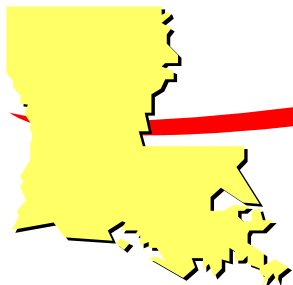


LOUISIANA GENERAL LIABILITY UPDATE

TAYLOR, WELLONS,
POLITZ & DUHE, 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

Smith v. Harrah's New Orleans Management Co., 2007 WL 98994 (5th Cir. (La.) 01/16/07)

When the plaintiff tried to retrieve his vehicle from valet parking, after drinking and gambling at the defendant's casino, he got into a dispute with the casino's employees over obtaining money from the vehicle to pay for the parking. As the casino's valet tried to drive away, the plaintiff grabbed onto the truck and fell. The valet did not stop, however, and ran him over, causing permanent injuries. At trial, the jury awarded \$357,142 for "loss of life enjoyment," \$67,857 for past pain and suffering, and \$18,571 for future pain and suffering. There were a number of issues on appeal, including the amount awarded for the loss of life enjoyment. The court noted that a plaintiff was entitled to recover such damages if he proved that his lifestyle had been detrimentally altered or if he had been forced to give up activities due to the injury. Moreover, the damages could be awarded separately from other general damages, such as mental and physical pain and suffering. The court also reasoned that a plaintiff could suffer loss of life enjoyment, although he might suffer little or no pain and did not require future surgery. The court held that total damages should be assessed *en globo* rather than piecemeal, but determined that loss of life enjoyment awards were generally lower than pain and suffering awards. The court then found that the loss of life enjoyment award was "entirely disproportionate" to the plaintiff's injuries and that after reviewing comparable cases, \$50,000 was the maximum amount the jury should have awarded. The court ordered a remittitur by adding 50% to that amount and awarded plaintiff \$75,000 with the option of a new trial on that issue if he chose not to accept the remittitur. (This case was not selected for publication).

VIDEO SURVEILLANCE

Bell v. Treasure Chest Casino, L.L.C., 2007 WL 530173 06-1538 (La. 02/22/07)

While playing a slot machine at the defendant's casino, the plaintiff was hit in the back by a push cart operated by a casino employee. There were security cameras throughout the casino, one of which captured the event on videotape. During discovery, plaintiff requested that the videotape be produced, but the defendant refused, arguing that it was impeachment evidence, which it was not required to produce until after the plaintiff's deposition. The trial court ordered production of the tape but the appellate court reversed on the grounds that the plaintiff had not met her burden of proof to set forth the special circumstances that would justify pre-deposition production. On a writ to the Louisiana Supreme Court, the court determined that the tape at issue was not created post-injury for the purpose of impeaching the plaintiff, but showed the actual accident. A videotape not created for impeachment purposes was generally discoverable, and therefore, it was the defendant, not the plaintiff, that had to demonstrate special circumstances that would justify postponing production. A videotape, such as the one at issue, that showed the actual circumstances of the accident would be of assistance to both parties, and its importance outweighed any potential impeachment value. Since the trial judge had broad discretion in regulating pre-trial discovery, the decision regarding production of the videotape should not be disturbed on appeal absent a clear showing of abuse of discretion. Since there was no such abuse, the trial judge's decision ordering production was reinstated.

ASBESTOS

Chaisson v. Avondale Industries, Inc., 947 So.2d 171, 05-1511 (La. App. 4 Cir. 12/20/06)

The decedent's husband worked as a pipefitter, and in his job came into contact with asbestos, and at the end of the day, his clothes were covered in dust. When he came home, his wife would shake out his work clothes and wash them, then sweep up any dust and residue from the floor. She died of asbestos-related mesothelioma, and her husband and adult daughters sued the husband's former employer for her wrongful death. The defendant argued that it had no duty to the decedent and that her risk of contracting mesothelioma was not within the scope of any duty it may have had. The court noted that the husband worked at the defendant's premises after OSHA issued regulations about the danger of asbestos and that the employer did not provide work uniforms, changing rooms, or laundry service. The defendant stipulated that its plant contained asbestos and as early as 1972, OSHA standards dictated that asbestos fibers and dust were dangerous and should not be carried home. Moreover, the court found that under the specific facts and circumstances presented, a reasonable company should have been aware of the hazards of household exposure to asbestos, and therefore it had a duty to protect third party household members from asbestos exposure, when it knew the job site contained asbestos. The defendant argued that the premises owner had the primary responsibility in guarding against the exposure, but the court disagreed, finding that argument would allow an employer to ignore potential work hazards simply because it could argue that someone else should be responsible. The court also found there was an ease of association between the work performed by the husband and his wife's illness. The court affirmed the wrongful death damages of \$1,370,000 to the husband and \$562,000 to each daughter, subject to a reduction based on the employer's fault and \$1,416,580.54 in survival damages.

INSURANCE-CGL-SELF INSURED RETENTION

Devillier v. Alpine Exploration Companies, Inc., 946 So.2d 738, 06-0770 (La. App. 3 Cir. 12/29/06)

After an oil well blowout, there were numerous lawsuits filed against the defendants. At issue was whether a self-insured retention (“SIR”) of \$100,000 in a policy issued by Evanston Insurance Company (“Evanston”) applied to each individual claim or only once to the occurrence regardless of the number of claims or claimants. Although Evanston argued that the term “per claim” was defined in the policy, it was not, even though the policy contained a definition for “claim” or “claims,” as a request or demand for money or services, including the filing of suit. Because the policy language treated both terms the same with no distinction between the singular and the plural, the court concluded that the phrase “per claim” was the same as “per claims.” The insurer argued that the term “per claim” was the same as “per person,” but again, there was no policy language to support that assertion. The court reviewed the jurisprudence cited by both parties, but noted that unlike the present matter, each of those cases distinguished between a singular claim and the plural claims. After conducting a *de novo* review of the policy, the court held that the SIR language was ambiguous, and there was no language in the policy to distinguish one claim from multiple claims arising from the same occurrence. Since the language was ambiguous and had to be construed against the insurer, the deductible applied only once to the occurrence.

INSURANCE-CGL-EXCLUSION

Markel American Insurance Co. v. Schubert’s Marine East, Inc., 2007 WL 54808 (E.D. La. 01/05/07)

The defendant was hired to remove the barrier coat from a vessel, remove any moisture from the hull, and recoat the hull with a protective coating. While performing the work, however, the hull was severely damaged, rendering the vessel a constructive total loss. The defendant’s insurer denied coverage arguing there was no occurrence as defined by the policy. The court found that the loss had to be analyzed from the standpoint of the victim rather than the insured, and that, in general, under Louisiana law, the incorporation of defective materials or defective workmanship were considered occurrences when they resulted in related property damage. Since the vessel’s owner would not have expected that faulty workmanship on the hull would result in the loss of the vessel, there was an occurrence which triggered coverage. The insurer then argued that the work product exclusion applied, precluding coverage. Again, the court disagreed finding that the insurer misconstrued the nature of the work. The court acknowledged that the defendant’s work or work product was difficult to identify because it was intangible, i.e., a service. The defendant’s “work” therefore consisted of the service of drying out the hull, which was performed improperly. The plaintiff did not seek recovery for damage to the work itself, but for the unexpected damage to the vessel caused by the improperly performed work. Therefore, the work product exclusions did not apply, and the court granted the plaintiff’s motion for summary judgment.

INSURANCE-AUTO-POLICY LIMITS

Williams v. Aymond, 945 So.2d 823, 05,1547 (La. App. 3 Cir. 12/06/06), writ denied, 949 So.2d 942, 07-0005 (La. 03/09/07)

After a fatal vehicular collision, two different sets of the decedent's heirs filed suit against the defendant and his insurer. The plaintiffs filed a motion for partial summary judgment that the applicable policy limits were \$300,000 for each accident rather than the \$100,000 for each person, and the trial court granted the motion. The policy defined "bodily injury" as physical bodily injury to a person and the death resulting from that injury. The policy also defined the "each person" limit as bodily injury to one person, including all injury and damages to others resulting from the bodily injury as well as emotional distress resulting from the bodily injury sustained by others. All of the injuries to the plaintiffs for the wrongful death of the decedent fell within the definition of bodily injury to one person. In other words, all of the injuries to the plaintiffs resulted from the physical bodily injury sustained by the decedent and the plaintiffs' emotional distress resulting from the decedent's bodily injury. Because the policy contained the additional phrase concerning the emotional distress for individuals who were not injured, the per person limits included both physical and emotional damages for all wrongful death claimants arising from the death of one person. Therefore, the each person limit of \$100,000 applied rather than the higher per accident amount.

INSURANCE-AUTO-CANCELLATION

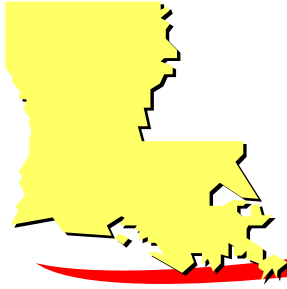
Domingue v. Rodriguez, 947 So.2d 63, 06-0578 (La. App. 5 Cir. 11/28/06)

The defendant's insurer filed a motion for summary judgment arguing that the insurance policy had been cancelled prior to the accident at issue. The trial court denied the motion, but the Fifth Circuit reversed. Initially, the defendant purchased auto insurance with a six month term, and near the end of the term the agent contacted the defendant about renewal, and defendant advised him she would not be renewing the policy because it was too expensive. The defendant claimed, however, that she had mailed a renewal payment two days before the end of the term, but that the envelope had been returned to her by the post office for insufficient address. The court determined that the cancellation provisions set forth in 22:636.1 and in the policy were inapplicable because the insurer did not attempt to cancel the policy prior to its natural termination date. Moreover, the statute did not apply because the insurer had manifested its willingness to renew, but the insured did not avail herself of the opportunity to renew within the time period allowed; therefore, the insurance had lapsed at the end of the termination policy. The court noted that the cancellation notice had been sent to the wrong address, but since no notice of cancellation was required, that fact did not alter the conclusion. The policy specified that the payment had to be received on or before the end of the policy period, and since the insurer indicated its willingness to renew, but did not receive the renewal premium timely, the insurance had lapsed, and there was no coverage.

INSURANCE-AUTO-PENALTIES

Lewis v. State Farm Insurance Co., 946 So.2d 708, 41,527 (La. App. 2 Cir. 12/17/06)

The plaintiffs were injured while in the course and scope of their employment for the City of West Monroe (the “City”). The City’s UM insurer never made a tender, and at trial the jury awarded \$125,000 to each plaintiff for the breach of the duty of good faith. At a post-trial hearing, however, the trial court awarded the plaintiffs \$50,000 in penalties pursuant to 1220C and \$59,000 in attorney’s fees under 22:658. The court reviewed the history of the claims and found that the insurer had “tossed” them from office to office, and adjuster to adjuster, but never made tender for the undisputed amounts. Furthermore, when the insurer eventually denied the claims, it relied on language that was added to the policy after the accident. After concluding that the insurer breached its duty, the court examined the specific statutory language which allowed for “any damages sustained as a result of the breach.” The court held that neither of the plaintiffs sustained any pecuniary damages as a direct result of the insurer’s failure to tender since both men were receiving workers’ compensation benefits, and their medical bills were being paid. The plaintiffs did suffer mental anguish and emotional distress caused by the litigation, and the court awarded \$8,000 and \$2,500 respectively to each of them. With respect to penalties under §1220, the court awarded the first plaintiff \$16,000 and the second \$5,000. Regarding attorney’s fees, the insurer argued that fees should be awarded only for the prosecution of the issues of bad faith and not for the additional damage claim. The court disagreed, finding that trial was required due to the failure to tender, and the \$59,000 in attorney’s fees was reasonable. Additionally, the court awarded \$2,000 for the appeal.



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