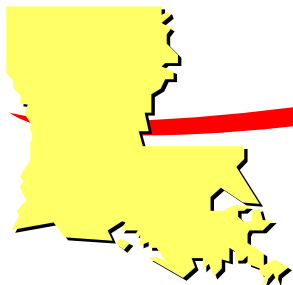


LOUISIANA GENERAL LIABILITY UPDATE

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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.

INSURANCE—AUTO—POLICY LIMITS

Hebert v. Webre, 982 So.2d 770, 08-0060 (La. 05/21/08)

The decedent was killed in a vehicular collision, and his wife and three minor children sought benefits under the UM policy, which had \$100,000/\$300,000 limits. The issue before the Louisiana Supreme Court was whether their wrongful death claims were subject to the single “each person” limit or the aggregate “each accident” limit. In its analysis, the Court emphasized that the focus had to be the language of the specific policy at issue and that cases interpreting policies with different language were distinguishable. The court found that the policy defined bodily injury as “physical bodily injury to a person,” and that the coverage under the “each person” provision limited damages to “bodily injury to one person . . . and all emotional distress resulting from this bodily injury sustained by other persons who do not sustain bodily injury.” The insurer had filed a motion for summary judgment on the coverage issue, which the trial court denied, and the Third Circuit denied writs. The Supreme Court found that the jurisprudence relied on by the Third Circuit was distinguishable because the policy language was different. In the instant matter, the policy limited bodily injury to physical injury only, whereas earlier cases had defined the term more broadly. The policy also defined bodily injury to include all emotional distress suffered by others. The court found that this policy language was “precise” and had eliminated the previous ambiguities that resulted in decisions against the insurers. Since the plaintiffs were not physically present in the car when the accident happened, they did not suffer any bodily injury in the same accident, and therefore were limited to the “each person” limit. The court determined that the injury suffered by a wrongful death plaintiff was not the physical bodily injury required by the policy, and no matter how severe the emotional distress, the policy unambiguously excluded all emotional damages resulting from the decedent’s bodily injury. Accordingly, the decision of the appellate court was reversed, and the case was remanded with instructions to grant the insurer’s motion for summary judgment.

INSURANCE—AUTO—OTHER INSURANCE

Shelter Mutual Insurance Co. v. State Farm Automobile Insurance, Co., 2008 WL 2787705, 07-0163 (La. App. 1 Cir. 07/18/08)

Shelter's insured, Whitaker, loaned her car to Gerac, who caused an accident for which she was solely responsible. Shelter paid the other driver, as well as Whitaker, for damages and then sought reimbursement from State Farm, Gerac's insurer. Both companies filed motions for summary judgment, and State Farm's motion was granted. On appeal, the court examined the "other insurance" provision of each policy and determined that with respect to the property damage for the third party's car, the "other insurance" provisions cancelled each other out, making each insurer liable for 50% of the amount of the third-party's damage. With respect to Whitaker's vehicle, however, the court examined the specific language of each policy and determined that the State Farm policy language regarding a loss to a non-owned car applied, which made State Farm's policy excess to Shelter's. Because Gerac was a permissive user, she was an insured under the Shelter policy and Shelter was precluded from seeking subrogation against its own insured. Therefore, Shelter was not entitled to reimbursement from State Farm for the damages to Whitaker's vehicle, and that portion of the summary judgment was reversed.

INSURANCE—AUTO—UM

Johnson v. Folse, 986 So.2d 110, 07-1031 (La. App. 5 Cir. 05/27/08)

Defendant Progressive Insurance Company ("Progressive") issued an automobile liability insurance policy in favor of Raymond Johnson, Inc. ("RJI"), and contended that there was no UM coverage because the owner of the company had rejected such coverage. Cross motions for summary judgment were filed on the issue, and the trial court denied Progressive's motion. Progressive not only appealed the granting of plaintiff's summary judgment, but filed a writ on the denial of its own motion. The Louisiana Fifth Circuit held that the UM rejection form at issue was invalid. The court noted that the form contained the typed company name and policy number at the top of each page, but the space for a policy number had been left blank. The court refused to decide whether that was sufficient because there were other omissions that created ambiguities about the rejection form. The owner, Raymond Johnson, signed his name, but did not print the name of the insured or legal representative and did not indicate whether he was signing individually or as the company's legal representative. Because the blank for the named insured had not been completed, and the legal capacity was not clear, the court determined that the defendant had not satisfied the Duncan requirements, and there was no valid rejection.

INSURANCE—VALUED POLICY LAW

Landry v. Louisiana Citizens Property Insurance Co., 983 So.2d 66, 07-1907 (La. 05/21/08)

In a case arising out of damages caused by Hurricane Rita, plaintiffs filed a motion for summary judgment arguing that Louisiana’s Valued Policy Law, La. R.S. 22:695, required their insurer to pay for the full value of their home because the loss was caused in part by wind, a covered peril, and in part by flood, which was not covered under the policy. The trial court granted the summary judgment, finding the defendant liable for the full value of the policy, but the Third Circuit reversed, and both parties filed writ applications. Louisiana Supreme Court assumed, without specifically deciding, that the statute applied to the matter and focused on the 1991 reenactment of the statute, which allowed for a different method of loss computation to be set forth in the application and policy and found that exactly such a method was included as a supplement to the policy, and the plaintiff had signed the separate supplemental application. The court noted that it had never interpreted the language at issue, which specifically allowed an insurer to use a different method to compute the loss and acknowledged that it was an attempt by the insurance industry to lessen the statute’s impact, so long as adequate notice was provided to the insured. The court also found that the statute set no limits on the method of loss computation used by the insurer so long as the chosen method was specified in both the policy and the application in “type of equal size.” The policy at issue specifically referenced the reenactment of the statute and the method of loss computation, making the parties’ intent to use a different method evident. The court found that the size of type used in the supplement to the application was slightly smaller than in the original application and policy, but was not in the type of fine print the statute intended to prohibit; because it was contained in a separate document with a separate signature it was not an attempt to hide the alternate method of loss computation. If an insurer complied with the statute’s requirement, then an alternate method of loss computation could be utilized instead of the one set forth in the statute. Since the insurer had complied, it was not obligated to pay the face value of the policy.

INSURANCE—INDEMNITY

Boykin v. PPG Industries, Inc., 2008 WL 2435055, 08-0117 (La. App. 3 Cir. 06/18/08)

The plaintiff was employed by D&Z as a security guard at the defendant's plant and claimed she was injured when she was exposed to chlorine gas at that facility. The plaintiff settled her claims with PPG, which then filed a motion for summary judgment seeking indemnification from D&Z and its insurer for the amounts paid. The court found that the agreement between the parties required D&Z to indemnify PPG to the extent that a claim was caused by the breach of any representation or warranty made by D&Z in the contract. The evidence established that D&Z's training of the plaintiff fell below the standards required, and D&Z had breached the contract by failing to provide properly trained security guards. The court also determined, however, that the language of the agreement did not contain the necessary unequivocal language that would require D&Z to indemnify PPG for its own negligence, and D&Z's breach of contract did not cause PPG's loss; therefore, PPG was not entitled to indemnification. PPG argued that there were two subsequent purchase orders containing language that specifically required D&Z to indemnify it for its own negligence. The court disagreed, however, and found that when there were multiple agreements between the same parties for the same goods or services with conflicting language regarding indemnification, the ambiguity would be construed against the indemnitee. While D&Z's failure to properly train the plaintiff may have contributed to her damages, when PPG settled the claim, it compensated the plaintiff only for those damages caused by its own negligence. Since the indemnification agreement did not encompass PPG's own negligence, the decision of the trial court awarding indemnification and attorney's fees was reversed.

DAMAGES—LOST CHANCE OF SURVIVAL

Benfield v. Sibley, 2008 WL 2669770, 43,317 (La. App. 2 Cir. 07/09/08)

In this medical malpractice matter, it was determined that the defendant, a nurse, had breached the standard of care by failing to timely notify the attending physician that the decedent was having difficulty breathing. There was conflicting testimony regarding the decedent's lost chance of survival, with one doctor testifying that nothing could have been done to save the decedent, and a second stated that if the chance was not zero it was "extraordinarily minimal." Another doctor, however, testified that there was a 20% chance of survival, while a different expert stated that it was 20 - 30%. The jury awarded \$260,000, which the defendant appealed as being excessive. The appellate court found that the award was high, but not excessively so, and affirmed.

DAMAGES—WRONGFUL DEATH

Lewis v. State of Louisiana, Medical Center of Louisiana at New Orleans, 983 So.2d 231, 07-0546 (La. App. 4 Cir. 04/16/08)

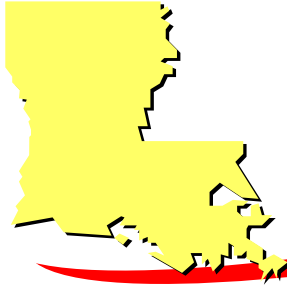
The decedent entered the hospital for surgery to correct a misalignment of his jaw. After discharge, he and his wife were walking to their car when he began to hemorrhage profusely from his mouth and died. The trial court found there was a breach in the standard of care and awarded a lump sum in general damages of \$1,834,914.31 to his wife and minor children, which was reduced by statute to \$500,000.

Mire v. O’Shee, 985 So.2d 843, 08-0093 (La. App. 5 Cir. 05/27/08)

The decedent was killed in an automobile-motorcycle collision when the defendant, while in the course and scope of his employment, turned left into the path of a motorcycle operated by the decedent. The jury awarded \$150,000 for the survival action, \$600,000 in general damages to the wife, \$300,000 in general damages to the minor son, \$112,000 for loss of services, and \$1,200,000 in loss of support, all of which were affirmed on appeal.

Kennedy-Fagan v. Estate of Graves, 2008 WL 2796782, 07-1062 (La. App. 1 Cir. 07/21/08)

The decedent suffered a series of strokes which significantly impaired her quality of life. She died from a gunshot, apparently inflicted by her husband pursuant to a “suicide pact,” since he was also found dead of an apparently self-inflicted gunshot wound. The plaintiff, the adult child of the wife’s previous marriage, filed a wrongful death action and was awarded damages for past pain and suffering in the amount of \$40,000, loss of companionship of \$100,000 and emotional distress in the amount of \$40,000 for a total of \$180,000. On appeal, the defendant argued that the award to an adult child for the loss of her eighty year old mother was excessive. The court determined that the awards for emotional pain and emotional distress were duplicative, and that for a wrongful death award, she was entitled to compensation from the time of the wrongful death until the time that the decedent would have died naturally, not the length of time a plaintiff might grieve. Based on the totality of circumstances, the court concluded that the award was excessive and reduced it to \$40,000.



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