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LOUISIANA INSURANCE LAW UPDATE

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Editor's Note

Dear Friends:

In recent months, Louisiana courts have rendered a number of decisions regarding insurance coverage issues. The biggest case is the Louisiana Supreme Court finding contrary to public policy the automobile business exclusion in commercial automobile policies. Take a look at *Sensebe v. Canal Indemnity Company*. Also, as usual, there are several decisions on our bad faith statutes and UM waivers.

As always, thanks for your continued support.

Richard J. Petre, Jr.

Insurance—Number of Accidents

In a serious accident, the insured truck overturned and almost simultaneously hit two other vehicles. The truck's liability insurer had a \$5,000,000.00 single limit. The liability coverage section of the policy contained the standard language that it would pay all sums the insured legally would have to pay "caused by an 'accident'". Further, the policy contained a limit of insurance section that read:

Regardless of the number of covered "autos", "insureds", premiums paid, claims made on vehicles involved in the "accident," the most we will pay for the total of all damages and "covered pollution costs or expense" combined, resulting from any

one “accident” is the Limit of Insurance for Liability Coverage shown in the Declarations.

All “bodily injury”, “property damage” and “covered pollution costs or expense” resulting from continuous or repeat exposure to substantially the same conditions will be considered as resulting from one “accident”.

In a lengthy opinion, the Louisiana Second Circuit Court of Appeal finds that there was only one “accident” and that the term “loss” in the physical damage coverage section did not apply to liability coverage. The appeals court noted that other courts in determining the number of occurrences or accidents have looked to the cause of the accident or occurrence, the number of damaged parties, and the number of events triggering liability. Here, the appeals court distinguished other cases involving multiple collisions separated by greater time and distance than in this case to conclude that there was only one accident and that all damages resulting from the accident were subject to the \$5,000,000.00 policy coverage limit. 62 So.3d 173 (2/16/11), *writ denied*, 62 So.2d 115 (La. 4/29/11).

Insurance—“Property Damage”

Plaintiff alleged that at least 108 of his checks were fraudulently presented for cashing at a Lake Charles grocery, and sued the grocery and its liability insurer. The insurer filed a summary judgment motion contending that plaintiff’s losses did not constitute “property damage” under the policy. Denying the summary judgment motion, the trial court found that the cash paid out on the fraudulent checks was tangible and constituted tangible property under the policy’s definition of “property damage.” The Louisiana Third Circuit Court of Appeal agrees, finding there was loss of use of tangible property constituting “property damage” under the policy. *Innovative Hospitality Systems v. Abraham*, 61 So.3d 740 (La. App. 3 Cir. 4/6/11).

Insurer—Waiver of Coverage Defense

Progressive in essence denied coverage to the insured, but appointed only one attorney to defend both the insured and the insurer for 17 months. Noting the retained counsel’s conflict of interest in representing both the insured and the insurer, the Louisiana First Circuit Court of Appeal readily finds that Progressive waived its coverage defenses, even though Progressive at the outset had sent reservation and declination letters to the insured. *Emery v. Liberty Mutual Fire Insurance Company*, 49 So.3d 17 (La. App. 1 Circuit 2010).

Insurance—Use of Vehicle

Baker, leaving a party, discovered that he had locked his keys inside his truck. He fashioned a metal lock pick from a piece of metal frame, opened his truck door and then threw the metal lock pick away, inadvertently striking the plaintiff in the eye. The trial court granted summary judgment, finding that Baker’s homeowner’s insurer provided coverage because the damages did not result from use of a motor vehicle, an exclusion in the homeowner’s insurance policy. Correctly affirming the trial court, the Louisiana Fourth Circuit Court of Appeal finds that the throwing of the metal did not involve use of a vehicle. *Baker v. Hurst*, 50 So.3d 215 (La. 4 Cir. 2010).

Insurer Bad Faith—Penalties

In a case involving insurer bad faith claims under then La. R.S. 22:1220 (now La. R.S. 22:1973), the Louisiana Supreme Court (1) finds that mental anguish damages can be awarded under the old 1220 statute regardless of the provisions of La. Civil Code Article 1998 that require an intent “to aggrieve” for the recovery of such damages for breach of contract; (2) affirms that the imposition of penalties under 1220 do not require a finding of actual damages caused by breach of the statutory duty; and (3) affirms that the 1220 penalty of twice the amount of damages caused by any statutory breach is discretionary with the trier of fact. Further, in this Hurricane Katrina case, the court finds that the trial court’s exclusion of evidence of flood insurance payments received by the plaintiffs in a suit against their homeowner’s insurer for wind damage was erroneous because of the relevance of such evidence on several issues. *Wegener v. Lafayette Insurance Company*, 60 So.3d 1220 (La. 3/15/11).

UM Insurance—Waiver

Under *Duncan v. USAA Inc. Co.*, 950 So.2d 544 (La. 2006), a UM waiver, to be valid, must be dated by the insured at the time of signing. Here, the UM insurer moved for summary judgment based on a UM waiver and an affidavit from the insurance agent that she “always had policy applicants sign and date all forms before leaving the office.” However, the plaintiff insured filed an affidavit that she did not sign the waiver form. The Louisiana Fifth Circuit Court of Appeal readily finds that the trial court correctly denied the summary judgment motion because of a genuine issue of material fact. *Gullatt v. Allstate Insurance Company*, 61 So.3d 731 (La. App. 5 Cir. 2/15/11).

Automobile Insurance—Excluded Driver Endorsement

Acting as head of the household, a wife obtained automobile liability coverage and executed an Excluded Driver Endorsement, excluding her 18-year old son from coverage under the policy. One year later, the excluded driver son driving a family vehicle caused an accident. Because the husband was the listed named insured on the policy, could the wife legally execute the Excluded Driver Endorsement?

Reversing the Louisiana Third Circuit Court of Appeal and offering a good history of legislative amendments to La. R.S. 32:900 (L) intended to overturn court opinions interpreting that statutory provision, the Louisiana Supreme Court says yes. La. R.S. 32:900 (L)(1) in pertinent part states:

[A]n insurer and an insured may by written agreement exclude from coverage the named insured and the spouse of the named insurer. The insurer and an insured may also exclude from coverage any other named person who is a resident of the same household as the named insured at the time that the written agreement is entered into, and the exclusion shall be effective, regardless of whether the excluded person continues to remain a resident of the same household, subsequent to the execution of the written agreement.

The Court finds that the mother was clearly “an insured” under the policy who had the authority under the statute to execute the Excluded Driver Endorsement. *Hawkins v. Redmon*, 42 So.3d 360 (La. 2010).

Homeowners’ Insurance—Nonrenewal Notice

Under then La. R.S. 22:636.6 (now La. R.S. 22:1335), a homeowners’ insurer cannot fail to renew a policy unless it mails or delivers to the named insured at the address shown in the policy written notice of its intention not to renew at least 30 days before the policy’s expiration date. In a case where the insurer denied coverage for a fire loss based on nonrenewal of the policy, a jury found that the insurer had properly mailed the notice to the plaintiff’s post office box, but that the post office had failed to deliver the notice; and found that the insurer provided coverage. Reversing the lower courts, the Louisiana Supreme Court holds that the statute requires only that the notice of nonrenewal be mailed, not that it be received, and that the jury’s finding that the insurer had properly mailed the notice of nonrenewal warranted judgment in favor of the defendant insurer. *Johnson v. Louisiana Farm Bureau Casualty Insurance Company*, 60 So.3d 607 (5/6/11).

Liability Insurance—Coverage for Insured’s Damages

In *Muller v. County Insurance Company*, 57 So.3d 341 (La. App. 1 Cir. 12/9/10), the Louisiana First Circuit Court of Appeal finds that a commercial general liability policy covers damages awarded against an insured in a lawsuit by the named insured.

UM—Waiver

The tortfeasor driver’s employer first selected a UM limit lower than the liability limit by opting for \$50,000.00 “each person” and \$50,000.00 “each accident.” The insurer’s underwriter then advised the agent that another waiver was needed “because we do not write in anything under the ‘each person’”. The employer then executed a second waiver showing a lower limit of \$50,000.00 “each accident,” with the agent filling in the amount. Awarding summary judgment against the insurer, a trial court found the waiver was invalid because the insured did not fill in the form. Affirming summary judgment, the Louisiana Third Circuit Court of Appeal holds that the waiver was invalid not because the agent filled in the amount, but because the insured did not “select” the lower limit. *Ware v. Gemini Insurance Company*, 51 So.3d 179 (La. App. 3 Cir. 11/24/10).

Insurer Bad Faith—Initiating Loss Adjustment

Under then La. R.S. 22:658 (A)(3) (now La. R.S. 22:1892), an insurer had 14 days to initiate loss adjustment of a claim, absent catastrophic loss when the time period was 30 days. Breach of this duty could subject the insurer to penalties under then La. R.S. 22:1220 (now La. R.S. 22:1973). In a factually complex class action case involving Louisiana Citizens Property Ins. Corp., a Louisiana Fifth Circuit Court of Appeal finds that:

- (1) Louisiana Citizens, though a non-profit and tax-entity state entity, is an insurer subject to the Louisiana insurer bad faith statutes.

- (2) Subject to the statutory ceiling, penalties under the 1220 statute are discretionary, and there exists no mandatory minimum penalty.
- (3) Because of the general language in 1220(A) regarding an insurer's duty of good faith and clear dealing, imposition of a penalty under the 1220 statute should require a factual finding of bad faith conduct by the insured.

It should be noted that the court's *dicta* suggesting a claimant's need to perhaps show subjective bad faith for all 1220 violations seems overly broad. *Oubre v. Louisiana Citizens Fair Plan*, 53 So.3d 492 (La. App. 5 Cir. 11/9/10).

Insurer Bad Faith—Unconditional Payment

In *Long v. American Security Insurance Company*, 52 So.3d 260 (4th Cir. 11/17/10), the insured and the insurer disagreed over the amount of the insured's property damage loss caused by Hurricane Katrina. The plaintiff invoked the appraisal process in the insurance policy. Later, the insurer tendered the amount of the estimate made by its appraiser during the appraisal process. The Louisiana Fourth Circuit Court of Appeal finds that, because of the invocation of the policy's appraisal process, the insurer did not have a duty to pay unconditionally the appraisal estimate of the insurer's appraiser.

Automobile Insurance—Business Exclusion

Boudreaux was an employee of Top Hatch. Top Hatch was an upholstery business. Boudreaux was driving a truck owned by Hyneman from the dealership where the truck had been previously purchased to Top Hatch to replace seat covers in the truck when the accident occurred. Mississippi Farm Bureau, which insured the truck, contested coverage under the policy's automobile business exclusion, which precluded coverage to anyone operating an automobile business as well as his employees. The policy definition of "automobile business" included a "repair shop." In *Sensebe v. Canal Indemnity Company*, 58 So.3d 441 (1/28/11), the Louisiana Supreme Court finds that the automobile business exclusion is contrary to Louisiana public policy because it violates La. R.S. 32:900(B)(2) requiring coverage for permitted drivers. The court notes that the 32:900 statute allows for only certain exceptions to omnibus coverage and does not specify automobile business use as an exception.