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Law Notes

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Also In This Issue

- Choosing a Mediator
- Assignments of Accounts Receivable
- Inside the Firm

April, 2011

NOLA VII Artist-Activist Retreat and benefit concert

Susan F. Clade, who serves on the board of the non-profit group Sweet Home New Orleans, recently attended the NOLA VII Artist-Activist Retreat and benefit concert. The retreat was hosted by two national non-profit organizations serving the music community: Air Traffic Control ("ATC"), a resource for managers and musicians interested in creating social change collaborations between and among themselves and other organizations; and Future of Music Coalition ("FMC"), an education, research and advocacy organization that identifies, examines and explains the challenging issues at the intersection of music, law, technology and policy for musicians and citizens.

ATC and FMC brought together musicians and music business persons and representatives of various donors and foundations from around the nation for a three-day retreat in February. The purpose of the 2011 retreat was to inform the attendees about the vital work that Sweet Home does in providing services to New Orleans' music and cultural communities and the efforts of the Gulf Restoration Network, based in New Orleans, to inform and guide the recovery and restoration of the Gulf of Mexico, Louisiana's fragile coast and all Gulf Coast communities in the wake of the 2010 BP drilling disaster. Emphasis was placed on informing the attendees of the enormous volunteer, financial and other needs of both organizations in assisting New Orleans and the Gulf Coast communities in recovery from the twin disasters of Hurricane Katrina and the BP oil spill, and restoring them to stronger and more sustainable positions than ever before.

Continued on page 3

Worker's Compensation Insurance – A Necessity

By Susan F. Clade

In economic times such as these, many employers find their need for workers in a state of flux. As a result, employers sometimes resort to hiring temporary and/or out-of-state workers who may or may not have the requisite training, skills and experience. Under Louisiana law, it is essential that employers have worker's compensation insurance in place to cover any job-related injuries or illnesses suffered by their workers, whether permanent or temporary, full-time or part-time. In Louisiana an employer may purchase such insurance from an insurer or it may be self-insured, which requires proof of the employer's financial ability to pay benefits as well as state certification. Without worker's compensation insurance, an employer can be sued by an injured employee in tort for damages which can significantly exceed the amounts the worker would be entitled to in worker's compensation benefits. Worker's compensation insurance limits an injured employee's recovery and, therefore, protects both the employer and the employee.

The failure of an employer to provide such insurance is punishable by civil and/or criminal penalties, including fines and/or imprisonment up to one year. The penalties may be imposed by the Office of Worker's Compensation ("OWC") on employers *and* on individuals who aid and abet employers who wilfully misrepresent that they are in compliance with the statute. An employer **"who fails to secure"** work-

Employers operating in Louisiana must obtain worker's compensation insurance or State certification of their self-insured status. Failure to do so can adversely affect the employer's financial condition, good will and reputation, and its very ability to continue to conduct business.

er's compensation insurance – regardless of the reason – **"shall be liable"** for a civil penalty up to \$250 per employee for a first offense and up to \$500 per worker for a subsequent offense. [La. R.S. 23:1170(A)]. Such an employer may also be investigated by the OWC, which could result in the discovery of additional violations. The OWC may also seek injunctive relief against an employer with prior offenses to prohibit it from continuing to operate until proof of insurance is provided and all fines are paid in full. La. R.S. 23:1171.1. An employer who **"wilfully"** – i.e., intentionally or through gross negligence – fails to provide insurance is subject to criminal penalties, including a fine of \$250 per day and/or imprisonment for up to one year, or both.

Any **"person"** who "knowingly" makes false or misleading statements or omits/conceals material information "for the purpose of" obtaining compensation coverage or avoiding or delaying

Continued on page 3

Six Factors to Consider When Choosing A Mediator

By Shannon H. Huber

1 Let the Other Side Choose

Although it sounds like a concession before even starting the mediation, allowing the adverse party to choose the mediator starts the mediation process off in the right direction.

First, it shows that you are willing to compromise and are truly interested in obtaining a settlement. Second, when the mediator is discussing your position with the other side and, hopefully, attempting to persuade them in your favor, the mediator already has credibility with the adverse party because they chose him or her as their mediator. Finally, while the purpose of mediation is to settle the case, it is important to remember that if you do not like the position taken by the mediator during the mediation, you do not have to settle the case. Mediation is not binding and there is no requirement to settle on the date of the mediation. If the mediator chosen by the other side is unsuccessful, other attempts, perhaps with a different mediator, may prove fruitful.

2 Mediator's Background

Although it is customary to obtain CV's and other biographical information of experts at trial, parties often times fail to obtain the same information on the mediator. Depending on the type of case that it is to be mediated, it is important to obtain any information the mediator might have regarding his technical expertise and/or experience with the complexities of your case. It is also useful to know if the mediator previously practiced or is still practicing as a plaintiff and/or defense attorney and in which jurisdictions he or she primarily practices. Knowledge of the jurisdiction and the personalities involved, including the potential jury pool and judges, enables the mediator

to be more persuasive. It is important to know if the mediator is versed in issues to be presented, i.e., construction, medical or appellate issues that may arise. A mediator who is aware and knowledgeable of such issues can only be an asset in obtaining a resolution of the case.

3 Flexibility

While it is true that many mediators have a specific formula for the mediation schedule, it is important that a mediator be open and flexible with regards to how mediations can best be handled on a case-by-case basis. A mediator who is open to suggestions and is willing to listen to the parties with regards to waiving opening presentations or even placement or location of the parties throughout an office is important and could in fact be the difference which leads to a successful mediation.

4 Follow Through

Many mediations do not settle their cases on their assigned mediation date. It is important to know, and to take into account, how often the mediator settles cases in the weeks or months after the initial mediation. Mediators who continue to call (and/or badger) both parties after the mediation date are usually very effective. These mediators show that they genuinely care about their success rate as mediators and do not believe their job only exists on the mediation date. (It should be noted that some mediators do not bill for these post-mediation calls, but if the length and amount of post-mediation follow-through is substantial, extra charges could apply).

5 Referrals, Referrals, Referrals

Referrals are a vital part of networking. Word of mouth is an excellent way to obtain suggestions for mediators who are most suited to a specific case. While the attorney handling the case might have

some suggestions for a mediator, information learned at trade meetings, industry conferences and even from competitors can lead to names of mediators known by others in a specific field. It is important to keep your ears open at all times and ask others of favorable experiences they might have had with certain mediators.

6 Respect

Finally, the most important factor to consider when choosing a mediator is that all sides have some level of respect for the mediator. For example, if there is a member of the judiciary who retires and becomes a mediator, and you did not respect him while he was on the bench, it is unlikely that you will be open to his powers of persuasion when he is discussing your case. If, however, the mediator has been suggested by one of your respected peers, and comes with a good referral, (or better yet a few good referrals) mediation is more likely to be successful.



Shannon Huber

Assignment of Accounts Receivable – Trap for the Unwary

By Steven A. Jacobson

Most businesses are familiar with the mechanics of an assignment of accounts receivable. A party seeking capital assigns its accounts receivable to a financing or factoring company which advances that party a stipulated percentage of the face amount of the receivables. The factoring company, in turn, sends a notice of assignment of accounts receivable to the party obligated to pay the factoring company's assignee, i.e. the account debtor. While fairly straightforward, this three party arrangement has one potential trap for account debtors.

Most account debtors know that once they receive a notice of assignment of accounts receivable, they are obligated to commence payments to the factor-

ing company. Continued payments to the assignee do not relieve the account debtor from its obligation to pay the factoring company.

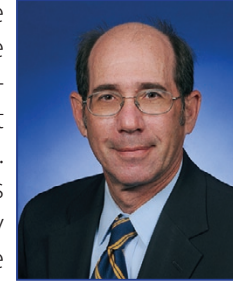
It is not uncommon for a notice of assignment of accounts receivable to contain seemingly innocuous and boilerplate language along the following lines:

Please make the proper notations on your ledger and acknowledge this letter and that invoices are not subject to any claims or defenses you may have against the assignee.

Typically, the notice of assignment of accounts receivable is directed to an accounting department and is signed, acknowledged and returned to the factoring company without consideration of the waiver of defenses languages.

Even though a party may have a valid defense to payment to its assignee, it

still must pay the face amount of the receivable to the factoring company if it has signed a waiver. In many cases, this will result in a party paying twice – once to the factoring company and once to have, for example, shoddy workmanship repaired or defective goods replaced. Despite the harsh result caused by an oftentimes inadvertent waiver agreement, the Uniform Commercial Code validates these provisions with limited exception. Accordingly, some procedures should be put in place to require a review of any notice of assignment of accounts receivable to make sure that an account debtor preserves its rights and defenses.



Steven Jacobson

Worker's Compensation Insurance – A Necessity

Continued from page 1

payment of compensation premiums may also be subjected to the statutory criminal penalties. La. R.S. 23:1172.2.

Lastly, a “knowing” failure to provide insurance together with a failure to pay an OWC “final judgment” for compensation benefits allows the employee to sue the employer in tort for “legal damages.” La. R.S. 23:1032.1. If the employee obtains a judgment in the tort suit as well, he may collect only one of the judgments but is entitled to choose the greater of the two. Although the employer does not have to pay double damages, a second legal action could result in the employer's incurring substantial

attorney's fees and costs.

Thus, an employer operating in Louisiana must obtain worker's compensation insurance or State certification of its self-insured status. Failure to do so can result in an employer's being subjected to a tort suit and/or adversely affect the employer's financial condition, good will and reputation, and its very ability to continue to conduct business.



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NOLA VII Artist-Activist Retreat

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If you would like more information on Sweet Home New Orleans, Gulf Restoration Network, Air Traffic Control or Future of Music Coalition, please contact Susan Clade at sclade@spsr-law.com or the organizations via their websites: www.sweethomeneworleans.org; www.healthygulf.org; www.atctower.net; and www.futureofmusic.org.

Inside the Firm

Best Lawyers has named **H. Bruce Shreves** as the "New Orleans Best Lawyers Alternative Dispute Resolution Lawyer of the Year" for 2011.

We are proud to announce that Simon, Peragine Smith & Redfearn was named in *U.S. News & World Report* as one of the "Best Law Firms".

The **Louisiana Super Lawyers 2011** list includes **H. Bruce Shreves** in the overall **top 10**. **Denise C. Puente** is listed in the top 25 Louisiana women attorneys and **Jay H. Kern** is listed under New Orleans Construction/ Surety lawyers.

The Louisiana Supreme Court recently denied writs in Susan Henderson Montgomery versus Administrators of the Tulane Educational Fund, thereby confirming the closure of the H. Sophie Memorial Newcomb College. It was an honor and a privilege for our firm to represent Mrs. Montgomery, and all those interested in preserving Newcomb College, in this case.

The firm recently completed a major renovation of its office space. Although the renovations extended throughout the firm, the primary focus was on the reception area pictured here. Go to www.spsr-law.com for more renovation photos.



Renovations at the firm

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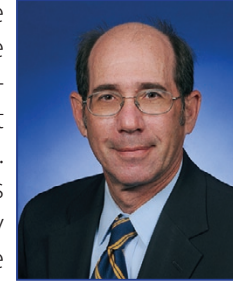
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