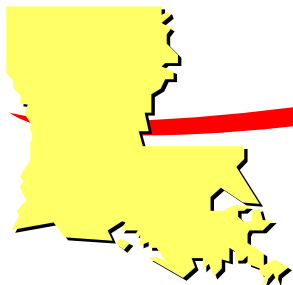


LOUISIANA GENERAL LIABILITY UPDATE

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.

INSURANCE—CGL

Sher v. Lafayette Insurance Co., 07-2441, 2008 WL 928486 (La. 04/08/08)

Plaintiff's property was damaged by Hurricane Katrina, and his insurer denied most of the claim citing, *inter alia*, the policy's flood exclusion. The trial court granted the plaintiff's motion for partial summary judgment, holding that the flood exclusion was ambiguous, and the Fourth Circuit agreed. The Louisiana Supreme Court, however, reversed. The Court found that the term "flood" was not defined by the policy, and therefore should be given its plain, ordinary and generally prevailing meaning. The Court of Appeal determined that because a flood could have varying causes the term was ambiguous, but the Court specifically rejected that reasoning, holding that a flood meant the "overflow of a body of water causing a large amount of water to cover an area that is usually dry." The cause of the overflow was irrelevant, and the meaning of the word was all-inclusive. Moreover, even if the exclusion referred only to natural, rather than man-made floods, the Court specifically held that the flood was caused by Hurricane Katrina; the levees did not cause the flood, rather, they failed to prevent the flood. The court also cited the U.S. Fifth Circuit's reasoning that a levee was a flood-control structure. The fact that it failed for whatever reason did not change the fact that the result was still a flood. The exclusion, therefore, was not ambiguous, and the insurer was entitled to limit its liability based on that exclusion.

Plaintiff also raised the issue of penalties and attorney's fees under 22:658, arguing that the insurer's breach of its duty of good faith and fair dealing was a continuing violation, entitled him to the 50% penalty as provided by the amended statute. The Court found there was nothing in the wording of the statute regarding the legislature's intent as to retroactivity, but the amendment was clearly substantive and could not be applied retroactively. The Court agreed that the insurer's duty was a continuing one, and if the plaintiff had submitted satisfactory proof of loss after the amendment became effective, the insurer could have been subjected to the increased penalties. Because the plaintiff submitted a satisfactory proof of loss prior to the amendment, however, the claim for penalties arose prior to the amendment's effective date. Plaintiff also argued that the insurer owed interest on penalties from the date of judicial demand rather than the date of judgment. The Court acknowledged that it had never directly addressed the issue, but held that interest on penalties could not be computed until penalties were imposed. Therefore, since penalties became due only after they were awarded, interest on such penalties was to be computed from the date of judgment.

INSURANCE—AUTO—UM

Gray v. American National Property & Casualty Co., 977 So.2d 839, 07-1670 (La. 02/26/08)

After a vehicular accident, plaintiffs filed a motion for summary judgment arguing that the UM selection form requesting lower limits for UM coverage was invalid. The District Court granted the motion, and the Court of Appeal denied writs. The Louisiana Supreme Court granted writs and affirmed. When the insured obtained quotes for insurance, it specified \$1,000,000 in automobile liability, \$100,000 in UM bodily injury, and \$10,000 in UM property damages. After the insurer was selected, correspondence confirmed the selection of limits. When the insured's representative completed the UM form, however, he initialed the selection for lower limits, but left the amounts blank and signed it. He also left blank the spaces for the printed name for insured, policy number, and date. The agent later completed the form, back-dating it to the date on which the policy became effective. The insurer argued that all six of the tasks required under Duncan had been completed, albeit not by the insurer's representative, but it was clear that the form reflected the intent of the parties, making it valid. The Court flatly rejected that argument, holding that the insurer had an affirmative duty to place the insured in a position to make an informed decision, not simply to provide the required form. Compliance with the form required more than "rote completion," but required that all six tasks be completed before the UM selection form was signed by the insured, and an insurer who was able to prove that the UM selection form was completed before it was signed could not meet its burden of proof that the form was valid.

Bellard v. American Central Insurance Co., 2008 WL 1764953, 07-0335 (La. 04/18/08)

The Louisiana Supreme Court granted writs in order to resolve a split among the appellate courts on the issue of whether a UM carrier was entitled to a credit for benefits paid to an injured worker by the workers' compensation carrier. The underlying suit arose out of a vehicular collision that occurred during the plaintiff's course and scope of employment. He settled with the tortfeasor, leaving his employer's UM carrier as the sole defendant. The Court determined that resolution of the case involved two issues—whether the UM carrier and WC insurer were solidary obligors, and whether the collateral source doctrine applied. Citing Civil Code article 1794, defining a solidary obligation and prior jurisprudence, the court reasoned that both insurers were obligated for certain elements of the plaintiff's tort damage, and specifically held that the fact that the source of the obligations were different was not dispositive, but the focus was the co-existiveness of the obligations. Second, both insurers shared a common liability although there were limits to each obligation with different terms and conditions. The fact that the amount of liability was different did not alter the fact that certain items of damage, *i.e.*, medical expenses and lost wage payments were co-extensive. Third, since payment by one solidary obligor exonerated the other, the UM carrier was entitled to a credit. The Court then examined the collateral source doctrine and held that it did not apply when a plaintiff was injured during his employment by a third-party tortfeasor with no fault on the part of the employer. First, applying the doctrine under the circumstances did not further the policy goal of tort deterrence, and would not deter wrongful conduct by a tortfeasor. Second, the plaintiff had not given any consideration, and his patrimony had not been diminished in any way because he had not procured the collateral benefits for himself and, therefore, would receive a true double recovery.

INSURANCE—AUTO—MISREPRESENTATION

Dean v. State Farm Mutual Automobile Insurance Co., 975 So.2d 126, 07-0654 (La. App. 4 Cir. 01/16/08), reh'g den. (02/27/08)

After plaintiff's car was stolen, her insurer denied the claim, citing numerous misrepresentations made by the insured and her daughter relating to the theft. The trial court granted the insurer's motion for summary judgment, but the Fourth Circuit reversed, finding that the misrepresentations, although willful and deceptive, were not material to the risk insured by the policy, i.e., the theft, and that insurer should not be allowed to void coverage on that basis. The plaintiff informed State Farm that she was the primary operator of the vehicle and had both sets of keys. On the morning of the theft, she drove the vehicle to her daughter's work place, locked it, and then left town to attend a funeral, but planned to return the same day to retrieve the vehicle. During the course of the investigation, however, the insurer learned that the daughter was the primary operator of the vehicle and had her own set of keys. She had driven the car to work that morning, and it was stolen from that parking lot. Both women acknowledged that they made the misrepresentations because they believed that if the insurer had known the truth surrounding the theft, and who was the primary driver, State Farm would have denied coverage. The Appellate Court determined that in order to void coverage for misrepresentations, the insurer had to establish that the statements were false, made with the intent to deceive, and materially affected the insurer's risk. The court found that the first two elements had been satisfied, but that the test for whether the third element had been satisfied was whether the policy would afford coverage for the theft regardless of the falsity of the statements. After reviewing all of the misrepresentations made, the Court determined that none of them had any "real bearing" on the theft of the vehicle with the named insured's permission. Since there was no dispute that the daughter had her mother's permission to drive the car, the insurer could not void coverage.

INSURANCE—AUTO—LIMITS

Hebert v. Webre, 971 So.2d 1238, 07-0095 (La. App. 3 Cir. 12/05/07), writ granted, 973 So.2d 744, 08-0060 (La. 01/25/08)

After a vehicular collision in which her husband was killed, plaintiff sued on behalf of herself and her three minor children and included their UM insurer as one of the defendants. The policy limits were \$100,000 per person and \$300,000 per accident, and the insurer paid the \$100,000 limit, arguing that their emotional distress constituted a physical injury, and therefore the per person limit did not apply. The court noted that in Crabtree v. State Farm Insurance Co., the Louisiana Supreme Court had held that severe and debilitating emotional distress could rise to the level of physical bodily injury, and if an insurer wished to limit bodily injury coverage, it could define that term to include only external physical injuries, but the insurer had not done so. In an *en banc* decision, the Third Circuit overruled Williams v. Aymond, and specifically held that when plaintiffs suffered mental anguish and/or emotional distress that rose to the level of a physical injury, those plaintiffs would not be limited to the per person limit, but were entitled the higher amount.

INSURANCE—PENALTIES

Orellana v. Louisiana Citizens Property Insurance Corp., 972 So.2d 1252, 07,1095 (La. App. 4 Cir. 12/05/07)

As a result of Hurricane Katrina, plaintiff sustained both wind and rain damage to his home. The first adjuster submitted an estimate in December 2005, but the insurer did nothing. In August, 2006, plaintiff submitted an estimate, but again, the insurer made no payments. In March 2007, the insurer sent another adjuster to do a new inspection, but the insurer still made no payment. At trial, plaintiff was awarded property damage plus \$125,000 in general damages based on the insurer's bad faith failure to timely and properly adjust the claim. Citing 22:1220, the Court found that the statutory language clearly provided that an insurance company could be assessed both general and special damages for breach of its duty. Additionally, Louisiana jurisprudence supported the award for mental anguish caused by property damage when the property was damaged by an intentional or illegal act. The court held that the insurer's arbitrary and capricious failure to pay the claim satisfied the requirement, and the damage to plaintiff's home had increased due to the insurer's failure to timely pay the claim, since plaintiff could have prevented further deterioration/or started the rebuilding process if the claim had been paid timely. The court also reviewed the plaintiff's testimony about the emotion distress he had suffered and the strain on his family and found that the amount of the general damage award was not an abuse of discretion.

INSURANCE—PENALTIES (continued)

Louisiana Bag Company, Inc. v. Audubon Indemnity Co., 2008 WL 239776, 07-1103 (La. App. 3 Cir 01/30/08), writ granted, 978 So.2d 356, 08-0453 (La. 04/25/08)

The plaintiff's plant and warehouse were destroyed by a fire, and it made a claim against the defendant insurer. Although the defendant made some payments, it failed to pay the policy limited, and plaintiff sued to obtain the limits, as well as penalties and attorney's fees as pursuant to 22:658. After a bench trial, the court found in favor of the defendant, but on appeal, the Third Circuit reversed. The insurer argued that "proof of loss" was a document that had to be issued by the insurer, and this document triggered the delays for adjusting the claim. The court disagreed, finding that the statute did not define the term "proof of loss," and under Louisiana jurisprudence, satisfactory proof of loss was not required to be in any specific document, and was a flexible requirement designed only to provide the insurer with information sufficient to fully apprise it of the claim. The Court noted that shortly after the fire, the adjuster retained by the insurer had issued a report indicating that the claim would be well in excess of the policy limits. The Court found that although there were some issues regarding coverage for certain items, the insurer had complete information about the loss by the end of August, yet did not make another partial payment for almost six weeks and did not make final payment until February. The insurer argued that the loss was complex and it needed time for a complete investigation, and its delay was not arbitrary and capricious. The Court found that the insurer's own experts believed that the loss exceeded policy limits from the beginning, and there was never any information countering that opinion. Although the insurer made a partial payment, it did not comply with the statute, and was therefore assessed a penalty of 25% of the amount owed, or \$566,599.75. Because the statute in effect at the time did not provide for attorney's fees, however, that portion of the claim was denied.

Dufrene v. Gautreat Family, L.L.C., 2008 WL 482702, 07-0467 (La. App. 5 Cir. 02/22/08)

Plaintiff fell on property owned by the defendants was awarded damages totaling \$3,206,000, including \$2,250,000 in general damages. After trial, plaintiff filed two motions for sanctions, alleging that the defendants failed to produce two applicable insurance policies until after trial and only after the jury had returned a verdict in excess of the only policy produced. The trial court, citing 22:1220, imposed sanctions in the amount of \$10,000. The court noted that the two additional policies had been issued by the same insurer and had the same named insured. The policies were covered by the discovery propounded, and the defendants' failure to produce the policies constituted misrepresentation under the statute. The defendants argued that the plaintiffs had not been damaged by the failure, and Plaintiff because there was no prejudice, penalties could not be awarded. The court rejected that argument as well as finding that §1220 did not require damages or prejudice before penalties could be assessed and affirmed the award.

DAMAGES—WRONGFUL DEATH

Leary v State Farm Mutual Automobile Ins. Co., 2008 WL 585111, 07-1184 (La. App. 3 Cir. 03/05/08)

The plaintiffs' 21 year old daughter was involved in a vehicular collision with a drunk driver on December 23, 2005. She survived 28 hours, dying on December 24. It took over an hour to cut her from the vehicle, and she sustained fractures of her right foot and left femur, a bladder contusion, a separated pelvis and a liver laceration that caused massive blood loss. The EMT who accompanied her to the hospital testified, as did both parents, to her significant pain prior to her death. The trial court awarded \$650,000 in survival damages, which the appellate court affirmed. Each parent was awarded \$450,000 in wrongful death damages, which the court also affirmed, citing their loving relationship and the fact that one or both parents was with her constantly at the hospital until her death. Pursuant to Civil Code Article 2315:4, the court also awarded \$850,000 to each parent in punitive damages. The court determined that while the amount was at the "high end," it was not excessive and affirmed that award as well.

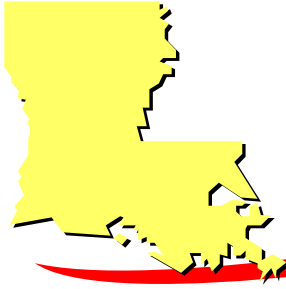
Wilson v. Town of Mamou, 972 So.2d 461, 07-0409 (La. App. 3 Cir. 12/19/07), writ denied, 978 So.2d 307, 08-0198 (La. 03/28/08)

The defendant police department was called to the decedent's home after she had been beaten by her boyfriend. She later went to her mother's home, where her boyfriend later appeared. He shot and killed her, then used the gun to commit suicide. The decedent's parents filed a wrongful death and survival action on behalf of their daughter and her four children. The trial court awarded \$60,000 to each child in wrongful death damages and nothing for a survival award. The appellate court found that failure to be clear error, noting that the decedent was chased through her mother's home for several minutes, and he fired two shots that missed before shooting her in the back. Based on those circumstances, the Third Circuit found that \$50,000 was a reasonable amount for the survival claim. With respect to the wrongful death award, the court noted that the decedent had four children under the age of six, and the youngest was only three weeks old. The court reviewed the jurisprudence and determined that the lowest amount for the wrongful death of a mother with such young children was \$150,000 to each child.

DAMAGES—WRONGFUL DEATH (continued)

Robinson v. Ferrari, 2008 WL 426274, 07-1482 (La. App. 1 Cir. 02/08/08)

While responding to an emergency, an ambulance driven by the defendant struck and killed the plaintiff's decedent, who was riding a bicycle. The trial court awarded the plaintiff-mother \$40,000 in wrongful death damages for the death of her adult son. On appeal, the court found this was an abuse of discretion and noted that she was seventy-nine, and her son was forty-two at the time of his death. While they did not live in the same town, the decedent often stayed with his mother, saw her on all holidays, frequently phones, and they had always enjoyed a close relationship. The court found that the lowest amount that could have reasonably been awarded to her was \$125,000.



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