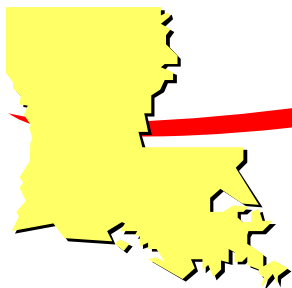


LOUISIANA GENERAL LIABILITY UPDATE

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POLITZ & DUHE,
APLC



NEW ORLEANS ♦ BATON ROUGE

MAY 2006

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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.

EMERGENCY VEHICLES

Rabalais v. Nash, 926 So.2d 683, 05-0937 (La. App 3 Cir. 03/29/06)

A fire captain was heading toward a fire in a department pick-up truck using the center turn lane with the vehicle's emergency lights and siren activated. The plaintiff pulled into the turn lane and was hit by the truck, sustaining serious injuries. At trial, the plaintiff was found to be 100% at fault, but on appeal the Third Circuit reversed. The court examined the language of the emergency vehicle statute, La. R.S. 32:24 and concluded that since it created a special privilege, it had to be strictly construed. Under such a construction, the fire captain's action of driving in the center turn lane en route to a fire did not fall within the statute's parameters. He was not parking, standing, proceeding past a stop signal, exceeding the speed limit, driving down a one way street, or turning. The court held the list of exceptions granted to emergency vehicles was exclusive, not illustrative, and because the defendant's actions did not fit in one of the specified exceptions, the statute was inapplicable. Under the duty-risk analysis, the court determined that the captain's actions constituted negligence per se and held each party 50% at fault.

HEALTH CARE PROVIDER PRIVILEGE

Moss v. State of Louisiana, 925 So.2d 1185, 05-1963 (La. 04/04/06)

After a fatal vehicular collision, the plaintiffs sued the DOTD alleging that the roadway was defective. The other driver tested positive for phenobarbital, and in his deposition the decedent's husband acknowledged that his wife took the drug for headaches caused by brain surgery several years earlier. The husband refused to sign a medical authorization for the release of his late wife's medical records. DOTD filed a motion for release of those records pursuant to La. R.S. 13:3715.1, and the husband again objected. The trial court denied the motion, concluding that under the statute, the records could be disclosed only with consent of the patient or after a finding that the release was "proper." Citing article 510 of the Evidence Code, the court determined that none of the exceptions to the health care provider privilege applied, and therefore the release would not be "proper," although the DOTD had a valid interest in seeking the records. The First Circuit agreed and denied writs, but the Louisiana Supreme Court reversed. The court agreed that none of the exceptions of the privilege applied, but held that the inquiry did not end there. The court also concluded that the husband did not impliedly waive the privilege by testifying at a deposition that he was compelled to attend and where he was not represented by counsel. Like the lower courts, the Supreme Court focused on the meaning of the word "proper" in 13:3715.1(B)(5). The court disagreed with the lower courts' restrictive interpretation of the meaning of the word "proper", however, finding that the contradictory hearing anticipated by the statute would be rendered meaningless, and the statutory language did not support such a narrow interpretation. The court reasoned that the word "proper" granted a court the discretion to evaluate whether the interests of justice would be served by the release of medical records in a particular situation. While there were no clear guidelines in the statute, a court was required to balance the parties' competing interests and whether the evidentiary need for the disclosure outweighed the patient's privacy interest. The court held that the party seeking to overcome the privilege had to make a substantial showing of relevance and need and should extend only to information necessary and relevant to the condition at issue that was the basis of a defense or claim. The court then remanded the matter back to the district court for a contradictory hearing pursuant to those guidelines.

INSURANCE-COMMERCIAL-INCREASED PREMIUMS

Severn Place Associates v. American Building Services, Inc., 2006 WL 909998, 05-0859 (La. App 5 Cir. 04/11/06)

The defendant provided janitorial services to the plaintiff's office building. One of the defendant's employees left water running overnight, causing flooding to the building. The plaintiff's own insurer paid the claim and then filed a subrogation action against the defendant and its insurer for reimbursement. Most of the claims between the parties were settled, and the only issue remaining was the claim for future increased insurance premiums, which had risen 126%. The trial court granted the defendant's exception of no cause of action, which was affirmed. Utilizing the duty-risk analysis, the court found the issue was whether the conduct of the defendant's employee in leaving the water running was a legal cause of the plaintiff's injuries, i.e., the increase in premiums. The court reasoned there must be an "ease of association" between the rule of conduct, the risk of injury and the loss. The court found that the damages at issue were too remote from the conduct, and as a matter of policy, the plaintiff did not have a cause of action for the increased premiums. Moreover, the court found that the insurer had advised the plaintiff that if it made a claim under its policy rather than pursuing a claim against the defendants, the premiums would increase. The plaintiff, however, sought to have damages repaired more quickly and therefore knew that its premiums would increase.

INSURANCE-CGL-EXCLUSION

Supreme Services and Specialty Co. v. Sonny Greer, Inc., 2006 WL 1154824, 04-1400 (La. App 3 Cir. 05/03/06)

The plaintiff contracted with the defendant to construct a commercial building, and during the work the plaintiff complained of cracks in the concrete slab and parking lot soon after that work was completed. Plaintiff sued the contractor, who third-partied its insurer, and the insurer filed a motion for summary judgment claiming there was no coverage based on the policy's work product exclusion. The trial court granted the motion finding that the exclusion was clear and unambiguous, and the exclusion applied to incorrectly performed work, but the Third Circuit reversed. After reviewing the specific exclusions at issue, the court determined that the work was performed by a subcontractor and therefore the subcontractor exception to the work product exclusion rendered that exclusion inapplicable. Next, the court found that the policy provided coverage under the "products-completed operations hazard" provision and determined that there was no unambiguous provision in the policy defining the extent of that coverage. Therefore, it was ambiguous and should be interpreted to favor coverage. The court found there was a work product exclusion, but that property damage included in the products-completed operations hazard did not fall within that exclusion and therefore rendered the exclusion void as to the work product of the insured. Moreover, the court found that the contractor had paid a premium for that coverage, and the section relating to that coverage was ambiguous.

INSURANCE-HOMEOWNER

Dixon v. First Premium Insurance Group, 2006 WL 786781, 05-0988 (La. App 1 Cir. 03/29/06)

When the plaintiffs purchased a new home, they advised their insurer they intended to rent it and wanted coverage only on the dwelling itself. A tenant moved in a month later and was occupying the house when it was destroyed by fire. The insurer denied the claim because the dwelling was no longer the plaintiffs' "residence premises" as defined by the policy. Citing La. R.S. 22:691, which the court found was incorporated into all fire insurance policies issued in the State, the court found there was a 60-day grace period preventing a company from terminating coverage, unless the insurer could demonstrate that the insured knowingly increased the hazard to the structure within that period. In support of their position, the owner and manager of the insurer testified that when a house was rented, it created an increase in risk for an insurer, but did not submit any evidence as to how the risk had been increased under the facts and circumstances presented. The court held that the testimony as to a general increase in risk was not sufficient. Additionally, the insureds had filed a satisfactory proof of loss immediately afterward, but the insurer had consistently refused to pay and was therefore arbitrary and capricious. The court awarded \$56,000 for the loss, \$18,900 in damages, \$37,800 in penalties and \$24,984.50 in attorney's fees pursuant to 22:1220 and 22:658. The court also held that the trial court erred in awarding damages for mental anguish and emotional distress for a non-pecuniary loss and reversed that portion of the award.

INSURANCE-AUTO-NO PAY, NO PLAY

Carrion v. Sandifer, 926 So.2d 784, 40,880 (La. App 2 Cir. 04/12/06)

The plaintiff, who spoke very little English, obtained an auto insurance policy with the assistance of a friend and interpreter with whom he lived. When he moved, he did not notify the insurer, and the insurer sent a notice at the old address notifying him that his policy would not be renewed because the agent no longer represented the company. Subsequently, the friend went to the agency and paid the premium in person, which he usually did, but the insurer returned the check to the agency. A few days later, the plaintiff was involved in a vehicular collision, and at trial, the court applied the “no pay, no play” statute because the plaintiff did not have a valid insurance policy in force. On appeal, the plaintiff argued that there should be a good faith exception to the statute because he did not “fail” to obtain the insurance and did everything he could to obtain a valid policy. He reasoned that since the statute used the term “fails” rather than “does not have” the legislature intended for a good faith exception to apply. The court disagreed, finding that there was nothing in the statute to support such an interpretation, and his remedy was to pursue the insurance agent, even though the prospects of recovery appeared unlikely. The court acknowledged that creating such an exception would be equitable under the facts, but that it was up to the legislature to do so, not the court.

INSURANCE - AUTO - UM

LeBlanc v. Aysenne, 921 So.2d 85, 05-0297 (La. 01/19/06)

At trial, the plaintiffs were awarded their UM policy limits of \$100,000, and the judgment provided that the insurer was responsible for legal interest on that sum from the date of judicial demand until paid. The plaintiffs appealed, however, claiming that the UM carrier was responsible for legal interest on the amount attributable to the underinsured driver, i.e., the total judgment. The First Circuit amended the judgment ordering the UM carrier to pay interest on its policy limits from the date of judicial demand and on the rest of the judgment from the date of the judgment until payment of the policy limits. The issue on appeal was whether the insurer could contractually limit its obligation to pay interest to the policy limits. The plaintiffs’ contention rested on one provision of the policy providing that the insurer would pay “all sums” that the insured was legally entitled to recover as damages from the underinsured driver. The Louisiana Supreme Court held that such a narrow interpretation ignored the policy as a whole and noted that the declarations page set forth UM limits of \$100,000. The court distinguished prior jurisprudence by noting that the policy at issue contained far more restrictive language, specifying that it would only pay interest on amounts “within the policy limits.” Accordingly, based on the unambiguous policy language, the insurer was required to pay interest only on its policy limits.

INSURANCE - AUTO - UM

Lee v. Naquin, 924 So.2d 250, 05-0606 (La. App 5 Cir. 02/03/06)

Plaintiff was injured in the course and scope of his employment and sought recovery from his employer's UM carrier. The insurer filed a motion for summary judgment claiming that the president of the company had signed a UM rejection form. The plaintiffs argued that the rejection was invalid because the president did not indicate he was signing on behalf of the insured, the form referenced a different policy number, premiums for UM coverage were included in the insurance quote, and the policy contained numerous references to UM coverage. The trial court granted summary judgment, and the appellate court affirmed. The court determined there was no question that the individual who signed the rejection form was president of the company, and there was an affidavit in which he asserted he was properly authorized to do so. Moreover, the president was listed as a named insured. The court also found that the incorrect policy number was that of the policy being renewed and because the UM form was executed on the day that the policy was renewed, the waiver of coverage was clear. Finally the court found that although there were references to UM coverage in the insurance quote and policy, the insured rejected such coverage on the form prescribed by the commissioner of insurance, and the rejection was valid.

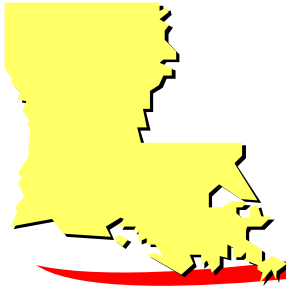
Munsch v. Liberty Mutual Insurance Co., 2006 WL 305878, 05-0147 (La. App 1 Cir. 02/10/06)

The plaintiff was a guest passenger in a car owned by the driver's grandmother. Prior to his death, the grandfather had selected lower limits of UM coverage and afterward the policy was renewed in the name of the grandmother only. At issue was the continued validity of the lower limits after the renewal. On cross motions for summary judgment, the trial court held in favor of the plaintiff, finding the prior UM selection invalid. The First Circuit analyzed the statutory language of 22:680(1)(a)(ii) and found the statute to be inconsistent in that the first part of the statute indicated the initial selection would remain valid only when a renewal, etc. was issued to the same named insured, while the second part of the statute provided that any change, except a change in limits of liability, did not require a new UM form. The court harmonized the two sections by reasoning that it anticipated that the named insured remained the same. The court found that the policy had been issued to the deceased spouse, but after the grandmother had it transferred into her name, there was a different named insured. Consequently, the UM selection form was no longer valid.

INSURANCE - AUTO - UM

Chesser v. Royal & Sunalliance Insurance Co., 926 So.2d 612, 05-0678 (La. App 5 Cir. 03/14/06)

At the time of the accident, the plaintiff was driving a Freightliner Tractor he owned and was operating pursuant to a contractor lease agreement. He sought to recover under his own UM policy, and the insurer denied coverage, citing an exclusion that there was no coverage if the tractor was under dispatch at the time of the accident. The trial court agreed and granted summary judgment, but the Louisiana Fifth Circuit reversed. The insurer argued that an insured only had UM coverage if there was also liability coverage. The court found that interpretation too narrow and noted that UM coverage followed the person of the insured, not the vehicle. Moreover, while the dispatch exclusion applied to liability coverage, there was no such exclusion under the UM coverage. Furthermore, UM coverage was required by statute unless it was validly rejected, and there was no such rejection. Because UM coverage was provided by a separate endorsement, which contained no exclusions and no rejection, the plaintiff was entitled to UM coverage.



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