

# DIGEST OF INSURANCE LAW

## LOUISIANA

Courtesy of  
[Gieger, Laborde & Laperouse, L.L.C.](#)  
New Orleans, Louisiana

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

There are numerous inferior courts of limited original civil jurisdiction; such as, Justices of Peace, Municipal and City Courts.

District Courts have unlimited original civil jurisdiction. Louisiana has forty judicial districts, plus the Civil and Criminal District Courts of the Parish of Orleans. Except for New Orleans, where the jurisdictional limit is \$25,000, and for several other large municipalities, city courts have jurisdiction where amount in dispute does not exceed \$15,000. This jurisdiction is concurrent with District Courts. La. C.C.P. Art. 4843. District Courts have original criminal jurisdiction and appellate jurisdiction from justices of peace and administrative and municipal agencies. Appeals from Justice of the Peace or Municipal Court shall be taken to District Court only if no parish court exists. La. C.C.P. Art. 4924.

#### Appellate Courts

Courts of Appeal. Louisiana has five (5) appellate circuits, each divided into three (3) districts. La. Rev. Stat. 13:312. Personnel of courts of appeal consists of twelve (12) judges for First Circuit (four elected from each district), nine (9) judges for Second Circuit, twelve (12) judges for Third Circuit (three elected at large from First District and three elected from the Second District and six elected from the Third District), and twelve (12) judges for Fourth Circuit (eight judges from First District, one from Second District, one from Third District, and two elected at large), and eight (8) judges for the Fifth Circuit, (six judges from First District, one from Second District and one from Third District). La. Rev. Stat. 13:312.1. Appeal may be taken to Courts of Appeal in all cases from family and juvenile courts except criminal prosecution against persons other than juveniles, all civil and probate matters of which district courts throughout state have exclusive original jurisdiction; and all cases decided by city and district courts. All appeals are on both law and facts.

Supreme Court. Supreme Court has control of and general supervision over all inferior courts. It is state court of last resort, civil and criminal. It is composed of Chief Justice, and six (6) Associate Justices, elected from Districts provided for in state constitution and specifically laid out in La. Rev. Stat. 13:101. It has exclusive original jurisdiction of disciplinary proceedings against members of bar. It has general supervisory jurisdiction over all courts. Jurisdiction of supreme court in civil cases extends to both law and facts. La. Const. Art. 5, § 5(c). The Supreme Court reviews civil cases decided by intermediate appellate courts only upon issuance of writ of certiorari.

### LAW

#### Abbreviations

- C.C.P. – Code of Civil Procedure.
- C.E. – Code of Evidence.
- Cr. C. – Criminal Code.
- F. Supp. – Federal Supplement.
- F.2d – Federal Reporter, Second Series.
- L.R.A. (NS) – Lawyer's Reports Annotated (New Series).
- L.S.A. – Louisiana Statutes Annotated.
- La. – Louisiana Reports.
- La. Ann. – Louisiana Annual Reports.
- La. App. – Louisiana Appeal Reports.
- La. C.C. – Louisiana Civil Code.
- La. Rev. Stat. – Louisiana Revised Statutes.
- So. – Southern Reporter.
- So. 2d – Southern Reporter, Second Series.

### ACCIDENT AND HEALTH INSURANCE

Creditors. Proceeds are exempt from liability for any debt of insured and any debt of beneficiary existing at time proceeds were made available. La. Rev. Stat. 22:1015.

Disability. General definition of total disability in a disability loss of income policy shall not be more restrictive than one requiring the individual to be totally dis-



abled from engaging in any employment or occupation for which he is, or becomes, qualified by reason of education, training, or experience and which provides him with substantially the same earning capacity as his former earning capacity prior to start of disability. La. Rev. Stat. 22:990.

Louisiana courts have adopted policy of liberal interpretation respecting accident insurance policies which provide benefits for total permanent disability, or inability to engage in any occupation for compensation or profit. *Foret v. Aetna Life & Cas. Co.*, 337 So. 2d 676 (La. App. 3rd Cir. 1976), *Cannon v. Ormet Corp.*, 479 So. 2d 555 (La. App. 1st Cir. 1985). In *Felker v. Aetna Life Ins. Co.*, 234 So. 2d 758 (La. App. 1st Cir. 1970), former traveling drug salesman who could no longer work long hours required due to tuberculosis, bronchitis, and emphysema was allowed to recover even though he was able to work short hours as used car salesman. Further, in *Miller v. American Cas. Co.*, 263 So. 2d 398 (La. App. 4th Cir. 1972), it was held that mere reporting to work would not preclude determination of permanent and total disability within meaning of policy. Key test is beneficiary's inability to perform his assigned duties. Fact that insured may engage in other occupation does not disqualify him from benefits for total permanent disability. *Foret*, 337 So. 2d at 682-683. If policy contains "house confinement clause" it will be liberally construed, and beneficiary may recover as long as there is substantial compliance with clause. Ability to venture out of doors on few brief occasions for short walks will not defeat recovery. *Manuel v. American Income Life Ins. Co.*, 223 So. 2d 817 (La. 1969). It is initially beneficiary's burden to prove that loss suffered was within policy provisions. *Jones v. World Ins. Co.*, 295 So. 2d 451 (La. App. 3rd Cir. 1974). However, burden shifts to insurer to prove that disability or its cause was within exclusionary clause. *Calcasieu Marine Nat'l Bank v. American Employers*, 533 F.2d 290 (5th Cir. 1976).

**Pre-Existing Disease.** If disorder or illness exists at time of injury, recovery may be had under accident policy if injury is severe enough to have caused considerable damage and if disease was not proximate cause or principal cause of disability. *Thibodeaux v. Pacific Mut.*, 112 So. 2d 423 (La. 1959).

Aggravation of pre-existing arthritis resulting from injury was caused by external means notwithstanding provision that loss not result "wholly or in part, directly or indirectly" from any disease. *Martin v. American Benefit Life Ins. Co.*, 294 So. 2d 200 (La. 1974). However, dormant or pre-existing condition must be awakened by event such that event, not disease, may be said to be directly culpable precipitant. *Barnewold v. Life Ins. Co. of North Am.*, 633 F. Supp. 432 (E.D. La. 1986).

Words of insurance policy should be construed in their ordinary and popular sense rather than in technical sense. *Gulf Building Services v. Travelers Indem. Co.*, 435 So. 2d 477 (La. App. 4th Cir. 1983). Courts impose strict burden on insurer to prove that exclusionary clause is applicable, and in case of health insurer, that alleged preexisting condition did in fact predate effective date of policy. *Casey v. Proprietors Life Assur. Co.*, 470 So. 2d 339 (La. App. 5th Cir. 1985).

**Excepted Risks.** La. Rev. Stat. 22:975. Death sustained while attempting to board seaplane to take flight is within exception of accident policy readings: "This insurance does not cover...injuries, fatal or otherwise, sustained by insured while in or on any vehicle...for aerial navigation." *Murphy v. Union*, 172 La. 383, 134 So. 256 (La. App. 3rd Cir. 1931). Sick benefit policy exempting venereal diseases from its coverage imposes no liability for syphilis. *Coleman v. National Life & Accident*, 145 So. 298 (La. App. 3rd Cir. 1933). Insured not entitled to recover under accident policy for period during which disability was prolonged by insured's refusal to follow medical advice. *Castella v. Southern Life*, 161 So. 344 (La. App. 3rd Cir. 1935). Where insured is shot and killed under mistaken belief that he is another person, his death does not result from "intentional act" within exception of policy. *Culotta v. Security Indus. Ins. Co.*, 325 So. 2d 863 (La. App. 2d Cir. 1976). When causative factor is driving automobile while intoxicated, insurer not liable under policy which excepted from coverage death resulting from violation of law. *Geddes v. First Nat'l*, 167 So. 881 (La. App. 3rd Cir. 1936); *Mathews v. All American Assur. Corp.*, 226 So. 2d 181 (La. App. 3rd Cir. 1969). Under policy reading "disability...benefits will not be paid for...injuries sustained...resulting from violation of law," insurer not relieved from liability where no causal connection exists between illegal concealment of weapon and accidental injury. *Harbor v. First Nat'l*, 169 So. 106 (La. App. 3rd Cir. 1936). Burden is on insurer to show causal connection between violation of law and injury. *Boudreaux v. First Nat'l Life*, 225 So. 2d 687 (La. App. 3rd Cir. 1969). Insured not entitled to recover under policy which excepts "loss caused directly or indirectly by medical or surgical treatment," where toe was amputated as result of burn caused by mechanical heat prescribed by physician. *Barkerding v. Aetna*, 82 F.2d 358 (5th Cir. 1936). Requirement of by-laws that there be eye-witness are satisfied where witness saw deceased attempting to dislodge bullet from gun and heard shot while walking away. *Villemarette v. Sovereign Camp, W.O.W.*, 178 So. 648 (La. App. 3rd Cir. 1938). Highway compactor-roller held neither "automobile," "truck," nor "farm tractor" for purpose of exclusion in policy. *Thomas v. Protective Life Ins. Co.*, 319 So. 2d 878 (La. App. 3rd Cir. 1975).



Insurer not relieved from liability under “time of war” exclusion where insured died aboard aircraft carrier during Vietnam conflict when there was no formal declaration of war by Congress. *Hammond v. National Life Acc. Ins. Co.*, 243 So. 2d 902 (La. App. 3rd Cir. 1971).

Policy providing payments for accidental injury while standing or walking on actual surface of public highway did not cover death as result of being struck by truck while standing between curb line and sidewalk of city street. *Davis v. Union Nat’l*, 54 So. 2d 860 (La. App. 3rd Cir. 1951).

Clause “loss of one hand by severance at or above wrist-joint” is not ambiguous, and does not include mangling of fingers. *Muse v. Metropolitan Life Ins. Co.*, 192 So. 72 (La. 1939). Loss of member dates from time of accident and not amputation. *Matthews v. Standard Life Ins. Co.*, 213 So. 2d 128 (La. App. 3rd Cir. 1968); *Perriloux v. First Standard Life*, 396 So. 2d 427 (La. App. 4th Cir. 1981). Incomplete fracture of arm within benefit clause for “complete fracture of bones.” *Miley v. Fireside*, 200 So. 505 (La. App. 1st Cir. 1941). Blindness considered total disability. *Mathews v. Louisiana*, 11 So. 2d 80 (La. App. 1st Cir. 1942).

Policy for payment of certain sum if insured is under 60 years of age refers to date of death and not date of issuance. *Buckley v. American*, 5 So. 2d 18 (La. App. Or. Cir. 1941).

Penalties and Attorneys’ Fees. La. Rev. Stat. 22:1811 provides that all death claims arising under policies issued or delivered in this state shall be settled within 60 days from receipt of proof of death. Failure to pay without just cause imposes penalty of 8% per annum interest from receipt of proof of death on amount due.

This provision applies to all claims for death benefits regardless of whether policy provides other types of benefits. *Brasher v. Life Ins. Co. of Louisiana*, 306 So. 2d 321 (La. App. 3rd Cir. 1975).

Where insurer reasonably believes its defense is valid, refusal to pay claim is not considered to be without just cause subjecting it to penalties, even if defense is subsequently rejected by court. *Carr v. Port Ship Service, Inc.*, 406 So. 2d 632 (La. App. 4th Cir. 1981).

Notice and Proof of Loss. La. Rev. Stat. 22:1821 provides that payment on claims under health and accident policies must be made within 30 days of written notice and proof of claim. Payment must also be made at least every thirty days during covered period. Failure to comply without reasonable grounds subjects insurer to penalty of double amount of health and accident benefits due during period of delay together with attorneys’ fees. Claims for accidental death under such policies shall be

settled within 60 days of proof of death. Failure to do so without just cause merits penalty of 6% per annum interest from receipt of proof of death. This section is applicable only to policies issued in state. *Dennis v. Businessmen’s Assurance Co. of Am.*, 175 So. 2d 431 (La. App. 2d Cir. 1965). Moreover, this section was intended to apply to small claims and monthly disability payments, and was inapplicable to lump-sum claim which could be as high as \$100,000. *Vallery v. All American Life Ins. Co.*, 429 So. 2d 513 (La. App. 3rd Cir. 1983).

Time allowed for giving notice runs only from date on which results of accident are ascertained, where these are not immediately apparent and there is no reasonable ground for believing accident will produce injury. *Wheeler v. London*, 156 So. 420 (La. 1934). Policy not void where insured’s failure to give proper notice of disability is due to insanity. *Hickman v. Pan-American*, 173 So. 742 (La. 1937).

Where issue raised by insurer is *res nova*, (one of first impression) insurer’s refusal to pay until issue is litigated may be allowed without penalty. *Dortlon v. Union Fidelity Life Ins. Co.*, 326 So. 2d 383 (La. App. 3rd Cir. 1976). *Res nova* aspect alone is not determinative of damage issue. *Boudreaux v. Fireman’s Fund*, 654 F.2d 447 (5th Cir. 1981). Insurer must test liability at its own expense. *Sanders v. General Amer. Life*, 364 So. 2d 1373 (La. App. 3rd Cir. 1978).

La. Rev. Stat. 22:1892 provides that payment under insurance policies other than life and health and accident policies must be made within thirty days of receipt of satisfactory proof of loss. Failure to comply “...when such failure is found to be arbitrary, capricious, or without probable cause,” shall subject insurer to 50% penalty, or \$1,000, whichever is greater. Being penal in nature, this section is subject to strict construction. *Cole v. State Farm Mut. Auto Ins. Co.*, 427 So. 2d 522 (La. App. 3rd Cir. 1983). Whether insurer’s failure to pay is arbitrary, capricious or without probable cause is question of fact to be determined in light of facts and circumstances of particular case. *Smith v. State Farm*, 695 F.2d 202 (5th Cir. 1983). One who claims entitlement to penalties and attorney fees has burden of proving insurer received satisfactory proof of loss predicate to showing insurer was arbitrary, capricious, or without probable cause. *Riser v. Shelter Mut. Ins. Co.*, 997 So. 2d 675 (La. App. 2d Cir. 2008).

## ACCIDENTAL MEANS

“Recovery is allowable for accidental death, whether or not precipitating act which accidentally produces this fatality was itself voluntary and intended.” *Schonberg v. New York Life Ins. Co.*, 104 So. 2d 171, 177 (La. 1958). Like most other jurisdictions, Louisiana has re-



puddiated distinction between accidental means and accidental results. Current test is “whether the average man, under existing facts and circumstances, would regard loss so unforeseen, unexpected, and extraordinary that he would say it was accident.” *Murphy v. Continental Cas. Co.*, 269 So. 2d 507, 517 (La. App. 1st Cir. 1972).

If traumatic event is predominant cause of death, provision of accidental injury death policy excluding benefits for death caused by disease or natural causes does not apply, even if injury aggravates existing illness, accelerating death. Death is regarded as resulting directly from injury. *Brown v. State Mut.*, 377 So. 2d 355 (La. App. 3rd Cir. 1979).

Insured has burden of proof to show that injury or death resulted from accident. *Jones v. World Ins. of Omaha, Neb.*, 295 So. 2d 451 (La. App. 3rd Cir. 1974).

### ADJUSTERS

Under La. Rev. Stat. 22:1675, insurance companies are prohibited from paying insurance adjusters any fee or compensation in excess of regular fixed salary or stipend, or to contract to pay adjuster any portion of amount saved through efforts of said adjuster, unless said adjuster is permanently employed by any insurance company authorized to do business in this state. Adjusters licensed in states other than Louisiana must pay state of Louisiana same license fee or tax imposed by their state in order to adjust any losses in Louisiana.

Unauthorized practice. When adjuster contracted with individual to settle and adjust claim for injuries to child, adjuster held illegally engaged in practice of law. *Meunier v. Bernich*, 170 So. 567 (La. App. Or. 1936).

### AGE

See “AUTOMOBILES”; “NEGLIGENCE.”

### AGENTS AND BROKERS

Broker. Plaintiff specifically retained person to procure desired insurance coverage wherever possible and at best price and whom plaintiff knew to be licensed agent of one insurance company obtained policy for plaintiff through another insurance company by whom he had not been delegated to solicit insurance. Such person was deemed independent insurance broker and not agent of company whose insurance he sold. *Duhon v. Mid American Cas. Co.*, 553 So. 2d 1100 (La. App. 3rd Cir. 1989).

Reformation. Written insurance contract can be reformed to conform to original intention of parties whether for mutual error or for negligent, mistaken or fraudulent conduct of agent who issues policy. *Raymond v. Ze-*

*ringue*, 422 So. 2d 534 (La. App. 5th Cir. 1982). If agent knows of policyholder’s true intention as to coverage desired, insurance company is bound by agent’s knowledge and policy will be reformed to conform to that intention. *Id.* at 536.

Knowledge of Insured. Insurance company may limit authority of its agents, and where direct notice of such limitation or any notice which prudent man is bound to regard, is brought to attention of insured, he is bound by it and relies upon any act in excess of such limited authority at his peril. *Murphy v. Royal Ins. Co. of Liverpool*, 27 So. 143 (La. 1899).

Knowledge of Agent. Acts of one procuring insurance as agent of insurer are imputable to insurer. Those acts of one acting as agent of insured, or as broker, are not. *Karam v. St. Paul Fire & Marine Ins. Co.*, 265 So. 2d 821 (La. App. 3rd Cir. 1972), *aff’d*, 281 So. 2d 728 (La. 1973).

Fact that broker was required to follow insurer’s underwriting guidelines was insufficient to establish apparent agency between broker and insurer so as to charge insurer with broker’s knowledge, where application form signed by insured clearly used word broker rather than agent. *Ford v. Golemi, Albrecht Ins.*, 522 So. 2d 1283 (La. App. 5th Cir. 1988).

### ARBITRATION

Where one of the parties to an agreement which provides for arbitration fails or refuses to abide by the provision, the other party may bring a judicial proceeding to compel arbitration. La. Rev. Stat. 9:4203. A court may entertain the question of whether the particular issue for which arbitration is sought was within the submission to arbitration provided in the contract. *Haase Constr. Co, Inc. v. Strohmeyer*, 738 So. 2d 152 (La. App. 4th Cir. 1999). There is a presumption in favor of arbitrability. *Aguillard v. Auction Management Corp.*, 908 So. 2d 1 (La. 2005), *superseded on other grounds by statute as stated in Arkel Constructors, Inc., v. Duplantier & Meric, Architects, L.L.C.*, 965 So. 2d 455, 2006-1950 (La. App. 1st Cir. 2007). Other issues, including waiver, are for the arbitrator to determine in the first instance. *International River Center v. Johns-Manville Sales Corp.*, 861 So. 2d 139 (La. 2003). A party may waive the right to arbitrate, *Albert K Newlin, Inc. v. Morris*, 758 So. 2d 222 (La. App. 3rd Cir. 2000), but waiver is not favored. *Rauscher Pierce Refsnes, Inc. v. Flatt*, 632 So. 2d 807 (La. App. 4th Cir. 1994), *superseded on other grounds by statute as stated in Allen v. Valero Energy Corp.*, 951 So. 2d 370, 06-726 (La. App. 5th Cir. 2007).



Prescription. Prescription on claims subject to arbitration is suspended during the submission. La. C.C. Art. 3105. However, if suit was filed prior to the submission, the general prescription rules apply to the dispute under arbitration. *Id.*

### ASSIGNMENT

See "FIRE INSURANCE."

### ATTORNEYS

Attorney and Client. Under Louisiana law, same attorney may not represent both insured and insurer where insurer denies coverage or reserves its right to do so. *Dugas Pest Control v. Mutual Fire*, 504 So. 2d 1051 (La. App. 1st Cir. 1987).

Attorney of record has no general or implied authority to dismiss case with prejudice. He does have implied authority to dismiss without prejudice, notwithstanding that statute of limitations may have run at time of such dismissal. *Duhe v. Jones*, 186 So. 2d 419 (La. App. 4th Cir. 1966).

Under Louisiana law, attorney-client privilege is supplied by jurisprudence and premised on common law principles. *New Orleans Saints v. Griesedieck*, 612 F. Supp. 59 (E.D. La. 1985), *aff'd*, 790 F.2d 1249 (5th Cir. 1986).

Contract exists including implied promise to pay lawyer value of his services, when one employs lawyer for professional services and amount or measure of lawyer's fee is not expressly agreed. *Schaff v. Landers*, 355 So. 2d 289 (La. App. 4th Cir. 1978). In determining and fixing necessary attorney's fees, courts must follow Louisiana Code of Professional Responsibility which prohibits fees in excess of what is reasonable. That law requires courts to disregard any provision of attorney-client contract which would produce excessive or unearned fees. *Moody v. Arabie*, 498 So. 2d 1081 (La. 1986). The *Moody* decision has been modified by La. Rev. Stat. 23:1103 which states in pertinent part, that in the event employer or employee becomes party plaintiff in suit against third person, plaintiff is entitled to be reimbursed by intervenor for reasonable legal fees and costs in amount not to exceed 1/3 of intervenors pre-judgment payments or damages. And employer as intervenor is no longer responsible for attorney's fees attributable to credit for future compensation payments. Attorney is not entitled to receive compensation from anyone but his client, no matter how valuable his services. *Milly v. ADF Svcs. of Louisiana*, 514 So. 2d 630 (La. App. 4th Cir. 1987).

Employment of attorney is sufficiently established when it is shown that advice and assistance of attorney

are sought and received in matters pertinent to his profession or when agreement of representation has been made under conditions acceptable to both parties. *La Nasa v. Fortier*, 553 So. 2d 1022 (La. App. 4th Cir. 1989), *cert. denied*, 559 So. 2d 124 (La. 1990). However, relationship between attorney and client is purely contractual in nature and results from clear and express agreement. *Pontiff v. Behrens*, 518 So. 2d 23 (La. App. 1st Cir. 1987), *aff'd in part and vacated in part sub nom, In Re J.M.P.*, 528 So. 2d 1002 (La. 1988), *superseded by statute as stated in In re A.J.F.*, 764 So. 2d 47, 2000-0948 (La. 2000).

Employment Contracts. Attorney's fee may be provided by contract, or in absence of contract, may be determined by application of doctrine of unjust enrichment or quantum meruit. *Banks v. Pearson*, 446 So. 2d 545 (La. App. 3rd Cir. 1984).

Factors to be considered in determining fee to be awarded attorney on basis of quantum meruit are ultimate result obtained, responsibility incurred, importance of litigation, amount involved, extent and character of labor performed, legal knowledge and skill of attorney, number of appearances made, intricacies of facts and law involved, diligence of counsel, court's own knowledge and ability of party liable to pay. *Julius Cohen Jeweler v. Succession of Jumonville*, 506 So. 2d 535 (La. App. 1st Cir. 1987), *writ denied*, 511 So. 2d 1155 (La. 1987).

### AUTOMOBILES

Minimum age for Class "A," "B," or "C" (commercial driver's license) is 18. However, hazardous materials endorsements shall be issued only to persons twenty-one years of age or above. Minimum age for Class "D" (chauffeur's license) is 17. Minimum age for Class "E" (personal vehicle driver's license) is 17. La. Rev. Stat. 32:405.1. Application of minor for operating privileges shall not be granted unless signed by a parent with legal custody. Minimum age for Class "E" learner's license is 15. Minimum age for Class "E" intermediate license is 16. La. Rev. Stat. 32:407. School attendance is a prerequisite condition of any driving privileges before 18 years of age. La. Rev. Stat. 32:431.1

Agency. Owner not liable for damages caused by automobile operated by third person with his knowledge and consent unless he was present or third person was his agent, servant or employee and was acting at time of accident within course and scope of his employment. *Reed v. Arthur*, 556 So. 2d 937 (La. App. 3rd Cir. 1990). Where employee is driving his employer's vehicle at time of accident, it is presumed that he is acting within course and scope of his employment. Only strong and convincing evidence is sufficient to overcome this pre-



sumption. *Taylor v. Lumpkin*, 391 So. 2d 74 (La. App. 4th Cir. 1980).

**Compulsory Automobile Insurance.** Owners of motor vehicles are required to carry liability insurance or to provide security. La. Rev. Stat. 32:861 (A)(1). Declaration of insurance or security is required upon application for motor vehicle registration or inspection tag. La. Rev. Stat. 32:862 (C). Mandatory minimum liability limits of \$15,000/\$30,000/\$25,000. La. Rev. Stat. 32:900 (B)(2).

**Minors.** Parents are responsible for damage occasioned by their minor or unemancipated children, if the children reside in parents' household. La. C.C. Art. 2318.

**Guests.** No guest statute. One who invites or allows another to ride in his automobile owes duty of reasonable and ordinary care for his safety. *Smith v. Travelers Ins. Co.*, 430 So. 2d 55 (La. 1983). Guest is under no duty to supervise driving of vehicle and he is not obliged to look out for sudden or unexpected dangers that may arise. *Hutson v. Madison Parish Police Jury*, 496 So. 2d 360 (La. App. 2d Cir. 1986), writ denied, 498 So. 2d 749. Nevertheless, comparative negligence on guest's part can diminish his recovery. Thus, passenger is under duty to decline ride when it is obvious that driver is intoxicated or unduly fatigued. *Galmiche v. Smith*, 269 So. 2d 490 (La. App. 4th Cir. 1972), cert. denied, 263 La. 995, 270 So. 2d 126 (1972). Guest is required to warn driver of danger known to him but apparently unknown to driver only if guest's protests might have influenced driver. *Adams v. Security Ins. Co. of Hartford*, 543 So. 2d 480 (La. 1989). However, host driver was not liable to guest for guest's injuries where guest, who was only witness, had been sleeping at time of accident and was unable to say that host was not keeping proper lookout or that he was not driving at legal speed. *Craker v. Allstate Ins. Co.*, 259 La. 578, 250 So. 2d 746 (La. 1971).

**Master and Servant.** Owner of automobile is liable for negligence of employee driving automobile only if employee was acting within scope and course of employment at time of accident. *Hughes v. Flynn*, 489 So. 2d 1044 (La. App. 1st Cir. 1986).

If car is taken by employee for purposes of master, but side trip is made for benefit of employee or another and accident occurs during "temporary deviation" from employment, employer is not liable. But, if accident occurs after employee has "re-entered" his course and scope of employment, employer is liable. Further, there can be no re-entry until employee has completed unauthorized trip. *Harding v. Christiana*, 103 So. 2d 301 (La. App. Orl. 1958). Collision coverage applies when vehi-

cle is in hands of thief. *Moore v. Stuyvesant Ins. Co.*, 98 So. 2d 911 (La. App., Orl. 1957).

**Service of Process on Non-Resident Motorists.** La. Rev. Stat. 13:3474 and 3475 provide Louisiana Secretary of State is authorized agent for service for that non-resident, his authorized agent, employee, or person for whom he is legally responsible, by operating motor vehicle on highways, or permitting his authorized chauffeur to do so. However, notice of such service, together with copy of petition and citation, must be actually delivered to defendant by personal delivery or registered mail or certified mail with receipt requested. Proof of delivery is made by affidavit of party delivering petition or by defendant's return receipt. Act held constitutional in *Moore v. Payne*, 35 F.2d 232 (W.D. La. 1929). Statute of limitations is interrupted by service of legal process upon Secretary of State. Notice of non-resident required by Act may be delivered after limitation period. *Allen v. Campbell*, 141 So. 827 (La. App. 2d Cir. 1932). Statute does not permit such service upon non-resident owner who was not within state at time his auto was operated in Louisiana by unauthorized person. *Brassett v. USF&G*, 153 So. 471 (La. App. Orl. 1934).

Term "public highways" includes every way for travel by persons on foot or with vehicles which public has right to use either conditionally or unconditionally. *Galloway v. Wyatt Metal & Boiler Works*, 189 La. 837, 181 So. 187 (La. 1938).

**Uninsured Motorist Coverage.** All policies issued or delivered in state must include uninsured motorist coverage with limits equal to those for liability unless rejected in writing by insured. Insured may also select lower limits. Form used for insured's rejection of UM or selection of lower limits must conform to form prescribed by Department of Insurance. La. Rev. Stat. 22:1295. Arbitration provision may be included, but is optional with insured and may not be used to deprive court of jurisdiction or actions against insurer. La. Rev. Stat. 22:1295. Compulsory arbitration is not permissible in Louisiana. *Bergeron v. Gassen*, 185 So. 2d 106 (La. App. 4th Cir. 1966). Uninsured motorist coverage is deemed first party insurance coverage. As such, statute addressing penalties and attorneys fees for arbitrary and capricious refusal to unconditionally tender money for damages within 30 days of proof of loss applies. See "LIABILITY INSURANCE."

## AVIATION

**Crash.** Forced landing made as result of necessity not on regular airfield or other suitable place for landing constituted crash or collision. Fire damage to airplane occurring after forced landing was caused by or resulted from crash or collision, within terms of exclusionary



clause of policy, where primary cause of fire was pilot's manipulation of switch after returning to airplane at time when inflammable material spilled in landing area was near enough to be ignited by resulting spark. *Paul Foshie Dusting Co. v. Byron*, 158 So. 2d 345 (La. App. 3rd Cir. 1963), writ denied, 245 La. 956, 253 So. 2d 794 (La. 1971).

Exclusions in Life Insurance Policy. Policy which excluded death in aerial navigation, but which did not exclude it in "Incontestable Clause," covers death within exclusion when policy becomes "incontestable." *Bernier v. Pacific*, 173 La. 1078, 139 So. 629 (1932). See also *Garrell v. Good Citizen Mut. Ben. Ass'n*, 204 La. 871, 16 So. 2d 463 (1943). Full recovery allowed though incontestable clause limited recovery for death resulting from aerial navigation to amount of premium paid. *Bernier v. Pacific*, 173 La. 1078, 139 So. 629 (1932).

Life policy which covered insured as passenger but not as pilot, operator, crew member or cabin attendant was ambiguous as to whether coverage extended to insured as student pilot. Because of ambiguity, coverage was construed in favor of insured. *Cruz v. Home Ins. Co.*, 511 So. 2d 22 (La. App. 3rd Cir. 1987).

Naval Reserve officer killed in airplane to which he was assigned and who was responsible for control, operation and management of plane held member of "crew" within exclusion clause of life policy and beneficiary limited to recovery of premiums with interest. *LeBreton v. Penn Mut. Life Ins. Co.*, 223 La. 984, 67 So. 2d 565 (1953)

### BAILMENT

When the deposit is onerous, the depository is bound to fulfill his obligations with diligence and prudence. When the deposit is gratuitous, the depository is bound to fulfill his obligations with the same diligence and prudence in caring for the thing deposited that he uses for his own property. La. C.C. Art. 2930. Once owner of property proves existence of contract of deposit and loss of deposited articles, there is presumption that depository has not fulfilled his obligation to act as prudent administrator and loss resulted from depository's lack of care. Depository then has burden of exonerating himself from fault. *Northern Assur. Co. of America v. Cotton*, 658 So. 2d 246 (La. App. 2d Cir. 1995).

Auto dealer who retained possession of car sold for purposes of repair liable as bailee and must establish loss or damage not caused by his negligence. *Chrysler Credit Corp. v. Caufield*, 252 So. 2d 461 (La. App. 4th Cir. 1971).

Garage Keeper. Liable as bailee. *Kaiser v. Poche*, 194 So. 464 (La. App. Or. 1940).

Recovery Allowed. When car stolen or damaged where garage keeper: left car unlocked on street. *Meine v. Mossler Auto Exch.*, 10 La. App. 65, 120 So. 533 (1929); left keys in car and failed to take additional measures to secure automobile. *Kirshner v. Johnson*, 521 So. 2d 697 (La. App. 1st Cir. 1988); had insufficient number of employees and no guard rail around open lot. *Kaiser v. Poche*, 194 So. 464 (La. App. Or. 1940); had insufficient lighting. *Marine v. Rehm*, 177 So. 79 (La. App. Or. 1937); was unable to explain disappearance. *Potomac v. Blaise*, 181 So. 629 (La. App. Or., 1938); for fire, *Gulf v. Temple*, 187 So. 814 (La. App. 2d Cir. 1939); *Luke v. Security, Storage & Van Co.*, 24 So. 2d 692 (La. App. Or. 1946).

Recovery Not Allowed. Where loss is caused by overpowering force. La. C.C. Art. 1873. See also La. C.C. Art. 2930, comment (c). Bailor not liable for inevitable theft when not occasioned by bailor's lack of due care. *Livaudais v. Tung*, 197 La. 844, 2 So. 2d 232 (La. 1941).

Garage keeper not liable for personal effects left in car unless he had constructive knowledge of their presence. *Travelers Ins. Co. v. General Auto Serv.*, 220 So. 2d 738 (La. App. 4th Cir. 1969).

### BROKERS

See "AGENTS AND BROKERS."

### BURGLARY INSURANCE

Forcible Entry. Exclusion in home owner's policy pertained to loss of property in unattended automobile unless loss was result of forcible entry of which there were visible marks. Judgment was rendered for insured on belief of witnesses that visible markings existed along top of window of automobile from which property was removed. *Schmidt v. Travelers Ins. Co.*, 259 So. 2d 632 (La. App. 4th Cir. 1972). Testimony of slight, but visible damage to rubber gasket around door window of car is legally sufficient to allow recovery. *Smith v. Aetna*, 437 So. 2d 930 (La. App. 2d Cir. 1983). Policy provisions limiting liability to visible evidence of forced entry on premises at place of entry held valid under public policy. *Delta Decks v. U.S. Fire Ins. Co.*, 463 So. 2d 653 (La. App. 4th Cir. 1985).

Warranties. Policy requiring two employees on premises covered burglary occurring while only one was present, where other was ten minutes late. *Demary v. Royal Indem. Co.*, 185 So. 662 (La. App. 1st Cir. 1939).

Burglary. La. Rev. Stat. 14:62 defines simple burglary as unauthorized entering of any vehicle, watercraft, dwelling or other structure, movable or immovable, with intent to commit felony or any theft therein.



Mysterious Disappearance. "Mysterious disappearance" under policy occurs when ring disappeared under unknown or puzzling circumstances which aroused wonder or curiosity. No need to show possible or probable theft. *Engelhart v. Assurance Co. of Am.*, 139 So. 2d 108 (La. App. 2d Cir. 1961).

Forcible Taking. Where policy which covered all loss occasioned by robbery and which defined robbery as felonious and forcible taking including taking by violence, forcible taking did not necessarily mean taking by violence. *Schwegmann Bros. Giant Supermarkets v. Underwriters at Lloyd's, London*, 300 So. 2d 865 (La. App. 4th Cir. 1974), *app. denied*, 303 So. 2d 172 (La. 1974). Where policy language indicated wilful damage caused by burglars, but did not cover theft, cost of installing items stolen could be recovered but not cost of items themselves. *Sterling v. Audubon Ins.*, 452 So. 2d 709 (La. App. 3rd Cir. 1984), *writ denied*, 456 So. 2d 169 (La. 1984).

### CANCELLATION

Automobile Insurance. Automobile policy can only be canceled for: 1) nonpayment; 2) suspension or revocation of vehicle registration or driver's license; 3) fraud or material misrepresentation; 4) nonreceipt of insurance application by insurer for insurance in which valid binder issued. La. Rev. Stat. 22:1266 (B). Cancellation requires written notice by insurer mailed or delivered to insured not less than 30 days (10 days for nonpayment and must state reason) prior to effective date of cancellation. La. Rev. Stat. 22:1266 (D)(1). "Mailed to insured" connotes completed process, transmission of notice through United States Mail. Affirmative proof of non-delivery thus renders notice ineffectual. *Broadway v. All-Star Ins. Corp.*, 285 So. 2d 536 (La. 1973); *Simmons v. Allstate*, 509 So. 2d 645 (La. App. 3rd Cir. 1987). Refund of unearned premium must be returned by check to insured within ten days of expiration of the ten-day notice of cancellation. La. Rev. Stat. 22:887 (D)(3)(e). When notice to cancel or not renew policy has been mailed, presumption of notice can be overcome by affirmative proof of non-delivery. *Collins v. State Farm*, 997 So. 2d 51 (La. App. 4th Cir. 2008).

Purpose of notices required by La. Rev. Stat. 22:1266 dealing with cancellation and non-renewal of automobile policies is to make insured aware that his policy is being terminated and to afford him time to obtain other insurance protection. *Taylor v. MFA Mut. Ins. Co.*, 334 So. 2d 402 (La. 1976).

Note by insurance agent, asking insured to come by to discuss premium did not comply with statutory requirement that automobile liability insurer give written notice to policy holder at least 20 days in advance of

intention not to renew policy. *Taylor v. MFA Mut. Ins. Co.*, 334 So. 2d 402 (La. 1976). Expiration notice which did not clearly express whether 22-day given period included legal holidays or days where insurer was closed was ambiguous. *Morrison v. State Farm*, 503 So. 2d 654 (La. App. 4th Cir. 1987).

Fire Insurance. La. Rev. Stat. 22:885 (A) provides for cancellation by insured by written notice to company and surrender of policy prior to or on effective date of cancellation. Not applicable to life insurance, annuity contracts, or fire insurance.

Where insured not given notice of cancellation of policy until after purported effective date of cancellation and after accident occurred, purported cancellation was ineffective and policy remained in effect even though premium finance company had mailed notice to insurer to cancel policy for nonpayment of premiums. *Cockern v. Government Employees Ins. Co.*, 415 So. 2d 330 (La. App. 2d Cir. 1982).

### CHATTEL MORTGAGES

Prior to 2001, Louisiana law of chattel mortgages was governed by La. Rev. Stat. 9:5351 to 9:5366.2. These statutes were repealed by Acts 2001 No.128, §18. Nonetheless, Section 19 of Act 128 provided, "it is the intent of the legislature in enacting this Act that R.S. 9:2736, 4501 and 4502, 4521, 4758, 4770, and 5363.1 not be expressly or impliedly repealed by this Act, but that such laws remain in effect, and, at times when so provided, be applied to secured transactions subject to Chapter 9 of the Louisiana Commercial Law as revised by this Act." Thus, La. Rev. Stat. 9:5363.1 was not repealed and remains the only existing section under this part. For more on Louisiana Chattel Mortgages, see La. Rev. Stat. 9:5363.1.

### CONSTRUCTION OF POLICY

Automobile. Automobile policies issued for less than six months are to be considered, for all purposes of insurance code, as if written for policy period of six months. *Taylor v. MFA Mut. Ins. Co.*, 334 So. 2d 402 (La. 1976).

Exclusions. Exclusions in insurance policies must be clear and unmistakable. *Roger v. Estate of Moulton*, 513 So. 2d 1126 (La. 1987), *superceded on other grounds by statute as stated in Pierce v. Foster Wheeler Constructors, Inc.*, 906 So. 2d 605, 2004-0333 (La. App. 1st Cir. 2005). Insurance policy is contract, and rules established for interpretation of written agreements are applicable to such policies. *Commercial Union Ins. v. Piker*, 557 So. 2d 717 (La. App. 2d Cir. 1990); *Trinity Indus. Inc. v. Insurance Co. of North Am.*, 916 F.2d 267

(5th Cir. 1990), *reh'g denied*, 923 F.2d 851 (5th Cir. 1991). Where policy contains definition of any word or phrase, that definition is controlling. *Oncale v. Aetna*, 417 So. 2d 471 (La. App. 1st Cir. 1982).

**Ambiguity.** Where terms of policy are ambiguous, policy must be construed in favor of insured and against insurer. *Otwell v. State Farm Fire and Cas. Co.*, 914 So. 2d 100 (La. App. 2d Cir. 2005). However, where policy terms are clear and unambiguous, courts are to enforce terms as written. *Leblanc v. Ayseme*, 921 So. 2d 85, 2005-0297 (La. 2006). This rule of strict construction against insurer does not apply to clause contained in insurance contract which is statutory. *Boyette v. Underwriters at Lloyd's, London*, 372 So. 2d 592 (La. App. 3rd Cir. 1979). Neither will it be applied when it is dependent upon strained constructions, *Ray v. Republic Vanguard Ins.*, 503 So. 2d 217 (La. App. 3rd Cir. 1987), where it produces unreasonable and absurd result, or when insured or his broker supplies policy language. *Halpern v. Lexington Ins.*, 715 F.2d 191 (5th Cir. 1983).

**Ambiguity of liability policy provisions**, either of coverage or exclusion, does not establish coverage as matter of law but simply means that most reasonable and logical interpretation under circumstances will be adopted in favor of insured. *Spiers v. Lane*, 278 So. 2d 549 (La. App. 1st Cir. 1973).

### CONTRIBUTION

See also "FIRE INSURANCE"; "LIABILITY INSURANCE". Generally, La. C.C. Art. 1804 provides that among solidary obligors, each is liable for his virile portion. As between joint tortfeasors, they are liable only in proportion to their fault. La. C.C. Art. 2324 (B). However, joint tortfeasors who conspire to commit intentional acts are solidarily liable for 100% of damages. La. C.C. Art. 2324 (A). Consequently, in actions based on ordinary negligence and strict liability, defendant is not required to bring contribution claim against joint tortfeasor because defendant can only be held liable for his degree of fault.

**Prescription (statute of limitations)** does not begin to run on action for contribution until last co-tortfeasor has been required to pay common debt. *USF&G Co. v. Safeco*, 420 So. 2d 484 (La. App. 1st Cir. 1982).

**Indemnity.** With adoption of comparative fault, Louisiana has abandoned claims for tort or implied indemnity. Formerly, defendant whose liability was purely technical or passive could recover 100% of damages from wrongdoer who was actively negligent.

**Insolvent defendant.** Evidence of insolvency of one joint tortfeasor should not be considered in apportioning damages as between joint tortfeasors, where there are

solvent joint tortfeasors from whom plaintiff can recover. Inability to pay does not become relevant until solvent joint tortfeasor seeks contribution. *McGrew v. State Farm Auto Ins.*, 385 So. 2d 1276 (La. App. 3rd Cir. 1980). See also La. C.C. Art. 1806.

### DAMAGES

Trial court will be given much discretion in its award, and only where there is abuse of that discretion will it be modified or when damages are unsusceptible of precise measurement. La. C.C. Art. 1999; 2324.1; *Dahab v. Mathieu*, 478 So. 2d 1294 (La. App. 5th Cir. 1985). Finding of abuse must be based on facts in record. *Lewis v. St. Francis Cabrini Hosp.*, 556 So. 2d 970 (La. App. 3rd Cir. 1990).

**Contributory Negligence.** Louisiana is a pure comparative fault state. Plaintiff's damage award is reduced in proportion to percentage of comparative negligence attributable to him. La. C.C. Art. 2323.

**Punitive Damages.** Not available in Louisiana unless specific statutory authorization. Available in cases involving vehicle accidents where intoxication is cause. La. C.C. Art. 2315.4. General rule is that insurance applies to these damages unless there is specific exclusion. Penalties and attorney fees are also available in situations involving claims of bad faith against insurers. La. Rev. Stat. 22:1892; La. Rev. Stat. 22:1973.

### DEATH

See Law Digest Tables.

If party suffering damages as result of offense or quasi-offense has filed suit for such damages prior to his death, action will not abate until three (3) year inaction abandonment rule, and thus heirs may, at any time within that period seek to be substituted as plaintiffs. La. C.C.P. Art. 561 (A). If injured party has not filed suit prior to death and his action has not yet prescribed (statute of limitations is one year), his heirs may file to recover his damages within one year from date of death. La. C.C. Art. 2315.1. This action to recover damages may be brought by following parties in order indicated: surviving spouse and children or any of them; surviving father and mother or either of them, if he leaves no spouse or child; surviving brothers and sisters or any of them, if he left no spouse, child or parent; surviving grandfathers and grandmothers, or any of them if he left no spouse, child, parent or sibling. Action may be brought by decedent's succession (estate) representative in absence of statutory beneficiary. La. C.C. Art. 2315.1 (B).

**Action for Wrongful Death.** Action to recover damages sustained through wrongful death of decedent may

be recovered by following parties in order indicated: Surviving spouse and children or any of them; surviving father and mother or either of them, if he leaves no spouse or child; surviving brothers and sisters or any of them, if he left no spouse, child or parent; surviving grandfathers and grandmothers, or any of them if he left no spouse, child, parent or sibling. La. C.C. Art. 2315.2. Adopted relations are considered to be within classifications listed above. La. C.C. Art. 2315.2 (D). However, a father or mother who has abandoned deceased during minority is deemed not to have survived him. La. C.C. Art. 2315.2 (E).

### DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

### FIRE INSURANCE

La. Rev. Stat. 22:1311 and 22:1313 control substantive provisions to be set forth in any standard fire insurance policy issued, or covering property located in Louisiana.

Appraisal. Mortgagee under loss payable clause bound by appraisal award, even though not party to proceedings. *Officer v. American Eagle Fire Ins.*, 175 La. 581, 143 So. 500 (La. 1932).

Arson. To sustain defense of arson, insurer has burden of proving by preponderance of evidence that fire was of incendiary origin and that insured was responsible for fire. *Christensen v. State Farm*, 552 So. 2d 1377 (La. App. 5th Cir. 1989). When proof is circumstantial, evidence must be so convincing that it will sustain no other reasonable hypothesis but that insured was responsible for fire. *Childs v. Zurich Am. Ins.*, 476 So. 2d 403 (La. App. 2d Cir. 1985).

Binder. May be made orally or in writing, deemed to include all terms of standard fire policy. La. Rev. Stat. 22:1311 (C). No binder is valid beyond issuance of policy as to which it was given. La. Rev. Stat. 22:870.

Cancellation. Governed by La. Rev. Stat. 22:887, which requires at least 30 days written notice of cancellation or 10 days if for non-payment of premium. Burden of proof rests on insurer when relying upon cancellation of policy as defense to claims thereunder. *Norred v. Commercial Union Ins.*, 526 So. 2d 829 (La. App. 2d Cir. 1988); *Pellets v. Miller's Mut.*, 241 So. 2d 550 (La. App. 2d Cir. 1970). Insured may effect cancellation by directing to insurer and/or agent clear and unequivocal intent to do so. *Society of Roman Catholic Church v.*

*Northwestern Mut.*, 204 So. 2d 116 (La. App. 1st Cir. 1967).

Causation. Insurer not required to show causal relation between breach of warranty and loss to avail itself of warranty defense. Insurer need only show that: 1) there was breach of warranty; 2) that breach increased physical hazard under policy; and 3) that both breach and resulting increase in hazard existed at time of loss. *Rodriguez v. Northwestern Nat'l Ins.*, 358 So. 2d 1237 (La. 1978).

Chattel Mortgage. Breach of chattel mortgage clause is not a defense unless it increases moral or physical hazard. Insurer has burden of proving that physical or moral risk has been increased. *Rodriguez v. Northwestern Nat'l Ins. Co.*, 358 So. 2d 1238 (La. 1978). Mortgagee has insurable interest in property of mortgagor entirely distinct and separate from insurable interest of mortgagor. *Miller v. Hartford Fire Ins. Co.*, 412 So. 2d 662 (La. App. 2d Cir. 1992).

Co-Insurance. Insurer which has paid claim and taken subrogation has no right of action against co-insured of subrogator for fire loss caused by negligence of co-insured, absent design or fraud on part of co-insured. *State Farm v. Sentry*, 316 So. 2d 185 (La. App. 3rd Cir. 1975). Where both policies covering property contained similar clauses which provided that coverage of each becomes excess coverage if other insurance applies, clauses are mutually repugnant and ineffective. *Hartford v. Roger Wilson, Inc.*, 291 So. 2d 852, 353 (La. App. 3rd Cir. 1974). Co-insurance may not be required unless premium adjustment made. La. Rev. Stat. 22:694.

Explosion. Exclusion of loss by explosion held valid. *Levert-St. John, Inc. v. Birmingham Fire & Cas.*, 137 So. 2d 494 (La. App. 3rd Cir. 1961).

Friendly Fires. Where insured's bracelet destroyed in voluntarily set trash fire, insurer held liable; no difference between accidental loss resulting from "friendly fire" and accidental loss caused by hostile fire. *Salmon v. Concordia*, 161 So. 340 (La. App. 1935).

Insurable Interest. Insurable interest must exist at time policy issued and at time of loss. *Brown v. State Farm*, 363 So. 2d 967 (La. App. 3rd Cir. 1978).

Mortgage Clause. Loss payable clause appoints mortgagee as conditional payee. *Diaz v. Cherokee Ins.*, 275 So. 2d 922, 923 (La. App. 4th Cir. 1973). *Rushing v. Dairyland Ins.*, 456 So. 2d 599 (La. 1984), *superceded on other grounds by statute as stated in BHNO Partners, LTD. v. Canterbury Joint Venture*, 1996 WL 531832 (E.D. La. 1996). Interest of mortgagee is to extent of debt at time of loss. Standard mortgage clause constitutes separate contract. *Id.*



Mortgagee under loss payable clause may maintain direct action against insurer. *White System v. Merchants Fire*, 53 So. 2d 697 (La. App. 2d Cir. 1951).

Ownership. La. Rev. Stat. 22:1316 makes it duty of insurer to issue policy in correct name of either husband or wife. Breach of sole ownership and fee simple clause are not defenses unless moral or physical hazard increased. *Rayford v. Aetna*, 193 So. 413 (La. App. 1st Cir. 1940).

Proof of Loss. La. Rev. Stat. 22:878 requires insurer, upon written request, to furnish insured a proof of loss form. Insured's failure to furnish proof of loss is waived where insurer denies liability on policy or refuses to pay on other grounds. *St. Landry v. Teutonia Ins.*, 113 La. 1053, 37 So. 967 (La. 1905). Where insurer did not immediately furnish blank proofs of loss, insurer cannot subsequently urge defense of failure to furnish proof of loss within sixty days. *Bamburg v. American Security Life Ins.*, 241 So. 2d 606 (La. App. 2d Cir. 1970); *Talbert v. Northwestern Nat'l*, 167 La. 608, 120 So. 24 (La. 1929). Without express provision in mortgagee clause of fire policy, there is no duty on mortgagee to furnish proofs of loss and mortgagor's failure to furnish timely proofs of loss does not affect mortgagee's rights. *Peterson v. Mechanics' & Traders' Ins.*, 168 La. 850, 123 So. 596 (1929). Where total loss exceeds policy limits, of which insurer has knowledge, written proof of loss is not required. *Deville v. Louisiana Farm Bureau*, 378 So. 2d 457 (La. App. 3rd Cir. 1979).

For false statements or misrepresentations on proof of loss to prevent recovery, such statements must be made knowingly and wilfully with intent to defraud insurer concerning material matter. *Darby v. Safeco*, 545 So. 2d 1022 (La. 1989). *Cousin v. Page*, 372 So. 2d 1231 (La. 1979). Insurer has burden of proving misrepresentation and intent to deceive. *Darby v. Safeco*, 545 So. 2d 1022 (La. 1989).

Insurer was relieved of liability under fire insurance coverage where insured knowingly and wilfully overvalued property and also concealed fact that insured had been ordered by State Fire Marshall to repair building. *St. Paul Fire & Marine v. St. Clair*, 193 So. 2d 821 (La. App. 1st Cir. 1966).

Insured entitled to copy of his testimony taken pursuant to policy provision. *Hart v. Mechanics & Traders*, 46 F. Supp. 166 (E.D. La. 1942).

Prescription. Under standard fire policy providing one year prescription, but under which no suit could be filed within 60 days of loss, insured had 10 months to file suit instead of one year under burglary and theft provisions of homeowners policy attached to standard fire policy. *Grice v. Aetna*, 359 So. 2d 1288 (La. 1978). Pol-

icy governs when it allows longer period for filing suit than is required by statute. *Sargent v. Louisiana Health*, 550 So. 2d 843, 844 (La. App. 2d Cir. 1989).

Reformation. Policy reformed to allow new owner to recover where original owner is named as assured and mutual mistake existed. *Randazzo v. Insurance Co. of Pennsylvania*, 196 La. 822, 200 So. 267 (1941). Burden is on one seeking reformation to prove error by strong, clear, and convincing evidence. *Many v. Hartford*, 505 So. 2d 929 (La. App. 2d Cir. 1987).

Repairs and Replacements. Where insurer undertakes repairs, they must be complete; otherwise, insured may complete repairs and collect full cost regardless of amount of insurance. *Henderson v. Crescent*, 48 La. Ann. 1176, 20 So. 658 (1896).

Severable Contracts. Violation of iron safe clause does not void policy covering merchandise, store building, fixtures and furniture. Policy is severable. *Thompson v. State Assur.*, 160 La. 683, 107 So. 489 (1926); *O'Neal v. American Equitable*, 162 So. 2d 384 (La. App. 2d Cir. 1964).

Standard Provisions. Revised standard fire insurance policy was adopted in 1948 and re-enacted in revised statutes. La. Rev. Stat. 22:1311. La. Rev. Stat. 22:1318 provides for "valued policy" on property immovable by nature. No reference to movable property is made. *Lighting Fixture Supply Co. v. Pacific Fire*, 176 La. 499, 146 So. 35 (1932). Effective July 1988, this provision was legislatively repealed. Insurer using this policy language prior to change in law is protected. Valued policy law does not prohibit insurer from contesting extent of insurable interest of insured in immovable described in policy. *Miller v. Hartford*, 412 So. 2d 662 (La. App. 2d Cir. 1982). Valued policy law does not require that building be entirely destroyed to be total loss. *Hart v. North British*, 182 La. 551, 162 So. 177 (1935). Insured who fails to keep books and accounts in accordance with policy requirements bears burden of proof. *Crifasi v. Houston Fire & Cas.*, 222 La. 247, 62 So. 2d 395 (1952).

If insured building loses character as such, coverage does not extend to materials of which it had been composed. *Mix v. Royal Exch. Assur.*, 54 So. 2d 355 (La. App. Orl. 1951).

Vacancy. For purposes of clause in fire policy where vacancy or unoccupancy of premises rendered policy null and void, "vacancy" meant empty of goods and property and "unoccupied" meant absence of regular habitation by humans. *Boyette v. Underwriters at Lloyd's, London*, 372 So. 2d 592 (La. App. 3rd Cir. 1979).

Warranties. La. Rev. Stat. 22:1314 precludes insurer from alleging breach of warranty (except in specific circumstances set forth in statute) as policy defense. Anti-technical statutes, such as La. Rev. Stat. 22:1314, have been enacted to preclude insurer from denying coverage by use of complex policy provisions concerning facts untutored insured would find relevant to his coverage. *Benton Casing Serv., Inc. v. Avemco Ins. Co.*, 379 So. 2d 225 (La. 1979). Burden is on insurer to prove that alleged breach did, in fact, increase moral or physical hazard. *Brough v. Presidential*, 189 La. 880, 181 So. 432 (1938).

Windstorm. Defined as being wind of sufficient violence to be capable of damaging insured's property, either by impact of its own force, or by propelling some object against property. *Roach v. Continental Ins. Co.*, 237 La. 973, 112 So. 2d 680 (La. 1959).

Wrongful Acts of Insured. Even if fire policy does not state that recovery is barred if loss due to arson, arson is valid defense where insured burns his own house. *Fuselier v. USF&G*, 301 So. 2d 681 (La. App. 3rd Cir. 1974). Wife of arsonist not allowed to recover on half of home's value as innocent coinsured. *Ashworth v. State Farm*, 738 F. Supp. 1032 (W.D. La. 1990).

### FRAUD

See "AGENTS AND BROKERS"; "FIRE INSURANCE, Proof of Loss"; "REPRESENTATIONS AND WARRANTIES."

Knowingly false written or oral statements in support of denial of claim for payment or other benefits pursuant to insurance policy is punishable by fine and/or imprisonment not to exceed \$5,000 and/or 5 years. La. Rev. Stat. 22:1924. False statements in application for insurance shall bar recovery upon insurance contract where such statements materially affect insurer's acceptance of assumed risk or such statements are made with intent to deceive. La. Rev. Stat. 22:860 (B); *Kieffer v. Southern United Life Co.*, 437 So. 2d 919 (La. App. 2d Cir. 1983); *Benton v. Shelter Mut. Ins.*, 550 So. 2d 832 (La. App. 2d Cir. 1989). Insurer carries burden of proving that false statements made on application were made with intent to deceive and were important to insurer's decision to issue policy. *Gulf Wide Towing v. Associated Ins. Mgrs.*, 563 So. 2d 432 (La. App. 1st Cir. 1990); *Coleman v. Occidental Life*, 418 So. 2d 645 (La. 1982); *Jamshidi v. Shelter Mut. Ins. Co.*, 471 So. 2d 1141 (La. App. 3rd Cir. 1985); *Ragan v. Pilgrim Life*, 461 So. 2d 618 (La. App. 1st Cir. 1984). Intent to deceive will be discounted where agent wrote answers on application rather than insured and agent has failed to communicate importance of questions. Acts of agent bind insurer, not

insured. *Ryan v. Security Indus. Co. Ins.*, 386 So. 2d 939 (La. App. 3rd Cir. 1980).

### GUEST CASES

See "AUTOMOBILES."

### HOSPITAL

La. Rev. Stat. 46:8 subrogates any state supported or veterans administration hospital in state to right of injured party to recover for cost of medical treatment from person responsible for injury. La. Rev. Stat. 46:13 gives right of action to hospital against liable employer or insurer in compensation cases for services rendered to employees. Where damage suit is brought by injured party, copy of petition must be served on charity hospital or veterans administration hospital rendering service. La. Rev. Stat. 46:9.

Regulation. Hospital Licensing Law, La. Rev. Stat. 40:2100 *et seq.*, does not bestow on state any specific authority over internal administrative policies of private hospitals. *Baier v. Woman's Hosp. Foundation*, 340 So. 2d 360 (La. App. 1st Cir. 1976).

Medicare Information. Hospital owes duty to those eligible for Medicare benefits to disclose by appropriate means within reasonable time its non-participating status. Patient has corresponding duty to inquire as to his eligibility. *Algiers Med. Group v. Adams*, 275 So. 2d 907 (La. App. 4th Cir. 1973).

Management. Hospitals may require staff physicians to carry malpractice insurance as condition of employment. *Pollock v. Methodist Hosp.*, 392 F. Supp. 393 (E.D. La. 1975).

Standard of Care. Hospital is not insurer of patient's safety, *Berry v. Rapides Gen. Hosp.*, 527 So. 2d 583 (La. App. 3rd Cir. 1988), but is bound to exercise requisite amount of care toward patient that patient's individual condition may require. *Palermo v. NME Hosp.*, 558 So. 2d 1342 (La. App. 4th Cir. 1990); *Hunt v. Bogalusa Med. Ctr.*, 303 So. 2d 745 (La. 1974).

Blood Services. La. C.C. Art. 2322.1 does not allow causes of action except those based on negligence with respect to blood and blood products. Strict liability and warranties of any kind without negligence shall not be applicable as such services are declared not to be sales. This does not deny constitutional rights. *Heirs v. Blood Svcs.*, 506 F.2d 841 (5th Cir. 1975); *see also* La. Rev. Stat. 9:2797

### HUSBAND AND WIFE

Community Property Rights. Under 1980 revisions of Louisiana Community Property Law, there are three



types of marriage regimes: 1) legal or community; 2) contractual; and 3) partly legal and partly contractual. La. C.C. Art. 2326, 2327. All property acquired during marriage and under legal regime, as result of efforts of husband or wife, belongs to community property. La. C.C. 2338. Damage for tortious injuries to either spouse are separate property. La. C.C. Art. 2344. Portion of damages attributable to expenses incurred by community, or in compensation of loss of community earnings, is community property. La. C.C. Art. 2344.

Either spouse is proper plaintiff to sue to enforce community right; however, if one spouse is managing spouse with respect to right sought to be enforced, that spouse is proper plaintiff. Where doubt exists whether right sought to be enforced is community right or separate right of plaintiff spouse, that spouse may sue in alternative to enforce right. When only one spouse sues to enforce community right, other spouse is necessary party. Where failure to join may result in injustice, court on own motion may order joinder. La. C.C.P. Art. 686. If managing spouse is absentee or mental incompetent, other spouse is proper plaintiff. La. C.C.P. Art. 695.

Marriage. Unless judicially separated, spouses may only sue each other for causes of action concerning marriage, child custody, or arising out of contract. La. Rev. Stat. 9:291. This provision does not affect direct action statute, La. Rev. Stat. 22:1269, so that husband may sue wife's insurer for injuries he sustained prior to or during marriage. *LeBlanc v. New Amsterdam Cas. Co.*, 202 La. 857, 13 So. 2d 245 (La. 1943); *McHenry v. American Employers*, 18 So. 2d 840 (La. App. 2d Cir. 1944). Surviving widow separated by judgment is entitled to bring action for wrongful death. *Harris v. Lumbermen's Mutual Cas. Co.*, 48 So. 2d 728 (La. App. 1st Cir. 1950).

## INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

## INLAND MARINE

According to La. Rev. Stat. 22:724, "Every insurer writing any form of commercial or residential property insurance, automobile insurance, marine, or inland marine insurance shall maintain a written catastrophe response plan or plan that describes how the insurer will respond to a catastrophe affecting its policyholders. During an examination required by R.S. 22:1981, or at such other time as the commissioner deems appropriate, he shall review the written catastrophe response plan of each insurer, the insurance written, and the response plan most appropriate for the type of insureds at issue. The written catastrophe response plan of each insurer shall be deemed to be confidential, proprietary information subject to the protections of the Uniform Trade Secrets Act,

pursuant to Chapter 13-A of Title 51 of the Louisiana Revised Statutes of 1950, shall not be subject to the public records disclosures of R.S. 44:1, and shall not be made public by the commissioner. Effective August 15, 2009 this provision was legislatively repealed by Acts 2009, No. 503 § 2. In addition, La. R.S. 22:1468 states that every member of or subscriber to the Property Insurance Association of Louisiana or other rating organization shall adhere to the rates and filings made on its behalf by such organization, except that: in case of fire, title, marine, and inland marine insurance to which this Part applies, any insurer may make written application to the commission for permission to file a deviation from the class rates, schedules, rating plans, or rules respecting any kind of insurance, or class of risk within a kind of insurance or combination thereof. Such application shall specify the basis for the modification, and copy thereof shall also be sent simultaneously to such rating organization concerned.

## LIABILITY INSURANCE

See also "NEGLIGENCE."

Insolvency of Insured. La. Rev. Stat. 22:1269 requires that liability policies must provide that insolvency or bankruptcy of insured shall not release insurer, and that executory judgment shall be deemed prima facie evidence of insolvency, and action may thereafter be maintained against insurer.

Insurer Subject To Direct Action. La. Rev. Stat. 22:1269 provides that injured party, at his option has right of direct action against insurer within terms and limitations of policy. Injured party can bring action in parish where injury occurred or in which domicile of insured is located. La. Rev. Stat. 22:1269 applies when either accident or injury giving rise to insurer's liability occurred in Louisiana or when insurance policy was written or delivered in Louisiana. *Landry v. Travelers Indem. Co.*, 704 F. Supp. 109 (W.D. La. 1989); *Heaton v. Gulf Int'l. Marine*, 536 So. 2d 622 (La. App. 1st Cir. 1988).

Limits of Direct Action. Right of direct action exists against insurer alone, or against both the insured and insurer jointly and in solido. However, action may be brought also against insurer alone when: insured is adjudged bankrupt by court of competent jurisdiction or when proceedings to adjudge insured bankrupt have been commenced before court of competent jurisdiction; insured is insolvent; service of citation or other process cannot be made on insured; cause of action is for damages as result of offense or quasi-offense between children and their parents or between married persons; insurer is uninsured motorist carrier; or insured is deceased. La. Rev. Stat. 22:1269 (B)(1).



“No Pay, No Play.” Under La. Rev. Stat. 32:866, owner or operator of uninsured motor vehicle is not entitled to recover first \$15,000 of bodily injury and first \$25,000 of property damages in action for personal injuries against another driver unless the driver of the other vehicle: 1) is cited for violation of La. Rev. Stat. 14:98 and subsequently convicted of or pleads nolo contendere to such offense; 2) intentionally causes accident; 3) flees from scene of accident; or 4) is in furtherance of commission of felony offense at time accident. Louisiana’s compulsory motor vehicle insurance law requires at least \$15,000 in liability coverage.

**Permissive User.** Once initial permission is given by insured to individual to operate insured’s vehicle, that individual is covered under omnibus clause of policy for entire time individual uses said vehicle, even if use extends beyond scope of insured’s permission. *King v. Louisiana Farm Bureau Ins. Co.*, 549 So. 2d 367 (La. App. 2d Cir. 1989). Policy requiring “permission” provides coverage only when operator has express or implied permission of insured and not just subjective reasonable belief of such permission. *Francois v. Ybarzabal*, 483 So. 2d 602 (La. 1986). In order to establish liability of owner of automobile for actions of permissive driver, plaintiff must establish either agency relationship between driver and owner or that owner knew or should have known of some physical or mental impediment affecting driver’s ability to control automobile. *Mitchell v. Wall*, 482 So. 2d 817 (La. App. 4th Cir. 1986).

**Medical Payments.** Injured automobile passengers, who were paid their medical expenses under medical payment provisions of policy, cannot again be awarded same medical expenses in tort action brought directly against insurer under same policy. *Gunter v. Lord*, 242 La. 943, 140 So. 2d 11 (La. 1962). But in cases where an insured’s damages exceed policy’s UM limit, insurer does not get a credit for sums paid under its medical payments coverage. *Sutton v. Oncale*, 765 So. 2d 1072 (La. App. 5th Cir. 2000). When medical payments are made under one policy, liability insurer under another policy is not entitled to credit against its liability for payments paid by other company. *Crenwelge v. State Farm*, 277 So. 2d 155 (La. App. 3rd Cir. 1973).

**Construction and Application.** Courts are bound to give legal effect to terms of insurance policies according to true intent of parties; intent is determined from words of contract when they are clear, explicit and lead to no absurd consequences. *Miller v. Duthu*, 470 So. 2d 500 (La. App. 1st Cir.), writ denied, 474 So. 2d 1310 (La. 1985).

Insurer has burden of proving applicability of its exclusionary clause. *Richard v. Old Southern Life Ins. Co.*, 502 So. 2d 1168 (La. App. 3rd Cir. 1987). Denial of

coverage or reservation of rights must be plead specifically as affirmative defense in pleadings. *Griffin v. Schwegmann Bros.*, 542 So. 2d 710 (La. App. 4th Cir. 1989).

Any ambiguity in insurance policy must be construed in favor of insured and against insurer. *Pareti v. Sentry Indem. Co.*, 536 So. 2d 417 (La. 1988). Where ambiguity relates to provision that limits liability under policy, provision will be interpreted liberally in favor of coverage. *Credeur v. Luke*, 368 So. 2d 1030 (La. 1979).

**Newly Acquired Automobiles.** Coverage existed on newly acquired truck as it was deemed replacement vehicle and not additional vehicle, and there was little or no increase in risk to insurer. *Pomares v. Kansas City S. Ry. Co.*, 474 So. 2d 976 (La. App. 5th Cir.), writ denied, 477 So. 2d 1131 (La. 1985).

**Substitute Vehicles.** Where insured borrowed truck from brother for weekend hunting trip because insured’s vehicle had been totally destroyed six weeks earlier, use of truck was temporary so coverage existed under policy. *Tunks v. Hartford Acc. & Indem. Co.*, 520 So. 2d 1060 (La. App. 3rd Cir. 1987).

**Rented Vehicles.** La. Rev. Stat. 22:1296 mandates that every insurance company authorized to write automobile liability, physical damage, or collision insurance extend to temporary substitute motor vehicles as defined in applicable policy and rented private passenger automobiles any and all such insurance coverage in effect in original policy or policies.

**Uninsured Motorist Coverage.** All policies issued or delivered for issue in state must include uninsured motorist provisions unless rejected in writing by insured. Unless insured rejects coverage, selects lower limits in writing or selects economic only coverage, insured will be obtaining uninsured motorist coverage not less than limits of liability coverage whenever insured obtains automobile liability coverage. La. Rev. Stat. 22:1295, *Tugwell v. State Farm*, 609 So. 2d 195 (La. 1992). After September 1, 1987, such rejection or selection of lower limits shall be made only on form prescribed by commissioner of insurance. La. Rev. Stat. 22:1295 (1)(a)(ii). Arbitration provision may be included, but is optional with insured and may not be used to deprive court of jurisdiction or to deprive insured of actions against insurer. La. Rev. Stat. 22:1295 (2)(b)(5). Coverage for punitive or exemplary damages may be excluded by terms of policy. La. Rev. Stat. 22:1295 (1)(a)(i).

Subject to policy’s limits, tort victim’s uninsured motorist insurer is solidarily liable with uninsured tortfeasor for full amount of tort victims damages. La. C.C. Art. 1794; *Rutkowski v. State*, 550 So. 2d 257 (La. App. 4th Cir. 1989).



Stacking. Insured will not be entitled to increase limits of liability because of multiple motor vehicles being covered under single policy, or because of multiple uninsured motorist provisions, or multiple policies with such provisions. However, if uninsured motorist coverage of primary policy (*i.e.*, policy covering vehicle in which injured party was occupant) is exhausted due to damages, injured party may recover as excess from other uninsured motorist coverage available to him under another policy, but only in case where injured party is occupant of automobile which is not owned by said injured party's resident spouse or resident relative. La. Rev. Stat. 22:1295 (1)(c).

La. Rev. Stat. 22:1892 requires all insurers issuing any type of insurance contract, other than life insurance, health and accident insurance, and workers compensation, to tender payment of any claim due to insured within 30 days after receipt of satisfactory proofs of loss from insured or any party in interest. La. Rev. Stat. 22:1892 (A)(1). Failure to make such payment within 30 days, when such failure is found to be "arbitrary, capricious, or without probable cause" subjects insurer to penalty of 50% on total amount of loss or \$1,000, whichever is greater, in addition to amount of loss. La. Rev. Stat. 22:1892 (B)(1). This statute has been interpreted as requiring insurer who has some liability to insured to tender unconditionally a reasonable payment to insured - "a figure over which reasonable minds could not differ[.]" and failure to do so subjects insurer to penalties and attorneys fees. *McDill v. Utica Mut. Ins. Co.*, 475 So. 2d 1085, 1092 (La. 1985).

Burden of proof is on claimant to show satisfactory proof of loss as necessary predicate to showing that insurer's actions are arbitrary, capricious, or without probable cause. *Webb v. Goodley*, 512 So. 2d 527 (La. App. 3rd Cir. 1987). For example, an insurer acted arbitrarily and capriciously in not tendering payment to insured when there was little dispute that uninsured motorist insurer had some liability although there was dispute as to amount of damages. *Burton v. Foret*, 484 So. 2d 753 (La. App. 1st Cir.), *aff'd*, 498 So. 2d 706 (La. 1986). Insurer was not arbitrary or capricious in refusing to tender payment to insured where insurer had "reasonable basis" to defend against claim or where refusal to pay was based on "substantial issues." *Kikendall v. American Progressive Ins. Co.*, 457 So. 2d 53 (La. App. 1st Cir. 1984); *Gibson v. Dixie Ins. Co.*, 542 So. 2d 635 (La. App. 5th Cir. 1989).

A complementary provision to La. Rev. Stat. 22:1892 is La. Rev. Stat. 22:1973, which provides that insurer owes to insured "duty of good faith and fair dealing" and affirmative duty to adjust claims fairly and promptly and to make reasonable effort to settle claims

with insured and/or claimant. Insurer who breaches these duties may be liable for penalties of amount not to exceed two times damages sustained or \$5,000, whichever is greater, in addition to general and/or special damages sustained. La. Rev. Stat. 22:1973 (A), (C). Health, accident and burial insurance policies are excepted from this statute. La. Rev. Stat. 22:1973 (D).

The following acts are deemed breaches of insurer's duties under La. Rev. Stat. 22:1973: misrepresentation of pertinent facts or insurance policy provisions relating to any coverage at issue; failure to pay settlement within 30 days after agreement is reduced to writing; denial of coverage or attempt to settle claim on basis of application which insurer knows was altered without notice to, or knowledge or consent of insured; misleading claimant as to applicable prescriptive periods; and failure to pay amount of any claim due to any person insured by contract within 60 days after receipt of satisfactory proof of loss from claimant when failure is arbitrary, capricious, or without probable cause. La. Rev. Stat. 22:1973 (B).

Penalty for failure to initiate loss adjustment of property damage claim under La. Rev. Stat. 22:1892 (A)(3) applies to third-party claimants. *Rogers v. Commercial Union Ins. Co.*, 796 So. 2d 862 (La. App. 3rd Cir. 2001); *Hebert v. Hill*, 855 So. 2d 768, No. 37,208 (La. App. 2d Cir. 2003).

Personal Liability Coverage. In case where insured punched plaintiff and fractures his jaw, and insured's homeowner's policy excluded coverage for bodily injury "which is either expected or intended from the standpoint of the insured[.]" court held exclusion required inquiry into subjective intention of insured. *Breland v. Schilling*, 550 So. 2d 609 (La. 1989).

Owners Landlords' and Tenants' Liability. "This type of coverage pertains only to claims arising out of the *ownership, maintenance, or use* of the insured premises and all operations necessary or incidental to ownership, maintenance, or use." *Hall v. North East Ins. Co.*, 507 So. 2d 255, 257 (La. App. 3rd Cir. 1987) (emphasis in original).

Homeowner's Insurance. "Property damage," as defined in plaintiff's homeowner policy, was held to be broad enough to encompass damages for "loss of reputation," "damages to his standing in the eyes of his employees" and "loss of business revenues" in slander/defamation suit. *Williamson v. Historic Hurstville Ass'n*, 556 So. 2d 103 (La. App. 4th Cir. 1990).

Insurer's Duty to Defend. Insured's obligation to defend under insurance policy arises whenever pleadings against insured disclose possibility of liability under policy. *Meloy v. Conoco, Inc.*, 504 So. 2d 833 (La. 1987).



This is true for insurers who provide either primary or excess coverage. *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 230 So. 2d 253 (La. 1969). When excess insurer uses term “collectible” or “recoverable,” it is agreeing to drop down in event that primary coverage becomes uncollectible or unrecoverable; on other hand, when excess insurer uses term “covered” or “not covered,” it is agreeing to drop down only in event that underlying policy does not provide coverage. *Mission Nat'l Ins. Co. v. Duke Transp. Co.*, 792 F.2d 550 (5th Cir. 1986).

Primary insurer in conducting settlement negotiations and defense efforts does not owe delictual duty to excess insurer of its insured. *Great S.W. Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966 (La. 1990).

Contribution between Joint Tortfeasors. Article 2324 of Louisiana Civil Code provides that, unless there is solidary liability because one has conspired with another to commit intentional or wilful act, then liability for damages caused by two or more persons shall be joint and divisible obligation. Joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to fault of such other person, including person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in La. Rev. Stat. 23:1032, or that other person's identity is not known or reasonably ascertainable.

Cooperation of Insured in Defense of Action. No statute on subject. Standard policy provisions prevail. Defense of failure to cooperate is an affirmative one. Burden of establishing it lies with insurer. *Lindsey v. Gulf Ins. Co.*, 7 So. 2d 757 (La. App. 2d Cir. 1942). Clause not violated because action brought by named insured on behalf of injured insane brother against another brother, also insured. *Levy v. Indemnity Ins. Co.*, 8 So. 2d 774 (La. App. 2d Cir. 1942). Lack of cooperation sufficient to defeat recovery must be substantial and material aspect which results in prejudicing insurer. *Bourgeois v. Great Am. Ins. Co.*, 222 So. 2d 70 (La. App. 4th Cir. 1969).

Cancellation. In general, cancellation by insurer of any policy which by its terms is cancellable at option of insurer, may be affected only by either 1) actually delivering or mailing to insured or its representative written notice of such cancellation not less than 30 days prior to effective date of cancellation, except in cases of non-payment of premium, or 2) by providing any insured in writing reasons for cancellation of policy upon request by named insured. La. Rev. Stat. 22:887 (A). This does not apply to temporary life insurance binders nor to con-

tracts of life or health and accident insurance which did not contain provision for cancellation prior to date to which premiums had been paid. La. Rev. Stat. 22:887 (E). In addition, insurer may not cancel or refuse to renew any policy of group or family group health and accident insurance, except for non-payment of premium or failure to meet requirements for group insurance policy, until 60 days after insurer has notified policyholders in writing by certified mail of such cancellation or non-renewal, which notice must also include reasons for policy cancellation. La. Rev. Stat. 22:887 (F).

No notice of cancellation of automobile liability insurance policy is effective unless mailed by certified mail or delivered by insurer to named insured at least (30) days prior to effective date of cancellation; however, if cancellation is for non-payment of premium, at least (10) days notice of cancellation accompanied by reasons therefor shall be given. La. Rev. Stat. 22:1266 (D)(1). This section does not apply to non-renewal. Insurer may not fail to renew policy unless it mails or delivers to named insured, at address shown in policy, at least (20) days advance notice of its intention not to renew. This subsection shall not apply: (a) if insurer has indicated willingness to renew; (b) in case of non-payment of premium; (c) if insurer or company within same group as insurer has offered to issue renewal policy to named insured; (d) if named insured has provided written notification to insurer of insured's intention not to renew policy. La. Rev. Stat. 22:1266 (E)(1). Proof of mailing notice of cancellation or intention not to renew, or of reasons for cancellation to named insured at address shown in policy is sufficient proof of notice. La. Rev. Stat. 22:1266 (F).

Insured may cancel any policy which by its terms is cancellable at insured's option, by written notice to insurer and surrender of policy, or if policy has been lost or destroyed, insurer may accept and in good faith rely upon insured's written statement setting forth fact of such loss or destruction. La. Rev. Stat. 22:885 (A). Within thirty days of such cancellation, insurer shall reimburse insured any unearned premium paid on policy. La. Rev. Stat. 22:885 (B).

Material Misrepresentation. Under La. Rev. Stat. 22:860 (A), insurance company may defeat or void insurance contract if insured made material misrepresentation with intent to deceive in applying for insurance coverage. La. Rev. Stat. 22:860 (A). Material misrepresentation requires showing of both false statement that materially affects risk, and intent to deceive. *Darby v. Safeco Ins. Co.*, 545 So. 2d 1022 (La. 1989). Insurer may be deemed to have waived or will be estopped from asserting defense of material misrepresentation to avoid contract when insurer was put on notice sufficient to put

reasonably prudent insurer on inquiry to investigate additional facts. *Swain v. Life Ins. Co.*, 537 So. 2d 1297 (La. App. 2d Cir.), writ denied, 541 So. 2d 895 (La. 1989).

### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

All actions for damages arising out of offenses or quasi-offenses (torts) must be brought within 1 year of date injury/damage is sustained. La. C.C. Art. 3492. Survival and wrongful death actions also prescribe 1 year from date of death. La. C.C. Arts. 2315.1 and 2315.2. Delictual actions which arise due to damages sustained as a result of an act defined as a crime of violence must be brought within two years from the day the injury or damage is sustained. La. C.C. Art. 3493.10. Actions against common carriers for loss or damage to freight must be brought within 2 years from date of shipment. La. Rev. Stat. 45:1100. Actions for the recovery of compensation for services rendered, actions for arrearages of rent and annuities, actions on money lent, actions on open accounts, and actions to recover underpayments or overpayments of mineral royalties all must be brought within three years of the act or omission giving rise to the action. La. C.C. Art. 3494. Actions on instruments or promissory notes, whether negotiable or not, must be brought within 5 years. La. C.C. Art. 3498. All personal actions, including one for breach of contract, must be brought within 10 years. La. C.C. Art. 3499. Insurer admitting liability coupled with prolonged negotiations with adjusters led insured to believe company would settle, insurer could not invoke limitation of action clause in windstorm policy. *Brocato v. Sun Underwriters Ins. Co.*, 219 La. 495, 53 So. 2d 246 (La. 1951). Suit under fire and extended coverage policy must be brought within 12 months of date of loss, not 12 months from expiration of 60 days after ascertainment of loss. *Gremillion v. Travelers Indem. Co.*, 256 La. 974, 240 So. 2d 727 (La. 1970).

Liability Insurance. Filing of suit against 1 joint obligor/tortfeasor interrupts prescription as to other joint obligor/tortfeasor. La. C.C. Arts. 1799, 2324. *Vicknair v. Hibernia Bldg. Corp.*, 479 So. 2d 904 (La. 1985); superseded by statute as stated in *Touchard v. Williams*, 617 So. 2d 885 (La. 1993), superseded by statute as stated in *Dumas v. State ex. Rel Dept. of Culture, Recreation & Tourism*, 828 So. 2d 530, 2002-0563 (La. 2002); see also *Peterson v. Skains*, 509 So. 2d 197 (La. App. 1st Cir. 1987), writ denied, 513 So. 2d 297 (La. 1987). Interruption of prescription occurs even though process is defective when process informs proper person of legal demands arising from described occurrence. *Vernon v.*

*Illinois Cent. R. Co.*, 154 La. 370, 97 So. 493 (La. 1922). However, proper person, as designated by law, must be served before service of process will interrupt running of statute of limitations ("prescriptive period"). *Conner v. Continental S. Lines*, 294 So. 2d 485 (La. 1974). See also La. C.C. Art. 3462.

### MALPRACTICE

Medical. Consent. Written consent to medical treatment must set forth nature and purpose of treatment to be undertaken, disclose known risks and alternate treatments available, acknowledge such disclosure, acknowledge that all questions asked about treatment have been answered satisfactorily, and must be signed by patient or by person authorized by law to consent when patient cannot do so. La. Rev. Stat. 40:1299.40 (A). Except in the case where consent was induced by misrepresentation of material facts, written consent in compliance with requirement of La. Rev. Stat. 40:1299.40 (A) creates rebuttable presumption of informed consent. In suit based on negligent failure to disclose, both disclosure and failure to disclose based on inclusion of procedure in panel list whereby disclosure is not required are admissible, and will create rebuttable presumption of compliance with disclosure. Such presumption shall be included in jury instructions. La. Rev. Stat. 40:1299.40 (E)(7)(a)(i). Failure to disclose for procedures which require disclosure is admissible, and shall create presumption of negligent failure to conform to disclosure, unless disclosure was not medically feasible (e.g., emergency). La. Rev. Stat. 40:1299.40 (E)(7)(a)(ii). Oral consent must meet criteria set forth in La. Rev. Stat. 40:1299.40 (A) and is subject to ordinary proof according to rules of evidence. La. Rev. Stat. 40:1299.40 (C). La. Rev. Stat. 40:1299.53 prescribes categories of persons who are authorized and empowered to consent to treatment on behalf of another, but any person 18 years of age or over may refuse to consent to treatment as to his own person. La. Rev. Stat. 40:1299.56. Consent will be implied where physician deems emergency exists, proposed treatment is reasonably necessary, alternative consent is unavailable, and delay is expected to jeopardize life or health. La. Rev. Stat. 40:1299.54 (A).

Death. Person will be considered dead if, in announced opinion of physician duly licensed in state of Louisiana, based on ordinary standards of approved medical practice, person has experienced irreversible cessation of spontaneous respiratory and circulatory functions. La. Rev. Stat. 9:111. In event that artificial means of support preclude determination that these functions have ceased, person will be considered dead if in announced opinion of physician, duly licensed in state of Louisiana, based upon ordinary standards of approved medical practice, person has experienced irreversible



total cessation of brain function. La. Rev. Stat. 9:111. Death will have occurred at time when relevant functions ceased. La. Rev. Stat. 9:111. In any case when organs are to be used in transplant, then additional physician, duly licensed in state of Louisiana, not member of transplant team, must make pronouncement of death. La. Rev. Stat. 9:111.

**Standard of Care.** In malpractice action based on negligence of licensed physician, optometrist, chiropractic physician or dentist, plaintiff shall have burden of proving: 1) degree of knowledge or skill possessed or degree of care ordinarily exercised by physicians, optometrists, chiropractic physicians or dentists licensed to practice in state of Louisiana and actively practicing in similar community or locale and under similar circumstances; and where defendant practices in particular specialty and where alleged acts of medical negligence raise issues peculiar to particular medical specialty involved, then plaintiff has burden of proving degree of care ordinarily practiced by physicians, optometrists, chiropractic physicians or dentists within involved medical specialty; 2) that defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in application of that skill; and 3) that as proximate result of this lack of knowledge or skill or failure to exercise this degree of care, plaintiff suffered injuries that would not otherwise have been incurred. La. Rev. Stat. 9:2794 (A).

**Burden of Proof.** In medical malpractice actions, jury shall be instructed that plaintiff has burden of proving, by preponderance of evidence, negligence of physician, optometrist, chiropractic physician or dentist. Jury shall be further instructed that injury alone does not raise presumption of physician's, optometrist's, chiropractic physician's or dentist's negligence. However, these jury instructions do not apply to situations where doctrine of *res ipsa loquitur* is found by Court to be applicable. La. Rev. Stat. 9:2794 (C).

**Medical Arbitration.** La. Rev. Stat. 9:4230 *et seq.* establishes guidelines and procedures for voluntary binding arbitration of medical and dental services or supply contracts.

**Medical Review Panel.** Specific guidelines and procedures exist for mandatory medical review panel which must be convened before any malpractice action may be brought in courts of this state against qualified health care providers. La. Rev. Stat. 40:1299.47 (B). Panel shall consist of three health care providers who hold unlimited licenses to practice their profession in Louisiana and shall be chaired by one attorney. La. Rev. Stat. 40:1299.47 (C). Panel's sole duty is to render expert medical opinion as to whether evidence supports conclusion that defendant or defendants acted or failed

to act within appropriate standards of care. La. Rev. Stat. 40:1299.47 (G). Challenged provisions of Act have been held constitutional by the Louisiana Supreme Court in *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Derouen v. Kolb*, 397 So. 2d 791 (La. 1981); *Vincent v. Romagosa*, 425 So. 2d 1237 (La. 1983).

**Damages.** Total amount recoverable shall not exceed \$500,000 plus interest and costs, while qualified health care provider is not liable for more than \$100,000 plus interest. La. Rev. Stat. 40:1299.42 (B). Excess liability is covered by statutorily created Patients Compensation Fund. La. Rev. Stat. 40:1299.44. Also, in addition to the \$500,000 cap on liability, recovery of unlimited future medical care is available. La. Rev. Stat. 40:1299.43 (D).

**Prescription.** No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital duly licensed under laws of this state, community blood center or tissue bank under La. Rev. Stat. 40:1299.41 (A), whether based upon tort or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from date of alleged act, omission or neglect, or within one year from date of discovery of alleged act, omission or neglect; provided, however, that even as to claims filed within one year from date of such discovery, in all events such claims shall be filed at latest within period of three years from date of alleged act, omission or neglect. La. Rev. Stat. 9:5628 (A).

**Legal Prescription.** Generally, malpractice action against attorney, whether based upon tort or breach of contract, shall be brought in proper venue within one year. La. Rev. Stat. 9:5605 (A). Prescriptive period remains one year from date of act, omission, or neglect, or one year from date of act, omission, or neglect is (or should have been) discovered. Regarding actions filed within one year of discovery of act, in all events such actions must be filed no later than three years after such act, omission, or neglect was committed. La. Rev. Stat. 9:5605 (A); *B. Swirsky & Co. v. Bott*, 598 So. 2d 1281 (La. App. 4th Cir. 1992); *Lynn v. Brown*, 655 So. 2d 675 (La. App. 2d Cir. 1995).

**Standard of Care.** An attorney is obligated to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in locality; while attorney is not required to exercise perfect judgment in every instance, his license to practice holds out to client that he possesses certain minimal skills, knowledge and abilities. *Muse v. St. Paul Fire & Marine Ins. Co.*, 328 So. 2d 698 (La. App. 1st Cir. 1976).

That attorney's judgment in confecting contracts, handling suits and doing other business may result in litigation is not, in and of itself, breach of attorney's duty to client. *Ramp v. St. Paul Fire & Marine*, 263 La. 774, 269 So. 2d 239 (La. 1972).

Expert testimony is admissible to establish standard of care based on practices of attorneys in community, and in certain cases, opinions of experts may be essential to prove standard of care attorney must meet, but in many cases trial court is competent to make such determination without assistance of expert witnesses. *Watkins v. Sheppard*, 278 So. 2d 890 (La. App. 1st Cir. 1973).

Summary process is available under La. Rev. Stat. 37:217, when nonsuit has been entered against client due to absence or neglect of attorney without reasonable excuse. *Quick Finance v. Youngblood*, 320 So. 2d 239 (La. App. 4th Cir. 1975). Where suit is based on negligence, and not contract, doctrine of contributory negligence is applicable. *Corceller v. Brooks*, 347 So. 2d 274 (La. App. 4th Cir. 1977).

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES"; "LIABILITY INSURANCE."

Attractive Nuisance. For this principle to apply, the following circumstances must exist: 1) injured child too young to appreciate danger; 2) reason to anticipate presence of children because of some attraction on defendant's premises, or some danger where children have right to be; 3) instrumentality causing injury presents strong likelihood of accident; 4) danger must be one not ordinarily encountered; and 5) defendant failed to take reasonable precautions under circumstances. *Melerine v. State*, 505 So. 2d 79 (La. App. 4th Cir. 1987).

Contributory negligence of child is measured by standard of self-care expected of child of similar age, intelligence and experience under particular circumstances presented in each given case. *Wilkinson v. Hartford Accident & Indem.*, 411 So. 2d 22 (La. 1982). Test to "determine contributory negligence of small children is a 'gross disregard of one's safety in face of known, perceived and understood dangers'." *White v. Hanover Ins. Co.*, 201 So. 2d 201, 204 (La. App. 1st Cir. 1967). In Louisiana, a six-year old is not considered to be capable of fault. *Jones v. Hawkins*, 708 So. 2d 749 (La. App. 2d Cir. 1998), *amended in part, reversed in part*, 751 So. 2d 216, 1998-1259 (La. 1999).

Comparative Negligence. In any action for damages where person suffers injury, death or loss, degree of fault of all persons contributing to damage shall be determined, regardless of whether person is party to action, is

insolvent, or is statutorily immune. La. C.C. Art. 2323 (A). This paragraph applies regardless of basis of liability to any claim for recovery of damages for injury, death or loss asserted under any legal doctrine. La. C.C. Art. 2323 (B). *See also* La. C.C. Art. 2324 for discussion of concurring fault, or debtors in solido. Thus, contributory negligence of claimant shall no longer constitute bar to recovery, but damages recoverable shall be reduced in proportion to percentage of negligence attributable to claimant. La. C.C. Art. 2323 (A). However, claimant's recovery shall not be reduced when his injury is partly fault of intentional tortfeasor. La. C.C. Art. 2323 (C).

Imputed Negligence. Generally, where there is no legal obligation on part of one to respond for fault of another, negligence of one person is not imputed to another. *Ruthardt v. Tennant*, 252 La. 1041, 215 So. 2d 805 (La. 1968); *Elliott v. Merritt*, 457 So. 2d 1216 (La. App. 1st Cir. 1984). In addition, negligence of driver generally cannot be imputed to guest passenger. However, guest can be guilty of independent negligence which will reduce his recovery. *See Bufkin v. Mid-American*, 528 So. 2d 589 (La. App. 2d Cir. 1988); *Gravois v. Succession of Trauth*, 498 So. 2d 140 (La. App. 5th Cir. 1986). In *Bufkin* and *Gravois*, plaintiffs voluntarily rode as passengers in cars driven by intoxicated drivers, both were found comparatively negligent. In order for joint venture theory to apply, in which negligence of defendant would be imputed to plaintiff, both parties must possess equal right to control operation of vehicle. *Johnson v. State Farm*, 303 So. 2d 779 (La. App. 3rd Cir. 1974). Negligence of spouse or child driving automobile is not imputable to other spouse or parent in action against third party. *Gaspard v. LeMaire*, 245 La. 239, 158 So. 2d 149 (La. 1963); *Dairyland v. Joseph*, 412 So. 2d 636 (La. App. 2d Cir. 1982).

Landlord and Tenant. Lessor responsible for damage or injury to lessee caused by vice or defect in building or from his failure to repair, even if he did not know of defect or if defect arose after lease was made. La. C.C. Art. 2695. Lessor's obligation under these articles extends only to lessee. *Cheatham v. Bohrer*, 17 So. 2d 492 (La. App. 1944). However, other persons may bring tort suit against lessor under La. C.C. Arts. 2315 and 2316, 2317 and 2322. *Weiland v. King*, 281 So. 2d 688 (La. 1973); *Dye v. Kean's*, 412 So. 2d 116 (La. App. 1st Cir. 1982). La. Rev. Stat. 9:3221 permits lessee to assume responsibility for condition of premises releasing owner of liability to lessee or third person on premises, who derives right to be there from lessee, for injury caused by any defect therein unless owner knew or should have known of defect or had received notice of it and failed to repair it within reasonable time.



Landowners. Common law classifications of invitee-licensee-trespasser are of little help in determining duty of landowner toward persons entering land. Proper test is “whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others.” *Vidrine v. Missouri Farm Ass’n*, 339 So. 2d 877, 879 (La. App. 3rd Cir. 1976). Landowner may be held liable for damages caused by ruin of building on his land, when this is caused by neglect to repair it or when it is result of vice in building’s original construction. La. C.C. Art. 2322; *Loescher v. Parr*, 324 So. 2d 441 (La. 1975). However, he is answerable for damages only upon showing that 1) he knew or, in exercise of reasonable care, should have known of vice or defect which caused damage, 2) damage could have been prevented by exercise of reasonable care, and 3) he failed to exercise such reasonable care. La. C.C. Art. 2322 (amended, 1st Extra. Sess. 1996). This article does not rebut use of *res ipsa loquitur*.

Last Clear Chance Doctrine. Necessary elements of this doctrine are: 1) plaintiff was in position of peril of which he was either unaware or was unable to extricate himself; 2) defendant was in position to discover plaintiff’s peril or, by exercise of reasonable care, should have observed plaintiff’s danger; and 3) defendant had opportunity, through exercise of reasonable care, to avoid injuring plaintiff. *Foxworth v. State Farm*, 308 So. 2d 348 (La. App. 4th Cir. 1975). Advent of comparative negligence principles in Louisiana has called continued validity of last clear chance doctrine into question. *Picou v. Ferrara*, 483 So. 2d 915 (La. 1986). *But see Mart v. Hill*, 505 So. 2d 1120, 1123 (La. 1987), where Supreme Court considered “concepts such as last clear chance” to determine comparative fault of parties.

Minors. Employment of all minors is regulated by La. Rev. Stat. 23:151 *et seq.* Mere unlawful employment is not negligence per se; there must be some causal connection between violator of statute and injury. *Cropper v. Mills*, 27 So. 2d 764 (La. App. 1946); *Picou v. J.B. Luke’s Sons*, 204 La. 881, 16 So. 2d 466 (La. 1943). In order for minors to be deemed contributorily or comparatively negligent, their conduct must be tested to determine “whether the particular child, considering his age, background and intelligence, indulged in a gross disregard of his own safety in the face of known, understood and perceived danger and whether there was an intentional exposure to an obvious danger in connection with nontechnical and ordinary objects and situations within the capacity of the child to understand and realize.” *Young v. Grant*, 290 So. 2d 706, 709-10 (La. App. 1st Cir. 1974); *Sanders v. English*, 325 So. 2d 692 (La. App. 1st Cir. 1976); *Fusilier v. Northbrook*, 471 So. 2d 761 (La. App. 3rd Cir. 1985).

Parents with whom children reside are strictly liable for acts of their children, if that act would be tortious when measured by normal standards, even if child’s age precludes his capacity to discern consequences of his act. *Turner v. Buchner*, 308 So. 2d 270 (La. 1975); *Fromenthal v. Clark*, 442 So. 2d 608 (La. App. 1st Cir. 1983).

Liability is determined by application of duty risk analysis. *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990), *superceded on other grounds by statute as stated in Williams v. Mumphrey*, 668 So. 2d 1274, 95-643 (La. App. 5 Cir. 1996); *Shelton v. Aetna*, 334 So. 2d 406 (La. 1976); William L. Crow, *The Anatomy of a Tort*, 22 Loy. L. Rev. 903 (1976).

Duty-risk analysis involves four-step evaluation. First, defendant’s conduct must be cause-in fact of accident. *Lejeune*, 556 So. 2d at 566. If court concludes conduct was substantial factor leading to accident (*i.e.* conduct had direct relationship to accident) causation-in-fact is established. *Miller v. Fields*, 570 So. 2d 39 (La. App. 4th Cir. 1990). Second, defendant must have owed duty to protect plaintiff from this type of harm, arising in this manner. *Lejeune*, 556 So. 2d at 566. Third, this duty must have been violated; and, finally, violation must have resulted in plaintiff’s harm. *Id.*

Merchants owe customers duty of reasonable care to keep aisles, passageways and floors in reasonably safe condition. La. Rev. Stat. 9:2800.6 (A). In negligence claim based on fall due to condition existing in or on merchant’s premises, claimant must prove: 1) condition presented unreasonable risk of harm which was reasonably foreseeable, 2) merchant either created or had actual or constructive notice of condition prior to occurrence and 3) merchant failed to exercise reasonable care. La. Rev. Stat. 9:2800.6 (B).

Statute became effective July 18, 1988 but does not apply retroactively. *Kelley v. Great Atlantic & Pacific Tea Co.*, 545 So. 2d 1099 (La. App. 5th Cir. 1989). Statute amended as above in 1990. Amendments effective September 1, 1990 and apply only to causes of action which arise on or after that date. Statute as above amended in 1996, providing that statute only applies to causes of action arising after May 1, 1996.

Violation of Statute. Violation of statute is not definitive of civil liability. Court must determine whether prohibition in statute is designed to protect from harm or damage which ensues from its violation. *Dixie v. American*, 242 La. 471, 137 So. 2d 298 (La. 1962), *superceded on other grounds by statute as stated in Touchard v. Williams*, 617 So. 2d 885 (La. 1993), *superceded on other grounds by statute in Dumas v. State*, 828 So. 2d 530, 02-563 (La. 2002); *Chandler v. Sun Ray Lighting*, 308



So. 2d 515 (La. App. 4th Cir. 1975); *Snyder v. Bergeron*, 501 So. 2d 291 (La. App. 1st Cir. 1986).

### NO-FAULT INSURANCE

In determining what persons are entitled to proceeds under no-fault insurance, the Court in *Sieferman v. State Farm Mut. Auto Ins. Co.*, 796 So. 2d 833 (La. App. 3rd Cir. 2001), held that status as an insured did not entitle accident victim's former spouse to recover death benefit under automobile policy. There, the policy required that the insurer pay the insured for death or loss caused by an accident in which the insured was occupying or was struck by a motor vehicle or trailer. The victim was the insured party entitled to recover. The spouse was not an insured occupying or struck by a motor vehicle or trailer. Citing La. Rev. Stat. 22: 1406(D), the Court held that an accepted, unconditional tender of funds, which an uninsured motorist insurer reasonably believes it owes, is not refundable absent some fraud or ill practices. *Dickens v. Commercial Union Ins. Co.*, 762 So. 2d 1193 (La. App. 1st Cir. 2000).

### PENALTY AND ATTORNEY FEES

Awards of penalties and attorney fees in workers' compensation cases are essentially penal in nature, and are imposed to deter indifference and undesirable conduct by employers and their insurers toward the injured workers. La. Rev. Stat. 23: 1201(G).

Under La. Rev. Stat. 23: 1201 (F), penalties and attorney fees for a failure to properly pay benefits shall be assessed unless the claim is reasonably controverted or unless it resulted from conduct over which the employer or insurer had no control. *Brown v. Texas-LA Cartage, Inc.*, 721 So. 2d 885 (1998). In order to reasonably controvert a claim, the defendant must have some valid reason or evidence upon which to base his denial of benefits. *Id.*

To determine whether the claimant's right has been reasonably controverted, thereby precluding the imposition of penalties and attorney fees under La. Rev. Stat. 23 :1201, a court must ascertain whether the employer or his insurer engaged in a non-frivolous, legal dispute. *Id.*

### PRIVILEGED COMMUNICATIONS

Both statutes were repealed by acts 1992, No. 376 §6, eff. Jan. 1, 1993; now see La. Code of Evidence. Most communications between attorney and client are privileged. La. C.E. Arts. 506-509. Private communications between husband and wife are deemed privileged, subject to certain exceptions. La. C.E. Arts. 504-505. Communications to health care providers are usually privileged. La. C.E. Arts. 510. Privilege is deemed

waived by plaintiff who files suit for bodily injury related to medical care provided, and disclosure is necessary for defense of provider. La. C.E. Art. 510 (B)(2)(j). Communications to clergymen are also privileged. La. C.E. Art. 511.

### PRODUCTS LIABILITY

On June 21, 1988, Louisiana enacted Louisiana Products Liability Act. The Act establishes "exclusive theories of liability for manufacturers for damages caused by their products." La. Rev. Stat. 9:2800.52. "Manufacturer" is defined as person or entity in business of manufacturing product for placement into trade or commerce; "Manufacturer" also means: (a) Person or entity who labels product as its own or who otherwise holds itself out to be manufacturer of product; (b) Seller of product who exercises control over or influences characteristic of design, construction or quality of product that causes damage; (c) Manufacturer of product who incorporates into product component manufactured by another; and (d) Seller of product manufactured outside of United States by manufacturer who is citizen of another country if seller in business of importing or distributing product for resale and seller is alter ego of alien manufacturer. La. Rev. Stat. 9:2800.53 (1). Manufacturer is liable to claimant for damage proximately caused by characteristic of product that renders product unreasonably dangerous when such damage arose from reasonably anticipated use of product by claimant or another person or entity. La. Rev. Stat. 9:2800.54 (A).

La. Rev. Stat. 9:2800.54 (B) provides that: 1) Product is unreasonably dangerous in construction or composition if, at time product left manufacturer's control, product deviated in material way from manufacturer's specifications or performance standards for product or from otherwise identical products manufactured by same manufacturer; 2) Product is unreasonably dangerous in design if, at time product left manufacturer's control, there existed alternative design that was capable of preventing claimant's damage and likelihood that product's design would cause claimant's damage and gravity of that damage outweighed burden on manufacturer of adopting such alternative design and adverse effect, if any, of such alternative design on utility of product (warning on product shall be considered in evaluating likelihood of damage when manufacturer has used reasonable care to provide such warning); and 3) Product is unreasonably dangerous because of inadequate warning if, when product left manufacturer's control, product possessed characteristic that may cause damage and manufacturer failed to use reasonable care to provide adequate warning of characteristic and its danger to users. *See* La. Rev. Stat. 9:2800.54 - 2800.57 (A). Manufacturer not required to provide adequate warning about



product when product is not dangerous to extent beyond that which would be contemplated by ordinary user, with ordinary knowledge common to community as to product's characteristics, or when user already knows or reasonably should be expected to know of characteristic of product that may cause damage and danger such characteristic poses. La. Rev. Stat. 9:2800.57 (B). Act also imposes liability on manufacturer who, after product has left his control, acquires knowledge of dangerous characteristic of product or who would have acquired such knowledge had he acted as reasonably prudent manufacturer and fails to use reasonable care to provide adequate warning of such characteristic and its danger to users and handlers of product. La. Rev. Stat. 9:2800.57 (C). In addition, products may be unreasonably dangerous because of non-conformity to expressed warranty made by manufacturer provided warranty induced claimant or other person or entity to use product and claimant's damage is proximately caused because expressed warranty was untrue. La. Rev. Stat. 9:2800.58.

La. Rev. Stat. 9:2800.59 (A) provides that manufacturer shall not be liable for damage proximately caused by characteristic of product's design if manufacturer proves that, at time product left his control: 1) He did not know or could not have known, in light of then-existing reasonably available scientific and technological knowledge, of design characteristic that caused damage or danger of such characteristic; or 2) He did not know and could not have known, in light of then-existing reasonably available scientific and technological knowledge, of alternative design identified by claimant under La. Rev. Stat. 9:2800.56 (1); or 3) In light of then-existing reasonably available scientific and technological knowledge or then-existing economic practicality, alternative design identified by claimant was not feasible. Moreover, manufacturer shall not be liable under La. Rev. Stat. 9:2800.57 (A) or (B) if manufacturer proves that, at time product left his control, he did not know and, in light of then-existing reasonable available scientific and technological knowledge, could not have known of characteristic that caused damage or danger of such characteristic. La. Rev. Stat. 9:2800.59 (B).

Warranty. Louisiana consumer injured by defective product also has cause of action against seller in implied warranty. "A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect." La. C.C. Art. 2520. "A seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those in-

curred for the preservation of the thing, and also for damages and reasonable attorney fees." La. C.C. Art. 2545.

The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use. La. C.C. Art. 2475. *See also Media Production Consultants, Inc. v. Mercedes-Benz of N.A., Inc.*, 262 La. 80, 262 So. 2d 377 (La. 1972).

Upon proving existence of redhibitory defect, buyer is awarded annulment of sale, return of purchase price, and pecuniary loss from manufacturer and seller; likewise, seller who knew of vice and omitted to declare it is liable, additionally, for attorneys' fees. La. C.C. Art. 2545; *Rey v. Cuccia*, 298 So. 2d 840 (La. 1974), *overturned on other grounds due to legislative action*, 1993 La. Sess. Law Serv. Act 841. Manufacturer, who is presumed to know of defects in its products, is also liable for reasonable attorney's fees, and it makes no difference whether plaintiff pleads action in tort or action in contract (Redhibition, implied warranty). *Philippe v. Brown-Ing Arms Co.*, 395 So. 2d. 310 (La. 1981).

"In redhibitory action, a plaintiff need only prove that a product contained hidden vice at time of sale, not apparent by ordinary inspection, which subsequently renders the thing unfit for the use intended or that its use became so inconvenient or imperfect that it must be supposed that the purchaser would never have purchased product had he known of the vice or defect." *Moreno's, Inc. v. Lake Charles Catholic High Schools, Inc.*, 315 So. 2d 660, 662 (La. 1975). Buyer need not prove underlying cause of redhibitory defect involved, but only that defect existed. *Rey v. Cuccia*, 298 So. 2d 840 (La. 1974), *overturned on other grounds due to legislative action*, 1993 La. Sess. Law Serv. Act 841. Warranty against redhibitory defects covers only defects that exist at time of delivery. La. C.C. Art. 2530. If vice has made its appearance within three days immediately following sale, it is presumed to have existed before sale. La. C.C. Art. 2530.

## RELEASE

See Law Digest Tables.

Minor's Claims. Minor's claim can be settled for no more than \$10,000 without obtaining court approval where child's natural parent approves settlement. La. Rev. Stat. 9:196.

In general, contract of compromise, which prevents or ends lawsuit must be either reduced to writing or recited in open court and capable of being transcribed from record of proceeding. La. C.C. Art. 3071. Contract



of compromise need not be in any particular form, but mutuality of intent and consent to contract is required. *Hornsby v. Travelers Indem. of Conn.*, 128 So. 2d 280 (La. App. 1st Cir. 1961). Terms of compromise agreement are interpreted according to normal rules of contractual interpretation. *Strickland v. Marathon Oil Co.*, 446 F. Supp. 638 (E.D. La. 1978).

In transaction with surety of debtor, creditor may only discharge surety and transaction will not diminish his right against debtor. But if transaction is with debtor, surety will likewise have benefit of transaction, because his obligation is only accessory to that of principal debtor. La. C.C. Art. 3076.

Between interested parties, transactions have force equal to authority of things adjudged and cannot be attacked on account of any error in law or any lesion. La. C.C. Art. 3078. Errors in calculations may always be corrected. La. C.C. Art. 3078.

Compromise agreement may be rescinded for: 1) error in person or on matter in dispute; 2) fraud, or 3) violence. La. C.C. Art. 3079; *Matthew v. Melton Truck Lines, Inc.*, 310 So. 2d 691 (La. App. 1st Cir. 1975).

To annul compromise on ground of fraud, payment made in compromise must be returned before suit can be brought. *Harrison v. First Nat'l Life Ins. Co.*, 179 So. 123 (La. App. 1938); *Certified Roofing Co. v. Jeffrion*, 22 So. 2d 143 (La. App. 1945).

Release in full executed by reason of fraud or misrepresentation or by reason of mistake of fact, or where insured does not intend to release insurer, will not bar further recovery by insured. *Hayward v. Carolina Ins. Co.*, 51 So. 2d 405 (La. App. 1st Cir. 1951).

Parol evidence is admissible to show circumstances under which release was executed, or true intention of parties. *Webb v. Sonnier*, 272 So. 2d 778 (La. App. 3rd Cir. 1973).

Release of one tortfeasor; credit. Non-settling defendant is entitled to credit in amount of percentage of fault assigned to released party. *Vedros v. Public Grain Elevator*, 654 So. 2d 775 (La. App. 4th Cir. 1995), *writ denied*, 656 So. 2d 1024 (La. 1995).

Unknown Injuries. Release covering all claims arising out of certain transaction can cover known and unknown injuries, provided there is intent to release these claims. *Henderson v. Stansbury*, 372 So. 2d 1253 (La. App. 3rd Cir. 1979).

## REPRESENTATIONS AND WARRANTIES

La. Rev. Stat. 22:860 (A) Provides that, except as provided in Subsection B of this section and La. Rev.

Stat. 22:1314 and 1315, no oral or written misrepresentation or warranty made in negotiations of insurance contract, by insured or on his behalf, shall be deemed material or defeat or void contract or prevent it attaching, unless misrepresentation or warranty is made with intent to deceive. La. Rev. Stat. 22:860.

Before insurer may successfully plead La. Rev. Stat. 22:860 (B) as defense to policy of insurance, it is required to prove that material misstatement was made either fraudulently or with intent to deceive or it materially affected either acceptance of risk or hazard assumed. *Watson v. Life Ins. Co.*, 335 So. 2d 518 (La. App. 1st Cir. 1976); *Topps v. Universal Life*, 396 So. 2d 394 (La. App. 1st Cir. 1981); *McClelland v. Security Industrial Ins.*, 426 So. 2d 665 (La. App. 1st Cir. 1982), *writ denied*, 430 So. 2d 94 (La. 1983). La. Rev. Stat. 22:619.

## SERVICE OF PROCESS

Upon Agent. Domestic corporation must appoint agent upon whom service of process may be made. If designated agent cannot be found, corporation has failed to designate one or registered agent has died, resigned, or been removed, service may be made on any employee of suitable age and discretion where corporation regularly conducts business, or by personal service on any officer, director, or resident agent named in articles of incorporation or in last report previously filed with Secretary of State or by service of process under provisions of La. Rev. Stat. 13:3204, if corporation is subject to provisions of La. Rev. Stat. 13:3201. If diligent effort to serve fails, service may be made on Secretary of State. La. C.C.P. Art. 1261-62. On foreign corporations, other than insurance companies, and, which have engaged in business activity in State, service may be made on agent designated by corporation and if he cannot be found in person, on 1) employee of suitable age and discretion in office of corporation or on counsel of record, 2) personal service of any employee of suitable age and discretion at any place where business of corporation is regularly conducted, or 3) by service of process under provisions of La. Rev. Stat. 13:3204, if corporation is subject to provisions of La. Rev. Stat. 13:3201. If diligent effort to serve fails, service may be made on Secretary of State. La. C.C.P. Art. 1261-62. *See also* La. Rev. Stat. 12:301 *et seq.*, La. Rev. Stat. 13:3471-13:3472.

Upon Foreign Insurers. Secretary of State is agent for service of process of all foreign insurance companies. La. Rev. Stat. 22:335.

Upon Non-Residents, generally. Louisiana Long-Arm Statute provides for service by certified mail of petition and citation by counsel for plaintiff in cases where court has personal jurisdiction over non-resident. La. Rev. Stat. 13:3204.

Upon Non-Resident Motorists. See "AUTOMOBILES."

### SUBROGATION

In General. There are two kinds of subrogation, conventional and legal. La. C.C. Arts. 1827-30. Conventional subrogation may be taken at any time of payment of money, without consent of obligor, and need not be in writing. La. C.C. Art. 1827. When subrogation takes place by operation of law, the new obligee may recover from the obligor only to the extent of the performance rendered to the original obligee. The new obligee may not recover more by invoking conventional subrogation. La. C.C. Art. 1830.

Collision Insurance. Stipulation in policy that payment shall operate as subrogation is valid and enforceable. *Maryland v. Muller*, 9 La. App. 700, 119 So. 764 (La. 1929); *Camden v. Fontenot*, 11 So. 2d 99 (La. App. 1st Cir. 1942). If insured conceals information involving release of obligor when executing subrogation, he is liable to insurer. *Travelers v. Ackel*, 29 So. 2d 617 (La. App. 2d Cir. 1947). If insured destroys subrogation rights of insurer, he may not recover under policy. *Brister v. Blue Cross*, 562 So. 2d 1040 (La. App. 3rd Cir. 1990). Insurer under subrogation feature of policy can acquire no better rights than assured. *LeBlanc v. Thibodaux*, 60 So. 2d 421 (La. App. 1st Cir. 1952), *rev'd on other grounds*, 162 So. 2d 753 (La. App. 1st Cir. 1964). Insured entitled to recover total amount of damages although portion paid by collision insurer. *Marmol v. Wright*, 62 So. 2d 528 (La. App. Orl. Cir. 1953).

Fire Insurance. Under provisions of Standard Fire Policy insurer paying fire loss to mortgagee by denying liability to mortgagor, is entitled to rights of mortgagee against insured. *Miller v. Hartford Fire Ins. Co.*, 412 So. 2d 662, (La. App. 2d Cir. 1982), *aff'd*, 422 So. 2d 1142 (La. 1982). If mortgagee violates subrogation rights of insurer, he is liable to insurer. *City v. Abraham*, 20 So. 2d 183 (La. App. 2d Cir. 1944); *Miller v. Hartford Fire Ins. Co.*, 422 So. 2d 1142 (La. 1982). Fire insurer paying loss caused by negligence of contractor may, under subrogation from insured, bring action against contractor for amount of loss. *Mercury v. Hodges*, 199 So. 526 (La. App. 1941).

Parties to Action. Suit may be brought by insured or insurer. *Audubon Ins. Co. v. Francois*, 315 So. 2d 354 (La. App. 4th Cir. 1975); *Commercial v. Union Carter*, 392 So. 2d 184 (La. App. 2d Cir. 1980). Defendant has no interest in payment to plaintiff by insurer. *Messina v. Bomicino*, 27 So. 2d 397 (La. App. 1st Cir. 1946); *Motors Ins. Corp. v. Employers' Liab.*, 52 So. 2d 311 (La. App. 1st Cir. 1951). *But see Holmes v. Le Cour Corporation*, 99 So. 2d 467 (La. App. Orl. Cir. 1958), where

defendants were allowed credit for amount paid by plaintiff's fire insurer and for which plaintiff gave subrogation right. Tortfeasor cannot question relation between plaintiff and his insurer which could not relieve him from liability for negligence. *Martinez v. Hunt*, 92 So. 2d 784 (La. App. 2d Cir. 1957). *See also Mahaffey v. Benoit*, 118 So. 2d 162 (La. App. 1st Cir. 1960).

Surety. Surety paying debt of its principal is legally subrogated to rights of creditor against principal. La. C.C. Art. 3048. However, there is no legal subrogation in favor of fidelity insurer paying bank because of defalcation of employee. *U.S. Fidelity v. Thomas*, 129 So. 556 (La. App. Orl. Cir. 1930).

### SUICIDE

Defense Of. Must be established to exclusion of all other reasonable hypotheses. *Schleunes v. American Cas. Co. of Reading, Pa.*, 528 F.2d 634 (5th Cir. 1976).

Presumption Against. Where it is doubtful from evidence whether death was caused by accident or by suicide, presumption arises that accident, not suicide, was cause of death. It is a principal of universal application that suicide is never presumed. *Canal v. Employers*, 155 La. 720, 728, 99 So. 542, 545 (La. 1924).

Motive. Motive for suicide not essential to insurer's defense. *New York Life v. Trimble*, 69 F.2d 849 (5th Cir. 1934); *Pilot Life Ins. v. Boone*, 236 F.2d 457 (5th Cir. 1956).

Defined. Voluntary destruction of insured, by whatever means accomplished. *Phillips v. Louisiana Equitable Life*, 26 La. Ann. 404 (La. 1874). Requires suicidal intent by insured. *Brignac v. Pacific Mut. Life*, 112 La. 577, 36 So. 595 (La. 1904).

Accidental or mistaken self-inflicted death is covered incident. *Heiman v. Pan American Life*, 183 La. 1045, 165 So. 195 (La. 1936).

Capital Punishment. Wrong doing by insured which results in capital punishment is determined to be self-inflicted. *Payne v. Louisiana Indus. Life*, 33 So. 2d. 444 (La. App. 1948).

Policy must include suicide exclusion, otherwise it is recoverable incident. *Gulfcoco Finance Co. of Marksville Inc., v. Guillory's Estate*, 134 So. 2d. 121 (La. App. 3rd Cir. 1961). Suicide is question of fact. *Bayles v. Jefferson Standard Life*, 148 So. 465 (La. App. 1933).

### THEFT

In order to constitute theft under policy, intent to permanently deprive owner of possession is necessary element. *Standard v. Federal*, 178 So. 642 (La. App.

Orl. Cir. 1937); *Thomas v. Pennsylvania Fire Ins. Co.*, 163 So. 2d 202 (La. App. 4th Cir. 1964), *Sterling v. Audubon Ins. Co.*, 452 So. 2d 709 (La. App. 3rd Cir. 1984).

Proof that automobile was unlawfully carried away by persons unknown and that owner never had notice where such automobile might be, establishes prima facie case for recovery under theft policy. *Daniel v. Transcontinental Ins. Co.*, 8 La. App. 616 (La. App. Orl. Cir. 1928). However, there can be no recovery under automobile policy insuring against theft where there is no intent to permanently deprive owner of vehicle. *Ducote v. USF&G Co.*, 125 So. 2d 176 (La. App. 4th Cir. 1960), *aff'd*, 241 La. 677, 130 So. 2d 649 (La. 1961).

Where parking garage employee took car without consent and wrecked it and when arrested was found to have employer's money in his pocket, insured was allowed to recover under theft policy. *Miller v. Newark*, 12 La. App. 315, 125 So. 150 (La. App. Orl. Cir. 1929).

Where prospective buyer absconded with automobile entrusted to him by dealer under policy which excluded coverage for any theft by any person entrusted by insured with custody or possession, such was considered "theft" within exclusionary clause, thus avoiding coverage. *Dupre v. Western Assurance Co.*, 112 So. 2d 165 (La. App. 1st Cir. 1959).

### WAIVER AND ESTOPPEL

Equitable estoppel may be urged by party to insurance contract when he has reasonably relied to his detriment upon inaccurate or misleading representation of fact made by other party. *Adam Miguez Funeral Home v. First Nat'l Life Ins. Co.*, 234 So. 2d 496 (La. App. 3rd Cir. 1970). Equitable estoppel arises when one by his actions, or by his silence when he ought to speak, induces another to believe certain facts causing other to rely on these facts to his prejudice. One, however, must be justified in his reliance. *American Bank & Trust Co. v. Trinity Universal Ins. Co.*, 251 La. 445, 205 So. 2d 35 (La. 1967); *LeDoux v. Old Republic Life Ins. Co.*, 233 So. 2d 731 (La. App. 3rd Cir. 1970). *See also American Sec. Bank of Ville Platte, Inc. v. Vidrine*, 255 So. 2d 140 (La. App. 3rd Cir. 1971). *See La. C.C. Art. 1843.*

Waiver has generally been defined as intentional relinquishment of known existing legal right. Waiver is conventional and thus both knowledge of facts and intention to waive, either express or implied, are necessary. *LeDoux v. Old Republic Life Ins. Co.*, 233 So. 2d 731 (La. App. 3rd Cir. 1970); *Aetna Finance Co. v. Antoinette*, 343 So. 2d 1195 (La. App. 4th Cir. 1977).

Accident Insurance. Insurer not requiring medical examination during application of policy cannot defend on ground that disease pre-existed policy for sick bene-

fits. *Hill v. Universal Life*, 160 So. 457 (La. App. 1935). However, although policy issued without medical examination, company not precluded from defense that death was due to cause not covered by policy. *Lado v. First Nat'l*, 182 La. 726, 162 So. 579 (La. 1935).

Fire Insurance. Insurance agent issuing policy with knowledge of chattel mortgage, and verbally promising that company would not insist upon provision voiding policy in such case, estops company from denying liability, even though policy provided that conditions could not be waived except in writing. *Gitz v. Union*, 160 La. 381, 107 So. 232 (La. 1926); *Monroe Air Park No. 1 v. American Aviation & Gen. Ins. Co.*, 41 So. 2d 795 (La. App. 1949). Where insurance companies were represented by same agent who issued two policies on same building notwithstanding provision in policy against concurrent insurance, knowledge of agent operates as waiver. *Corporation v. Royal*, 158 La. 601, 104 So. 383 (La. 1925).

Where there is no showing that insurers were misled by any acts of insured and insured signed release under error of fact, insurer's plea of estoppel was not sustained. *Hayward v. Carolina Ins. Co.*, 51 So. 2d 405 (La. App. 1951). Generally, under La. Rev. Stat. 22:879, following acts by insurer do not waive any defenses: acknowledgment of receipt of notice of loss; furnishing forms for reporting loss or claims, for giving information relative thereto or making proof of loss; receiving or acknowledging receipt of forms or proofs of loss; investigating any loss or engaging in negotiations for settlement of any loss. *Insurance Co. of North America v. John J. Bordlee Contractors*, 532 F. Supp. 774 (E.D. La. 1982) *aff'd*, 733 F.2d 1161 (5th Cir. 1984).

Insurer may be estopped by its conduct from insisting upon forfeiture provision of policy, but coverage or restrictions on coverage may not be extended by application of doctrine of waiver or estoppel. *Lemar Towing v. Firemen's Fund Ins. Co.*, 352 F. Supp. 652 (E.D. La. 1972) *aff'd*, 471 F.2d 609 (5th Cir. 1973), *cert. denied*, 414 U.S. 976 (1974). *Plaquemine Bank & Trust v. Grand River Towing*, 510 So. 2d 64 (La. App. 1st Cir. 1987).

Liability Insurance. Attempt to settle claim under non-waiver agreement does not estop insurer from denying liability. *Sheeren v. Gulf*, 174 So. 380 (La. App. 1937).

### WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

### WORKERS' COMPENSATION

See Law Digest Tables.



Employee's claim must first be filed with Office of Worker's Compensation Administration within one year after accident. La. Rev. Stat. 23: 1209. State District Court no longer has jurisdiction at outset. La. Rev. Stat. 23:1310.3. Instead, claim is assigned to hearing officer at office of Workers' Compensation. La. Rev. Stat. 23:1310.3. Except when involving suit to recover funds being paid to employee. If employee remains unsatisfied, he can appeal to appropriate circuit court of appeal within delays established by Louisiana Code of Civil Procedure for appeals, (which is typically within 60 days). La. Rev. Stat. 23:1310.5 (B). However, Supreme Court held that district courts are not divested of jurisdiction of cause of action for retaliatory discharge by amendment to Workers' Compensation Act. *Sampson v. Wendy's Management, Inc.*, 593 So. 2d 336 (La. 1992).

Benefits – General. 66 2/3% of wages during period of disability. Additional benefits provided for certain scheduled injuries. La. Rev. Stat. 23:1221 (1).

Maximum - Minimum. For injuries occurring September 1, 1975 - August 31, 1976: \$85 per week/\$25 per week. For injuries occurring September 1, 1976 -August 31, 1977: \$95 per week/\$30 per week. For injuries occurring on or after September 1, 1977 and before July 1, 1983: 66 2/3% of average weekly wage paid in all employment subject to Louisiana Employment Security Law and minimum of 20% of such wage. For injuries occurring on or after July 1, 1983, maximum weekly compensation to be paid shall be 75% of average weekly wage paid in all employment subject to Louisiana Employment Security Law, and minimum compensation for total disability shall be not less than 20% of such wage. Where employee was receiving wages at rate less than applicable minimum compensation, compensation shall be computed on Federal minimum wage provided for by Fair Labor Standards Act. *Breaux v. Hoffpauir S.C.*, 674 So. 2d 234 (La. 1996).

Medical Benefits. Employer shall furnish all necessary medical expenses including cost of repair and replacement of all necessary prosthetic devices. La. Rev. Stat. 23:1203.

Death Benefits – Allocation to dependents:

Spouse alone: 32½ % of wages. La. Rev. Stat. 23:1232 (1).

Spouse and one child: 46¼ % of wages. La. Rev. Stat. 23:1232 (2).

Spouse and two or more children: 65% of wages. La. Rev. Stat. 23:1232 (3).

One child alone: 32½ % of wages. La. Rev. Stat. 23:1232 (4).

Two children: 46¼ % of wages. La. Rev. Stat. 23:1232 (5).

Three or more children: 65% of wages. La. Rev. Stat. 23:1232 (6).

Other dependents. Woman not married to worker but who lived with worker, recovers difference between statutory maximum and benefits paid to informally acknowledged illegitimate children. *Winn v. Thompson-Hayward Chemical Co.*, 522 So. 2d 137 (La. App. 2d Cir. 1988).

If no children or widow(er). Mother or father receives 32½ % of wages. La. Rev. Stat. 23:1232 (7). If both surviving, 65% of wages. La. Rev. Stat. 23:1232 (7).

If no children, widow(er), nor dependent parent: one brother or sister 32½ % of wages with 11% additional for each sibling exceeding one. La. Rev. Stat. 23:1232 (8).

Benefits are due until death or remarriage of spouse and upon remarriage, spouse receives lump sum payment of two years' compensation. La. Rev. Stat. 23:1233.

Benefits to minor child terminate when he dies, marries, reaches 18, or if enrolled in an accredited educational institution until the age of 23. La. Rev. Stat. 23:1233. Weekly payments to surviving child, physically or mentally incapacitated from earning, shall continue as long as such incapacity exists. La. Rev. Stat. 23:1233.

No dependents. Each surviving parent paid lump sum of \$75,000. La. Rev. Stat. 23:1231B (2).

Disability – Total. Inability to engage in any gainful occupation for wages whether or not same or similar occupation as that in which employee was customarily engaged when injured and whether or not occupation for which employee was particularly fitted by reason of education, training or experience. La. Rev. Stat. 23:1221. Supplemental earnings benefits equal 66 2/3% of difference between average monthly wages at time injured and thereafter. La. Rev. Stat. 23:1221 (3)(a).

Compensation for permanent total disability shall not be awarded if employee is engaged in any employment or self-employment regardless of nature or character of employment or self-employment including but not limited to any and all odd-lot employment, sheltered employment, or employment while working in any pain. La. Rev. Stat. 23:1221 (2)(b).

Partial Disability generally defined by statute which sets forth recovery schedule for specifically listed members of body and threshold requirement of greater than 25% anatomical or functional loss for benefits under this sec-

tion. La. Rev. Stat.23:1221 (4). La. Rev. Stat. 23:1221 (4)(s), provides for additional \$30,000 payment to employee who proves: 1) by “clear and convincing evidence” that he suffered injury arising out of and in the course and scope of his employment; 2) that the injury occurred between May 1, 1996 and July 1, 2006, and 3) that the injury is paraplegia or quadriplegia or the total anatomical loss of both hands, or both arms, or both feet, or both legs, or both eyes, or one hand and one foot, or any two thereof, “or” third degree burns of 40% or more of the total body surface.”

Supplemental earnings benefits are payable to employees whose injury results in inability to earn wages equal to 90% or more of wages at time of injury. La. Rev. Stat. 23:1221 (3).

No benefits are payable for permanent partial disability unless impairment is greater than 25% as determined according to standards of American Medical Association’s “Guides to Evaluation of Permanent Impairment”. La. Rev. Stat.23:1221 (4)(q).

Occupational diseases are covered. La. Rev. Stat. 23:1031.1.

Attorneys’ fees. Maximum of 20% of first \$20,000 and 10% of any amount recovered exceeding \$20,000; all claims for attorney’s fees must be approved by hearing officer. La. Rev. Stat.23:1141.

Penalties, and additional attorneys’ fees may be awarded if there is arbitrary or capricious refusal to pay compensation. La. Rev. Stat. 23:1201. Any employer or insurer discontinuing payment of claims due is subject to a penalty not to exceed \$8,000 plus reasonable attorneys’ fees when such discontinuance is found to be arbitrary, capricious or without probable cause. La. Rev. Stat. 23:1201 (F).