

# LOUISIANA GENERAL LIABILITY UPDATE

## LOUISIANA NEW HOME WARRANTY ACT

### THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL FINDS DEFECTIVE CHINESE DRYWALL IS SUBJECT TO THE SHORTER PEREMPTIVE PERIOD FOR ASSERTING A CLAIM AGAINST A BUILDER UNDER LOUISIANA'S NEW HOME WARRANTY ACT

The Louisiana First Circuit Court of Appeal held that a claim for contaminated drywall (in this case contaminated Chinese drywall), is subject to the one year and thirty day preemptive period set forth in Louisiana's New Home Warranty Act (La. R.S. 9:3144). The plaintiffs alleged that their claim was subject to the statute's longer five year period, which addresses the warranty for major structural defects, rather than the shorter one year and thirty day period applicable for defects in materials or workmanship. The First Circuit, applying the statute's definition for "major structural defect" to the plaintiffs' allegations in their petition, found the plaintiffs' allegations of physical damage to the walls and partitions in their home did not include any alleged damage caused by the failure of the load-bearing portions of the home, such as the building studs, or that the alleged damage was caused by a defect or failure in the building studs. Additionally, there was no evidence presented that the drywall was load-bearing or performed any load-bearing functions in the home. The First Circuit sustained the builder's exception of preemption as the plaintiffs failed to file suit within the one year and thirty day preemptive period for claims arising from defective materials. *Caminita v. Core, Smith & Core, Inc.*, 10-1961 (La. App. 1st Cir. 5/6/11) \_\_\_\_\_ So. 3d \_\_\_\_\_.

## PREMISE LIABILITY

### A BARGE HATCH COVER USED AS PART OF A WALKWAY WAS NOT UNREASONABLY DANGEROUS

The Louisiana Fifth Circuit Court of Appeal recently upheld the trial court's granting summary judgment, finding a barge hatch cover did not pose an unreasonable risk of harm to the plaintiff. The plaintiff, an electrician, was performing electrical work at the defendants' home, which required him to access electrical facilities on the outside of the home. To reach these facilities, plaintiff had to climb over a barge hatch cover lying on the ground and put in place by the defendant homeowner. The plaintiff testified that he was aware the cover was there, had walked over the cover multiple times, had placed sand on the barge cover earlier that day because of dew on the ground, and that earlier that day he had slipped but not fallen on the cover. The Fifth Circuit upheld summary

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judgment finding that the plaintiff was aware of the slippery condition, took measures to deal with it, and had not asked the homeowner to remove the cover. Under these circumstances the condition was not unreasonably dangerous. *Ruschel v. St. Amant*, 11-78 (La. 5th Cir. 5/24/11) \_\_\_\_\_ So. 3d \_\_\_\_\_.

## **INSURANCE**

**THE LOUISIANA SUPREME COURT HELD THAT AN INSURANCE CONTRACT THAT CONTAINS A POST-LOSS ANTI-ASSIGNMENT CLAUSE IS NOT AGAINST PUBLIC POLICY; HOWEVER, TO BE VALID, THE CLAUSE MUST BE CLEAR AND UNEQUIVOCAL**

The Louisiana Supreme Court addressed the following certified question of law submitted by the United States Fifth Circuit Court of Appeal: “Does an anti-assignment clause in a homeowner’s insurance policy, which by its plain terms purports

to bar any assignment of the policy or an interest therein without the insurer’s consent, bar an insured’s post-loss assignment of the insured’s claims under the policy when such an assignment transfers contractual obligations, not just the right to money due?” The question arose as a result of Louisiana’s “Road Home” program which provided grants to Louisiana homeowners to repair uninsured or underinsured property damaged by hurricanes. As part of the grant, the State of Louisiana required recipients of the grant money to assign to the State future rights to reimbursement or payments received under casualty or property damage insurance or flood insurance. The State of Louisiana filed suit against more than two hundred insurance companies who allegedly wrote property insurance in Louisiana at the time. The insurance policies contained anti-assignment clauses and the insurers argued these clauses prohibited post-loss assignments. The Louisiana Supreme Court concluded there is no public policy in Louisiana preventing parties from contractually prohibiting post-loss assignments, however, any contract language prohibiting post-loss assignments must clearly and unambiguously express that the non-assignment also applies to post-loss assignments, requiring a separate evaluation of each policy’s language. *In re Katrina Canal Breaches Litigation*, 10-1823 (La. 5/10/11) \_\_\_\_\_ So. 3d \_\_\_\_\_.

## **RECENT DECISIONS TO NOTE OF THE LOUISIANA SUPREME COURT**

### **MENTAL ANGUISH DAMAGES FOUND AVAILABLE TO INSURED FOR FAILURE TO PROPERLY ADJUST INSURANCE CLAIM REGARDLESS OF INTENT OF THE INSURER**

The Louisiana Supreme Court recently clarified when mental anguish damages may be awarded for the failure to properly adjust an insurance claim. In *Wegner*, a homeowner sued their first party property insurer as a result of property damage sustained during Hurricane Katrina. Plaintiffs claimed that their home was a total loss and were entitled to the full amount of their policy limits, including payment for additional living expenses, loss of use, mental anguish damages and statutory penalties pursuant to LA R.S. 22:658 and 22:1220. Following a jury trial, it was determined that the insurer violated 22:1220 but not 22:658 and no award was made for mental anguish or penalties under 22:1220. The trial court subsequently granted a judgment notwithstanding the verdict with respect to the issue of penalties and awarded nearly \$100,000 in penalties. The defendant insurer appealed the trial court’s decision, which was upheld by the Louisiana Fourth Circuit. The Supreme Court subsequently reversed the lower courts, finding that the jury was improperly instructed as to the burden of proof required for the imposition of mental anguish damages. Specifically, the jury was instructed that in order to recover for mental anguish, there must be evidence of a breach by the insurer and the intent to aggrieve the insured. With respect to the issue of intent, the insurer argued that LA C.C. art. 1998 limited the availability of general

damages under Section 22:1220 as it modifies when such general damages may be awarded in contractual settings. The Supreme Court rejected this position, finding instead that the intent of the insurer is irrelevant in the imposition of general damages under Section 22:1220 and that Article 1998 does not serve to limit the application of such damages in the insurance context. The court reasoned that Section 22:1220 imposes a statutory duty of good faith and fair dealing upon an insurer to its insured and that the general and special damages authorized under 22:1220 are directed at misconduct outside the scope of an ordinary breach of contract. The court noted that the statute was broadly worded, explicitly permitting liability for any damages sustained including without limitation any general or special damages. Accordingly, if an insured is successful in establishing that an insurer has violated its duty under 22:1220, the general damages which flow there from are separate and apart from ordinary contractual damages and will not be limited to those instances where the insurer intended to aggrieve the plaintiff.

The Supreme Court also found the jury interrogatories were improperly structured preventing the jury from considering an award of penalties under La.R.S. §22:1220. The court noted that the jury interrogatories were structured in such a way that the imposition of penalties under 22:1220 was dependent upon a finding of actual damages. The decision noted that because penalties are permissive pursuant to 1220, they may be awarded in the absence of actual damages and as such, the structure of the jury interrogatories resulted in legal error sufficient to vacate the jury's verdict. As the court stated, "in this case the jury was unable to properly consider and determine whether the [plaintiffs] suffered mental anguish damages because the jury instruction required the jury to find a fact beyond what the law requires before awarding such damages."

In its decision, the Supreme Court also reversed the trial court's decision to exclude evidence of payments received by the plaintiff under their flood insurance policy, as the Court determined that evidence of such payments is relevant to the issue of what uncompensated losses remain. As the Court reasoned, depriving the jury of the benefit of evidence relative to the plaintiff's flood insurance claim requires the jurors to essentially award damages in a vacuum without the ability to assess whether any such award would constitute an impermissible double recovery for the plaintiff. Accordingly, evidence of such payments was found admissible and its exclusion by the trial court erroneous. *Wegener v. Lafayette Insurance Company*, 2010-0810 (La. 3/15/11)

### **TIMELY FILED SUIT AGAINST A STATUTORY EMPLOYER FOUND SUFFICIENT TO INTERRUPT PRESCRIPTION AS TO A THIRD PARTY TORTFEASOR**

The Louisiana Supreme Court recently held that a timely filed suit against a statutory employer interrupted prescription as to a third-party tortfeasor. The action stemmed from an explosion and subsequent fire during onshore drilling operations to complete an oil well. The mineral owner's general contractor, subcontracted with the plaintiff's employer and a third-party to complete the well. In the course of drilling operations, a flash fire occurred resulting in injuries to the plaintiff. Within one year of the incident, plaintiff brought suit against the general contractor. Following initial discovery, the plaintiff subsequently amended his pleadings to include the third-party's subcontractor. The amended petition was filed outside the limitations period.

Following the amended petition, the general contractor filed a motion for summary judgment arguing that it was the plaintiff's statutory employer. The motion was subsequently granted and the general contractor dismissed from the litigation. Soon after the dismissal of the general contractor, the third-party subcontractor filed an exception of prescription arguing that there was no timely suit against a joint tortfeasor sufficient to interrupt prescription and the plaintiff's claims against it were,

accordingly, time barred. The district court agreed with the third-party defendant's analysis and granted the exception of prescription, which was subsequently upheld by the Louisiana Third Circuit.

The Supreme Court granted certiorari and reversed the prior decisions, finding that the lower courts erred in sustaining the alleged third-party tortfeasor's exception of prescription. The Supreme Court reasoned that the Louisiana Civil Code provides a two part formula for interpreting whether prescription has been interrupted under such circumstances. First, pursuant to Civil Code Article 3462, the party seeking to avoid prescription must establish that a timely lawsuit was filed and, if in an incompetent court, service accomplished. Second, the party must establish that a solidary relationship exists between a party against whom suit was timely brought and a party not sued within the applicable prescriptive period.

The Court reasoned that because the general contractor against whom the plaintiff timely brought suit and properly served was statutorily immune from suit, the plaintiff had satisfied the first element of the analysis. Justice Weimer, writing for the Court, noted that commencing a tort lawsuit against a party that is immune from tort liability is akin to commencing an action in an incompetent court, insofar as the district court would not have been competent to render a tort judgment against a statutory employer who is necessarily immune from tort liability. While not seeking to establish a broad based definition for an incompetent court, the Supreme Court found that, at a minimum, an incompetent court includes a court lacking in subject matter jurisdiction.


Finding the first requirement of its analysis satisfied, the Court turned to whether a solidary obligation exists between statutory employer and a third-party tortfeasor. Relying on C.C. art 1799, the Justice Weimer reasoned that even though worker's compensation and tort remedies have different legislative sources, that does not alter the solidary relationship between a defendant with employer status and a defendant that is an alleged tortfeasor. Relying on the Court's prior decision in *Williams v. Sewerage and Water Board of New Orleans*<sup>1</sup>, as well as Civil Code Article 1797, the Court stressed that an obligation may be solidary though it derives from a different source for each obligore. Accordingly, whether the source of the obligation is a voluntary obligation, that fact that an obligation exists to provide worker's compensation benefits meant that, for the purposes of prescription, the alleged tortfeasor and the statutory employer were solidary obligores. In reaching this conclusion, the court rejected the proposition that parties cannot be solidarily liable unless their liability is based upon the same cause of action, finding that argument, previously adopted by the Louisiana Fourth Circuit, runs a foul of both the Civil Code and prior decisions of the Louisiana Supreme Court. Rather, the court reasoned, that parties are solidarily liable to the extent that they share coextensive liability to repair certain elements of the same damage. As such, the Court held that for the purposes of prescription, a timely brought suit and effective service against a statutory employer is sufficient to interrupt prescription as to third-party tortfeasors. *Glasgow v. Par Minerals Corp.*, 2010-2011 (La. 5/10/11)

<sup>1</sup>611 So.2d 1383 (La. 1993)

**SUPREME COURT FINDS MAILING OF NON-RENEWAL  
SUFFICIENT TO TERMINATE COVERAGE**

In a per curiam decision, the Louisiana Supreme Court held that LA R.S. 22:1335 requires only that an insurer mail notice of non-renewal of a homeowners insurance policy in order for such non-renewal to be deemed effective. *In Johnson*, the home at issue had become an unacceptable risk, the insurer mailed a notice of non-renewal to the homeowner at the mailing address on the policy. Six months after the mailing of the notice of non-renewal, the subject property was destroyed by fire. The homeowner filed a claim and the insurer denied coverage. The homeowner then filed suit arguing that she had not received the notice of non-renewal and hence the cancellation was not effective. Relying on its decision in *Nolan v. Mobre* the Court found that an insurer has a prima facie burden to prove that it mailed the required notice of non-renewal, which creates a presumption the insured received the notice. If this burden is satisfied, the insured may rebut the presumption by presenting evidence or testimony the notice was never delivered. The Court held that Section 22:1335 requires only mailing, not proof of receipt of the notice of non-renewal to be effective, finding that any evidence of non-delivery is relevant only as far as its evidence of non-mailing or improper mailing, which is an issue for the finder of fact to resolve. As the jury had found that the insurer had properly mailed the notice of non-renewal, the Supreme Court ruled that the cancellation of coverage was effective and reversed both the trial court and intermediate appellate court's finding of coverage.

*Johnson v. Louisiana Farm Bureau Casualty Insurance Company*, 2011-0476 (La. 5/6/11)



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