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## LOUISIANA INSURANCE LAW UPDATE

May 2009

### Editor's Note

Dear Friends,

This newsletter covers recent insurance coverage and tort decisions of note in Louisiana over the past six months. Regarding the coverage decisions, note that the Louisiana Supreme Court once again finds valid claims-made coverage, holding clearly that claims-made policies do not violate the Louisiana statute prohibiting policy provisions that limit a right of action to less than one year from the cause of action accruing; that the US Fifth Circuit Court of Appeals finds that the Civil Code contract articles simply do not apply to an award of mental anguish damages under our insurer bad faith statute; and that the number of attempted challenges to the validity of UM waiver forms may well be boundless.

As always, thanks for your continued support.

### PROCEDURE

#### ABANDONMENT — WAIVER

After the three-year abandonment period had run, a defendant-in-reconvention responded to interrogatories and participated in a deposition. Can the reconventional demand still be dismissed for abandonment? The Louisiana Fourth Circuit Court of Appeal says no, finding that, by engaging in discovery, the defendant waived its "right to assert abandonment by taking actions inconsistent with an intent to treat the case as abandoned." *True Gospel of Jesus Christ Church Ministry v. Ducette*, 2008-0634 (11/19/08).

#### DEFAULT JUDGMENT

Plaintiff's counsel sent a letter to the defendant demanding damages for poor service work on a car. The defendant's attorney responded, denying responsibility. The plaintiff filed suit, serving the defendant but not advising the defendant's attorney of the suit. The defendant failed to answer the suit, and plaintiff obtained a default judgment. Was the plaintiff's failure to advise the defendant's attorney of the suit and default judgment an ill practice that nullifies the judgment? The Louisiana Fourth Circuit Court of Appeal says no, finding that the defendant's attorney was entitled to notice only if he had actually participated in the litigation proceedings. *ASI Management v. Advantage Ford*, 2008-0255 (11/19/08).

#### INDEMNITY — PRESCRIPTION

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The Louisiana Supreme Court makes clear that prescription on a claim for indemnity does not begin running until the indemnitee has sustained a loss; and that as a result Louisiana Code of Civil Procedure Article 1067, which extends prescription for incidental demands by 90 days after service of the main demand, does not apply. *Orlando v. E.T.I.*, 2007-1433 (12/12/08).

### **UM — PRESCRIPTION**

On May 3, 2005, plaintiff was involved in a car accident. The liability insurer for the other driver quickly paid its policy limit. On November 8, 2006, plaintiff's UM insurer made an unconditional payment of \$23,000.00 to plaintiff. The letter enclosing the payment stated:

*Enclosed is our check for the unconditional Unconditional Tender of \$23,000.00 in settlement of your Underinsured Motorist Claim. Please call me to discuss the final settlement of your claim.*

On May 14, 2007, slightly more than two years after the accident, the plaintiff sued the UM insurer. Based on the two year prescriptive period for UM claims, the UM insurer filed an exception of prescription. Opposing the exception, plaintiff argued that the unconditional payment and letter request that the adjuster be called "*to discuss the final settlement of your claim*" constituted tacit acknowledgment of an obligation interrupting prescription.

The Louisiana First Circuit Court of Appeal disagrees, finding that an acknowledgment requires more than recognition of the mere existence of a disputed claim, and agrees with the trial court that plaintiff's suit prescribed. The Court of Appeal distinguished an unconditional payment by an insurer statutorily required to make unconditional payments from third party insurers that make an unconditional payment. It should be noted that the UM insurer argued that the payment did not constitute acknowledgment of any additional obligation because if in fact a greater undisputed sum had been due, the UM insurer would have been in bad faith for not then having made a greater payment. *Demma v. Automobile Club Inter-Insurance Exchange*, 2008-0380 (10/31/08).

### **UM — PRECLUSION BY JUDGMENT**

Plaintiff was involved in a car accident and sued the other motorists and his liability insurer. After receiving the liability insurer's policy limit, plaintiff dismissed the lawsuit against the other motorists and the liability insurer. After that dismissal, plaintiff then sued his UM insurer. The UM insurer filed an exception of *res judicata*, arguing that dismissal of the first lawsuit extinguished all of plaintiff's rights arising out of the car accident under Article 425 of the Louisiana Code of Civil Procedure. Article 425 states:

*A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.*

Reversing the trial court's granting of the UM insurer's exception, the Louisiana Third Circuit Court of Appeal finds that Article 425 must be read in connection with the Louisiana *res judicata* statute, La. R. S. 13:4231, and that *res judicata* applies only to actions between the same parties. It must be noted that the Third Circuit expressly disagreed with a contrary finding by the Louisiana First Circuit in *Westerman v. State Farm Mutual Automobile Insurance Co.*, 834 So.2d 445 (9/20/02). *Spires v. State Farm Mutual Automobile Ins. Co.*, 08-573 (11/5/08).

### **SETTLEMENT AGREEMENTS — RES JUDICATA**

Plaintiff was involved in an accident and sued the other driver and her liability insurer. In the suit, plaintiff brought claims not only for bodily injury and property damages, but

also for punitive damages, alleging that the intoxication of the other motorist caused the accident. Plaintiff and the liability insurer entered into a settlement. The settlement agreement prepared by the defense attorney contained a general release provision whereby plaintiff agreed to release the insurer and its insured from all claims arising out of the car accident. However, plaintiff's attorney inserted in the settlement agreement additional language reading:

*Note — this release is with regard to Bodily Injury claims only, and any and all Rights with regard to the property claim are reserved.*

After execution of the settlement agreement, plaintiff proceeded with not only the property damage claim, but also the punitive damage claim. However, as to the punitive damage claim, the defendant driver filed an exception of *res judicata*, stating that this claim was part of the settlement agreement. Reversing the district court finding in favor of the defendant, the Louisiana Third Circuit Court of Appeal finds that the settlement agreement was equivocal. *Reyes-Ramirez v. Progressive Security Insurance Co.*, 08-374 (11/5/08).

### **PRESCRIPTION — ACKNOWLEDGMENT**

In *Lila, Inc. v. Underwriters at Lloyd's London*, 2008-0681 (9/10/08), the Louisiana Fourth Circuit Court of Appeal finds that unconditional payments made by a first party property insurer for Hurricane Katrina claims did not constitute an acknowledgment of liability sufficient to interrupt prescription.

### **SETTLEMENT**

Plaintiff was a passenger in a car hit by a car driven by Coyle and owned by Delony. Coyle was at fault. Coyle's personal insurer was Progressive. Delony's insurer was State Farm. State Farm settled with plaintiff, and plaintiff signed a release that expressly released Coyle, Delony, State Farm, and "*all other persons, firms or corporations*" that might be liable. However, after the settlement, plaintiff sued Progressive. Progressive argued that it had been released in the settlement agreement. The trial court agreed, granting Progressive summary judgment.

The Louisiana Second Circuit Court of Appeal also agrees, finding that an affidavit by the plaintiff's attorney that plaintiff did not intend to release Progressive was not enough to show mistaken intent on plaintiff's part. *Hudson v. Progressive Security Insurance Co.*, 43,857 (12/10/08).

### **SUMMARY JUDGMENT — TIME PERIOD**

Weeks before trial, the trial court heard defendant's summary judgment motion, but issued its ruling granting summary judgment the day before trial. Louisiana Code of Civil Procedure Article 966 requires that summary judgment be rendered at least 10 days before trial. Finding that this language is mandatory, the Louisiana Fourth Circuit Court of Appeal reverses the summary judgment. *Environmental Operators v. Natco*, 2008-1183 (3/18/09).

## **CAUSES OF ACTION**

### **REDHIBITION — PRESCRIPTION**

Seven years after buying their mobile home, plaintiff's discovered the ceiling was discolored and damp, and claimed the mobile home had mold. Plaintiff sued the seller of the mobile home. The seller argued that the suit had prescribed because the prescription period for sellers under Civil Code Article 2534 is four years from date of delivery of the object sold, or one year from the buyer's discovery of the defect, whichever occurs first. The trial court agreed, granting the seller summary judgment. Reversing, the Louisiana

Third Circuit Court of Appeal finds that because the seller allegedly installed some component parts in the mobile home, the seller was a manufacturer presumed to have knowledge of any defects; and that the prescription period for manufacturers or "bad faith sellers" is one year from date of the buyer's discovery of the defect. *Credeur v. Champion Homes of Boaz*, 08-1096 (3/4/09).

### **PROPERTY CONDITION — HOLE IN ROAD**

Plaintiff, a log truck driver, claimed injury when his truck hit a hole in a logging road and sued the property owner. Because the hole should have been obvious to the driver, logging roads are temporary and often contains ruts and holes, and the utility of logging road, the Louisiana Supreme Court finds that the roadway condition was not unreasonably dangerous and grants summary judgment to the defendant property owner. *Dauzat v. Curnest Guillot Logging, Inc.*, 2008-0528 (12/2/08).

### **ROADWAY DEFECT**

In a wrongful death action, the deceased driver drove her car partially on the highway's right shoulder and overcorrected her steering to the left, causing her car to skid sideways and overturn. There was a four to six inch difference between the height of the roadway and the height of the contiguous shoulder. Making a *de novo* determination of fault, the Louisiana First Circuit Court of Appeal finds that the driver was 25 percent at fault and the Louisiana Department of Transportation and Development was 75 percent at fault because of knowledge of the defect from a citizen complaint and by-weekly inspections of the area. *Adam v. State of Louisiana*, 2008-1134 (2/13/09).

### **NEW HOME WARRANTY ACT**

In a case where a defective roof framing system caused water intrusion into a house which in turn caused rotten roof decking and a collapsed bedroom ceiling, the Louisiana First Circuit Court of Appeal agrees with the trial court that the house roof decking was part of the framing system and served a structural function; and that plaintiffs had proven a major structural defect for purposes of suit under the Louisiana New Home Warranty Act, La. R.S. 9:3141 *et seq.* *Hutcherson v. Smith Construction*, 2008-1046 (2/13/09).

### **FAULT — LEFT TURNING MOTORIST**

In a case involving outrageous facts, plaintiff was a passenger in a truck driven by Rabalais. Rabalais rear-ended one car, fled the scene, later began passing vehicles in a no-passing zone, and hit a car driven by Steinman that was turning left. Plaintiff sued Rabalais, Steinman, and their insurers. Before trial, plaintiff settled with Rabalais. At trial, Steinman testified that before turning left, she looked in her rear-view mirror, but not her side mirror. In a bench trial, the trial judge found Rabalais totally at fault because of that driver's outrageous conduct. However, the Louisiana Third Circuit Court of Appeal disagrees, finding that Steinman was at a minimum 10 percent at fault because she failed to look in her side mirror before turning. *Prejean v. Rabalais*, 998 So.2d 1225 (12/11/08).

### **FAULT — STRAY ANIMALS**

Plaintiffs' father riding a motorcycle was killed in an accident when the motorcycle hit a stray dog on a rural highway. Plaintiff sued the defendants, claiming the defendants had custody of the dog because they fed him and under Civil Code Article 2321 were strictly liable. Affirming the trial court's summary judgment to defendants, the Louisiana Second Circuit Court of Appeal finds that the mere feeding of the dog was not enough to show control of the animal. Further, the court finds the defendants had no duty to report the stray dog to the parish governing authorities, though noting the parish did not have a program to impound stray animals. *Holland v. Teague*, 996-325 (9/17/98).

## INSURANCE COVERAGE

### COVERAGE — CLAIMS-MADE POLICY

The defendant physician treated the plaintiff in 2003. The physician's professional liability policy provided claims-made coverage. The policy expired on January 1, 2004, and the physician failed to renew the policy or buy "tail coverage" for incidents occurring during the policy period. The insurer received notice of the claim when the plaintiff sued the physician in April 2004. The insurer denied coverage, arguing the claim was made outside the policy period.

The issue was whether a claims-made policy violated La. R.S. 22:629, which in pertinent part states:

*No insurance contract shall contain any condition, stipulation or agreement limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues.*

Here, the Louisiana Supreme Court holds that a claims-made policy does not violate La. R.S. 22:629, stating that claims-made coverage does not limit a plaintiff's right to sue, but only affects the scope of coverage procured by the insured. *Hood v. Cotter*, 2008-0215 (12/2/08).

### INSURER BAD FAITH — MENTAL ANGUISH DAMAGES

In a Hurricane Katrina suit, plaintiff homeowners showed their homeowners' insurer was in bad faith by belatedly making payments for house damage. In *Dickerson v. Lexington Insurance Co.*, 07-30823 (1/21/09), the United States Fifth Circuit Court of Appeals correctly finds that an insured claimant can recover mental anguish damages under La. R. S. 22:1220, and that Civil Code Article 1998, which limits damages for non-pecuniary loss in contract claims, does not apply to R.S. 22:1220 and thus does not limit damages under the 1220 statute. Here, the insured received \$25,000.00 in mental anguish damages.

Further, the Fifth Circuit reversed the trial court's award of attorney's fees under La. R.S. 22:658, finding that the amendment to the statute authorizing attorney's fees that became effective on August 15, 2006 did not apply to acts of bad faith triggered by the submission of a proof of loss before the amendment.

### UM — INSURED VEHICLE

Two children, passengers in a car, were injured when their father driving lost control. The father was separated from his wife and was living with his mother. The parents had joint custody, and the children in the accident were considered residents of their grandmother's house. The father's automobile policy had no UM coverage. However, suit was filed for the children against the grandmother's UM insurer Farm Bureau.

Farm Bureau contested coverage on two grounds. First, Farm Bureau relied on a policy exclusion that was based on La. R.S. 22:1406(D)(1)(e), and that read in pertinent part:

*The insured motorist coverage does not apply to bodily injury, sickness, or disease, including death of an insured resulting there from, while occupying a motor vehicle owned by the insured if such motor vehicle is not described in the policy under which a claim is made . . .*

Farm Bureau argued that there was no UM coverage because insureds (the children) occupied a vehicle that was owned by the insured and that was not listed on the policy. The Louisiana Third Circuit Court of Appeal disagreed, stating that the exception would not apply regarding the children because they were not the insureds who owned the car.

Second, Farm Bureau argued that under its policy the definition of uninsured automobile did not include a vehicle "furnished for the regular use of [the grandmother named insured] or a relative" and that the father regularly used the car. The court disagreed with this argument as well, finding the policy definition was contrary to Louisiana's UM statute and thus contrary to state public policy. *Salvaggio v. Allstate Ins. Co.*, 08-0585 (11/5/08).

#### **UM — WAIVER**

Reversing the trial court and granting the UM insurer summary judgment, the Louisiana Fourth Circuit Court of Appeal finds that a UM waiver form not showing the policy number is valid if, at the time the waiver form was completed, a policy number was not available. *Kurz v. Milano*, 2008-CA-1090 (2/18/09).

#### **UM — WAIVER**

A Sears employee driving a company vehicle was involved in a car accident and made a UM claim against Liberty Mutual, the UM insurer for Sears. Liberty Mutual moved for summary judgment arguing that Sears had rejected UM coverage. Plaintiff opposed the motion, contending the UM waiver form was invalid because the name of the legal representative was not printed or typed on the waiver form. The trial court agreed with the plaintiff, denying the summary judgment motion. Reversing, the Louisiana Supreme Court finds the waiver form was valid. The Supreme Court noted that under its decision of *Duncan v. USAA Ins. Co.*, 950 So.2d 544 (La. 11/29/06), the waiver form should show the printed name of the named insured or the legal representative, not both, and that there was no need that the printed name of the signatory appear on the form. *Harper v. Direct General Insurance Company of Louisiana*, 08-2874 (2/13/09).

#### **UM — WAIVER**

In *National Interstate Insurance Company v. Collins*, 2008-0693 (2/13/09), the Louisiana First Circuit Court of Appeal, reversing a summary judgment in favor of a UM insurer, finds that the UM waiver form was invalid because the form did not show the representative capacity of the person signing and did not identify the named corporate insured.

#### **UM — WAIVER**

Plaintiffs bought economic-only UM coverage, but after involved in an accident wanted more. Plaintiffs sought to invalidate their UM selection form. During the coverage period, the number for their policy was changed by one number to indicate that they had become eligible for a group savings discount, but the insurer did not have a new UM selection form executed. However, under La. R.S. 22:680(1)(a)(ii), a waiver or selection form remains valid even with renewal, amended, reinstatement and substitute policies, unless there are changes in liability limits. Affirming summary judgment to the UM insurer, the Louisiana Second Circuit Court of Appeal finds that the policy number change did not require a new rejection or selection form. *Denofrio v. Greer*, 999-1235 (1/14/09).

#### **UM — WAIVER**

While working, a company employee was involved in a car accident and sued the employer's UM insurer. The UM insurer argued the named insured employer had waived UM coverage. The UM waiver form contained the signature, but not the printed name, of the company's legal representative. Finding the waiver did not satisfy the waiver form proscribed by the Insurance Commissioner's office because the legal representative's name was not printed, the Louisiana First Circuit Court of Appeal finds the waiver form was invalid. *Banquer v. Guidroz*, 2008-0356 (12/23/08). However, note the Louisiana Supreme Court decisions in *Gingoes* and *Harper* discussed herein.

## UM — WAIVER

In *Gingoes v. Dardenne*, 2008-2995 (3/13/09), the Louisiana Supreme Court reversing the Louisiana Third Circuit Court of Appeal finds that a company's UM waiver form that does not expressly show the insurer's name is still valid because a listing of the insurer's name is not one of the six waiver form requirements under *Duncan v. USAA*, 950 So.2d 544 (La. 2006).

## UM — VEHICLE OWNERSHIP

A husband and wife were involved in a car accident. At the time of the accident, the two were physically separated, though still married. The two were in a car that was registered in the husband's name and that the husband used; however, the car was community property. The wife made a claim against her own UM insurer, which denied coverage because she had been occupying an owned vehicle that was not described on the policy. Reversing the trial court, the Louisiana Fourth Circuit Court of Appeal finds the car as community property was the wife's "own vehicle," and for that reason the wife had no UM coverage under her policy. *Oliver v. Allstate Insurance Co.*, 991 So.2d 566 (8/6/08).

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