability to earn 90% or more of his average pre-injury wage." Once the employee makes such a showing, the employer must then prove that the employee is physically able to perform a certain job and that the job was either offered to the employee or that the job was available within the employee's community or geographic region in order for the employee to be prevented from recovering SEBs. While actual job placement is not required, an employer must prove job availability under La. R.S. 23:1221(3)(c)(i) by showing: (1) the existence of a suitable job within claimant's physical capabilities and within claimant's or the employer's community or reasonable geographic region; (2) the amount of wages that an employee with claimant's experience and training can be expected to earn in that job; and (3) an actual position available for that particular job at the time that the claimant received notification of the job's existence. Here, summary judgment was not appropriate because factual issues remained. Carambat v City of New Orleans Police Department, Fourth (La.) Circuit, No. 2014-CA-0810 (2/4/15), at http://www.la4th.org/opinion/2014/373163.pdf

Section 1208 applies to any false statement or misrepresentation, including one concerning a prior injury, made willfully by a claimant for the purpose of obtaining benefits, and thus is generally applicable once an accident has allegedly occurred and a claim is being made. Section 1208.1, on the other hand, applies to false statements or misrepresentations made pursuant to employment-related inquiries regarding prior medical history such as in an employment application or some post-employment questionnaire and not to statements made in relation to a pending claim. The employer must prove three elements to avoid liability under 1208.1: (1) an untruthful statement; (2) prejudice to the employer; and (3) compliance with the notice requirements. Absent an employer's attempt to clarify ambiguous answers, an employer fails to prove that claimant has knowingly made an untruthful answer for which forfeiture is justified. An employee "fails to answer truthfully when he clearly indicates "No" on the employer's questionnaire, denying the existence of a known medical condition.'" "No" is not an ambiguous answer. If claimant failed to answer truthfully when he clearly indicated "No" to his answers on the employer's medical questionnaire concerning his prior medical history of injuries to his neck, back, and knee, his entitlement to workers' compensation benefits may be forfeited under La. R.S. 23:1208.1 if the other requirements are met. In order to carry its burden of proof under the prejudice portion of the analysis, employer is required to prove that claimant's untruthful answers directly relate to the medical conditions at issue. "Direct relation is established when subsequent injury was inevitable or

very likely to occur because of the presence of preexisting condition, and is not based on mere anatomical connexity." Because statutory forfeiture must be strictly construed, the employer did not carry his burden where the medical testimony established that a pre-existing condition more likely than not made him more susceptible to re-injury to those areas, there was no testimony that re-injury was "inevitable" or very likely to occur. Lavalais v Gilchrist Construction Co., LLC, Third (La.) Circuit, No. WCA 14-785 (2/4/15), at http://www.la3circuit.org/Opinions/2015/02/020415/14-0785opi.pdf

The WCJ erred in finding that employer was not entitled to select Carlisle a pharmacy to be used by claimant. Here, there is no evidence in the record indicating that employer's choice of pharmacy, Carlisle, failed to timely provide claimant with her prescription medications. Rather, the only evidence presented as to claimant's reason for switching to another pharmacy is that she felt frustrated, depressed and overwhelmed. We find that this evidence is insufficient to establish that claimant failed to receive her prescription medications timely, or that she experience any other discernable deficiencies in filling her prescriptions through Carlisle. Downs v Chateau Living Center, Fifth (La.) Circuit, No. 14-CA-672 (1/28/15)
at http://www.fifthcircuit.org/dmzdocs/OI/PO/2015/0B94E00A-73FA-44A9-9424-2E54E991A656.pdf

Labor Law

On March 18, 2015, the General Counsel of the National Labor Relations Board (NLRB) released a memorandum, Memorandum GC 15-04, regarding the legality of rules maintained by employers. In recent years, the NLRB has been finding that many employer rules violate Section 7 of the National Labor Relations Act regardless of whether the employer's employees are represented by a union. It is important to note that even employees not represented by a union have the right under Section 7 to engage in concerted activity for mutual aid or protection. Under the Board's analysis in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), a rule that explicitly restricts Section 7 activities is unlawful, and a rule that does not explicitly restrict Section 7 activities is unlawful if any of the following is true: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Lutheran Heritage, 343 N.L.R.B. at 647. Memorandum GC 15-04 is available on the NLRB website at http://nlrb.gov/reports-guidance/general-counsel-memos

For a mandatory term contract to exist, "the parties [must] have clearly agreed to be bound for a certain period of time during which the employee is not free to depart without assigning cause and the employer is not free to depart without giving a reason." Fixed term employment contract not found where only evidence of fixed term was affirmatively answered interview question asking whether plaintiff was willing to commit to a period of employment for five or six years given his age. Read v Willwoods Community, Louisiana Supreme Court, 14-C-1475 (La. 3/17/15)
at www.lasc.org/opinions/2015/14C1475.opn.pdf