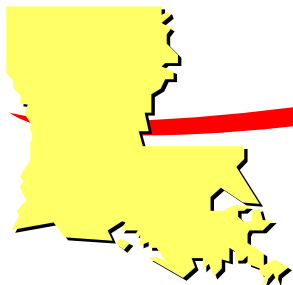


LOUISIANA GENERAL LIABILITY UPDATE

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.

EMERGENCY VEHICLE LIABILITY

Rabalais v. Nash, 952 So.2d 653, 06-0999 (La. 03/09/07)

Plaintiff was attempting a left turn when he was struck by a fire department pick up truck which had its emergency lights and siren activated. The jury found the plaintiff to be solely at fault for the accident, but the court of appeal held that the jury erroneously applied the Emergency Vehicle Statute, La.R.S. §32:24 and reversed, allocating 50% fault to the plaintiff and 50% fault to the fire department. The Louisiana Supreme Court granted the writ and reversed, holding that the statute applied, and the fire department was immune. Plaintiff argued, first that the statute did not apply because the fire had been ongoing for some time and was no longer an emergency. Second, the pick up truck was not traveling to the fire but back to the station to retrieve additional equipment. Finally, the turning lane was not designated for travel, but was a no passing lane and that as a motorist, plaintiff had the right to assume that fire department employees would follow traffic laws and the statute should be strictly construed. The court reviewed the evidence regarding the size of the fire and the dangerous nature of a chemical fire and concluded that the defendant was responding to an emergency when he left the fire to go to the station and obtain additional equipment. The court acknowledged that a pick up truck was not a traditional emergency vehicle, but noted that other vehicles, such as wreckers had been held to qualify, and determined that an official truck of a fire department marked as such was an emergency vehicle. Next, the court reviewed the language of Section B of the statute which allowed emergency vehicles to disregard certain traffic regulations. The court of appeal concluded that since driving in a center turning lane was not specifically listed, the statute was not applicable. The court rejected such a restrictive interpretation, holding that the purpose of the statute was to provide immunity to drivers of emergency vehicles when the conditions specified by the statute were met, and that the statutory phrase "direction of movement" could include an emergency vehicle traveling the wrong way on a one way street as well as in the turning lane on a highway.

INDEPENDENT MEDICAL EXAM

Hogan v. Morgan, 2007 WL 1218215, 06-0808 (La. App. 1 Cir. 04/26/07)

Plaintiff filed suit for injuries to his upper back, shoulders, and cervical spine arising out of a vehicular accident. The insurer retained the defendant-doctor to conduct an IME. Before the examination, the insurer sent the plaintiff's medical records to the doctor, and included a court order restricting the doctor's physical examination to those areas and specifying that there would be no exam on any other part of the plaintiff's body. Neither the doctor nor anyone from his staff reviewed those materials prior to the exam, and the doctor was therefore unaware of the court order prior to the IME. He conducted a routine orthopedic and neurological examination of the plaintiff's entire body, but the plaintiff never objected, only commenting once or twice that the doctor was not supposed to "go below his shoulders." The trial court awarded damages for an unreasonable invasion of the plaintiff's right to privacy and for the doctor's battery upon the plaintiff. The appellate court reversed, finding first that a battery must be a harmful or offensive contact and that the examination did not satisfy that definition. The doctor did not know about the court order, and that one of his examinations had never been limited by court order. Moreover, the plaintiff acknowledged that he never told the doctor to stop the exam and that he found the doctor's actions reasonable. Similarly, the court found no invasion of privacy because there was nothing about the examination that was unreasonable or that seriously interfered with the plaintiff's privacy interest. Although the plaintiff later claimed that during the exam he felt "violated" and "uneasy," the court noted the plaintiff had placed his physical condition in controversy, the examination was non-invasive and consisted of voluntary movements by the plaintiff and the limited placing of the doctor's hands upon his body while conducting a typical exam.

PRODUCTS LIABILITY

Evans v. Ford Motor Co., 484 F.3d 329, (5th Cir. (La.) 04/10/07)

The dealership where the plaintiff worked purchased a used Ford Explorer at an auction. The vehicle was still within the original 36-month/36,000 mile warranty and had been classified as a "green light" vehicle at the auction, which meant that there should be no mechanical defects. When the plaintiff unloaded the Explorer from a transportation truck, he put it in "Park" and exited the vehicle with the motor running and the door open. As he spoke to a co-worker, the Explorer moved backward, running over him. Plaintiff argued that the vehicle was unreasonably dangerous because it did not conform with an express warranty, *i.e.*, the owner's manual, the 36-month/36,000 mile warranty, the "green light" warranty given at the auction, and the shift indicator which was an affirmative representation that the vehicle was in "Park" when it was not. The jury agreed, but on appeal, the Fifth Circuit reversed. First, there was no evidence that the plaintiff had ever seen or relied on the owner's manual before he was injured. Likewise, plaintiff presented no evidence that the 36-month/36,000 mile warranty had been violated; he simply stated that it was in effect at the time of his injury and did not identify any particular provision that had been breached. Next, even assuming that the "green light" warranty satisfied the statutory definition, there was no evidence that the defendant-manufacturer had any role in identifying the Explorer as a "green light" vehicle. Finally, with respect to the shift indicator, the evidence demonstrated that at the time of the accident, it was broken or not functioning properly, but plaintiff failed to establish that at the time the Explorer left Ford's hands, the shift indicator "represented" that the vehicle was in "Park" when it was not. Furthermore, if the plaintiff had insured that the gearshift was securely latched in the "P" position, the vehicle could not have moved and plaintiff acknowledged that he did not do so before exiting the vehicle.

INSURANCE-CGL-WORK PRODUCT EXCLUSION

Supreme Services & Specialty Co. v. Sonny Greer, Inc., 958 So.2d 634, 06-1827 (La. 05/22/07)

The plaintiff contracted with the defendant to pour concrete on a construction project. The concrete cracked, however, and the plaintiff sued to recover damages resulting from the defective work. No other property damage or bodily injury was alleged to have resulted from the defective concrete. The defendant's CGL insurer denied coverage, claiming that the "work product" exclusion applied, and the trial court granted the insurer's summary judgment. On a writ to the Louisiana Supreme Court, it examined the language of the exclusion and concluded that its purpose was to exclude coverage for an insured's own defective product or faulty workmanship; thus, the policy unambiguously excluded coverage for the defective concrete work. The court also analyzed the language contained in the "products-completed operations hazard" ("PCOH") and whether there was an ambiguity when the two clauses were considered together. The court found that there was no contradiction between them because the PCOH provided coverage after the work was complete for damages that arose out of the faulty workmanship. For example, if an electrical subcontractor's defective work caused a fire, there would be no coverage for any damage to the faulty electrical work, but the ensuing property damage would be covered under the PCOH. Because there was no subsequent damage at issue, the PCOH did not come into play, and the work product exclusion barred coverage for the defendant's defective work.

INSURANCE-UMBRELLA POLICY

Huggins v. Gerry Lane Enterprises, Inc., 957 So.2d 127, 06-2816 (La. 05/22/07)

The plaintiff sued after she tripped and fell on the defendant's premises. The defendant's insurer, which had issued a policy with a \$1,000,000 limit was declared insolvent, and LIGA assumed the defense. The defendant also had an umbrella policy, which LIGA argued dropped down and provided primary coverage. The court examined the policy language, noting that two courts of appeal had reached opposite conclusions about its effect. The court found that the three subparts of the Limits of Liability section were separated by the word "or," which made each of the items clearly alternative, and was not ambiguous. The items were further modified by the unambiguous word "only," which made it clear that only one of the items could apply in any given situation. Since there was scheduled underlying insurance, only one item applied, and the unambiguous language provided that the umbrella insurance was in excess of that limit. Furthermore, there was other language in the policy specifying that "under no circumstances" would the umbrella policy be required to drop down and replace the limits of a financially impaired insurer. Since it had been stipulated that the value of the plaintiff's claim did not exceed \$1,000,000, the umbrella insurance did not provide any coverage.

INSURANCE-AUTO-IMPLIED PERMISSION

Barton v. U.S. Agencies Casualty Insurance Co., 948 So.2d 1267, 41,950 (La. App. 2 Cir. 02/07/07)

The defendant, Dykes, took the keys to his brother's car while he was at work and picked up some friends, including the plaintiffs. Later, Dykes lost control of the car, and it plunged into a canal. Plaintiffs alleged that Dykes had his brother's permission to drive the car and filed a motion for summary judgment on the issue of coverage. The defendant insurer also filed a motion on the grounds that coverage was excluded. The court noted the familial relationship, but concluded that since Dykes did not live in his brother's household, that portion of the policy was not relevant. On the night of the accident, the brother had left his car keys on the dresser in his bedroom before going to work, and his brother took the keys and drove off in his vehicle. Dykes did not have a driver's license and had never been permitted to drive his brother's car. The only time he had been allowed to operate the vehicle was to move it in to the driveway so it could be washed. There had been one unauthorized use when Dykes moved the car in the driveway, but dented it in the process, requiring him to admit the unauthorized use. The brother did not recall ever expressly forbidding his brother to drive the car, but had never given him permission to do so either. The court held that there was no express permission and that there was only one authorized use, which was in the driveway only. The one unauthorized use also occurred within the driveway, and the court concluded that the limited scope of Dykes' use did not constitute a course of conduct indicating acquiescence in his use of the vehicle, and therefore he did not have implied permission, and there was no coverage.

INSURANCE-AUTO-NO PAY-NO PLAY

Khalig v. Progressive Security Insurance Co., 950 So.2d 933, 06-1207 (La. App. 3 Cir. 02/07/07), **writ denied**, 955 So.2d 688, 07-0471 (La. 04/27/07)

Plaintiff's son, while operating his father's car without permission, was involved in an accident with another vehicle. Plaintiff settled with the owner of the other car, then sued his own insurer who refused to pay because the son was listed as an excluded driver on the policy. The insurer argued that the exclusion applied regardless of whether the driver was operating the vehicle with consent, but the appellate court disagreed. The situation was not one in which the plaintiff received a reduced premium for excluding his son on his policy, but allowed him to drive the car, and since the son took the vehicle without the owner's permission or knowledge, the situation was no different from one in which a thief stole the car and damaged it.

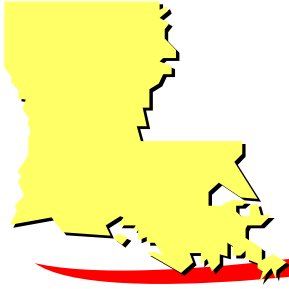
INSURANCE-PENALTIES

Weiss v. Allstate Insurance Co., 2007 WL 1017341 (E.D. La. 03/28/07)

In a suit arising out of damages caused by Hurricane Katrina, the insurer moved for partial summary judgment on the issue of penalties. The plaintiffs sought to recover a penalty of 50% under their homeowner's policy pursuant to the amendment to La.R.S. §22:658, which took effect on August 15, 2006. Plaintiffs alleged the penalty was due based on their insurer's allegedly arbitrary and capricious failure to make a payment or written offer to settle within 30 days after the receipt of satisfactory proof of loss. Plaintiffs admitted, however, that the relevant events for that claim occurred no later than June 15, 2006. The court determined that since the higher rate was not in effect until after the relevant events, the amendment did not apply. Moreover, the plaintiffs conceded, and the court agreed, that there was no support for the proposition that the amendment was intended to apply retroactively to causes of action that accrued before it went into effect. There was no such expression by the legislature in the amendment and therefore, the plaintiffs were limited to a 25% penalty.

Arvie v. Safeway Insurance Company of Louisiana, 951 So.2d 1284, 06-1266 (La. App. 3 Cir. 02/07/07), **writ denied**, 957 So.2d 181, 07-0797 (La. 06/01/07)

The plaintiff's car was involved in an accident while being driven by a permissive user, who rear-ended another vehicle. The guest passenger was injured and offered to settle for the \$10,000 policy limits, enclosing proof of medical expenses of almost \$4,000. Plaintiff's insurer refused, countering with a far lower offer, which was rejected. At trial, a judgment was rendered for \$15,315.49, and the passenger sought to obtain the excess from the plaintiff, who then filed suit against his insurer for a bad faith failure to settle the claim. The trial court concluded that the insurer had been arbitrary and capricious in its handling of the claim and awarded damages and attorney's fees pursuant to La.R.S. §22:1220. The court found that the insurer consistently failed to communicate, it failed to include the pertinent facts necessary for the insured to determine what was in his own best interest. Specifically, the insurer failed to inform its insured of the extent of the medical damages and the probability that damages would exceed the policy limits. Moreover, the insurer failed to offer its insured any input into the settlement decision and failed to disclose that it refused to negotiate until after the settlement offer had expired. Based on those facts, the appellate court found no error in the trial court's decision and affirmed.



TAYLOR, WELLONS, POLITZ & DUHE, APLC

NEW ORLEANS
1515 Poydras Street, Suite 1900
New Orleans, LA 70112
Phone: (504) 525-9888
Fax: (504) 525-9899

Email:
James M. Taylor
Paula M. Wellons
Paul J. Politz
Charles J. Duhe, Jr.
B. Scott Cowart

Desiree Adams
Jeanne Marie Bourque
Sebastian Caballero
Gina Talluto Cursain
Daryl Daigle
Sammie Henry
Aaron Lawler
Denise Ledet
Faye D. Morrison
Marvin Olinde
Scott Rainwater
Brent Steier

BATON ROUGE
7924 Wrenwood Blvd., Suite C
Baton Rouge, LA 70809
Phone: (225) 387-9888
Fax: (225) 387-9886

jtaylor@twpdlaw.com
pwellons@twpdlaw.com
ppolitz@twpdlaw.com
cduhe@twpdlaw.com
scowart@twpdlaw.com

dadams@twpdlaw.com
jbourque@twpdlaw.com
scaballero@twpdlaw.com
gcursain@twpdlaw.com
ddaigle@twpdlaw.com
shenry@twpdlaw.com
alawler@twpdlaw.com
dledet@twpdlaw.com
fmorrison@twpdlaw.com
molinde@twpdlaw.com
srainwater@twpdlaw.com
bsteier@twpdlaw.com

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TAYLOR, WELLONS, POLITZ & DUHE, APLC
1515 Poydras Street, Suite 1900
New Orleans, LA 70112