

MAPS-ADR

INSURANCE LAW UPDATE

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UNINSURED MOTORIST COVERAGE

PROOF OF UNINSURED STATUS

Lozano vs Brown, 2011 WL 250391 (La. App., 5th Cir, 1/25/2011)

Emphasizes need to prove uninsured status. Here, plaintiff introduced proof of settlement with the underlying carrier and nothing more. The court of appeal found this to be insufficient to establish the uninsured status of the at fault driver

ANTI-STACKING PROVISIONS

Hardy vs Augustine, 54 So.3d 1246 (La. App., 3rd Cir, 2011). Wrongful death action by parents of child killed by underinsured motorist. State Farm provided coverage to parents under two policies, each with limits of \$100,000, under which both parents were insured. Parents sought to recover policy limits of both policies. Parents argued that it was error for the law to permit divorced parents to recover when those who were married could not. The Third circuit said the provisions of 22:1295(1)(c) were clear and prohibited the parents from stacking the two policies as they were both named insureds on both policies.

UM Waivers

Duncan revisited

In Duncan vs. USAA Insurance Company, 950 So.2d 544 (La., 11/29/2006), the Louisiana Supreme Court established the criteria for determining whether a UM waiver is valid. It held that:

- 1) The form must be initialed for the selection or rejection of coverage
- 2) If the limits are less than the liability limits, the amount of coverage for each person/accident must be filled in
- 3) The name of the named insured or legal representative must be printed
- 4) The form must be signed by the named insured or legal representative
- 5) The policy number must be filled in

6) The form must be dated

Bordelon vs Western Heritage Insurance Company, 48 So.3d 421 (La.App. 1st Cir. 2010). Employee sued employer's UM carrier. The evidence showed that the policy was amended to reject UM coverage. The policy was not issued until after the wreck, even though the waiver had been signed four days before the wreck. The First Circuit held that the waiver was valid where it had been properly signed by the insured, was dated, and contained the correct policy number. This involved an amendment to an existing policy.

Ware vs Gemini, 51 So.3d 179 (La.App. 3rd 2010) Suit by employee against employer's UM carrier. The waiver contained a selection of lower limits of \$50,000. The form contained a number of options and the employer's representative initialed the line signifying he wanted lower limits, but the agent wrote in the same amount, person and per accident. The underwriter said the form had to be redone because they only had single limits policies. The agent wrote in 50,000 per accident and the insured initialed and signed the form. The trial court denied the insurer's MSJ holding there was an issue as to whether the insured personally had to fill out the form. The Third Circuit affirmed on other grounds, holding that because there was no showing that the insured knowingly selected lower limits the waiver was not valid

BUT:

Taylor vs U.S. Agencies, 38 So.3d 433 (La.App. 3rd Cir. 4/7/10), where a State Farm employee filled out all the blanks and it was then initialed and signed by the insured. The Fourth Circuit ruled that the form was valid because the law does not require that the insured fill out the form and the insured failed to rebut the presumption that he knowingly selected lower limits.

Guillory vs Progressive Security, 47 So.3d 12 (La. App., 3rd 10/6/10). The trial court granted plaintiff's summary judgment on coverage, holding that the waiver was invalid because it contained no policy number. The insurer pointed out that an earlier waiver had a number on it but the plaintiff maintained that the number was not there when the employer's representative executed the waiver. The court ruled that an issue of fact existed, reversed the trial court ruling in plaintiff's favor, and said that the case was not appropriate for summary judgment.

OTHER UM CASES

Mednick vs State Farm Mutual Automobile Insurance Company, 31 So.3d 1133 (La. App. 5th Cir. 1/26/10)

Policy excluded government vehicles from definition of uninsured vehicles. Held: Exclusion was against public policy.

Sumner vs. Mathes, 52 So.3d 931, (La.App. 4th Cir. 11/24/10).

The appellate court held because the City of New Orleans was not insolvent, insured motorist was not entitled to UM benefits following an accident with a city vehicle and there was no violation of public policy in enforcing insurance policy's language excluding self-insured vehicles from UM coverage. Plaintiff's policy included a UM provision stating that an "uninsured motor vehicle" does not include any vehicle owned or operated by a self-insurer, except a self-insured that is or becomes insolvent. The court distinguished **Mednick** stating that while **Mednick** properly delineated the public policy rationale for UM coverage, the policy language at issue in **Mednick** was much broader.

Hoagboon v. Geico, 54 So.3d 802 (La.App. 1st Cir. 12/29/10).

The court held that a policy provision imposing a condition that any economic damages claimed must first be incurred and documented to be covered under the policy was unenforceable. The court found the provision restricted the EOUM coverage in derogation of the statutorily-mandated coverage.

THE INSURANCE CODE PENALTY STATUTES AND THEIR APPLICATION

La.R.S. 22:1892

REQUIRES A SHOWING THAT THE BEHAVIOR WAS ARBITRARY AND CAPRICIOUS BEFORE AN AWARD OF PENALTIES CAN BE ASSESSED

PENALTY IS CALCULATED ON THE AMOUNT DUE OR THE DIFFERENCE BETWEEN THE AMOUNT DUE AND THE AMOUNT PAID

ALLOWS AN AWARD OF ATTORNEYS FEES AND COSTS

PENALTY IS RESTRICTED TO FIRST PARTY CLAIMS ON ADJUSTING, ALLOWS PENALTIES ON THIRD PARTY CLAIMS FOR AUTO ADJUSTING AND AFTER SETTLEMENT OF PROPERTY AND MED PAY CLAIMS

SEPARATE PENALTIES FOR SPECIFIC VIOLATIONS DEALING WITH ADJUSTMENT OF PROPERTY CLAIMS

La. R.S. 22:1973 UNFAIR TRADE PRACTICES

CREATES A CAUSE OF ACTION FOR GENERAL AND SPECIAL DAMAGES.

IS RESTRICTED TO THE 5 CLAIMS PRACTICES LISTED

- 1) MISREPRESENTING PERTINENT FACTS OR INSURANCE POLICY PROVISIONS RELATING TO ANY COVERAGES AT ISSUE.

- 2) FAILING TO PAY A SETTLEMENT WITHIN 30 DAYS AFTER AN AGREEMENT IS REDUCED TO WRITING

NOTE: THERE IS NO REQUIREMENT THAT THE FAILURE TO PAY BE ARBITRARY AND CAPRICIOUS.

- 3) DENYING COVERAGE OR ATTEMPTING TO SETTLE A CLAIM BASED ON AN APPLICATION THAT THE INSURER KNOWS WAS ALTERED WITHOUT NOTICE TO, OR KNOWLEDGE OF, THE INSURED

- 4) MISLEADING A CLAIMANT AS TO THE APPLICABLE PRESCRIPTIVE PERIOD

- 5) FAILING TO PAY THE AMOUNT OF ANY CLAIM DUE ANY PERSON INSURED BY THE CONTRACT WITHIN 60 DAYS AFTER RECEIPT OF SATISFACTORY PROOF OF LOSS FROM THE CLAIMANT WHEN SUCH FAILURE IS ARBITRARY, CAPRICIOUS, OR WITHOUT PROBABLE CAUSE

- 6) FAILING TO PAY CLAIMS PURSUANT TO La. R.S. 22:1893 (DEALING WITH ADJUSTMENT OF HURRICANE CLAIMS)

ALLOWS A SEPARATE CLAIM FOR PENALTIES IF THERE IS A SHOWING OF ARBITRARY AND CAPRICIOUS BEHAVIOR BY THE INSURER

CALCULATION OF PENALTIES IS BASED ON TWICE THE DAMAGES AWARDED OR \$5000, WHICHEVER IS GREATER

RECENT CASES INTERPRETING BOTH PENALTY STATUTES

Richardson vs Geico, 48 So3d 307 (La. App. 1st Cir, 2010) writ denied 51 So.3d 7 (La. 12/17/10).

UM case illustrating what constitutes “satisfactory proof of loss” sufficient to trigger penalties. Here, involving a clear liability accident, the insured settled with the at fault driver then made demand of his UM carrier for payment of the UM limits and also the med pay. The insured’s attorney sent the insurer a copy of the settlement check from the primary carrier, an affidavit from the at fault driver attesting to no additional coverage, a copy of the police report and copies of medical records and bills totaling an amount in excess of the underlying limits. It also contained a statement that GEICO has received separate notice of a lien from the U.S. Navy for reimbursement of medical expenses it had paid. Correspondence continued between GEICO and plaintiff’s counsel attempting to determine the full amount of the lien, and 26 days after receiving plaintiff’s demand, GEICO sent what the court termed an “intent to settle” letter, indicating its willingness to pay the UM limits but noting that the issue of the lien as well as who got the med pay still needed to be resolved. Approximately 6 weeks after the initial demand by the insured, plaintiff’s counsel indicated that he had settled with the lien holder and that GEICO did not have to pay the lien. He further reiterated his demand for the limits, declined to have his client execute a release as a condition of payment, and notified the carrier that since it had satisfactory proof of loss as of the date of his first demand letter, that it was subject to penalties for failing to make a

tender within 30 days after satisfactory proof of loss. GEICO tendered the UM and med pay limits two days later.

The insured sued for penalties and attorneys fees for failure to pay the claim within 30 days. The insurer filed and was granted summary judgment. The First Circuit reversed, finding the case turned on when the carrier received satisfactory proof of loss. The court held that the insurer had notice as to the full amount of the lien from the Navy within 2 weeks of the demand letter and at that time should have tendered the undisputed amount owed its insured. Failure to do so subjected GEICO to penalties and attorneys fees. "An unconditional offer must have no strings attached."

Jones vs Johnson , 2010 WL 5100192 (La. App. 2nd Cir. 2010)

Penalties were awarded under 22:1892 where the insurer, aware of competing claims by the policy holder and health care providers, was found to be arbitrary and capricious for failure to deposit the policy proceeds, interest and costs into the registry of the court. The penalty in that case was the amount of the policy limits of \$100,000 and attorneys fees of \$10,000.

Hudson vs AIG, 40 So.3d 484 (La.App. 3rd 2010)

UM claim where penalties sought under 22:1973 for failure to pay claim within 60 days of satisfactory proof of loss. (Recall that this statute entitles the insured to damages as well as discretionary penalties)

Plaintiff received the primary limits of \$10,000 then made demand on her UM carrier for its limits of \$25,000. As proof of loss, the insured attorney submitted her "medical profile"(there was no discussion of what this constituted), a coverage certificate from State Farm attesting to its policy limits, an affidavit from the at fault driver attesting that there was no additional coverage, and the release of State Farm for payment of its limits. AIG requested a recorded statement from its insured which was required under the policy and which she refused to provide. The Third Circuit held that the failure to provide this statement does not mean that the insurer did not receive satisfactory proof of loss when the demand was made and it affirmed an award of damages of twice the amount of the policy limits or \$50,000, finding that proof of damages was not a prerequisite of recovery of penalties.

Wegener vs Lafayette Insurance, 2011 WL 880339 (La, 3/15/2011)

Hurricane claim under 22:1973 for wind and water damage to insured's home. The insurer under-appraised the home and was found to be arbitrary and capricious in failing to pay what it owed for the structure. Insureds sought recovery for damages for mental anguish as well as for penalties and attorneys fees.

The trial court had instructed the jury that in order for the plaintiffs to recover for mental anguish, they had to show that the insurer breached its duty of good faith and fair dealing and intended to aggrieve the plaintiffs. The jury declined to award mental anguish damages or penalties and the insureds appealed. The Supreme Court contrasted the language in La. Civ. Code art 1998 and 22:1973 and specifically found that the right to damages does not come from the insurer's breach of contract, but from the violation of its statutory duty owed under 22:1973 and that proof of an intent to aggrieve is

not necessary for recovery of damages. Moreover, proof of damages does not have to occur for an award of damages to be made.

Audubon Orthopedic and Sports Medicine APMC vs Lafayette Ins. Co., 38 So.3d 963 (La. App. 4th Cir. 4/21/10)

Suit filed against insurer for breach of business interruption policy. Insured sought compensatory damages and penalties and attorneys fees. The jury awarded damages in excess of \$240,000, penalties under 22:658 (now 1892) of 25% of the difference between what was paid and what was awarded and statutory penalties under 22:1220 (now 1973) of \$5000 for each business location. In a motion for a new trial, the insured cited failure of the jury to award damages under 22:1220 and failure to award attorneys fees. Trial court vacated original judgment and entered a couple of revised judgments which maintained the business loss, but changed the penalties to award damages of \$175,000 and \$20,000 to the two business locations and attorneys fees of \$5000. On motion of the insured, the court signed a third judgment increasing the award of attorneys fees to \$75,000.

The case contains a discussion of the penalty statutes starting with the acknowledgment that the insurer cannot be penalized twice for failing to pay within the statutory delays after satisfactory proof of loss and can only be hit with the greater penalty. The court analyzed the two statutes and concluded that to be able to recover damages under 1220 (1973), damages must have been sustained; and if not, it can only recover the penalty of \$5000. The court then compared this penalty with the one that can be assessed under 658 (1892) which was 25% of the difference between what was paid and what was awarded, and since this was the greater figure, it amended the judgment to award that penalty. The court disallowed the attorneys fees because the statute did not provide for them at the time of the loss.

Miscellaneous jurisprudence involving policy interpretation and application

BUSINESS INTERRUPTION POLICIES

Mr. Mudbug vs Axis Surplus, 2010 WL 5058312 (E.D. La.)

This case dealt with a claim for property damage business interruption insurance. Although the insured and the agent initially agreed that the policy was to contain a 100% coinsurance term, the policy was issued without the rider. After Gustav, the insured made a claim for property damage and business interruption coverage. In the course of the investigation it was discovered that the coinsurance rider was missing. The insurer applied the provision anyway, and the insured sued for the full value of the policy, arguing under 22:873 that the policy as delivered represented the contract of insurance. The insurer countered seeking reformation of the policy. Judge Fallon concluded that since there was no dispute that the rider should have been on the policy that reformation was appropriate.

Dickie Brennan & Co. vs Lexington Insurance Company, 2011 WL 996193 (C.A. 5th La)

Business interruption policy. Insured sued for losses while unable to conduct business during a mandatory evacuation. This was a Gustav claim. The policy provided for payment of damages due to a civil authority action which prohibited access to the described premises of the insured which was caused by “direct physical loss of or damage to property other than at the described premises caused by or resulting from and Covered Cause of Loss.” The insured claimed that damages in the Caribbean fit the description of property other than the described premises. The insurer argued there must be a connection between the damage and the civil action and the damage must be near the insured premises.

HELD: Civil authority coverage is intended to apply to situations where access to the insured’s property is prevented by an order of the civil authority issued as a direct result of damage to other premises in the proximity of the insured’s property.

POLICY EXCLUSIONS

Sensebe vs Canal Indemnity Company et al, 2011 WL 259929, 2010-C-0703 (La. 1/28/11)

An employee of Top Hatch, a company that had a contract with an auto dealership to customize car seats, rear-ended the plaintiff. The employee was driving a vehicle that had been purchased by an individual who left it with the dealership to have leather seats put in, and she was taking this Top Hatch to be done when the accident happened.

The plaintiff sued the insurer for the vehicle owner Mississippi Farm Bureau, as well as Top Hatch and its carrier Canal Indemnity. Farm Bureau filed for summary judgment, claiming that its policy contained an exclusion for vehicles operated in an “automobile business”. Farm Bureau recognized that this language was in violation of the Compulsory Motor Vehicle Liability Security law and argued in the alternative that its coverage should be limited to the minimum limits required by that law. Summary judgment was granted by the trial court. The First Circuit reversed, stating that Farm Bureau failed to prove that its exclusion applied to an auto upholstery customizer.

The Louisiana Supreme Court held that while Top Hatch’s business activities fell within the policy definition of “automobile business,” under La. 32:900(B)(2), which deals with the statutory omnibus clause, the insurer was required to cover not only the named insured but also any other permissive user and this requirement is mandatory. Farm Bureau’s exclusion was in conflict with the statutorily mandated omnibus clause and the exclusion must be found in violation of public policy.

This case contains an extensive discussion of other types of policy exclusions that have been read out of auto policies, such as the “business use” exclusion, where invoked against the named insured. It also distinguishes specific statutory exceptions to the omnibus clause found in the same statute, such as the named driver exclusion.

NOTE: The court did not address the alternative argument of Farm Bureau that the coverage should only be for the minimal limits because this issue was not raised on appeal.

Fouquet vs Daiquiris & Creams of Mandeville, 49 So.3d 44 (La. App, 1st Cir. 9/13/2010).

Stabbing in a bar. Victim sued bar owner as well as his attacker and their liability insurers. Colony, the insurer for the bar, intervened and sought a summary judgment on coverage. The policy contained an exclusion for assault and battery as well as a weapons exclusion. Plaintiff argued in opposition that there were certain elements of his cause of action that were covered by the policy, such as his allegations of negligence against the owner for failing to prevent repeated criminal acts on the premises, failing to assist him and failing to render first aid. In upholding the summary judgment in favor of the insurer, the court of appeal held that plaintiff was wrong to focus on the negligence allegations, when the exclusion pertained to “bodily injury” from an assault and battery or from a weapon.

INSURER’S DUTY TO DEFEND

Emery vs Progressive, 49 So.3d 17 (La. App. 1st Cir. 2010)

An employee of T & T Seafood rear-ended the plaintiff. It was alleged that at the time of the accident, he was in the course and scope of his employment. However at the time of the accident, the employee was driving his personal vehicle. Progressive insured T & T for a number of vehicles identified on the policy, and the employee’s personal vehicle was not listed as one of the vehicles, nor was it a replacement or substitute. Progressive issued a reservation of rights letter to T & T. On the same day, Progressive sent T & T a letter denying coverage. At no time did it advise T & T to retain counsel to pursue the coverage question, but instead appointed a single attorney to defend T & T. The answer filed on behalf of T & T and Progressive asserted the coverage defense and denied that its policy covered the accident. The attorney then took the deposition of the employee upon whose negligence plaintiff’s claim was based and questioned him about the accident. After the deposition was taken, Progressive retained a separate lawyer to represent T & T. This attorney then advised of the conflict of interest of the other and told T & T that it needed to hire its own counsel to pursue coverage. The original attorney met with the owner of T & T to get him to execute an affidavit stating that the employee’s vehicle was not covered, and then attached the affidavit in support of Progressive’s motion for summary judgment seeking a ruling of no coverage. T & T filed its own partial MSJ, contending that Progressive had waived its coverage defenses.

The Court of Appeal stated Progressive knew from the start that there was a coverage issue and had a duty to appoint separate counsel for its insured, and in failing to do so until later in the case, waived its coverage defenses.