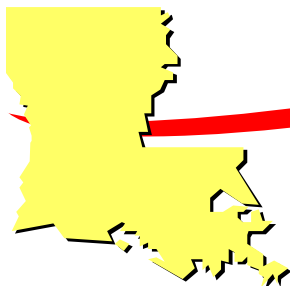


LOUISIANA GENERAL LIABILITY UPDATE

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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.

PRODUCTS LIABILITY

Lawson v. Mitsubishi Motor Sales of America, Inc., 938 So.2d 35, 05-0257 (La. 09/06/06)

Plaintiff blew her car's horn, and the driver's side air bag deployed, causing her significant injuries. She filed suit against the manufacturer, and a jury found for the defendants. The trial court granted the plaintiffs' motion for JNOV, and the appellate court affirmed. On appeal, the Louisiana Supreme Court reversed. The defendants argued that although the air bag malfunctioned, a malfunction was not the same as a manufacturing defect, and this was the only documented case of spontaneous air bag deployment in a Mitsubishi vehicle. The defendants pointed out that the car had been owned by a rental company and driven for 21,000 miles, the plaintiffs had driven it for another 26,000 miles before the malfunction occurred, and a manufacturing defect would have occurred earlier. The plaintiffs responded that the doctrine of *res ipsa loquitur* applied, and the Third Circuit agreed. The Supreme Court concluded that *res ipsa* could be utilized in a products liability case because it merely shifted the burden of proof to the manufacturer to prove that the product was not defective when it left its control. In order to rely on the doctrine, however, the plaintiff had to submit evidence that would exclude any negligence on the part of the plaintiff or others. Due to the manner in which the plaintiffs' expert removed a portion of the air bag system, it was impossible to determine whether the accident was a result of a manufacturing defect or third-party negligence, and therefore plaintiffs could not rely on *res ipsa* in the instant matter.

INSURANCE - PROPERTY

Maison Orleans I v. Liberty Mutual Fire Insurance Co., 2006 WL 2460755 (E.D.La. 08/22/06)

Plaintiff sued its insurer to recover for losses sustained due to Hurricane Katrina, and the insurers sought to stay the matter pending an appraisal. The policy provided for the appraisal of losses in the event the parties disagreed, but a demand for appraisal had to be made within 60 days after the insurer received the proof of loss. The insurer argued that the proof of loss was inadequate, but the court noted that under Louisiana law a proof of loss was not required to be in any form or style, so long as the insurer received sufficient information to act on the claim. The court found that the plaintiff had submitted its proof of loss on March 29, 2006, after the insurer's adjuster had submitted a preliminary estimate for a far lower amount. The insured filed suit in May, and the insurer did not request an appraisal until June 28, three months after receiving the proof of loss. The court determined that the insurer was in possession of sufficient proof of loss for more than 60 days before requesting appraisal; therefore the request was untimely, and the insured did not have to submit to the appraisal procedure.

In re Katrina Canal Breaches Consolidated Litigation, 2006 WL 3421012 (E.D.La. 11/27/06)

In these matters, which dealt only with the damage associated with the various levee breaches in the New Orleans area, the plaintiffs alleged that the proximate cause of loss was not flood, but the negligence of Levee Board and therefore, their homeowners policies should provide coverage. The defendants filed 12(b)(6) motions arguing that the damages were caused by "flood," which was excluded under the policies. In a lengthy opinion, Judge Duval examined the definition of the word "flood" and noted that it was not defined in the policies. The court analyzed jurisprudence from a number of jurisdictions and held that the term "flood" was ambiguous because it could be interpreted to encompass a flood that resulted due to either natural causes or to the acts of man, but noted that it was included within a series of terms that all referenced natural sources of water. Because the exclusion was ambiguous, it was to be interpreted against the insurer, and there was coverage under those policies using the standard definition. The court also held, however, that the State Farm policy had a "lead-in" provision that excluded coverage "regardless of the cause of the excluded events," which excluded coverage for flood regardless of the cause of the flooding. Additionally, the court determined that the Hartford policy's exclusion defined flood to include "release of water" by a levee or other flood control device, which was unambiguous, and there was no coverage for the Hartford Policies containing that language.

INSURANCE-AUTO-UMBRELLA

Samuels v. State Farm Mutual Automobile Insurance Co., 939 So.2d 1235 06-0034 (La. 10/17/06)

The driver of a vehicle involved in an accident had an automobile policy with State Farm with liability limits of \$250,000/\$500,000 per accident and an umbrella policy from State Farm with \$2,000,000 in coverage. The driver had a third umbrella policy from Evanston Insurance that erroneously listed the State Farm umbrella policy as a homeowner's policy due to a clerical error. Both insurers filed motions seeking to rank their policies, with State Farm relying on the clerical error to argue that the policies should provide coverage on a pro-rata basis rather than the State Farm policy paying first. The trial court granted State Farm's motion, but the Fourth Circuit reversed, finding that the Evanston policy should be reformed to reflect the true intent of the parties, and the Louisiana Supreme Court affirmed that decision. The court determined that it was obvious that Evanston's agent made a clerical error in identifying the State Farm umbrella policy, but in issuing its umbrella policy State Farm did not rely on the Evanston error. Moreover, the insured would have the same amount of excess coverage; the only issue was which insurance company would pay first. The uncontroverted evidence, including affidavits from the agents and the amount of the premiums, demonstrated that the Evanston policy was to be in excess of the State Farm policy. State Farm argued that because of the Evanston policy did not list the State Farm umbrella policy as an underlying one, the court lacked the authority to change the terms under the guise of interpretation. The court disagreed, holding that it was not interpreting an ambiguity in the policy, but correcting a clerical error to reflect the parties' mutual intent. State Farm also argued that Evanston was bound by the agent's error in completing the insurance application, but again the court disagreed, finding the principle not applicable when both the insured and insurer agreed as to the correct terms of the policy at issue. The court held that in the case of mutual error, an insurance contract could be reformed to reflect the true intent of the parties, and there was no rule of contractual interpretation that would lead the court to ignore the parties' clear intent when that error would benefit a third party that did not even rely on the error in issuing its own policy.

INSURANCE-AUTO-PRESCRIPTION

Mallett v. McNeal, 939 So.2d 1254, 05-2289 (La. 10/17/06)

Plaintiff was involved in a rear-end accident on January 8, 2004, and the defendant's insurer subsequently issued checks for the plaintiff's property damage. On February 17, 2005 the plaintiff filed suit for personal injury and argued that the action was not prescribed because the insurer's payment of property damage served as an acknowledgment, interrupting prescription. The trial court denied the defendant's exception of prescription. The Court of Appeal denied the writ, and the Louisiana Supreme Court affirmed. The court reasoned that an acknowledgment was not subject to any particular formality and could be express or tacit. The court also distinguished acknowledgment from a settlement offer, noting that an unconditional tender pursuant to 22:658 could not, by definition, be a settlement offer since it was made to comply with the duties imposed on the insurer. The court reasoned that it had previously held that an unconditional payment or tender could constitute acknowledgment sufficient to interrupt abandonment, and held that an unconditional payment of a property damage claim constituted an acknowledgment sufficient to interrupt prescription. The court then examined 22:661, which provided that the settlement of a third-party claim for property damage under a motor vehicle policy did not constitute an admission of liability. The court reviewed the definition of the term "settlement" and how that term should be defined in connection with §658. The court determined that since §661 only applied to settlements between insurers and third-party claimants, there was no potential interaction between the duty to make an unconditional payment to the insured and the limitations set forth in §661. The court then held that the term "settlement" as used in 22:661 clearly referred to a compromise or transaction as defined by C.C.Art. 3071, and was not equivalent to the term "payment" as argued by the insurer.

INSURANCE-AUTO-SETTLEMENT

Leray v. Nissan Motor Corp. U.S.A., 2006 WL 3103362, 05-2051(La. App. 1 Cir. 11/03/06)

The plaintiff was a guest passenger in a vehicle that was involved in an accident. She entered into a settlement, but the plaintiff and her parents later filed suit against the driver and a number of other parties. The trial court granted an exception of res judicata, but the appellate court reversed. The plaintiff signed a check which contained the language "in full payment for full/final settlement and/all claims." The court found that the check was a valid compromise, but that it was insufficient to settle the claims of the parents, who were not parties to the settlement. The court determined that a compromise made by one party was not binding on others, even when the claims sought to be asserted were derivative of the claim that was compromised. Because the parents' loss of consortium and medical expenses claims were personal to them, their daughter's signature on the check could not serve as a waiver of their claims.

INSURANCE-AUTO-TEMPORARY SUBSTITUTE

Reynolds v. U.S. Agencies Casualty Insurance Co., 2006 WL 3081096, 41,598 (La. App. 2 Cir. 11/01/06)

On June 30, 2005, Jarrod Jacob was involved in an accident that rendered his vehicle, which was insured by USAgencies, unsafe to drive. The next day, he borrowed his grandmother's truck, which was insured by Allstate, and while driving it, rear-ended the plaintiff. Both insurers filed motions for summary judgment arguing that the other insurer was primary. Allstate claimed that 22:681 required USAgencies to provide primary coverage for a "temporary substitute" motor vehicle, while USAgencies argued that its policy did not define the term "temporary substitute;" therefore 22:681 was not applicable, and its policy provided only excess coverage for "non-owned" vehicles. The trial court granted Allstate's motion, and Second Circuit affirmed. USAgencies argued that because it chose not to include the term "temporary substitute" as a defined term in its policy and because it chose to extend only excess coverage to "non-owned" vehicles, 22:681 did not apply. The court disagreed, finding that the statute mandated that USAgencies provide primary coverage, and to allow the statute to apply only if an insurer chose to define "temporary substitute" would lead to an absurd result. The court also determined that the Legislature intended to require that the insurance coverage an individual had on his own vehicle would extend to the use of a rental vehicle or a temporary substitute vehicle, and the insurer could not opt out of mandatory coverage simply by choosing not to define a term. USAgencies also argued that "temporary substitute" was included within the definition of "non-owned" vehicle, and that under the parties' freedom to contract, it was allowed to extend only excess coverage to a non-owned vehicle. The court rejected that argument, finding that the language of the policy had to yield to the statute. The court acknowledged that the decision changed long-standing practice in the insurance industry and that where the driver of a "temporary substitute" vehicle was at fault, the liability insurer of the vehicle owner was now secondary.

INSURANCE-AUTO-UM

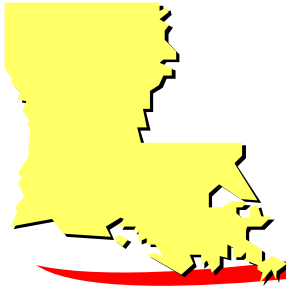
Duncan v. U.S.A.A. Insurance Co., 2006 WL 3423220 06-0363 (La. 11/29/06)

Plaintiff was a guest passenger in a vehicle that was rear-ended. She filed suit against a number of parties, including the UM carrier for the driver operating the car in which she was a passenger. The insurer filed a motion for summary judgment asserting that the owner of the vehicle had rejected UM coverage, and the plaintiff responded that the rejection was invalid because there was no policy number on the rejection form. The trial court granted the plaintiff's motion, holding that the UM coverage was equal to the liability limits of the policy, but the Fifth Circuit reversed, finding that the waiver was valid. The Louisiana Supreme Court granted writs, and remanded to the appellate court, which this time held for the plaintiff. The Supreme Court again granted writs and held that the UM statute required that the form promulgated by the Commissioner of Insurance had to be properly completed in order to effectuate a valid waiver of UM coverage. The court noted the inconsistent decisions on the issue rendered by the appeals courts and turned to the language of the UM statute for its analysis. The court found that the 1997 amendments to the statute added a new provision specifying that "a properly completed and signed form" created a rebuttable presumption that the insured knowingly rejected UM coverage. The plaintiff argued that the quoted phrase required the insured to fill in every blank on the form, while the insurer argued that the statute did not have such a requirement. The court reasoned that if the statute required only the bare essentials, it would have been unnecessary for the Legislature to direct the Commissioner of Insurance to prescribe a form. By directing the Commissioner to prescribe a form, the Legislature gave the Commissioner the authority to determine the requirements of that form. Thus, in order for the UM waiver to be valid, there had to be compliance with the form's requirements. Even if there was a clear expression of a desire to reject UM coverage, that intent was not sufficient to cure a defect in the waiver form, and the failure to add the policy number on the form invalidated the UM rejection.

INSURANCE-AUTO-UM - Continued

Succession of Greer v. Mills, 2006 WL 3079150, 41,571 (La. App. 2 Cir. 11/01/06)

Plaintiff's decedent was a guest passenger in a vehicle that struck a tree, and the estate sued the driver, his insurer and the decedent's UM carrier. The UM insurer filed a motion for summary judgment, arguing that the decedent had rejected UM coverage. The form the decedent executed was the one utilized by the Commissioner of Insurance and included five options. Four of the options contained the designation "N/A," while the fifth option was initialed by the decedent, and signed at the bottom, and the issue was whether the "N/A" notation before the remaining option invalidated the rejection. The court noted that the first option was technically superfluous since it provided for UM coverage in the same limits as bodily injury and was not within the legislative directive of 22:680, which required the form to provide for rejection, selection of lower limits or economic-only coverage. The court determined, however, that it did not lead to confusion or detract from the substance of the form, and it clearly contrasted with the last option, which waived UM coverage. The court determined that even with the "N/A" inserted, the decedent clearly intended to waive UM coverage by initialing the last option and signing the form, and the waiver of UM coverage by the decedent was valid.



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