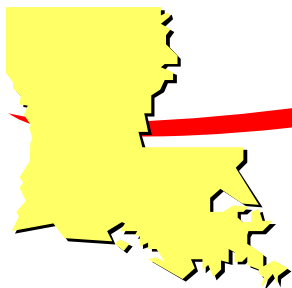


LOUISIANA GENERAL LIABILITY UPDATE

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APLC



NEW ORLEANS ♦ BATON ROUGE

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INTRODUCTION

This newsletter, which is published quarterly, is designed to provide you with a brief synopsis of recent cases that analyze issues of interest to our clients with potential general liability concerns. For your convenience, we have organized the cases based on the type of claim. If you need more information, please contact us.

DAMAGES / LOSS OF ENJOYMENT OF LIFE

McGee v. AC and S, Inc., 933 So. 2d 770, 05-1036 (La. 07/10/06)

Plaintiff's filed wrongful death and survival actions based on the decedent's exposure to asbestos. The issue before the Louisiana Supreme Court was whether loss of enjoyment of life was recoverable as an element of general damages that could be included as a separate line item on a jury verdict form. After reviewing the history of compensatory damages, the court concluded that loss of enjoyment of life fell within the definition of general damages and was compensable. The court reasoned that the elements of general damages were often listed individually, and to have an award for the loss of enjoyment of life reflected "the accepted method of listing elements of general damages separately." The court also found that such a separate itemization accurately reflected the possible change in lifestyle caused by the injury at issue. The court held, however, that only the primary tort victim was entitled to such damages and that any alteration in lifestyle was encompassed within the loss of consortium for a family member. Likewise, in the context of wrongful death and survival actions, loss of enjoyment of life was only recoverable by the victim during his lifetime and not by family members because it was derivative of the wrongful death action.

PRODUCTS LIABILITY

Edwards v. Ford Motors Co., 934 So. 2d 221, 06-0101 (La. App 3 Cir. 06/21/06)

Plaintiff acquired a Ford pick-up truck on May 25. He noticed a burning odor, but experienced no other problems and never attempted to ascertain the source of the odor. When he exited the vehicle on August 8, he left it running, and when he re-entered it and shut the door, the air bag deployed. He filed suit under the LPLA and also pled *res ipsa loquitur*. At trial, he abandoned the LPLA claims relied on *res ipsa*. The judge found for the plaintiff, and the Third Circuit reversed. The appellate court agreed that it was not necessary for a plaintiff to rule out every possible theory, but that when a defendant presented a plausible, well-developed theory absolving it of liability, the plaintiff was required to address that theory or present an alternate theory of how the accident occurred. The purpose of *res ipsa* was not simply to grant recovery every time there was a strange accident. The defendant presented expert testimony that there were 600,000 similar trucks made that year, but this was the only instance of spontaneous air bag deployment. Additionally, the defendant's expert testified that a large fuse was missing, and where the fuse should have been there was a wire, probably for electronic equipment, which indicated the vehicle had been altered. The plaintiff's expert, who was a former mechanic and had no experience with air bags, testified that the wires were "shorted," but made no attempt to determine how or why. Because the plaintiff did not provide any evidence of a defect in the vehicle or of negligence on the manufacturer's part, there was no liability.

DEFAMATION

Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d 669, 05-1418 (La. 07/10/06)

The plaintiff went through the drive-thru lane of a fast food restaurant and tendered a 1974 \$100 bill to pay for the order. Restaurant employees suspected the bill was counterfeit and notified the sheriff. The deputy who arrived agreed the bill looked “suspicious,” handcuffed the plaintiff and took him to a nearby substation while the bill was investigated. Another deputy obtained a counterfeit pen and determined the bill was legitimate. He filed suit against both the Sheriff and the restaurant. The trial court granted summary judgment on the plaintiff’s defamation claim against the restaurant, but the First Circuit reversed, finding there were issues of fact regarding the reasonableness of the employees’ conduct. The Louisiana Supreme Court reversed and reinstated summary judgment in favor of the restaurant. After reviewing the history of the tension between defamation actions and the First Amendment, the court noted that in the instant matter, both the plaintiff and defendant were private non-media entities and that the speech at issue, a report to law enforcement officers of suspected criminal activity, was a matter of public concern. The court held that in a defamation action involving private entities, but a matter of public concern, the defendant would be liable only if he had actual knowledge that the statement was false and defamatory, and he acted in reckless disregard or negligently in failing to ascertain the statement’s falsity and defamatory impact. The court also held that there were a number of situations in which statements that were potentially defamatory were granted a conditional privilege, and such a privilege clearly applied to an individual reporting the possible commission of crime, but the privilege could be defeated if the defendant acted in reckless disregard with respect to the falsity of the statement. Once the privilege was established, the burden shifted to the plaintiff to set forth evidence establishing abuse of the privilege, i.e., the defendant knew the defamatory statement to be false or acted in reckless disregard as to its truth or falsity. The plaintiff argued that the restaurant’s employees were negligent in ascertaining whether the bill was counterfeit before reporting it to the police, but the court held that mere negligence as to a statement’s falsity did not qualify as an abuse of a conditional privilege.

INSURANCE-HOMEOWNER -VALUED POLICY

Turk v. Louisiana Citizens Property Insurance Corp., 2006 WL 1635677 (W.D.La. 06/07/06)

The plaintiffs, a putative class action, sought a judgment that Louisiana's Valued Policy Law, La. R.S. 22:695 required the defendant insurers to pay the full face amount of the homeowner's policy for the damages their property sustained from Hurricane Rita. Plaintiffs argued that under the statute, as long as the covered property was rendered a total loss, and any portion of the damage was attributable to a covered peril, the insurer was required to pay the limits of the policy. The court held that because the policies at issue excluded coverage for damage caused by flood water, the policy holders did not pay a premium for that peril. Accordingly, the statute could not be construed to require an insurer to pay the policy limits when an insured property was rendered a total loss, in whole or in part, by a non-covered peril, such as flood. The court gave an example that if covered property was a total loss, and 50% of that loss was attributable to a covered peril, then the insurer would be responsible for paying only that percentage. The court also found that since its decision involved a controlling question of law, it was appropriate for interlocutory appeal and stayed the proceedings pending such an appeal.

INSURANCE-AUTO-LIMITS

Hill v. Shelter Mutual Insurance Co., 935 So. 2d 691, 05-1783 (La. 07/10/06)

After their father was killed in a car accident, three of his adult children filed suit against his wife (the driver) and the insurer. The plaintiffs and the insurer filed cross motions for summary judgment on the issue of whether the insurer was liable to each plaintiff as a separately injured person based on the "per accident" bodily injury limit or whether the plaintiff's claims had to be satisfied out of the "per person" limits. The trial court granted the plaintiffs' summary judgment, but the appellate court reversed. On appeal, the Louisiana Supreme Court examined the policy language and found that the policy defined "bodily injury" to include not only bodily injury to a person, but included "sickness, disease or death which results from it." The policy also defined bodily injury to include "all injury and damages to others resulting from this bodily injury." The court found this language to be ambiguous, and the language could reasonably include mental pain and anguish to others. The court then held that a wrongful death claim included loss of love, affection and companionship as well as mental pain and suffering, which could be termed "bodily injury" under the policy. Damages such as loss of services and support, and funeral and medical expenses, however, were pecuniary in nature, and thus could not be included;" hence those damages would be restricted to the "per person" limits of the policy. Whether the mental anguish and distress allegedly suffered by the plaintiffs rose to the level of severe and debilitating pain and anguish sufficient to satisfy the policy's definition was an issue of fact, and the court remanded for that determination.

INSURANCE-AUTO-PERMISSIVE USE

Arceneaux v. Norman, 931 So.2d 484, 05-1536 (La. App 3 Cir. 05/24/06)

The defendant was hired as a truck driver the day before the accident, and she was driving an 18-wheeler belonging to her employer when the accident occurred. The plaintiff and another individual were passengers in the truck, and the defendant claimed the plaintiff saw someone who allegedly owed him money, and he jumped out of the moving vehicle. In her version, all three were drinking beer. The plaintiff alleged, however, that only the driver was drinking, and that when he saw her doing so, he demanded to be let out of the vehicle. While he was attempting to exit, she accelerated, causing him to fall. The issue before the court was whether the defendant was a permissive user of the truck and was covered as an insured under her employer's policy. The court examined the policy's language which provided for coverage "but only with respect to liability arising out of operations performed" on behalf of the insured. The policy also provided that the use of the vehicle had to be within the scope of permission initially granted. The employer and insurer argued that the driver was prohibited from having guest passengers in the truck without prior written approval, she was not permitted to consume alcohol while driving the truck, and she was using the truck for personal use; therefore the accident did not arise out of "operations performed." The court reasoned, however, that based on La.R.S. 32:900, once initial permission had been established, coverage was provided regardless of whether the accident occurred during operations performed for the employer. Moreover, the jurisprudence held that once there was initial permission, coverage was precluded only when there was a deviation amounting to theft or conduct displaying an utter disregard for the return or safekeeping of the vehicle. Based on the facts of the case, the driver had initial permission to use the truck and to keep it parked overnight at her residence. The fact that she chose to use the truck to drive around with her friends and drink did not amount to a deviation evidencing utter disregard for the safekeeping of the truck, and the court affirmed the granting of the driver's summary judgment.

INSURANCE-AUTO-UM

Shirey v. Barton, 2006 WL 1577440, 05-1192 (La. App 1 Cir. 06/09/06)

The plaintiff sued his own UM carrier after his accident, and both parties filed for summary judgment on the issue of the validity of the UM rejection form. On the policy, the plaintiff was the named insured, and there were no additional drivers. He completed and signed the application and printed and signed his name on the UM form. He stated that he thought he was accepting UM coverage by doing so. His wife's initials were placed next to the option rejecting UM coverage, and the plaintiff testified that they were not there when he signed the form, and his wife denied doing so. The insurance agent testified that, the wife, who was not an insured, initialed the policies until she took them from the wife and gave them to the plaintiff. The appellate court found that based on the explicit language of the insurance contract itself and the statute, La.R.S. 22:1406 D (now 22:680) the insured who signed the rejection form also had to make the selection rejecting UM coverage by placing his initials next to that option. Whether the plaintiff's wife or someone else placed the initials in the blank rejecting UM coverage was "immaterial" since it was not the plaintiff who did so. The court found the UM rejection form invalid and affirmed the granting of the plaintiff's summary judgment.

INSURANCE-AUTO-PENALTIES

Geraci v. Byrne, 934 So. 2d 263, 06-0058 (La. App 5 Cir. 06/28/06)

After a car accident, plaintiff sued her own UM carrier and sought penalties and attorney's fees, alleging that the insurer offered to only reimburse her for court costs. The court reviewed the medical evidence and testimony from the claims adjuster, who stated that the \$10,000 received from the tort feisor was sufficient for the plaintiff's injuries. The adjuster testified that she became aware of the accident in July 2003, although the plaintiff had reported it to the insurer on February 27, 2002, shortly after it occurred. There was also a detailed demand letter in the file dated a month before the amended petition was filed that added the UM carrier. The court noted that the insurer had a medical release and interrogatories providing the names of all of the healthcare providers a year before suit was filed. In open court, the trial judge stated that the adjuster had treated the claim with very little thought and respect and handled the matter in a very "arbitrary" and "subjective" manner. The trial court awarded the plaintiff \$5,000 in additional damages, \$5,000 in penalties based on the insurer's arbitrary and capricious failure to pay the claim and over \$14,000 in attorney's fees. The appellate court reviewed the evidence and affirmed the damage award and penalties. The appellate court also noted that although there was a contingency contract, the presence of such a contract was merely one factor to be used in determining whether the fees were reasonable. The court found that plaintiff's counsel charged \$150 per hour, and the attorney had expended approximately 83 hours on the matter, which took over two years to come to trial. Under those circumstances, the amount of attorney's fees was reasonable, and the matter was affirmed.

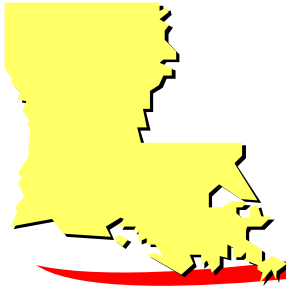
LEGISLATIVE UPDATE

22:658 - This statute has been amended, and if an insurer is found to be arbitrary and capricious in its failure to make a payment, the amount of the penalty has been increased from 25% to 50%. It also provides for attorney's fees and costs in the event of a partial tender. The statute now specifically provides that if such penalties are awarded, the insurer may not use them in computing past or prospective loss experience for the purpose of setting rates or making rate filings.

22:1210.71 et seq. - The Legislature enacted the Louisiana Claims Adjuster Act which defines a claims adjuster, specifies licensing requirements, continuing education requirements and standards. The legislation also set forth procedures for claims adjuster registration in the event of a catastrophe or emergency and the requirements for a non-resident claims adjuster to obtain a license. The Act becomes effective on January 1, 2007. This legislation also sets forth a qualifications and procedures for the licensing of public adjusters and limits their licensure to assist the insurers in first-party claims.

32:681 - This new statute provides for post-accident testing for the operator of any motor vehicle involved in a collision in which a fatality occurs. The statute also directs that a toxicology screen be performed on the victim of a traffic fatality to determine whether that person was impaired at the time.

9:2800.16 - This new statute provides that a person who uses reasonable and “apparently” necessary or deadly force to prevent a forcible offense against his person or property is immune from civil action and also awards that person reasonable attorney’s fees, court costs, compensation for loss of income and expenses, if a court determines that the defendant qualifies for such immunity.



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