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LOUISIANA TORT LAW UPDATE

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Editor's Note

Dear Friends:

In this issue of the Update, we discuss a number of recent coverage decisions, including a major insurer bad faith case by the Louisiana Supreme Court, and we report on a major case by the Third Circuit on wrongful death damages.

As always, thanks for your continued support.

Richard J. Petre, Jr.

Insurer Bad Faith—La. R.S. 1973

In a major insurer bad faith decision, *Durio v. Horace Mann Ins. Co.*, 2011-0084 (La. 10/25/11), the Louisiana Supreme Court holds as follows:

(1) Under La. R.S. 22:1220 (now La. R.S. 22:1973), a claimant for breach of one of the enumerated statutory duties, in this case arbitrarily failing to make an unconditional payment under the policy to the insured within 60 days of satisfactory proof of loss, can recover as a statutory penalty only twice the claimant's consequential damages caused by the insurer's breach of duty. The claimant cannot also recover as a penalty twice the amount that the insurer failed to arbitrarily pay under the policy.

Here, the trial court awarded the claimant insured \$57,000 in mental anguish damages and \$100,333 in lost income because of breach of the duty. Under the 1220 statute, a penalty of twice the consequential damages could be awarded. However, no penalty under the 1220 statute could be awarded for the amounts the insurer failed to pay under the policy.

(2) The post-Katrina amendment to La. R.S. 22:658 (now La. R.S. 22:1892) increasing the statutory penalty under the statute to 50 percent of the amount that should have been paid from 25 percent and attorneys' fees cannot be applied retroactively. The cause of action under the statute arises when the insurer receives satisfactory proof of loss, which in this case occurred before the 658 statute was amended.

Insurance—Bodily Injury and Property Damage

A Louisiana anesthesia services group fired an anesthesiologist employee for drug usage. However, Dr. P, a shareholder in the group, later wrote a letter of recommendation for the fired anesthesiologist to a Washington state medical center. The medical center hired the anesthesiologist, who under the influence failed to properly administer anesthesia to a patient, resulting in catastrophic injury. The Washington medical center settled with the injured patient for \$7.5 million dollars, after incurring nearly \$744,000.00 in attorney's fees in the Washington state lawsuit, and then sued Dr. P in Louisiana for recovery of the settlement payment and attorney's fees. At trial, a jury found Dr. P had committed intentional and negligent misrepresentations in his recommendation letter and awarded to the medical center damages of \$8,244,000.00. However, Dr. P's insurer contested coverage, arguing that the damages were not bodily injury or property damages but economic damages.

The United States Fifth Circuit Court of Appeals agrees, holding that the damages awarded against Dr. P were not damages for "covered bodily injury." *Preau v. St. Paul Fire & Marine Insurance Company*, 645 F.3d 293 (5th Cir. 6/23/11).

Insurance—Policy Reformation

Reversing a district court summary judgment, the United States Fifth Circuit Court of Appeals in a Louisiana case finds that, in a coverage dispute between insurers, an insurer can use extrinsic evidence to show mutual mistake in reforming the insurance policy. Because the insurer is trying to reform the policy, rather than rescind it, La. R.S. 22:1262, which prohibits after an accident the insurer and insured trying to rescind or annul a policy, does not apply. *Fruge v. Amerisure Mut. Ins. Co.*, 10-31178 (5th Cir. 11/22/11)

Insurance—"Chinese Drywall"

In a "Chinese drywall" case, the Louisiana Fifth Circuit Court of Appeal finds that, though the drywall caused direct physical loss to the plaintiff's home, the plaintiffs' homeowner's policy does not provide coverage because of the application of several exclusions. The court found that the policy exclusions for faulty, inadequate or defective materials; latent defects; corrosion; and pollution all applied. Further, the court rejected the plaintiffs' argument that the policy covered the loss of personal property caused by "smoke" a specified peril in the policy, because "the emission of sulfuric gases from the drywall do (sic) not constitute smoke pursuant to the definition provided in the policy." *Ross v. Adams Construction*, 70 So.3d 949 (5th Cir. 6/14/11).

CGL Coverage—Employer's Liability Exclusion

Western World issued a CGL policy to Landaverde. Landaverde's employee was injured in an accident and sued several defendants including Woodward. Woodward was a general contractor, who subcontracted work to Stewart who in turn contracted work to Landaverde.

Sued for indemnity in a third party action, Woodward filed a cross-claim for contractual indemnity against Landaverde and for coverage against Landaverde's CGL insurer Western World.

The Louisiana Fifth Circuit Court of Appeal finds that Western World provides no coverage to Woodward because of the policy's employer's liability exclusion, which excludes coverage for injury to the named insured's employee. *Moreno v. Entergy Corporation*, 09-976 (La. App. 5 Cir. 10/27/11).

Automobile Insurance

Amending La. R.S. 32:900(B)(2)(c), 2011 Act 17 states that \$25,000 is the minimum limit for property damage in one accident.

UM Coverage—Guest Passengers

In a questionable opinion, the Louisiana Fourth Circuit Court of Appeal finds that nonresident relative guest passengers are UM insureds under the owner's automobile policy. The policy expressly stated that UM insureds were the named insured and relatives residing in his household. However, the insured persons in the policy's liability section included "[a]ny person with respect to an accident arising out of that person's use of a covered vehicle with the express or implied permission of the named insured."

The court found that the guest passengers were "using" the vehicle with the named insured's permission; and that because the guest passengers were liability insureds, under Louisiana law they were entitled to UM coverage under the policy. The court rejected the argument that for a permitted user to be a liability insured, the accident had to arise out of his use of the vehicle; and noted the anomaly of allowing a driver to recover UM benefits, but not guest passengers. *Bernard v. Ellis*, 2010-1495 (9/29/11).

Damages—Wrongful Death

In a case involving the death of an infant caused by acetaminophen toxicity from Tylenol usage, the Louisiana Third Circuit Court of Appeal affirms awards to each parent of \$1,000,000 for his or her mental anguish and \$1,000,000 for loss of the child's love and affection, as well as \$1,000,000 in survival action damages. *Hutto v. McNeil*, 11-609 (12/7/11).

Damages—Punitive Damages

In a drunk driver case, the jury failed to award punitive damages under La. Civil Code Article 2315.4, finding that, though the defendant driver's intoxication caused the accident, the defendant was not guilty of "wanton or reckless disregard" that caused plaintiff's injuries. The defendant's blood alcohol level was .171. Granting plaintiff's judgment notwithstanding the verdict, the trial court awarded plaintiff \$100,000 in punitive damages. The Louisiana Circuit Court of Appeal affirms the JNOV. *Guillory v. Saucier*, 11-745 (La. App. 3 Cir. 12/7/11).

Note that the accident aggravated plaintiff's pre-existing low back disc herniation resulting in lumbar epidural steroid and facet injections, and radio frequency ablation. Past medical expenses were \$68,141.25. The jury awarded plaintiff in damages the past medical expenses, \$10,000 in lost wages, \$10,000 for loss of enjoyment of life, and \$20,000 for pain and

suffering. The jury awarded no amounts for loss of consortium, disability, and lost earning capacity. The court of appeal affirmed the jury verdict on damages.

Damages—Loss of Consortium

With evidence that her husband, the injured plaintiff, displayed “irritability, anger, screaming, yelling, and hatefulness,” the Louisiana Third Circuit Court of Appeal reversed the trial court judgment that failed to award damages to the injured plaintiff’s wife and awards \$1,000 for loss of consortium. *Jones v. Brookshire Grocery Company*, 74 So.3d 1258 (10/5/11).

Liability—Slip-And-Fall

Plaintiff leaving a restroom in a Metairie bar missed the step at the restroom’s threshold and fell. Finding that the plaintiff who had entered the restroom obviously knew of any step-down hazard, the trial court granted the defendant bar summary judgment. Reversing the summary judgment, the Louisiana Fifth Circuit Court of Appeal finds that the trial court should have considered other factors such as lighting, signage, and the utility of the step, along with plaintiff’s knowledge of the hazard. *Boye v. Daiquiris & Creams No. 3*, 11-118 (La. App. 5 Cir. 11/15/11).

Abandonment

The Louisiana Supreme Court finds that sending a Rule 10.1 letter requesting a conference to discuss a discovery dispute, which is required before filing a motion to compel, is a step in prosecution or defense of the case that interrupts the three-year abandonment period. *La. Dept. of Transp. And Development v. Oilfield Heavy Haulers*, 2011-0912 (La. 12/6/11).

Overhead Power Line Safety Act—Indemnity

La. R.S. 45:144(A) in the Louisiana Overhead Power Line Safety Act states:

If a violation of this chapter results in physical or electrical contact with any high voltage overhead line, the person violating this chapter shall be liable to the owner or operator of the high voltage overhead line for all damages, costs, or expenses incurred by the owner or operator as a result of the contact.

In a personal injury tort action, overhead line owner Entergy was sued. Can Entergy under La. R.S. 45:144(A) obtain indemnity for its own negligence from other parties with fault? The Louisiana Fifth Circuit Court of Appeal says no, finding that under Louisiana comparative negligence law, Entergy will receive a credit for the percentage of fault assigned to other persons and that the purpose of the statute is to allow the overhead line owner to be reimbursed only for its direct damages. *Moreno v. Entergy Corp.*, 09-976 (La. App. 5 Cir. 10/27/11).

Right of Action—Subsequent Purchaser Rule

Trucking companies allegedly contaminated property owned by companies, which years later sold the property to plaintiff. After buying the property, plaintiff discovered the contamination and sued the trucking companies. The Louisiana Supreme Court finds that plaintiff has no right of action in tort or contract against the trucking companies for non-apparent

property damage that occurred before plaintiff's property purchase, absent an assignment or subrogation of rights in the property sale, which here did not take place. *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11).

Comparative Fault—Intentional Act

Injured by bouncers in a nightclub incident, two plaintiffs sued the nightclub. For both plaintiffs, the jury found plaintiff A 20 percent at fault, and the nightclub 40 percent at fault because of negligence and another 40 percent at fault because of intentional misconduct. The trial court then reduced the damages of both plaintiffs for the negligence of plaintiff A. Reversing the trial court, the Louisiana Third Circuit Court of Appeal finds that, based on Civil Code Article 2323(c), with an intentional tortfeasor, the damages of a plaintiff cannot be reduced because of the plaintiff's own fault based on negligence or based on another tortfeasor's fault based on negligence. *Le v. Nitetown, Inc.*, 10-1239, 72 So.2d 374 (7/20/11).

Course and Scope of Employment—Intentional Act

Reversing summary judgment to the defendant employer, the Louisiana Third Circuit Court of Appeal finds questions of fact exist as to whether an employer should be responsible for a sexual assault committed by a supervisor and crew members on a co-employee. The attack took place on a Saturday when the supervisor ordered the plaintiff to return to the company shop where the assault occurred. The court noted that the supervisor ordering the plaintiff inside the shop was "unquestionably incidental to the performance of" the supervisor's duties and that a question of fact existed as to whether the eventual attack was employment-related.

Note the Court of Appeal did affirm summary judgment to the employer defendant dismissing the hostile work environment claim under La. R.S. 23:232 because the plaintiff had never made prior complaints pursuant to the company's harassment policy, and there was no evidence the employer tolerated or was aware of prior misconduct. *Edmond v. Pathfinder Energy Services*, 73 So.3d 424 (9/21/11).