

**EVALUATION AND HANDLING OF AUTO CLAIMS
UNDER LOUISIANA LAW**

TABLE OF CONTENTS

I.	INSURANCE	1
	A. Compulsory Insurance Laws	1
	B. Liability Limits	1
	C. Louisiana Direct Action Statute	1
	D. "No Pay/No Play" Law	2
	E. Uninsured/Underinsured Coverage	3
II.	STATUTE OF LIMITATIONS/PRESCRIPTION	8
III.	RULES OF THE ROAD	9
	A. General Duties	9
	B. Rear-end Accidents	9
	C. Changing Lanes	10
	D. Left-turning Motorist	10
	E. Passing Motorist	10
	F. Intersections and Intersection Controls	11
	G. Unlicensed Drivers and Negligent Entrustment	12
	H. Weather Conditions	12
IV.	DEFENSES	13
	A. Comparative Fault/Contributory Negligence	13
	B. Sudden Emergency Doctrine	13
	C. Unavoidable or Inevitable Accident Doctrine	14
	D. Mitigation of Damages	14
V.	POLICY LIABILITY EXCLUSIONS	15
VI.	EVALUATING CLAIMS--QUANTIFICATION OF DAMAGES	16
	A. General Damages	16
	B. Special Damages	17
	C. Punitive Damages	18
	D. Loss of Consortium	19
	E. Quantification of Damages	19

VII. SETTLEMENT ISSUES	24
A. Damages and Penalties Available to an Insured	24
B. Damages and Penalties Available to a Third-Party Claimant	26
C. Excess Judgment--Bad Faith: The Duty to Settle Within Policy	
Limits to Prevent Excess Exposure	28
D. Claims Made on Behalf Minor Children	29
E. Attorney Liens	29
F. Medical Liens	29
 VIII. LIMITATION UPON JURY TRIALS/MONETARY JURISDICTIONAL LIMITS .	31

EXHIBITS

Louisiana No Pay/No Play Verification Form	“A”
State of Louisiana Uninsured/Underinsured Motorist Bodily Injury Coverage Form . .	“B”

LOUISIANA AUTO CLAIMS

I. INSURANCE

A. Compulsory Insurance Laws

These laws require every motor vehicle registered in the State of Louisiana, with certain minor exceptions, to be covered by a motor vehicle liability policy as defined by Louisiana Revised Statute ("LA R.S.") **32:900** or by other specified security. It is the duty of the registered owner of the motor vehicle to maintain the liability policy, or other security. **LA R.S. 32:861-865.**

B. Liability Limits

1. Every policy of motor vehicle liability insurance must have limits of at least \$10,000.00 for bodily injury per person and \$20,000.00 per accident, as well as \$10,000.00 for property damage. **LA R.S. 32:900.** Medical Payments Coverage is not mandatory in Louisiana. Thus, insurers may limit their liability under a policy of insurance as long as the limitation does not conflict with statutory law or offend public policy.
2. Uninsured/Underinsured Coverage must be provided by all insurers issuing automobile liability insurance in an amount that is not less than the limits of bodily injury liability provided by the policy, unless: (a) the insured selects lower limits, however, an insured cannot select limits lower than \$10,000.00 per person/\$20,000.00 per accident; or (b) the insured rejects UM coverage in writing. **LA R.S. 22:1406.** (Changed by 2003 Legislation to **LA R.S. 22:680**)

C. Louisiana Direct Action Statute

Louisiana law allows a claimant to proceed directly against an insurance company/insurer, assuming there is proper jurisdiction over the insurer, when:

1. The insured has been declared bankrupt or proceedings to declare an insured bankrupt have been commenced before the proper court;
2. The insured is insolvent;
3. Service cannot be obtained on the insured;
4. When the cause of action is for damages resulting from an offense between children and their parents or between married persons;

5. When the insurer is an uninsured motorist carrier; or
6. The insured is deceased.

Additionally, the direct action is also available to a claimant when either:

1. The policy was issued or delivered in Louisiana; or
2. The accident or injury occurred in Louisiana.

LA R.S. 22:655.

D. "No Pay/No Play" Law

Act 1476 of the Louisiana Legislature created the Omnibus Premium Reduction Act of 1997. This act became effective **September 4, 1998**. For the purposes of automobile litigation, the most significant portion of the law is referred to as the "No Pay/No Play" Law. Pursuant to the "No Pay/No Play" law:

- An owner or operator of an uninsured vehicle involved in a motor vehicle accident cannot recover the first \$10,000.00 of bodily injury damages nor may he recover the first \$10,000.00 of property damage. As such, it is imperative that the claimant owner/operator's insurance coverage is verified. A form which may be used for this purpose is attached as Exhibit "A." There are four exceptions to these limitations which apply when the other vehicle's driver:
 - a. Is cited for violation of R.S. 1498 (DWI) and the driver is convicted of the offense or the driver pleads *nolo contendere*;
 - b. Intentionally causes the accident;
 - c. Flees from the scene of the accident; or
 - d. At the time of the accident, the driver of the vehicle is in furtherance of the commission of a felony. **LA R.S. 32:866A(1-3).**
- The limitation of recovery provisions do not apply to a passenger in an uninsured vehicle. **LA R.S. 32:866E.**
- Except for newly acquired vehicles added to a policy subject to the policy terms, the issuance, change, or adjustment of any motor vehicle liability

insurance policy after a motor vehicle accident, without proof of coverage having been in effect prior to such motor vehicle accident, shall not permit an individual to avoid the limitation of recovery provisions of the statute.

LA R.S. 32:866G

- The limitation of recovery provisions do not apply to any vehicle that is legally parked at the time of the accident. **LA R.S. 32:866H**
- The limitation of recovery provisions do apply to the operator of an uninsured vehicle owned by another, when the operator does not have automobile liability insurance affording coverage either to himself or the uninsured vehicle. Jasper v. Progressive Ins. Co., 99-1479 (La. App. 3 Cir. 2/9/00), 758 So.2d 848.

E. Uninsured/Underinsured Coverage

1. General Provisions

- The UM statute provides that no automobile liability insurance shall be issued in this state without uninsured and underinsured motorist ("UM") protection.
- Who Gets Um Coverage: UM coverage must be provided to those persons who are insured under the automobile liability coverage. If the claimant is neither the named insured or a relative (as defined in the policy) the statute allows UM coverage if claimant was occupying the insured vehicle.
- Minimum Limit Required: All insurers issuing automobile liability insurance must provide UM coverage in an amount that is not less than the limits of bodily injury liability provided by the policy, unless: (a) the insured selects lower limits, however, an insured cannot select limits lower than \$10,000.00 per person/\$20,000.00 per accident; or (b) the insured rejects UM coverage in writing. **LA R.S. 22:680.**

2. What is an uninsured motor vehicle?:

- a. A motor vehicle which does not have automobile liability coverage on the date of loss.
- b. A motor vehicle which has automobile liability coverage on the date of loss, but it has limits less than that required by state law.
- c. A motor vehicle that had automobile liability insurance on the date of

loss, and said liability limits have been exhausted.

d. A hit-and-run vehicle whose owner or operator cannot be identified.

3. What is not an uninsured motor vehicle?:

Vehicle owned or furnished or available for the regular use of an insured is not an uninsured motor vehicle.

Mandatory coverage?: No, it can be rejected. See (1) above and (4) below.

4. Can it be rejected?: Yes. Louisiana courts are very strict with regard to the rejection of UM coverage and any slight deviation from the statutory requirements discussed here can nullify the rejection.

5. Rejection/Selection of Lower Limits

After September 1, 1987, but prior to September 4, 1998, rejection of UM coverage or selection of lower limits could only be made on a form designed by each insurer. Any forms executed **prior to September 4, 1998**, the effective date of the "No Pay/No Play" Law, are valid until the policy renewal date. The "No Pay/No Play" Law requires the commissioner of insurance to prescribe a form for the rejection of UM, selection of lower limits, or selection of "economic only" coverage. A copy of the prescribed form is attached hereto as Exhibit "B". **LA R.S. 22:680.**

After September 4, 1998, when the prescribed form is signed by the insured or his legal representative initially rejecting coverage, selecting lower limits, or selecting economic-only coverage (discussed below) it shall remain valid for the life of the policy and shall not require the completion of a new selection form when a renewal, reinstatement, substitute, or amended policy is issued to the same named insured by the same insurer or any of its affiliates. An insured may change the original uninsured motorist selection or rejection on a policy at any time during the life of the policy by submitting a new uninsured motorist selection form to the insurer. Any changes to an existing policy, regardless whether these changes create new coverage, except changes in the limits of liability, do not create a new policy and do not require the completion of new uninsured motorist selection forms. As for the purposes of the statute, a new policy shall mean an original contract of insurance which an insured enters into through the completion of an application on the form required by the insurer. **LA R.S. 22:680**

6. Economic-Only Coverage

When the “No Pay/No Play” Law was enacted, the legislature also amended the UM statute to give an insured another option regarding selection of UM coverage. Prior to the amendments which took effect **September 4, 1998**, an insured had three (3) options:

- a. Selection of limits equal to the bodily injury liability limits issued under the policy;
- b. Selection of limits lower than the bodily injury liability limits issued under the policy, provided the insured does not have the minimum amount of compulsory motor vehicle liability insurance; and
- c. Rejection of UM coverage. The rejection must be in writing. **LA R.S. 22:1406D(1)(a)(I).**

With the amendments to the UM statute, an insured can now select “economic-only” coverage. This option allows recovery for economic damages, but excludes recovery for non-economic damages, i.e., pain, suffering, inconvenience, mental anguish. **LA R.S. 22:680.**

7. What is the Statute of Limitations for UMBI?

The Statute of Limitations, or under Louisiana law, the prescriptive period, for an uninsured motorist/bodily injury claim is two years. However, if the insured has filed a third party tort action, the third party action interrupts prescription as to a potential claim against his uninsured motorist carrier. **LA R.S. 9:5629.**

8. What is the statute of limitations for UMPD? Same as above- two years. **LA R.S. 9:5629.**

9. Is UM subrogable?

Yes, however the UM insurer can only seek to recover from the tortfeasor payments it made to the insured prior to insured’s settlement and release of the tortfeasor. Further, a tortfeasor who settles with a claimant before a UM payment is made is protected from a subrogated UM carrier. State Farm Mutual Automobile Insurance Company v. Nathan, 95-2001(La. App. 1 Cir. 5/10/96), 673 So.2d 710; **LA R.S. 22:680**; **La. C.C. 2159-2162** (see, now, generally, La. C.C. art. 1825 et seq., effective Jan. 1, 1985) .

10. Can UM be stacked?

Yes, under limited circumstances. The UM statute contains an anti-stacking provision. This provision limits the insured to one UM policy except when the insured is a passenger in a motor vehicle not owned by the insured, his or her resident spouse or resident relative. In that instance, the UM policy on the occupied vehicle is primary. If that primary UM policy is exhausted, the injured party may recover, as excess, under another UM policy. However, "in no instance shall more than one coverage for more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant," thus allowing only one excess UM Policy. **LA R.S. 22:680**

11. Must a UM tender be made?

Yes, if the claimant/insured, or any party in interest, has submitted satisfactory proofs of loss to the insured. To establish a satisfactory proof of loss of a UM claim the insured must establish that the insurer received sufficient facts that fully apprise the insurer (1) that the owner and/or operator of the other vehicle involved in the accident was uninsured or underinsured; (2) that the other driver was at fault; (3) that such fault caused the damages to the insured; and (4) the extent of the damages. Further, if the insured submits sufficient evidence to establish the first three elements of the satisfactory proof of loss, but there is a dispute over the amount or the extent of the damages, the insurer must nevertheless unconditionally tender to the insured the reasonable amount due, or a "figure over which reasonable minds could not differ." Such a tender is referred to as a McDill tender. McDill v. Utica Mutual Insurance Company, 475 So.2d 1085(La. 1985); **LA R.S. 22:658A(1)**.

LA R.S. 22:658 (for all accidents occurring prior to June 27, 2003) provides that such a tender must be made within thirty days of receipt of satisfactory proofs of loss. When there is a failure to make such a payment within the prescribed time and the failure is found to be arbitrary, capricious, or without probable cause, the insurer shall be subject to a penalty, in addition to the amount of the loss, of 10% of the amount due or \$1,000, whichever is greater, together with all reasonable attorney fees for the prosecution and collection of such loss. (In the event a partial payment is made by the insurer, then the penalty is 10% of the difference between the amount paid or tendered and the amount found to be due and all reasonable attorney fees for the prosecution and collections of such amount.) **LA R.S. 22:658B(1)**.

The 2003 amendment to this statute simply provides for a penalty of 25% of the amount due or \$1,000.00, whichever is greater. There is no longer any award of attorney fees.

12. Can Medical Pay Benefits be set off against UM benefits?

Possibly. According to Louisiana jurisprudence, where a plaintiff's total damages do not exceed the UM/UIM policy limits, and the language of the policy allows such, the UM/UIM carrier is entitled to a credit for any amount which it has paid the plaintiff under the medical payments coverage. Sutton v. Oncale, 765 So.2d 1072 (La. App. 5th Cir. 2000); Taylor v. State Farm Mutual Automobile Insurance Co., 237 So.2d 690 (La. App. 4th Cir. 1970); Wilkinson v. Fireman's Fund Insurance Co., 298 So.2d 915 (La. App. 3rd Cir. 1974); Barnes v. Allstate Insurance Co., 608 So.2d 1045, 1047 (La. App. 1st Cir. 1992) and White v. Patterson, 409 So.2d 290 (La. App. 1981).

13. Does a BI settlement act as a set off and reduction of UM limits?

Sometimes. The UM insurer may be entitled to a "credit" if the insured settles with the negligent motorist and his liability insurer for less than the full liability coverage. However, if the full policy limits are not available to the insured because there are multiple claimants, then the UM insurer is entitled to credit only for the liability coverage reasonably available to the insured. Johnson v. Phillips, 544 So.2d 600 (La. App. 1st Cir. 1989); and Turner v. Pelican, 661 So.2d 1065 (La. App. 4th Cir. 1995).

14. Does there have to be physical contact with the injured party or the vehicle which the injured party is occupying for the party to recover UM benefits?

No, with a caveat. The UM statute, specifically **LA R.S. 22:680**, provides that there does not have to be physical contact between the injured party, or the vehicle the injured party is operating, and the uninsured or unidentified/phantom vehicle to recover UM benefits provided that the injured party can prove by an independent and disinterested witness that the injuries were the result of the actions of another vehicle, whose identity is unknown or who is uninsured or underinsured. Typically, a child of the injured party or anyone who resides with the injured party will not be considered independent or disinterested.

15. Uninsured Motorist Policy Exclusions

Generally, automobile liability policies do not provide UM coverage for bodily injuries sustained by:

- a. Anyone occupying or hit by a vehicle owned by the insured which is not insured for UM coverage under the policy;
- b. Persons occupying the insured auto when the insured auto is being used to transport persons for a fee;
- c. Persons using the vehicle without a reasonable belief that he or she is entitled to do so;
- d. Persons or his or her legal representative, who settles their BI claim without the insurer's written consent--except that the insured may, without the consent of their insurer, release the insurer of the uninsured motor vehicle/tortfeasor's insurer from any further obligation to pay damages after a settlement that exhausts the tortfeasor's limits of liability-- this exclusion is subject to interpretation under Louisiana Law.
- e. Persons occupying or using a motor vehicle with less than four wheels;
- f. Persons occupying or using a motor vehicle for racing;
- g. Persons who do not notify the police or law enforcement agency within twenty-four (24) hours, or as soon as practicable if a hit-and-run driver is involved;
- h. Anyone who is specifically excluded by endorsement;
- i. Persons who are in the course and scope of their employment at the time of the accident--this exclusion is subject to interpretation under Louisiana law because the Louisiana Supreme Court in Marcus v. Hanover Insurance Company, Inc., 98-2040 (La. 6/4/99), 740 So.2d 603, rehearing denied (July 2, 1999), held that the business use exclusion violated Louisiana public policy and was invalid. The court found that the purpose of the Louisiana motor vehicle safety responsibility law, which requires that every vehicle registered in the State of Louisiana have automobile liability insurance, will be undermined if business use exclusions were allowed and would also create uncertainty because liability coverage would be dependant upon the purpose of a particular journey. Further, the court found that

the exclusion could place employees in the position of traveling on business without coverage, or using their job if refused.

II. STATUTE OF LIMITATIONS/PRESCRIPTION

- Delictual, or tort, actions are subject to a prescription period of one year. This prescription period commences from the day the injury or damage is sustained. **C.C. Art. 3492.**
- UM claims are subject to a prescriptive period of two years from the date of the accident. **LA R.S. 9:5629.**
- In all suits filed on or after January 1, 1998, the plaintiff is to request service on all named defendants within ninety (90) days of commencement of the action. When the petition is amended to add additional defendants, plaintiff shall request service, within ninety (90) days of the amendment, on the newly named defendants. **Louisiana Code of Civil Procedure Article (“C.C. P. Art.”) 1201.** A trial court shall grant a Motion For Involuntary Dismissal, without prejudice, where service has not been requested on a defendant within ninety days of the filing of the Petition, unless good cause is shown why service could not be requested, in which case the court may order that service be effected within a specified time. **C.C.P. Art. 1672©.**

• III. RULES OF THE ROAD

A. General Duties

- A motorist duty of reasonable care include the duty to keep his vehicle under control and to maintain a proper lookout for hazards.
- A driver does not have the right to assume his course of travel is free from danger if he cannot see clearly ahead. If he continues to travel as if he knew there was perfect clearance, he does so at his own risk.
- A driver has a duty to drive defensively from the time the driver witnesses a negligent operation of another vehicle or notices other hazards posing the potential for resulting damage. That duty may include the duty to slow down or otherwise avoid risk posed by a vehicle ahead.
- Drivers generally must focus their attention to the front, to see what is in their path or what might be entering or about to enter their path.

- A motorist is negligent if he drives a vehicle at a speed greater than is reasonable and prudent under the existing conditions and for the potential hazards, and due regard for the traffic on the highway, its surface and width and the conditions of the weather.

B. Rear-end Accidents

- Louisiana law imposes a duty on a motorist not to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and condition of the highway.
- The following motorist in a rear end collision is presumed to have breached this duty; accordingly, there is a rebuttable presumption that he is negligent. The burden of proof in a rear end collision is, therefore, on the following driver to prove a lack of fault to avoid liability.
- The following motorist in a rear end accident may prove his lack of negligence by establishing that his vehicle was under control, that he closely observed the leading vehicle and followed at a safe distance under the circumstances. The following motorist may also avoid liability by proving that the driver of the lead vehicle negligently created a hazard which he could not reasonably avoid.

C. Changing Lanes

- A presumption of negligence arises when a driver leaves his own lane of traffic and strikes another vehicle. When a collision occurs between two vehicles, one of which is in the wrong lane of travel and the other in its correct lane of travel, the driver in the wrong lane is presumed at fault and is required to exculpate himself from any fault, however slight, contributing to the accident.
- A motorist whose vehicle is struck from the rear by reason of his inopportune change of lanes may not thereby convert that the occurrence into a rear end collision so as to impose the burden upon the other motorist to prove himself free of negligence. In such cases, the plaintiff has the burden to establish negligence by a preponderance of evidence without the benefit of a presumption.

D. Left-turning Motorist

- Louisiana jurisprudence describes a left turn as a “dangerous maneuver.” A motorist attempting to make a left turn is under a duty to exercise a high

degree of care. He must ascertain, before turning, that the turn can be made without danger to normal overtaking or oncoming traffic, and he must yield the right of way to such vehicles. When a driver is making a left turn at the time of an accident, the burden rests heavily upon him to explain how the accident occurred and to show that he was free from negligence.

- A left turning motorist involved in a collision that occurs across the center line is burdened with the presumption that he is at fault and must offer evidence to show that he is free from negligence to avoid liability.
- The duties of a left turning motorist include properly signaling an intention to turn left and keeping a proper lookout for both oncoming and overtaking traffic. The left turning motorist is required not only to look to the left before turning, but has a duty to see what should be observable in other directions. The high burden placed upon a left turning motorist is not discharged by the mere signaling of an intention to turn. The giving of a signal is immaterial if at the time the driver did not have the opportunity to make the turn in safety.

E. Passing Motorist

- Like a left turn, leaving one's proper lane of travel to pass another vehicle is considered a dangerous maneuver. The driver of an overtaking or passing vehicle has the duty to ascertain before attempting to pass that from all the circumstances of traffic, lay of the land and conditions of the roadway, the passing can be completed with safety.

F. Intersections and Intersection Controls

- A governmental entity that places control signals at an intersection must exercise a high degree of care for the safety of the motoring public.
- A motorist confronted with a stop sign or flashing red signal at an intersection is required to bring his vehicle to a complete stop before entering the intersection, to appraise traffic in the intersecting street and to make certain that the way is clear for him to make a safe passage across the intersection. Stopping does not fully discharge the duty. Rather, one also has a duty to make sure after having stopped that it is safe to proceed through the intersection.
- A driver's duty upon approaching a green light is to make a general observation of the intersection and to allow traffic already in the intersection at the time the light changes to complete the crossing. A

driver is entitled to assume that traffic approaching an intersection on a red light will comply with the signal and respect his right of way.

- A green light does not give a motorist a carte blanche right to cross intersections in total disregard of possible dangers.
- A motorist facing a flashing yellow light has the right of way and the right to assume vehicles on the inferior street will honor that right of way. However, the driver must approach with caution and if the evidence reflects that a motorist on an inferior street will not stop then the duty rest upon the driver on the favored street to avoid the accident if he can. The motorist approaching an intersection control by flashing yellow lights is under a duty to exercise a greater degree of care than one approaching a green light or uncontrolled crossing. The degree of caution required includes approaching at a reasonable speed and maintaining a proper lookout for danger.
- The “doctrine of preemption” generally applies in cases of intersectional collisions. Before one can benefit from the doctrine of preemption, he must establish that he entered the intersection first, that his entry was made after first ascertaining that the intersection traffic was so far removed as to allow his passage without causing the other vehicle to make an emergency stop, and that he entered the intersection with a bonafide belief and expectation that he can safely cross.

G. Unlicensed Drivers and Negligent Entrustment

- A person who loans an automobile to another can be found liable for the borrower’s negligence in an automobile accident if the evidence shows that the lender was negligent in loaning the vehicle. A lender cannot be found liable for loaning the car to a competent driver, or to a driver not known to be a risk or threat to other persons simply for the reason that he knew or should have known that his own liability insurance policy, by its terms, would not cover the driver’s liability for negligently causing injury.
- Under the “negligent entrustment” theory, the lender of a vehicle is not responsible for the negligence of the borrower unless the lender knew or should have known that the borrower was physically or mentally incompetent to drive.
- In a 1999 case, the court held that a reasonable prudent person has a clear duty to recognize a manifest danger of making a long term, open ended loan of a vehicle to someone they know or should know is a

habitual abuser of alcohol and is prone to drive a vehicle under the influence of alcohol. The court further held that prudent person should recognize that under these circumstances it is highly likely that serious injuries or death will reasonably result. *Oaks v. Dupuy*, 32,070 (La.App. 8/18/99); 740 So.2d 263.

- Violation of a criminal statute does not automatically create liability in a civil case. Accordingly, a violation of the statute that requires a driver of a motor vehicle to be licensed, does not constitute negligence unless the violation bears a cause of relation to the accident sued on.
- There is not duty on an owner or lender of an automobile to make an inquiry into one's driving habits or record when no reason exists to place the lender on notice of a disability or incompetence.

H. Weather Conditions

- Even though a motorist may assume that the road ahead is safe for travel, he must, when traveling after darkness or in circumstances of limited or impaired visibility, observe and so control his vehicle as to avoid discernable objects in his path of travel; that is, in adverse conditions, a greater degree of care must be exercised. This rule, however, is subject to the well established exception that a night driver is not charged with the duty of guarding against unusual or unexpected obstructions which he had no reason to anticipate he would encounter on the highway and which, under the circumstances, are difficult to discover.
- When visibility is impaired by fog, a driver must exercise care commensurate with the severity of the condition, i.e., he must reduce speed, maintain a close lookout and, if necessary, stop his vehicle.
- Temporary sun blindness like visual impairment caused by fog or heavy rain, is a physical condition with which drivers must learn to contend in a safe and responsible manner.

IV. DEFENSES

A. Comparative Fault/Contributory Negligence

Joint and Several Liability Abolished

Effective April 16, 1996, Louisiana adopted a pure comparative fault scheme, thereby abolishing joint and several liability. In personal injury actions, a defendant is obligated to pay only that percentage of damages attributable to

the defendant's percentage of fault. The only exception applies in cases involving injury caused by two or more persons who conspire to commit an intentional or willful act.

In automobile accident cases, the comparative fault of the plaintiff driver and any other third parties should be asserted as a affirmative defense. Third parties may include other drivers contributing to the cause of the accident, the state or local municipality responsible for the condition of roadways and traffic signals, and any other party whose intentional or negligent conduct may have contributed to causing the accident. After adoption of the pure comparative fault scheme, it is no longer necessary to file third party claims or cross claims against other potentially responsible parties. The judge/jury must quantify the fault of all persons contributing to the accident whether or not that person is an actual party to the lawsuit, a non-party, insolvent or unidentified.

Although the obligation among two or more persons who cause an injury is not joint and several, a timely filed suit against one defendant interrupts the statute of limitations—i.e., one year from the date of the accident—against other defendants alleged to be at fault.

B. Sudden Emergency Doctrine

- The Louisiana Supreme Court has defined the “sudden emergency doctrine” as follows: “One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method unless the emergency in which he finds himself is bought about by his own negligence.” *Hickman v. Southern Pacific Transport*, 262 So.2d 385 (La 1972).
- The rule of sudden emergency cannot be claimed by a driver who has brought that emergency upon himself or by his own wrong or who has not used due care to avoid it. It does not apply to lower the standard of care required of a motorist before the emergency occurs.
- The sudden emergency doctrine excuses a following motorist from liability if he is suddenly confronted with an unanticipated hazard created by a following vehicle, which could not be reasonable avoided.
- The jurisprudence has recently held that since the passage of the pure comparative fault scheme in Louisiana, the defense of sudden emergency

is merely treated as one of the factual considerations which is to be used in assessing the degree of fault attributed to a party.

C. Unavoidable or Inevitable Accident Doctrine

- The unavoidable or inevitable accident doctrine has been defined as follows: As a corollary of the rule for determining legal responsibility for negligence, if a motorist or other traveler has exercised ordinary care as required by the law and has nevertheless been the cause of injury to another, the accident is said to be inevitable, for which no liability attaches.

D. Mitigation of Damages

- An accident victim has the duty to mitigate, or minimize, his damages. He need not make extraordinary efforts or do what is unreasonable and impractical in his efforts to minimize damages, but his efforts must be reasonable and in accordance with the rules of common sense, good faith and fair dealing.
- In order to minimize damage, an injured party is obligated to submit to reasonable medical treatment recommended for the party's improvement. Recovery will not be limited because of a refusal to undergo medical treatment that holds little promise for success for recovery.
- The duty to mitigate damages includes attempting to find suitable employment if he or she is, employable.
- Failure to undergo corrective surgery because a plaintiff cannot monetarily afford to do so is not failure to mitigate damages.
- In *Aisole v. Dean*, 574 So.2d 1248 (La. 1991), the supreme court ruled that the obese plaintiff's recovery was diminished because he neglected his duty to mitigate damages by failing to follow medical advice that he reduce his weight.
- The burden is on the defendant to show what extent damages should be mitigated and the rule of mitigation should be applied with extreme caution.

V. POLICY LIABILITY EXCLUSIONS

Some of the more commonly used exclusions found in policies of automobile liability insurance include the following:

- a. Expected or intended injury--either bodily injury or property damage expected or intended by the insured. Insurer must prove the insured's expectations or intentions in order to successfully use this exclusion.
- b. Contractual liability--liability assumed under any contract or agreement. This exclusion generally has reference to contracts under which the insured has assumed the liability of a third-party, usually in the form of a hold harmless or other indemnity agreement. Application of this exclusion depends upon the specific case and contract in question.
- c. Workers' compensation--generally, liability policies do not afford coverage to the insured in the event the insured has a legal obligation to pay compensation, disability benefits or unemployment to the injured party.
- d. Auto Business Operations--Policy does not provide liability coverage for bodily injury or property damage resulting from any auto business operation, such as a transportation or taxi service.
- e. Injury to the Insured--Bodily injury to the insured, family member or resident of the insured's household or any person who is an insured under the policy is excluded from receiving damages under the liability coverage.
- f. Use of auto without permission--Bodily injury or property damage liability coverage is not afforded to anyone other than the insured, a family member, or a resident of the insured's household for damages which resulted from the use of an insured auto without the permission of the named insured, or the named insured's spouse if the spouse is a resident of the same household, or in the event the use went beyond the scope of the permission granted.
- g. Automobile for hire--any auto used to carry persons or property for a fee.
- h. Other auto--Liability coverage will not be provided for bodily injury or property damage arising out of the ownership, maintenance, or use of any auto other than an insured auto that is owned by the named insured or his or her resident spouse, or furnished or available for regular or frequent use by the named insured or the named insured's resident spouse. (i.e., owned vehicle not on policy).
- i. Persons excluded by the policy--No liability coverage is afforded for bodily injury or property damage resulting from the operation or use of an insured auto by any person specifically excluded by endorsement.
- j. Commission of crime--No liability coverage is afforded for bodily injury or

property damage in the event the accident arises out of or is related to the operation or use of an insured auto or a non-owned auto while the named insured, his or her resident spouse, any insured, or any occupant of the insured auto or non-owned auto is involved in the commission of a crime.

- k. Business use exclusion: generally auto liability policies include an exclusion of bodily injury or property damage liability coverage arising out of the ownership, maintenance or use of any vehicle, including the insured auto, while in the course and scope of employment or while engaging in a business. The Louisiana Supreme Court in Marcus v. Hanover Insurance Company, Inc., 98-2040 (La. 6/4/99), 740 So.2d 603, rehearing denied (July 2, 1999), held that the business use exclusion violated Louisiana public policy and was invalid. The court found that the purpose of the Louisiana motor vehicle safety responsibility law which requires automobile liability insurance, will be undermined if business use exclusions were allowed and would also create uncertainty because liability coverage would be dependant upon the purpose of a particular journey. Further, the court found that the exclusion could place employees in the position of traveling on business without coverage, or using their job if refused.

VI. EVALUATING CLAIMS--QUANTIFICATION OF DAMAGES

A. General Damages

- General damages are those damages that cannot be fixed with pecuniary exactitude. General damages include mental and physical pain and suffering, inconvenience, loss of intellectual gratification or physical enjoyment, and other losses of life or lifestyle that cannot be objectively measured in monetary terms.
- The primary objective of general damages is to restore the injured party in as near a fashion as possible to the state the injured party was in at the time immediately preceding the injury.
- It is well-settled that a person causing injury takes his victim as he finds him. When a defendant's negligent conduct aggravates a preexisting condition, the victim must be compensated for the full extent of the aggravation.
- The factors to be considered in assessing quantum for general (pain and suffering) damages are severity and duration.
- A party causing injury is liable not only for the injuries which he causes

directly to the victim, but also for additional suffering caused by inappropriate medical care.

- Where injury occurs due to the negligent acts of one party, and the injury is subsequently aggravated by a separate negligent act of another party, the original negligent party is only responsible for the damages caused by his own fault.
- The plaintiff bears the burden of proving a causal relation between the accident and the injuries. A claimant's disability is presumed to have resulted from an accident if, before the accident, he was in good health, but commencing with the accident, the symptoms of the disabling condition appear and continually manifest themselves afterwards, providing that the medical evidence shows there to be a reasonable possibility of a causal connection between the accident and disabling condition.

B. Special Damages

- Unlike general damages, special damages represent those items of loss that can be measured with some monetary certainty. These include past lost wages, loss of earning capacity/loss of future wages, pension losses and other fringe benefit losses, past medical expenses, future medical expenses, property damages, loss of use of vehicle/rental expense, housekeeping expenses, loss of profits, etc.
- It is an error of law to award special damages for medical expenses without awarding general damages for personal injury, pain and suffering.
- Loss of use of a vehicle/rental expenses.
- Generally, damages for the loss of the use of a vehicle or for the rental of another are recoverable. In those cases in which the wrecked vehicle is a total loss, those damages are recoverable only for a reasonable time. It has been held that a reasonable time to replace a destroyed vehicle is a period of thirty (30) days after discovery that the car's a total loss. The measure of loss of use damages is normally the cost of renting a substitute vehicle until a replacement vehicle is purchased. Damages for loss of use of a vehicle not totally destroyed are measured by the rental cost of a substitute vehicle for the period of the time required for repair.

C. Punitive Damages

- While the purpose of general and special damages are to compensate the

victim, the purpose of punitive damages is to punish and deter wrongdoers.

- Punitive damages are recoverable under a liability insurance policy unless the policy specifically excludes coverage for punitive damages. Louisiana courts have held that such exclusions are enforceable under Louisiana law. Generally, as part of the insuring agreement, automobile liability policies include language that liability coverage excludes punitive and exemplary damages.
- In 1997, the Louisiana legislature eliminated recovery of punitive damages where the accident involved the transportation of hazardous waste. In Louisiana, punitive damages are now only available in cases in which the defendant's intoxication was shown to be a cause of the accident. The plaintiff must prove: 1) The defendant was intoxicated or had a sufficient quantity of intoxicants to make him lose normal control of his mental and physical faculties, 2) The drinking was the cause in fact of the accident, and 3) the injuries were caused by a wanton or reckless disregard for the rights and safety of others.
- While punitive damages may not be recovered under a policy of insurance, these damages may still be recovered from the individual insured. In the event that a claim has been made for punitive damages, the insurer is obligated to advise the insured as to the exclusion of coverage for punitive damages pursuant to its policy. In the event that the insured is charged with driving under the influence and is found guilty of such charges or pleads no contest, he individually could be required to pay punitive damages to the claimant.

D. Loss of Consortium

- A loss of consortium action is a derivative claim of the primary victim's injuries. Loss of consortium claims are typically made on behalf of spouses, minor children and parents (when children are injured). Because the right of action in the loss of consortium claim is derived from the primary victim's injuries, recovery is restricted to the insurance policies per person limits.
- Loss of consortium is broken down into the following general categories: 1) Loss of love and affection; 2) Loss of society and companionship; 3) Impairment of sexual relations; 4) Loss of performance of material services; 5) Loss of financial support; and 6) Loss of aid and assistance.

E. Quantification of Damages

1. Soft Tissue Injuries of the Neck and Back (No Surgery)

- Generally, Louisiana courts award from \$1,000 to \$2,000 in general damages per each month of treatment for soft tissue injuries. Some jurisdictions are more conservative and some may be more liberal. As such, it is recommended that you consult with defense counsel regarding the particular jurisdiction where the claim is pending.
- *Dolmo v. Williams*, 99-0169 (La.App. 4th Cir. 9/22/99) - Two plaintiffs involved in a rear end automobile accident were each awarded \$12,500 in general damages for moderately severe strains to the cervical-thoracic spine. Plaintiff's also complained of recurring headaches. Plaintiff's were treated conservatively for five months. The court determined that \$2,500 per month multiplied by five months was reasonable compensation.
- *Reed v. Recard*, 97-2250 (La.App. 1st Cir. 11/18/98) - \$15,000 in general damages awarded to a woman who sustained soft tissue injuries in the neck as the result of an automobile accident and was treated for one year with residual pain at the time of trial. Plaintiff had preexisting cervical spine injuries with radiating pain one year prior to the accident.
- *Marie v. John Deer Insurance Company*, 96-1288 (La.App. 1st Cir. 3/27/97) - The court awarded \$8,500 to a woman who sustained cervical and lumbar soft tissue injuries. Plaintiff underwent four months of active treatment and was seen on an as needed basis afterwards. Ten months post accident, and three weeks prior to trial, the doctor noted that plaintiff was doing "quite well" and had only occasional neck and low back pain. The trial judge awarded \$6,000 for the first four months of treatment, \$1,500 for two months of "semi-active" treatment and \$1,000 for the remaining four months of treatment.
- *George v. Allstate Insurance Company*, 32,899 (La.App. 2nd Cir. 4/5/00) - The court awarded a ten year old girl \$550 for minor neck and back injuries. Plaintiff was treated conservatively on three occasions for a little over two weeks and did not complain of any pain at trial.
- *Davis v. Wal-Mart*, 31,542 (La.App. 2nd Cir. 1/22/99) - The appellate court concluded that \$4,500 was the maximum award for a three month soft tissue injury. Plaintiff was treated by a chiropractor for three months using hot and cold packs, electro-stimulation and

adjustments. She continued to work throughout the three months. She was discharged without residuals at the end of three months and incurred medical expenses totaling \$1,700. **NOTE: The Davis case is almost three years old. The maximum award for this type of injury in the 2nd Circuit may now be \$5,000 to \$6,000.**

- *Henry v. Wal-Mart Stores, Inc.*, 99-1630 (La.App. 3rd Cir. 3/1/00) - The court awarded a 73-year old woman \$22,000 for ten months active treatment, for low back, leg and shoulder pain.
- *Mire v. Martin*, 99-989 (La.App. 3rd Cir. 12/2/99) - The court awarded \$15,000 to a man who sustained a six month soft tissue injury as the result of an automobile accident. Plaintiff lost \$6,550 in wages and incurred medical expenses in the amount of \$11,731.
- *Taylor v. Premier Insurance Company*, 98-1935 (La.App. 3rd Cir. 6/30/99) - A man was awarded \$18,000 for five months active treatment for soft tissue injury. Plaintiff sustained cervical and lumbar strains and was restricted from working for five months. Plaintiff continued to complain at trial. Plaintiff loss \$9,200 in wages and incurred \$2,768 in medical expenses.
- *Straughter v. Ellebnawi*, 99-1012 (La.App. 5th Cir. 3/22/00) - A man was awarded \$9,000 in general damages for five months treatment of cervical and lumbar strain as a result of an automobile accident. Plaintiff loss two days of work and incurred \$1,479 in medical expenses.

2. Cervical Surgery

- *Birdsall v. Regional Electric & Construction*, 97-0712 (La.App. 1st Cir. 4/8/98) - Plaintiff sustained a cervical injury requiring a fusion surgery and was awarded \$150,000 in general damages.
- *Littleton v. Wal-Mart Stores, Inc.*, 99-390 (La.App. 3rd Cir. 12/1/99) - A woman received \$150,000 in general damages for an injury requiring a single level cervical fusion surgery.
- *Jackson v. CSX Transportation, Inc.*, 97-0109 (La.App. 4th Cir. 12/23/97) - A man received \$125,000 in general damages for injuries resulting in a single level cervical fusion surgery.

3. Lumbar Surgery

- *Caro v. Louisiana and Delta Railroad*, 94-0059 (La.App. 1st Cir. 11/10/94) - A 49-year old man who sustained a low back injury requiring surgery was awarded \$175,000 in general damages.
- *Foster v. Cohen*, 99-98 (La.App. 3rd Cir. 6/30/99) - An appellate court raised a general damage award from \$48,000 to \$150,000 to a woman who underwent low back surgery after a minor rear-end automobile accident. Plaintiff had undergone two back surgeries before the accident and the minor collision apparently reversed all benefits of the prior surgeries.

4. TMJ

- *Johnson v. Brookshire Grocery Company*, 32,770 (La.App. 2nd Cir. 3/1/00) - A woman sustained jaw, knee and hand injuries after a trip and fall. X-rays of plaintiff's knees and jaw revealed no fractures. Plaintiff was diagnosed with TMJ and was fitted with a splint which she continued to wear at the time of trial. The knee pain resolved itself within one week of the accident. Plaintiff was awarded \$7,500 in general damages for the TMJ injuries.
- *Knepper v. Robin*, 99-95 (La.App. 3rd Cir. 11/17/99) - A woman injured in an automobile accident had sustained a TMJ injury was awarded \$25,000 in general damages. Plaintiff had to wear upper and lower splints which she had worn every night since the accident up until the time of trial. Plaintiff was considered a candidate for future oral surgery.
- *Hall vs. State Farm*, 94-867 (La.App. 3rd Cir. 5/31/95) - A woman incurred a TMJ disorder complaining of right side ear pain and headaches. She also complained of sensitivity in her teeth and pain in her shoulders as a result of an auto accident. She received splint therapy for the TMJ disorder. Although plaintiff had six missing teeth before the accident which would predispose her to TMJ and which required that she receive bridges in order to properly treat the TMJ disorder, she was awarded \$35,000 in general damages.

5. Concussions and Headaches

- *Walton v. Bellard*, 581 So.2d 307 (La.App. 1st Cir. 1991) - A woman was awarded \$30,000 in general damages after sustaining a moderate severe cervical strain with a significant contusion and skull laceration, a mild cerebral concussion and a contusion to the left

knee as the result of an auto accident. She was diagnosed as having post concussion syndrome and possible neurosis. Three and one half years after the accident, plaintiff still suffered from residual problems of headaches, memory loss and nausea attributable to the concussion syndrome. **NOTE: This is a 1991 case.**

- *Fontenot v. Omni Insurance Group*, 99-504 (La.App. 3rd Cir. 10/13/99) - A man struck his face and head against the steering wheel as a result of an automobile accident. Plaintiff was diagnosed with a concussion, contusions to the knee, mid-back strain and acute cervical strain. Most of plaintiff's soft-tissue related pain resolved within weeks of the accident but he continued to experience headaches. Plaintiff was awarded \$7,500 in general damages.

6. Knee Injuries

- *Gage v. Potts*, 94-1542 (La.App. 1st Cir. 4/7/95) - A man involved in a rear-end accident sustained mild lumbar and cervical strains and a knee injury. The knee injury required arthroscopic surgery which revealed a torn cartilage, chondromalacia and torn gristle under the knee cap. Plaintiff was awarded \$20,000 in general damages.
- *Johnson v. Brookshire Grocery*, 32,770 (La.App. 2nd Cir. 3/1/00) - Plaintiff sustained an abrasion and swelling to her left knee and some swelling to her right knee as a result of a trip and fall in a parking lot. No breaks or fractures were noted and plaintiff testified her knee pain resolved itself within one week of the accident. The Court of Appeal reduced a general damage award of \$4,000 regarding the knee injury to \$2,000.
- *Nicks v. Teche Electric*, 640 So.2d 723 (La.App. 3rd Cir. 1994) - A 62-year old man hurt his knee, back, neck and foot and eventually underwent a knee surgery for torn cartilage and roughening of the joint surface. The soft tissue injury was resolved after several months. After knee surgery, he was assigned a ten to fifteen percent disability and restricted in squatting and climbing. Plaintiff was awarded \$40,000 in general damages.
- *Zappala v. Home Depot*, 94-225 (La.App. 5th Cir. 11/16/94) - A woman sustained soft tissue injuries to her neck, arms, and ankles and aggravation of a preexisting degenerative knee arthritis as a result of an automobile accident. Plaintiff's soft tissue problems resolved within six or seven months, but the aggravation to plaintiff's knees

produced painful and lasting effects and caused a major change in her lifestyle. Plaintiff needed cortisone treatment, a walking cane and had to take many different medications. Plaintiff was awarded \$40,000 in general damages.

7. Loss of Consortium

- In cases in which the injuries are soft tissue injuries with no surgery, loss of consortium awards are often denied. In some case, minimal amounts may be awarded to family members.
- *Reed v. Ricerd*, 97-2250 (La.App. 1st Cir. 11/18/98) - A woman sustained soft tissue injuries requiring treatment using heat, home traction and a tens unit. As a result, her husband and 13 year old child had to do a lot of the household chores. Husband and wife also had to give up their bowling league. Husband was awarded \$1,000 for loss of consortium.
- *Marie v. John Deer*, 96-1288 (La.App. 1st Cir. 3/27/97) - A man was awarded \$500 for loss of consortium in a case in which his wife sustained a ten month cervical and lumbar strain injury.
- *Williams v. U.S. Agencies*, 33,200 (La.App. 2nd Cir. 5/15/00) - Husband and wife were injured in an auto accident. They were both taken to the hospital and treated for soft tissue injuries. Husband did not miss any work. Wife testified their sexual relations and her ability to perform housework was impaired to a degree for the five month recovery period. Plaintiffs presented no evidence of an actual loss of material services nor was their testimony presented suggested any strain on the marriage. The court denied damages for loss of consortium.

8. Judicial Interest

- Attaches from the date of judicial demand.

- Rates

1995 - 8.75%

1996 - 9.75%

January 1 through July 31, 1997 - 9.25%

August 1 through December 31, 1997 - 7.9%

1998 - 7.6%

1999 - 6.73%

2000 - 7.285%

2001 - 8.241%

2002 - 5.75%

2003 - 4.5%

2004 - 5.25%

2005 - 6%

VII. SETTLEMENT ISSUES

A. Damages and Penalties Available to an Insured

1. LA R.S. 22:1220 Good Faith Duty; Claim Settlement Practices; Causes of Action; Penalties

An insurer owes to its insured a duty of good faith and fair dealings. LA R.S. 22:1220(A).

An insured who breaches its duty to adjust claims fairly and promptly and to make reasonable efforts to settle claims with its insured shall be liable for any damages sustained as a result of the breach. **Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the above recited duties:**

1. misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue;
2. failing to pay a settlement within thirty days after an agreement is reduced to writing;
3. denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured;

4. misleading a claimant as to the applicable prescriptive period; and
 5. failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause. **LA R.S. 22:1220(B).**
- In addition to awarding damages sustained as a result of the breach, penalties may also be assessed against the insurer in an amount not to exceed two times the damages sustained or \$5,000, whichever is greater. **LA-R.S. 22:1220©** Again, a showing by the insured of actual damages resulting from the breach is required. See Khaled v. Windham, 657 So.2d 672 (La. App. 1st Cir. 1995), writ denied 661 So.2d 1369, (La. 1995) and Graves v. Busline Towing Corp., 673 So.2d 311 (La. App. 1st Cir. 1996). However, see Hall v. State Farm Automobile Insurance Company, 658 So.2d 204,208 (La. App. 3d Cir. 1995) in which the appellate court held that “if there are no damages proven as a result of the breach itself, then the maximum amount that can be awarded is \$5,000 in penalties.”
 - Attorney’s fees are not available under Louisiana Revised Statute 22:1220.
2. LA R.S. 22:658 Payment and Adjustment of Claims; Policies other than Life and Health and Accident; Personal Vehicle Damage Claims; Penalties:

Aside from the damages and penalties available to an insured under **LA R.S. 22:1220**, penalties may also be available under LA-R.S. 22:658.

- This statute requires, in part, that **insurers pay the amount of any claims due any insured within 30 days after receipt of satisfactory proofs of loss from the insured or any party in interest. LA R.S. 22:658(A)(1).**
- When there is a failure to make such a payment within the prescribed time **and the failure is found to be arbitrary, capricious, or without probable cause**, the insurer shall be subject to a penalty, in addition to the amount of the loss, of 10% of the amount due or \$1,000, whichever is greater, together with all reasonable attorney fees for the prosecution and collection of such loss. (In the event a partial payment is made by the insurer, then the penalty is 10% of the difference between the amount paid or tendered and the amount

found to be due and all reasonable attorney fees for the prosecution and collections of such amount.) **LA R.S. 22:658B(1)**.

- Except in the case of catastrophic loss, the **insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen (14) days after notification of loss by the insured**. Failure to comply with this requirement shall subject the insured to penalties provided in Louisiana Revised Statute 22:1220. **LA R.S.22:658a(3)**.

B. Damages and Penalties Available to a Third-Party Claimant

1. LA R.S. 22:1220

- **Penalties in third-party claims are generally not recoverable against an insurer for bodily injury claims.** In Theriot v. Midland Risk Insurance Co., 95-2895 (La. 5/20/97), 694 So.2d 184, the Louisiana Supreme Court held that a third-party claimant has a claim for penalties against an insurer pursuant to **LA R.S. 22:1220 only if the insurer specifically committed one of the acts set forth in 1220B(1)-(5)**.
- Be specifically mindful of 22:1220B(2) and (4) as to third-party claimants.
- As noted in the section above, paragraph **B5** of **LA R.S. 22:1220** provides that any insurer breaches its duty when it fails to pay the amount of any claim due any person insured by the contract within 60 days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause. **Although the Louisiana Supreme Court has not yet faced the issue of whether or not a third-party claimant has a right of action under LA R.S. 22: 1220(B)(5), the appellate courts of this state have declined to find that such a right of action exists in favor of a third-party claimant.**

2. LA R.S. 22:658

- The legislature has also addressed possible **penalties for failure to make timely payments with third-parties once a written agreement or settlement has been reached**. Subsection **(A)(2)** of **LA R.S. 22: 658** provides, in part, that **insurers shall pay the amount of any third party property damage claim and of any reasonable medical expenses claim due any bona fide third-party claimant within 30 days after written agreement of settlement of the claim from any third party claimant**. When there is a failure to do so and that failure is shown to be arbitrary, capricious, or without probable cause, the insurer is subject to a penalty, in addition to the amount of the loss, of 10% damages on the amount due or \$1,000, whichever is greater, together with all reasonable attorney fees for the prosecution and collection of such loss. (In the event a partial payment is made by the insurer, then the penalty is 10% of the difference between the amount paid or tendered and the amount found to be due and all reasonable attorney fees for the prosecution and collections of such amount.)
- Except in the case of a catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen (14) days after notification of loss by **THE CLAIMANT**. There is still some question as to whether claimant applies to both the insured and third-party claimants. The State of Louisiana law on this issue remains unsettled. **LA R.S. 22:658A(3)**.
- **All insurers shall make a written offer to settle any property damage claim within thirty (30) days after receipt of satisfactory proofs of loss of that claim. LA R.S. 22:658A(4)**. It appears that this portion of the statute is applicable to third-party claimants as in subsection A(1) the statute specifically provides for payment of claims due any insured within thirty (30) days after receipt of satisfactory proofs of loss. Hence, **it appears that an insurer has an obligation to settle a property damage claim with a third-party within thirty (30) days after receipt of satisfactory proof of loss of that claim**. There is some question as to whether penalty provisions are applicable to this provision as the penalty provision provided in 22:658B does not specifically include A(4) within its context.
- In addition to the foregoing, **LA R.S. 22:658** also addresses a third-party claimant's rights concerning his property damage claim on his

own personal vehicle when he is deprived of the use of same for more than five working days, as a direct consequence of the inactions of the insurer. Under this scenario, paragraph **B(4)** of **LA R.S. 22:658** requires the insurer, to the extent that it is legally responsible, to pay for the reasonable expenses incurred by the third-party claimant in obtaining alternative transportation for the entire period of time during which the third-party claimant is without the use of his personal vehicle. When that payment is not made within 30 days after receipt of adequate written proof and demand therefor, and such failure is found to be arbitrary, capricious, or without probable cause, the insurer is subject to, in addition to the amount of the reasonable expenses incurred, a reasonable penalty not to exceed 10% of such reasonable expense or \$1,000, whichever is greater, together with all reasonable attorney fees for the collection of such expense.

C. Excess Judgment--Bad Faith: The Duty to Settle Within Policy Limits to Prevent Excess Exposure

In the event that coverage is afforded under the policy, an insurer has the duty to act in good faith and deal fairly when handling and settling claims in order to protect the insured from exposure to excess liability. Hodges v. Southern Farm Bureau Casualty Insurance Company, 411 So.2d 564, 566 (La. App. 1st Cir. 1982). Where an insurer is proven to have been arbitrary and capricious in failing to accept a reasonable settlement offer within policy limits, an insured may recover from the insurer the amount of any excess judgment executed against it. Champion v. Farm Bureau Insurance Company, 352 So.2d 737, 740 (La. App. 3d Cir. 1977), writ denied 354 So.2d 1040 (La. 1978).

In 1996, the Louisiana Supreme Court made an attempt to clarify Louisiana jurisprudence regarding the insurer's liability for excess judgment. Smith v. Audubon Insurance Company, 95-2057 (La. 9/5/96), 679 So.2d 372. The Louisiana Supreme Court made clear that the mere failure to accept a settlement within policy limits is not, itself, proof of bad faith. Smith at 377. Rather, only arbitrary and capricious conduct in the settlement context is bad faith. Id. The focus must be upon whether the failure to settle was unreasonable, rather than whether the insurer failed to predict the correct outcome. Id. In Smith, the Louisiana Supreme Court enumerated factors to be used by the lower court as a guide in determining whether a refusal to settle is arbitrary, capricious or in bad faith. These five (5) factors are as follows:

1. The probability of the insured's liability;

2. The extent of damages incurred by the claimant;
3. The amount of the policy limits;
4. The adequacy of the insurer's investigations; and
5. The openness of communications between the insurer and insureds.

Smith, at 377.

More recent decisions of the Louisiana appellate circuits have held that even if only some, or even one of these factors is established pointing towards bad faith, there may be bad faith.

D. Claims Made on Behalf Minor Children

In Louisiana, a child remains under the authority of his father and mother until his majority, 18 years of age, or emancipation. **LA C.C.P. Art. 216.** All settlements with minors must be approved by a court, even if the claim is settled before suit is filed. However, settlement for an amount less than \$7,500.00 does not require court approval if the person bringing the suit on behalf of the minor is entitled to tutorship by nature. Essentially, one entitled to tutorship by nature is the minor's natural parent in the event the other parent is crazy, deceased, missing, or has not acknowledged the child.

E. Attorney Liens

- By written contract signed by the client, an attorney may acquire a fee interest in a suit, proposed suit, or claim. The fee interest shall be a special privilege superior to all other privileges and security interests. In the contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim. Either party may record the contract with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. After the contract is recorded in the public records, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client without the written consent of the other, is null and void. La R.S. 37:218.

F. Medical Liens

1. Federal Law

Federal law provides that in any case in which the United States is authorized or required to furnish care to an injured person, under circumstances creating a tort liability upon some third person, the United States shall have the right to recover from said third person the reasonable value of the care and treatment. **42 U.S.C. 2651**. In enforcing the right, the government may either intervene in the veteran's tort action or it may bring a legal proceeding against the third person in state or federal court. The government has three years after the right of action first accrues to bring its claim for reimbursement. It is important to note that federal cases have held that even where a tortfeasor is found only 1% negligent, the defendant will have to pay the government the full value of the veteran's medical care. See. U.S. Theriaque, 674 F. Supp 395. Furthermore, a release signed by the veteran in favor of the tortfeasor will not bind the government, who as noted above, has an independent right of recovery against the tortfeasor.

Federal law has also created a right of subrogation and reimbursement in the government's favor to cover expenses paid by Medicare. **42 U.S.C. §1395y(b)(2)(B)(ii-iii)**. Medicare has the right to pursue third parties, including attorneys, who receive payments of any sums which should be reimbursed to Medicare. **42 U.S.C. §1395y(b)(2)(B)(ii)**. See also: **42 C.F.R. §411.24(g) and 411.26**. In accordance with the provisions of **42 U.S.C. 1396(a)**, Louisiana has established a similar right of subrogation reimbursement in favor of the State for the recovery of expenses paid by Medicaid. **LA. R.S. 46:446**.

Medicare is subrogated to the rights of the Medicare beneficiary (injured party) and can recover benefits Medicare paid directly from the automobile or liability insurance company or self-insured plans as well as from any entity, including the beneficiary that was paid by the liability insurer.

2. Louisiana Law

Louisiana has created a right of subrogation in favor of state supported charity hospitals and veterans administration hospitals which provide treatment to individuals who have been injured at the hands of another. **LA R.S. 46: 8, et seq.** This right of subrogation is an independent cause of action in favor of the state supported provider. Thus, a patient's compromise of any claim with the tortfeasor or his insurer, whether made before or after the filing of the suit, shall not affect the right of any state supported charity hospital or veterans administration hospital to recover their fees and charges. **LA R.S. 46:10**. Further, the hospital is under no obligation to provide notice to the tortfeasor or his insurer of its

subrogation claim. By contrast, the patient/plaintiff is obligated to serve a copy of the petition upon the hospital at least ten (10) days prior to trial. **LA. R.S. 46:10.**

State supported hospitals and veterans hospitals must bring their independent claims for recovery of medical expenses within one year of the incident date. However, if the injured party filed suit against a third party, the hospital may intervene at any time prior to settlement or judgment to protect its interest.

Pursuant to **LA. R.S. 9:4751, et seq.**, Louisiana has also created a right of reimbursement in favor of ambulance services, hospitals, and other health care providers against the proceeds of any judgment or settlement for medical services provided to an injured plaintiff. This privilege is perfected upon the health care provider providing written notice prior to the payment of any judgment or settlement. Should an attorney who is responsible for disbursing proceeds fail to recognize the lien, he or she may become personally liable to the health care provider. **LA R.S. 9:4754.**

VIII. LIMITATION UPON JURY TRIALS/MONETARY JURISDICTIONAL LIMITS

A trial by jury is not available in a Louisiana State Court unless the petitioner's cause of action exceeds \$50,000.00, exclusive of judicial interest and court costs. Often times, plaintiffs will stipulate that their claims are worth less than \$50,000.00 for the purposes of having a friendly judge decide liability and quantum issues, especially in cases involving bulging discs. **LA R.S. C.C.P. 1732.**

Generally, city courts and parish courts in the State of Louisiana have monetary jurisdictional limits, which means that an individual plaintiff's damages, exclusive of judicial interest and cost, cannot exceed the monetary jurisdictional limit of the court. For example, in First City Court for the City of New Orleans, the monetary jurisdictional limit is \$20,000.00.

EXHIBIT A

LOUISIANA NO PAY/NO PLAY VERIFICATION FORM

A claim has been presented by your insured against _____ for damages allegedly caused by a loss which took place on the date shown below. Please complete the following information in order that we may expedite the handling of your insured's claim pursuant to LRS 32§866.A.

Insured's Name:	Date of Accident:	Time of Accident:
Insured's Policy:	Effective Dates: From:	
Your Claim No.:	Driver of Ins. Vehicle:	

Owner of Vehicle:				
Vehicle Information:	Vin:	Make:	Model:	Year:

1. Is the Automobile involved in the accident considered a COVERED AUTO on your insured's policy?
Yes: _____; No: _____; If no, please explain: _____
_____.
2. Is the Driver involved in the accident considered a COVERED DRIVER on your insured's policy?
Yes: _____; No: _____; If no, please explain: _____
_____.
3. Are there any endorsements adversely effecting coverage:
Yes: _____; No: _____; If yes, please explain: _____
_____.

4. Are there any exclusions adversely effective coverage?
Yes: _____; No: _____; If yes, please explain: _____
_____.

5. Is the policy premium financed: Yes: _____; No: _____;
If yes, is account current? Yes: _____; No: _____.

6. Is coverage in order for accident date? Yes: _____; No: _____.

7. Comments: _____
_____.

Signed by:

Title:

Date:
