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Louisiana

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

The timing for responses and determinations for most types of insurance claims is governed by Louisiana Revised Statutes 22:1892 and 22:1973.[1] Under Louisiana Revised Statute 22:1892(A), all insurers, except those specified in Louisiana Revised Statutes 22:1811 and 22:1821 and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, must pay the amount of any claim due within 30 days of receipt of satisfactory proof of loss unless just and reasonable grounds exist such as would put a reasonable businessman on his guard. Disability payments must be made at least every thirty days. *Id.* Claims for accidental death must be settled within 60 days of receipt of proof of death.

Failure of the insurer to meet these deadlines may be grounds for penalties, which are addressed in more detail in Section IV.B.2. below.

Standards for Determination and Settlements

There are two essential elements to a settlement: (1) mutual intention of preventing or putting an end to litigation; and (2) reciprocal concessions of the parties to adjust their differences. *Klebanoff v. Haberle*, 43,102 (La. App. 2 Cir. 3/19/08), 978 So.2d 598; *Rein v. Luke Edwards, LLC*, 2005-754 (La. App. 3 Cir. 2/1/06), 921 So.2d 1158; *Geer v. B.P. Am. Prod. Co.*, 14-450 (La. App. 3 Cir. 11/05/14), 150 So.3d 621, 627.

Louisiana Civil Code article 3072 mandates that settlement agreements be in writing, or clearly recited in open court. The statutory requirement that the agreement for a compromise be in writing does not necessarily mean that the agreement must be contained in one document; where two instruments, emails included, read together, outline the obligations each party has to the other and evidence each party's acquiescence in the agreement, a written compromise agreement has been perfected. *Klebanoff v. Haberle*, 43,102 (La. App. 2 Cir. 3/19/08), 978 So.2d 598.

Numerous appellate court decisions have stressed the importance of reducing settlement agreements to writing, or reciting them unambiguously in open court. The Louisiana Supreme Court in *Lavan v. Nowell*, 98-0284 (La. 4/24/98), 708 So.2d 1052, finally interpreted several key requirements of a settlement agreement.

Referencing one of its prior decisions, *Sullivan v. Sullivan*, 95-2122 (La. 7/3/96), 671 So.2d 315, the Supreme Court confirmed in *Lavan* that to enforce a settlement agreement, it must be reduced to writing **and signed by both parties or their agents** or must be recited in open court and be capable of transcription from the record of the proceeding. *Lavan*, 708 So.2d at 1052; *but see Jones v. Travelers Indmenity Co.*, 6:18-cv-946 2018 WL 6684584, at *2 (W.D.La. 12/19/18) (holding that a settlement agreement

which was drafted by plaintiff, executed by defendant only, would be considered an accepted and binding settlement agreement). The Court in *Sullivan* further clarified that the exception of recitation in open court would be strictly interpreted. In *Sullivan* a proposed settlement agreement was orally recited by the respective parties' attorneys in the presence of a court reporter, and a transcript was subsequently produced. However, one party did not agree to the terms in the transcript, and the Supreme Court decided that the settlement was not enforceable because the recitation was not in open court, nor was the agreement signed by both parties.

PRINCIPLES OF CONTRACT INTERPRETATION

In Louisiana, "[f]irst and foremost is the rule that an insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code." *Sims v. Mulhearn Funeral Home, Inc.*, 2007-0054 (La. 5/22/07), 956 So.2d 583, 588-89; *Ledbetter v. Concord General Corp.*, 95-0809 (La. 1/6/96), 665 So.2d 1166, 1169; *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 93-0911 (La. 1/14/94) 630 So.2d 759. Thus, under Louisiana law, an insurance contract forms the law between the parties and the obligations set forth therein are enforceable. *Sims*, 956 So.2d at 588-89. However, Louisiana courts have held that insurance policies issued in the state are considered to contain all provisions required by statute." *Simms v. Butler*, 702 So.2d 686, 688 (La. 1997). Further, Louisiana courts have consistently held that the interpretation of an insurance contract is a question of law, and, can therefore be properly resolved in the framework of a motion for summary judgment." *Sanchez v. Callegan*, 99-0137 (La. App. 1 Cir. 2/18/2000) 753 So.2d 403, 405; *Paige v. Tucker*, 96-2447 (La. App. 1st Cir. 11/7/97) 702 So.2d 1184, 1186; *Madden v. Bourgeois*, 95-2354 (La. App. 1 Cir. 6/28/1996) 676 So.2d 790, 792; *Wallace v. Huber*, 90-1086 (La. App. 3 Cir. 4/16/92) 597 So.2d 1247, 1249; *Zanca v. Breaux*, 90-1892 (La. App. 4th Cir. 1991) 590 So.2d 821, 824; and, *Gulf Coast Marine v. Young*, 92-447 (La. App. 5th Cir. 1992) 608 So.2d 251, 252.

"The test for construing an insurance policy is not what the insurer intended the words to mean, but, how the words would have been understood by a reasonable person in the shoes of the insured. The policy should be read as a layman would have read it and not as it might be analyzed by an insurance expert." *Dawson Farms, LLC v. Millers Mutual Fire Ins. Co.*, 34,801 (La. App. 2 Cir. 08/01/01), 794 So.2d 949, 951 (emphasis original). "An insurance contract is to be construed as a whole and each provision in the contract must be interpreted in light of the other provisions. One provision of the contract should not be construed separately at the expense of disregarding other provisions." *Sims*, 956 So.2d at 589. *See also*, Louisiana Civil Code Article 2050. Additionally, documents evidencing the complete insurance contract, "such as binders and riders, when executed together for that purpose, must be read together." *Smith v. Burton*, 2004-2675 (La. App. 1 Cir. 12/22/05), 928 So.2d 74, 79.

Where the language of the insurance policy is clear and unambiguous, it must be interpreted solely by reference to the four corners of the policy and courts are obligated to give legal effect to such policies according to the intentions of the parties as evidenced in the language of the policy. *McGoldrick v. Lou Anna Foods, Inc.*, 649 So.2d 455, 459 (La. App. 3 Cir. 1994), *Tunstall v. Stierwald*, 2001-1765 (La. 2/26/02), 809 So.2d 916, 922; *Peterson v. Schimek*, 1998-1712 (La. 3/2/99), 729 So.2d 1024, 1031; *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 850 So.2d 686, 693. "Courts lack authority to alter the terms of an insurance contract under the guise of contractual interpretation when the contract's provisions are couched in unambiguous terms." *Succession of Fannaly v. Lafayette Insurance Company*, 2001-C-1144 (La. 1/15/2002), 805 So.2d 1134, 1137. Therefore, the Louisiana Supreme Court has repeatedly held that an insurance policy should not "be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion." *Sims*, 956 So.2d at 588-89. "The rules of contractual interpretation simply do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient

clarity the parties' intent." *Id*. "[I]n interpreting an insurance policy, the words of the policy should be given their generally prevailing meaning, and words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract." *Kirby v. Ashford*, 2015-1852 (La. App. 1 Cir. 12/22/16), 208 So. 3d 932, 937 (citing La. Civ. Code. arts. 2047-48). "Each provision of the policy must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole, and it must be interpreted to cover only those things it appears the parties intended to include. *Id*. (citing La. Civ. Code arts. 2050-51; *Ridenour ex rel. Ridenour v. Reed*, 2005–1849 (La. App. 1 Cir. 9/20/06), 944 So.2d 584, 586). "Thus, when the meaning of the words is clear, the court should look no further in determining the intent of the parties." *Id*. *See also*, *Cosey v. Flight Academy of New Orleans, LLC*, 2020 WL 2478462, at *3 (La. App. 4 Cir. 5/13/20); *Savoie v. Anco Insulations, Inc*., 2021 WL 1326774, at * 2 (La. App. 1 Cir. 4/9/21).

The parties' intent, as reflected by the words of the insurance policy, determine the extent of coverage. *Ledbetter v. Concord General Corp.*, 95-0809 (La. 1/6/96), 665 So.2d 1166, 1169; *Schumacher Group of Delaware, Inc., v. Liberty Mutual Fire Insurance Company*, 6:15-cv-2736 2018 WL 2293650 *5 (W.D.La. 5/10/18). Such intent is to be determined in accordance with the general, ordinary, plain, and popular meaning of the words used in the policy, unless the words have a technical meaning. *Id*. If the policy wording at issue is clear and expresses the intent of the parties, the agreement must be enforced as written. *Id.*; *see also*, Louisiana Civil Code articles 2045-2057 on Interpretation of Contracts; *Peterson v. Schimek*, 729 So.2d 1024, 1028 (La. 1999), *Succession of Fannaly v. Lafayette Ins. Co.*, 2001-1144 (La. 1/15/02), 805 So.2d 1134, 1137-38. "If, on the other hand, the contract cannot be construed simply, based on its language, because of an ambiguity, the court may look to extrinsic evidence to determine the parties' intent." *Doerr v. Mobil Oil Corp.*, 00-CC-0947 (La. 12/19/00), 774 So.2d 119, 124.

Louisiana Civil Code article 1971 provides that "parties are free to contract for any object that is lawful, possible, and determined or determinable." As such, Louisiana Courts have held that "[a]bsent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and enforce reasonable conditions upon the policy obligations they contractually assume." *Louisiana Insurance Guaranty Association v. Interstate Fire & Casualty Company*, 630 So.2d 759, 763 (La. 1994). Moreover, Louisiana courts have held that "[w]hen there is a clause in a contract, and that clause is the agreement of the parties, the defense of a lack of knowledge of its existence is untenable." *Maloney v. Oak Builders, Inc.*, 235 So.2d 386, 390 (La. 1970), *see also, Gonsalves v. Dixon*, 487 So.2d 644, 645 (La. App. 4th Cir. 1986); *Louisiana Insurance Guaranty Association v. Interstate Fire & Casualty Company*, 630 So.2d 759, 763 (La. 1994).

However, in Louisiana, "[a] liberal interpretation is not permitted of clauses in the contract exempting or limiting the insurer's liability." *Massachusetts Protective Association v. Ferguson,* 168 La. 271, 280, 121 So. 863 (La. 1929), *see also Tunstall v. Stierwald*, 2001-1765 (La. 02/26/02) 809 So.2d 916. "Policies should be construed to effect, not deny, coverage." *Yount v. Maisano*, 627 So.2d 148, 151 (La. 1993). "Any ambiguity in an insurance policy is construed against the insurer." *Louisiana Maintenance Services, Inc. v. Certain Underwriters at Lloyd's of London*, 616 So.2d 1250, 1252 (La. 1993). Particularly, with regard to exclusions in an insurance policy, Louisiana law requires such provisions to be clearly worded and requires any ambiguities in an exclusion to be narrowly construed in favor of coverage. *Peterson v. Schimek*, 729 So.2d 1024, 1029 (La. 1999), *Yarbrough v. Federal Land Bank of Jackson*, 731 So.2d 482, 488 (La. App. 2nd Cir. 1999), *Williams v. U.S. Agencies Casualty Ins. Co.*, 779 So.2d 729, 731 (La. 2001). Likewise, indemnity clauses in insurance contracts are strictly construed and the wording used must be clear and unequivocal. *Polozola v. Garlock, Inc.*, 343 So.2d 1000, 1003 (La. 1977).

Any riders and endorsements, like the insurance policy, are also governed by the general rules of contractual interpretation. *Ledbetter v. Concord General Corp.*, 95-0809 (La. 1/6/96), 665 So.2d 1166, 1169. However, Louisiana courts have held that "an insurer may change or amend coverage by an endorsement attached to the

policy. Where an attachment to the policy conflicts with the terms of the policy, the attachment will control." *Sea Trek, Inc. v. Sunderland Marine Mutual Ins. Co., Ltd.*, No. 99-CA-893 (La. App. 5th Cir. 2/16/2000), 757 So.2d 805, 810; *see also, Bailsco Blades & Casting, Inc. v. Fireman's Fund Ins. Co.*, 31,876 (La. App. 2nd Cir. 5/5/99), 737 So.2d 164, 166. Further, endorsements to insurance policies take precedence over the printed provisions contained in the body of the policies. *St. Paul Fire & Marine Insurance Company v. Roubion*, 252 So.2d 679, 681 (La. App. 1st Cir. 1971), *Howell v. American Cas. Co. of Reading, Pennsylvania*, 1996-0694 (La. App. 4 Cir. 3/19/97), 691 So.2d 715, 724, *writs denied*, 97-1329 (La. 9/5/97), 700 So.2d 512. "Where there is a conflict between policy endorsements affecting the same coverage provision, the most recent endorsement form's language should be construed as superseding the corresponding language of the earlier endorsement." *Lafauci v. Jenkins*, 2001-CA-2960 (La. App. 1st Cir. 1/15/2003), 844 So.2d 19, 27, *writs denied*, 2003-0498 (La. 4/25/03), 842 So.2d 403; *see also Chesne v. Elevated Tank Applicators, Inc.*, 2004-CA-46 (La. App. 3rd Cir. 5/12/2004), 874 So.2d 333, 337, *writs denied*, 2004-1439 (La. 9/24/04).

Louisiana courts have also specifically interpreted certain word and phrases that are common to all insurance policies and often the focus of coverage litigation. For example, Louisiana courts interpret the term, "Arising out of," as words of broader significance than 'caused by.' *Tucker v. State Farm Mut. Auto Ins.*, 154 So.2d 226, 226 (La. 1963). Further, the term "'in connection with' is broader terminology than 'arising out of.'" *Smith v. Matthews*, 611 So.2d 1377, 1380 (La. 1993). "The phrase 'with respect to' generally means 'with reference to', 'relating to', or 'pertaining to.'" *Id.*, ("The broader terminology providing coverage 'with respect to' the insured premises does not necessarily limit coverage to injuries caused by premises defects or arising out of the use of the premises, but only requires some connection with or relation to the insured premises as opposed to any other location"). The term 'occurrence' is "generally understood to mean the time and/or event when negligence manifests itself by causing actual damages, rather than the commission of the causative negligence." *St. Paul Fire & Marine Ins. Co. v. Valentine*, 95 0649 (La. App. 1 Cir. 11/9/95), 665 So.2d 43, 46, *writs denied*, 95-2961 (La. 2/9/96), 667 So.2d 534.

CHOICE OF LAW

In Louisiana, the starting point for resolving any choice of law issue is Book IV of the Louisiana Civil Code, entitled, "Conflict of Laws." "Louisiana's Conflict of Laws provisions [ ] afford the balancing of competing interests between states. The objective of those provisions is to identify the state whose policies would be most seriously impaired if its laws were not applied to the issue at hand." *Champagne v. Ward*, 2003-3211 (La. 1/19/05), 893 So.2d 773, 786.

Specifically, with regard to choice-of-law issues arising with insurance policies, Louisiana courts have consistently concluded that the appropriate starting point in a multistate case is to conduct a choice-of-law analysis pursuant to La. Civ. Code arts. 3515 and 3537 to determine which state's law applies to the interpretation of the policy. Id. at 783; *see also Boutte v. Fireman's Fund County Mut. Ins., Co.*, 06-34, p. 16 (La. App. 3 Cir. 5/10/06), 930 So.2d 305, 315, *writs denied*, 061482, 1484 (La. 9/29/06), 937 So.2d 864.

Louisiana Civil Code Article 3515 is the first article in Book IV and states the basic and general policy that:

> [A]n issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

> That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

Louisiana Civil Code article 3537 specifically governs choice-of law issues as to "conventional obligations," which in Louisiana, includes all contracts such as insurance policies. Thus, Article 3537 governs the critical choice-of-law determination of which state's laws would be most seriously impaired if its law were not applied to interpret the provisions of the insurance policy and requires the court to make this determination by evaluating:

> the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.

Thus, "[a]rticle 3515 instructs the court to examine the relationship of each state to the parties and the dispute, and Article 3537 invites analysis of the nature, type, and purpose of the contract, as well as the policies referred to in Article 3515." *Dunlap v. Hartford Ins. Co. of Midwest*, 2004-0725 (La. App. 1 Cir. 3/24/05), 907 So.2d 122, 124. "The threshold question in determining the application of La. C.C. art. 3515 et seq. is whether there is a true conflict, a false conflict, or no conflict." *Champagne*¸ 2003-3211 at p. 22, 893 So.2d at 786; *see also Tolliver v. Naor*, 115 F.Supp.2d 697, 701 (E.D. La. 2000), *In re Combustion, Inc.*, 960 F. Supp. 1056, 1067 (W.D. La. 1997). Of course, if the laws of two states are substantially identical, then there is no conflict. Thus, Louisiana Civil Code article 3544(1) provides, in pertinent part, "[p]ersons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state." A false conflict occurs when it is determined that only a single state has an interest in the application of its law to an issue and the other state involved has no interest in the application of its law to the issue. *See In re Combustion, Inc.*, 960 F. Supp. at 1067.

Once a true conflict is identified, Louisiana courts apply the rules of code articles 3515 et seq. on an "issue-by-issue" or "issue specific" basis. *Wooley v. Lucksinger*, 14 So.3d 311, 356-357 (La. App. 1 Cir. 2008); *see also, Favaroth v. Appleyard*, 2000-0359, p. 4 (La. App. 4 Cir. 5/2/01), 785 So.2d 262, 265 ("Under Louisiana's choice of law rules, a sweeping determination that the law of one state applies to the case, as opposed to an issue in a case, constitutes a derogation of the appropriate analysis. When a conflict exists with regard to more than one issue, each issue should be analyzed separately"). One result of this analysis might be that the laws of different states may be applied to different issues in the same dispute, or *dépeçage*. See Comment (d) to La. Civ. Code art. 3515. "However, dépeçage should not be pursued for its own sake. The unnecessary splitting of the case should be avoided, especially when it results in distorting the policies of the involved states." *Id.*; *see also Murden v. ACandS, Inc.*, 2005-0319, p. 5 (La. App. 4 Cir. 12/14/05), 921 So.2d 165, 169, *writ denied*, 2006-0219 (La. 4/17/06), 526 So.2d 926, *Rigdon v. Pittsburgh Tank & Tower Co., Inc.*, 95- 2611, p. 5 (La. App. 1 Cir. 11/8/96), 682 So.2d 1303, 1306; *Thomas v. Fidelity Brokerage Services, Inc.*, 977 F. Supp. 791, 794 (W.D. La. 1997).

Applying the above conflicts principles in the realm of insurance policies, Louisiana courts generally choose "the law of the state where the insurance contract was issued and executed." *Am. Elec. Power Co. Inc. v. Affiliated FM Ins. Co.*, 556 F.3d 282, 286 n.2 (5th Cir. 2009), *see also Woodfield v. Bowman*, 193 F.3d 354, 360 (5th Cir. 1999) ("Louisiana courts generally choose the law of the state in which the insurance policy in question was issued to

govern the interpretation of the terms of the policy"); *Anderson v. Oliver*, 97-721 (La. App. 3 Cir. 01/07/98), 705 So.2d 301, 305-06; *Holcomb v. Universal Ins. Co.*, 640 So.2d 718, 722 (La. Ct. App. 1994). For example, in *Liberty Mut. Ins. Co. v. Zurich Am. Ins. Co.*, the court applied articles 3515 and 3537 and found that "based on Mississippi's interest in regulating insurance contracts entered into in Mississippi, and the factual contacts of this insurance contract to Mississippi, the interests of the State of Mississippi would be most seriously impaired if its law were not applied in this case, and therefore Mississippi law governs this Court's interpretation of the insurance policy." 2007 WL 3487651 *4 (E.D. La. Nov. 13, 2007); *see also Harrison v. R.R. Morrison & Son, Inc.*, 862 So.2d 1065, 1070 (La. App. 2003) (applying the law of the state where the contract was entered into and noting that "Louisiana has no connection to the insurance policy other than the fact that it is one location among many that is considered the object of the contract").

However, Louisiana has an interest in guaranteeing that innocent victims injured in Louisiana are fully compensated and thus Louisiana courts distinguish cases involving a dispute only between insureds and insurers from those involving direct actions by injured parties. *Champagne v. Ward*, 20033211 (La. 1/19/05), 893 So.2d 773, 786. Where an injured plaintiff brings a direct action against an insurance company, Louisiana courts hold that "while not determinative, the residence of the injured plaintiff is pertinent and is a factor in determining choice-of-law issues." *Boutte v. Fireman's Fund County Mut. Ins. Co.*, 2006-34 (La. App. 3 Cir. 5/10/06), 930 So.2d 305, 319, *writs denied*, 2006-1482 & 2006-1484 (La. 9/29/06), 937 So.2d 864. In contrast, where a case before a Louisiana court "does not involve a direct action by injured Louisiana residents against the insurance companies.... the court is only called on to decide issues concerning the interpretation of contracts between the parties to those contracts." *Norfolk Southern Corp. v. California Union Ins. Co.*, 2002-0369 (La. App. 1 Cir. 9/12/03), 859 So.2d 167, 181, *writs denied*, 2003-2742 (La. 12/19/03), 861 So.2d 579.

Further, "Louisiana's system for regulating insurance is particularly state-specific. The insurance industry in Louisiana is pervasively affected by public policymaking and is heavily regulated." *Wooley v. Lucksinger*, 2006-1140 (La. App. 1 Cir. 12/30/08), 14 So.3d 311, 365-366. It is firmly established in Louisiana jurisprudence that the state where an insurance policy is issued "has an interest in the regulation of its insurance industry and in the contractual obligations that are inherent parts thereof. The integrity of the contract is a substantial and real interest. The fact that Congress has allowed fifty states to have their own uniform system of regulations governing insurance strongly suggests this is a legitimate public purpose." *Champagne v. Ward*, 2003-3211 (La. 1/19/05), 893 So.2d 773, 788; *see also Norfolk Southern Corp. v. California Union Ins. Co.*, 2002-0369 (La. App. 1 Cir. 9/12/03), 859 So.2d 167, 181, *writs denied*, 2003-2742 (La. 12/19/03), 861 So.2d 579; *Cummings v. Electric Ins. Co.*, 2020 WL 5505652 (W.D. La. Sept. 11, 2020); *Latorre v. Hunter*, 2021 WL 672966, at *5 (La. App. 1 Cir. 2/22/21).

In *Shell Oil Co. v. Hollywood Marine, Inc.*, the Louisiana Fifth Circuit Court of Appeal held that Texas law, rather than Louisiana law, governed the interpretation of a liability insurance contract that the parties contracted for in Texas and the insurance company issued to companies doing business in Texas, even though the injury occurred in Louisiana. 97-106 (La. App. 5 Cir. 10/15/97), 701 So.2d 1038. The court explained its reasoning as follows:

> Although, the injury occurred in Louisiana, the injured party has been compensated and his judgment against Shell satisfied, and accordingly he has no interest in the outcome of this proceeding. Louisiana's interest arises only because a Delaware corporation, with its principal place of business in Texas, seeks indemnity under a policy of insurance issued in Texas to recover payment it made to recompense for damages it caused to a Louisiana citizen. We do not believe that this interest is sufficient to override the compelling interest Texas has in regulating insurance contracts written in Texas and issued to Texas companies.

Id. at 1041.

Even if a Louisiana court concludes that it must apply the substantive law of another state, Louisiana law on liberative prescription (know in other states as statute of limitation) will still apply to bar a claim unless the other state's statutes of limitation would not bar it and maintenance of the action is warranted by "compelling considerations of remedial justice." La. C.C. art. 3549(B)(1). Jurisprudence is thin on what "compelling considerations of remedial justice" might be; however, they such considerations do not exist when a Plaintiff could have filed suit in the jurisdiction whose limitation laws he wishes to apply. *Brown v. Slenker*, 220 F.3d 400 (5th Cir. 2000).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

"A liability insurer's duty to defend and the scope of its coverage are separate and distinct issues." *Mossy Motors, Inc. v. Cameras America*, 20040726 (La. App. 4 Cir. 3/2/05), 898 So.2d 602, 606, *writs denied*, 2005-1181 (La. 12/9/05), 916 So.2d 1057; *Chance v. Designer Wardrobe Trailers, Inc.*, 07-9427 2008 WL 11353680, 5 (E. D. La. 12/18/08); *see also La. Citizens Prop. Ins. Corp. v. Age*, 2012-0805 (La. App. 4 Cir. 11/28/12), 104 So.3d 675, 677.

"The insurer's duty to defend suits brought against the insured is determined by the allegations of the plaintiff's petition, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage." *Steptore v. Masco Constr., Inc.*, 93-2064 (La. 8/18/94), 643 So.2d 1213, 1218. Accordingly, the insurer's obligation to defend suits is generally broader than its obligation to provide coverage for damage claims. *George S. May Int'l Co. v. Arrowpoint Capital Corp.*, 2011 1865 (La. App. 1 Cir. 08/10/12), 97 So.3d 1167, 1171. "Thus, assuming all of the allegations of the petition are true, if there could be both (1) coverage under the policy and (2) liability to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit." *Id*. An insured's duty to defend arises when the pleadings against the insured disclose even a possibility of liability under the policy. *Id*. Additionally, the allegations of the petition are liberally interpreted in determining whether they set forth grounds which bring the claims within the scope of the insurer's duty to defend the suit brought against its insured. *Motorola, Inc. v. Associated Indem. Corp.*, 02-0716 (La. App. 1st Cir. 6/25/04), 878 So.2d 824, 836, writs denied, 04-2314, 2323, 2326, and 2327 (La. 11/19/04), 888 SO.2d 207, 211, and 212; *see also Yount v. Maisano*, 93-1276 (La. 11/29/93), 627 So.2d 148, 153; *Suire v. Lafayette City-Parish Consol. Government*, 2004-1459 (La. 4/12/05), 907 So.2d 37, 52.

"Under Louisiana law, when an insurer has a duty to defend any claim asserted, the insurer must defend the entire action against its insured." *Riley Stoker v. Fid. & Guar. Ins. Underwriters*, 26 F.3d 581, 589 (5th Cir. 1994). "Put differently, once a complaint states one claim within the policy's coverage, the insurer has the duty to accept the defense of the entire lawsuit, even though other claims in the complaint fall outside the policy's coverage." *Yarbrough v. Fed. Land Bank of*

Jackson, 31,815 (La. App. 2 Cir. 3/31/99), 731 So.2d 482, 488. "Thus, an insurer who wrongfully refuses to defend is liable for reasonable attorney's fees and expenses incurred by the insured in defending both the covered and uncovered claims brought against it." *Riley Stoker*, 26 F.3d at 589.

Therefore, "the factual allegations of the plaintiff's petition must be liberally interpreted to determine whether they set forth grounds which raise even the possibility of liability under the policy…. even though a plaintiff's petition may allege numerous claims for which coverage is excluded under the insurer's policy, a duty to defend may nonetheless exist if there is at least a single allegation in the petition under which coverage is not unambiguously excluded." *Lang v. Asten, Inc.*, 2004-1665 (La. App. 4 Cir. 03/30/05), 900 So.2d 1031, 1038, *reversed in part on other grounds*, 2005-1119 (La. 01/13/2006), 918 So.2d 453.

On the other hand, "If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured. The most recently amended complaint provided to the insurer must be examined to determine whether there is a duty to defend. When uncontroverted facts preclude the possibility of a duty to indemnify, the duty to defend ceases and the duty to indemnify is negated." *Maldonado v. Kiewit La. Co.*, 2013-0756 (La. App. 1 Cir. 03/24/14), 146 So.3d 210, 219.

An insurer may not "deny its duty to defend simply because the plaintiff has previously asserted coverage and a duty to defend by another insurer." *Yarbrough*, 731 So.2d at 489. Where two insurers have "other insurance" clauses which concern the duty to defend, the defense costs generally will be equally borne by the two insurers. *Id*. at 489-90.

Two Courts have adopted the "*Cumis* Rule" and concluded that an insurer's denial of coverage allows the insured the right to select independent counsel to represent the insured at the insurer's expense. *Belanger v. Gabriel Chem., Inc.*, 00-747 (La. App. 1 Cir. 5/23/01), 787 So.2d 559, 563, *writ denied*, 01-2289 (La. 11/16/02), 802 So.2d 612; *Smith v. Reliance Ins. Co. of Ill.*, 01-387 (La. 1/15/2002), 807 So.2d 1010, 1022.[2] The counsel chosen by the insured is subject to the same fee rates and terms as the counsel whom the insurer would have selected in its ordinary course of business. *Belanger* at 566-67.

Louisiana cases have not definitively identified when an insurer's obligation to defend terminates where there is a valid coverage defense, but commentators have stated that the "obligation should terminate upon the first judicial determination of the coverage issue." MCKENZIE & JOHNSON, LOUISIANA CIVIL LAW TREATISE: INSURANCE LAW & PRACTICE, § 213 (2d ed. 1996). One Court has held that the duty to defend ceases when deposition testimony unequivocally establishes that there is no coverage under the policy. *Allstate Ins. Co. v. Roy*, 94-1072 (La. App. 1 Cir. 4/7/95), 653 So.2d 1327, 1333, *writ denied*, 95-1121 (La. 6/16/95), 655 So.2d 339 (An insurer is not "required to provide a defense where the undisputed facts obviously exclude coverage in a suit simply because the allegations of the petition omit crucial, undisputed facts."). Where the petition alleges claims and facts which, if true, are excluded from coverage, there is no duty to defend or cover the claim against the insured. *Jackson v. Lajaunie*, 270 So.2d 859, 864 (La. 1973).

Exhaustion of policy limits will also terminate the duty to defend if the policy so provides. This

includes circumstances where policy limits are exhausted by settlement with less than all plaintiffs. The duty of a insurer when faced by multiple claims likely to exceed policy limits has been summarized as to "treat the claims as if it policy was unlimited." Thomas R. Newman, *Ending the Duty to Defend*, 55 NO. 3 DRI FOR THE DEFENSE 38, March 2013, at 8. The issue of multiple claimants on a liability policy, and the insurer's duty to settle, is well settled law in Louisiana.

> [I]n every case, the insurance company is held to a high fiduciary duty to discharge its policy obligations to its insured in good faith-including the duty to defend the insured against covered claims and to consider the interests of the insured in every settlement. When multiple claims are filed against the insured that have the potential for exceeding the insurer's policy limits, the insurer must act in good faith and with due regard for the insured's best interest in considering whether to settle one or more of the claims.

Pareti v. Sentry Indemnity Co., 536 So.2d 417, 423 (La. 1988) (internal citations omitted).

If the insurer does settle in good faith, exhausting the policy limits, it is without further liability either to the insured or the remaining claimants, for either payment of damages or defense costs. *Holtzclaw v. Falcon, Inc*., 355 So.2d 1279 (La. 1977); *Pareti v. Sentry Indemnity Co.*, 536 So.2d 417, 423 (La. 1988).

2. Issues with Reserving Rights

Reservation of rights letters have additional considerations and consequences where coverage concerns an accident or injury that occurs in Louisiana. Unlike most other states, the Louisiana law allows a tort victim who is injured or involved in an accident in Louisiana to directly sue the tortfeasor, any persons responsible or liable for the tortfeasor's conduct, and any insurers of any of the foregoing based on the Louisiana Direct Action Statute, La. R.S. 22:1269. The Direct Action Statute trumps and voids "No Action" clauses. *Black v. First City Bank*, 642 So.2d 151, 153 (La. 1994). As a consequence, insurers frequently consider retaining a single law firm or lawyer to represent the insured tortfeasor, other insureds and the insurer where no conflicts exist.

In cases where an insurer either denies coverage or reserves its rights to do so, but also provides the insured with separate counsel, the insurer is not responsible for fees and costs incurred in prosecution of the coverage issue. *Steptore v. Masco Constr., Inc.*, 93-2064 (La. 8/18/94), 643 So.2d 1213, 1218; *Nat'l Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986 (5th Cir. 1990); *see also Landreneau v. United States Fid. & Guar. Co.*, 287 So.2d 554 (La. App. 3 Cir. 1973), *writ denied*, 293 So.2d 175 (La. 1974). "[I]f the insured hires an attorney to represent himself in coverage disputes, he will have to bear those costs himself." *Id*. (citations omitted).

Where an insurer either denies coverage to the insured or reserves its rights to do so, it is improper for the same attorney to represent both the insurer and the insured. The Committee on Professional Ethics and Grievances of the Louisiana State Bar Association, Opinion No. 342, May 30, 1974, *approved*, *In re La. Assoc. of Def. Counsel*, 338 So.2d 294 (La. 1976). It is well-settled that an attorney may not represent both the insured and the insurer where the insurer declines coverage or reserves its rights to do so. *Storm Drilling Co. v. Atlantic Richfield Corp.*, 386 F. Supp. 830, 832 (E.D. La. 1974). Thus, where an insurer issues a reservation of rights letter, the insurer should retain counsel to defend the insured on the merits and separate counsel to represent the insurer on any coverage or other issues. The insurer's assignment to the attorney defending the

insured should specifically state in writing that the scope of the attorney's representation of the insured does not include assisting or representing the insured regarding any coverage disputes or issues with the insurer.

Where the insurer is or should be aware of potential coverage defenses, allowing a single lawyer to represent both the insurer and the insured may result in a waiver of such coverage defenses. "Accordingly, when an insurer, with knowledge of facts indicating noncoverage under the insurance policy, assumes or continues the insured's defense without obtaining a nonwaiver to reserve its coverage defenses, the insurer waives such policy defense." *Steptore v. Masco Construction, Inc.*, 643 So.2d 1213, 1216 (La. 1994). "A waiver may apply to any provision of an insurance contract, even though this may have the effect of bringing within coverage risks originally excluded or not covered." *Id.; see also North American Capacity Insurance Company v. Brister's Thunder Karts, Inc.*, 287 F.3d 412 (5th Cir. 2002)

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

Individuals who intentionally violate of the Louisiana Insurance Code (other that Subpart A of Part I of Chapter 5, La. R.S. 22:1541 *et seq*) may be fined up to $10,000, or imprisoned for up to five years, or both. Corporations may be fined up to $50,000. La. R.S. 22:13.

In response to the Gramm-Leach-Bliley Act, the Louisiana Commission of Insurance promulgated Regulation 76, Louisiana Administrative Code 37:9901 et seq., thereby establishing appropriate standards for the collection, use and disclosure of nonpublic personal information gathered in connection with insurance transactions by insurance institutions, agents or insurance support organizations. This regulation requires an insurance licensee to provide notice to individuals about its privacy policies, describes the conditions under which an insurance licensee may disclose nonpublic personal financial information about individuals, and provides methods for individuals to prevent an insurance licensee from disclosing that information.

An unauthorized disclosure between a medical provider and an employer gives rise to a cause of action for the intentional tort of invasion of privacy as well as for breach of contract under Louisiana's Medical Malpractice Act, La. R.S. art. 13:3734. In *Leger v. Spurlock*, 589 So.2d 40, 41 (La. App. 1 Cir.1991) the plaintiff, a police officer who was involuntarily committed to a chemical dependency unit, confided to his treating physician about the problems which were the basis for his commitment. Throughout his treatment, the patient believed that everything he communicated to his physician was protected by physician-patient confidentiality. The physician's subsequent unauthorized disclosure to the district attorney and another attorney resulted in damage to the patient's reputation and marriage; the patient's being fired from his job as a police officer; and the filing of criminal charges against the patient. The court held that the physician's disclosures went beyond the immunity provided under Louisiana's medical malpractice act and plaintiff's claim should not have been dismissed with prejudice. *Id*. at 43.

The exclusive method for obtaining medical, hospital, or other records relating to a person's medical

treatment in connection with litigation or other proceedings is pursuant to La. R.S. §§ 13:3715.1 and 40:1299.96. Under La. R.S. §13:3715.1, a health care provider shall disclose records of a patient who is a party to litigation after receiving an affidavit from the party issuing a subpoena that the records requested are for a party to the litigation, and that notice of the subpoena has been sent by registered or certified mail to the party whose records are sought. *Id*. LA. REV. STAT. § 40:1299.96 (A)(1) states that a health care provider must furnish a patient, upon request, a copy of any information the health care provider has transmitted to any company, or any public or private agency.

2. The Standards for Compensatory and Punitive Damages

Under Louisiana law, an insurer has to perform its obligations in good faith and in the best interests of its insured. La. C.C. Art. 1759; and La. R.S. 22:1892, 22:1964 and 22:1973. *Instant Replay Sports, Inc. v. Allstate Ins*. Co., 2012-2181 (La. 12/14/12), 104 So.3d 419; *Cox, Cox, Filo, Camel & Wilson, LLC v. Louisiana Workers' Compensation Corp*., 2021 WL 1206415, at *6 (La. App. 3 Cir. 3/31/21) ("Section 1973(A) imposes the following duties on insurers: 'a duty of good faith and fair dealing,' 'an affirmative duty to adjust claims fairly and promptly,' and a duty 'to make a reasonable effort to settle claims with the insured or the claimant, or both.'). In fact, the Louisiana First Circuit Court of Appeals "has stated that '[t]he insurer is the champion of the insured's interests. The interests of the insured are paramount to those of the insurer, and the insurer may not gamble with the funds and resources of its policyholders.'" *Gourley v. Prudential Prop. & Cas. Ins. Co.*, 98-0934 (La. App. 1 Cir. 5/14/99), 734 So.2d 940, 944, *writ denied*, 99-1777 (La. 10/8/99), 750 So.2d 969 (quoting *Md. Cas. Co. v. Dixie Ins. Co.*, 92-0816 (La. App. 1 Cir. 5/28/93), 622 So.2d 698, 701, writ denied, 93-2382 (La. 12/10/93), 629 So.2d 1138). "As such, an insurer owes its insured the duty to act in good faith and to deal fairly in handling claims." *Gourley*, 734 So.2d at 944.

An insurer owes a fiduciary duty to its insured. *Id*. at 944-45. "The duty of good faith is an outgrowth of the contractual and fiduciary relationship between the insured and the insurer, and the duty of good faith and fair dealing emanates from the contract between the parties. In the absence of a contractual obligation, the duty of good faith does not exist." *Smith v. Citadel Ins. Co*., 2019-00052 (La. 10/22/19), 285 So. 3d 1062, 1069.

Louisiana Revised Statute 22:1973 and La R.S. 22:1892 both allow remedies to plaintiffs when insurers breach their duty to fairly and promptly make a reasonable effort to settle claims on behalf of their insureds. Under both of the above-mentioned statutes, failure to pay a claim due within 60 days under Louisiana Revised Statute 22:1973 or 30 days under Louisiana Revised Statute 22:1892 would constitute a breach by an insurer ***if such failure was arbitrary, capricious or without probable cause.***

"The plaintiff, insured, has the burden of proving that the insurer was given satisfactory proof of loss from the insured or any party in interest." *Patin v. Imperial Lloyd's Ins. Co.*, 95-841 (La. App. 3 Cir. 1/17/96), 670 So.2d 238, 243-44; *see also Daney v. Haynes*, 93-1103 (La. App. 4 Cir. 12/30/93), 630 So.2d 949. The provisions of the statute are punitive and penal in nature, and must be strictly construed. *McDill v. Utica Mut. Ins. Co.*, 475 So.2d 1085 (La. 1985); *Patin*, 670 So.2d at 243; *Shrader v. Life Gen. Sec. Ins. Co*., 588 So.2d 1309, 1317 (La. App. 2 Cir. 1991).

Louisiana jurisprudence has interpreted the standard under Louisiana Revised Statute 22:1821 in the same fashion as the "arbitrary and capricious" behavior applicable to casualty and other insurers

under Louisiana R.S. 22:1892. *DeSalvo v. Orleans Parish School Bd.*, 97-1339 (La. App. 4 Cir. 4/8/98), 711 So.2d 371. "These penalties should not be applied unless the refusal to pay is clearly arbitrary and capricious." *Schrader* at 1317. "The sanctions imposed by the statute should only be imposed when the facts negate a probable cause for non-payment." *Patin*, 670 So.2d at 243; *see also La. Bag Co. v. Audubon Indemn. Co.*, 999 So.2d 1104, 1120 (La. 2008); *Holt v. Aetna Cas. & Surety Co.*, 628,540 (La. App. 2 Cir. 9/3/96), 680 So.2d 117, 130, *writ denied*, 96-2515 (La. 12/6/96), 684 So.2d 937.

An insurer risks imposition of statutory penalties and attorney's fees if it misinterprets its own policy or Louisiana law in denying coverage. *Carney v. Am. Fire & Indem. Co.*, 371 So.2d 815, 819 (La. 1979). An insurer must take the risk of misinterpreting its own policy provisions. If it errs in interpreting its own insurance contract, such error will not be considered as a reasonable ground for delaying the payment of benefits, and it will not relieve the insurer of the payment of penalties and attorney's fees. *Id.* An insurer's misinterpretation of the law or its own policy cannot be accomplished at the expense of the insured, and warrants the imposition of attorney's fees and costs where the insurer's interpretation is contrary to the law or the terms of the policy. *Gandy v. United Services Auto. Ass'n.*, 97-1095 (La. App. 5 Cir. 10/1998), 721 So.2d 34, 37-38, *writ denied*, 98-2836 (La. 1/15/99); 736 So.2d 208; and *Dawson Farms v. Millers Mut. Fire Ins. Co.*, 34,801 (La. App. 2 Cir. 8/1/01), 794 So.2d 949, 953, *writ denied*, 01-2477 (La. 1/7/01), 803 So.2d 34. An insurer's actions or conduct are arbitrary and capricious when the refusal of a claim is not based on a good faith defense, or is unreasonable or without probable cause. *Calogero*, 753 So.2d at 173.

However, Louisiana case law is also clear that if a reasonable dispute between an insurer and its insured exists, a refusal to pay by the insurer is not arbitrary, capricious or without probable cause. *Molony v. U.S.A.A. Property & Cas. Ins. Co.*, 97-1836 (La. App. 4 Cir. 3/4/98), 708 So.2d 1220; *see also La. Bag Co. v. Audubon Indemn. Co.*, 999 So.2d 1104, 1114 (La. 2008). "[W]here the insurer has legitimate doubts about coverage, the insurer has the right to litigate these questionable claims without being subjected to damages and penalties." *Calogero v. Safeway Ins. Co.*, 99-1625 (La. 10/1/99), 753 So.2d 170, 173. However, the insurer must take substantive and affirmative steps to accumulate the facts that are necessary to evaluating a claim and the mere opening of a claim does not satisfy the requirement for timely initiation of loss adjustment. *Sher v. Lafayette Ins. Co.*, 988 So.2d 186 (La. 4/8/08). If there are certain uncontradicted and uncontested portions of a claim, an insurer shall pay within 30 days of receipt of a proof of loss or be subject to sanctions under 22:1892. *Louisiana Bag Co. Inc. v. Audubon Indemnity Co.*, 999 So.2d 1104 (La. 12/2/08).

This apparent contradiction can perhaps be explained by special circumstances in *Carney*, the court concluded that the insurer was not arbitrary in denying coverage due to its legal mistake over whether an off-road race car was an "automobile" covered under the policy *Carney v. Am. Fire & Indem. Co.*, 371 So.2d 815 (La. 1979). The special circumstances were that the trial court, the appellate court, and multiple other jurisdictions, including four state supreme courts, had interpreted the clause at issue in the insurer's favor. *Id*. at 819.

On December 3, 2003, the Louisiana Supreme Court resolved the split in the Circuits as to whether actual damages need to be proven in order to establish the right to recover penalties under Louisiana Revised Statute 22:1973, and concluded that such proof is not required. *The Sultana Corp. v. Jewelers Mut. Ins. Co.*, 03-0360 (La. 12/3/03), 860 So.2d 1112; *Placenio v. Progressive Paloverde Insurance Co*., 6:17-cv-01433 2019 WL 348799, *8 (W.D. La. 1/28/19). Notably, the Court also concluded that the "knowingly committed" standard for proving the right to recover penalties where an insurer failed to

pay a settlement within 30 days was satisfied by proof that the defense lawyer was competent and that the insurer's claims department was monitored by a corporate vice-president to ensure compliance with Louisiana laws. *Id*. at 119. The Supreme Court rejected the insurer's defense that the check was 15-20 days late because of a "clerical error," and remanded the case for an assessment of penalties. *Id*.

The measure of damages available to an insured whose insurer, arbitrarily or in bad faith, fails to promptly pay or adjust claims is described in more detail in Section V.A.1.

3. Insurance Regulations to Watch

The Louisiana Administrative Code provides a "detailed administrative process" for parties to challenge violations of Louisiana insurance regulations. *Melder v. Allstate Corp.,* 404 F.3d 328, 331 (5th Cir. 2005); La. Admin. Code tit. 37, § 1101 *et seq*; *see* Section IV.B.5, below. The Commissioner's decisions may be appealed to the 19th Judicial District Court in East Baton Rouge Parish. La. Admin. Code tit 37, Part XI, § 1143. However, a litigant must exhaust his administrative remedies before the Commissioner and the Department of Insurance before seeking judicial review. *Melder* at 332.

To qualify for protections under the Louisiana Medical Malpractice Act (La. R.S. 40:1231.1 *et seq* (including damage caps), a medical provider must comply with both the statutory provisions of the Act and the administrative rules promulgated by the Department of Insurance, La. Admin. Code Title 37, § 5001 *et seq*. *Luther IOM Company LLA*, 13-0353 (La. 10/15/13) 130 So.3d 817,826; *Brimmer v. Eagle Family Dental, Inc.*, 17-0951 (La. App. 4 Cir. 8/8/18) 2018 WL 3802022.

4. State Arbitration and Mediation Procedures

La. Rev. Stat. §§ 9:4201 through 9:4217 contain the Louisiana Arbitration Law ("LAL"). The LAL is virtually identical to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 ("FAA"). For that reason, Louisiana courts have turned to federal jurisprudence under the FAA for guidance in construing the LAL. *Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc.*, 871 So.2d 380, 388, (La. App. 4 Cir. 2004); *Blount v. Smith Barney Shearson*, Inc., 695 So.2d 1001,1003 (La. App. 4 Cir. 1997).

Both the federal and state jurisprudence hold that any doubt as to whether a controversy is arbitrable should be resolved in favor of arbitration. La. Rev. Stat. § 9:4201 favors and upholds arbitration agreements except upon such grounds as exist at law or in equity for the revocation of any contract. Louisiana law favors an interpretive effort toward upholding arbitration.

Where there is doubt over arbitrability of a claim the general rule is that the doubt should be resolved in favor of, not against, arbitration. *Cajun Elec. Power Co-Op., Inc. v. La. Power & Light Co.*, 324 So.2d 475, 478 (La. App. 4 Cir. 1975). Arbitration awards are presumed valid because of a strong public policy favoring arbitration in Louisiana. A reviewing court cannot review the merits of an arbitrator's decision; the grounds for judicial inquiry under arbitration law are whether a valid arbitration agreement exists, and whether it has been complied with. *Orleans Parish Sch. Bd. v. United Teachers of New Orleans*, 689 So.2d 645, 647 (La. App. 4 Cir. 1997). The party seeking to enforce arbitration has the burden of showing the existence of a valid contract to arbitrate. *Johnson's, Inc. v. GERS, Inc.*, 778 So.2d 740, 743 (La. App. 2 Cir. 2001).

In *McBride v. Mursimco*, 2004 WL 1459565 (E.D. La. June 28, 2004), the court held that, under Louisiana law, the right to demand arbitration is strong. To determine whether parties should be

compelled to arbitrate, a court should consider first, whether the parties agreed to arbitrate the dispute; and, second, if so, whether any statute or policy renders the claims nonarbitrable. Because the parties did agree to arbitrate, and the Fifth Circuit Court of Appeals held that Title VII claims are arbitrable in *Mouton v. Metro. Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998), the *McBride* court determined that the parties were compelled to arbitrate the dispute. *Id.* at 4. *See also Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc.*, 871 So. 2d 380 (La. App. 4 Cir. 2004) (holding that once a court finds an arbitration agreement and a failure to comply with such agreement, the court must compel the parties to arbitrate unless it may be demonstrated that such arbitration agreement is not susceptible of an interpretation that covers the asserted dispute).

5. State Administrative Entity Rule-Making Authority

The insurance industry in Louisiana is regulated by the Louisiana Department of Insurance. La. Const. Art. 4, § 11, § 20; La. R.S. 22:2-3, 11. Rules are adopted per the procedure set forth in La. R.S. 49:953, but the Department's rule-making authority is overseen by the Louisiana legislature. La. R.S. 49:968.

All insurance producers must be licensed to sell or negotiate insurance policies in Louisiana. La. R.S. 22:1543. The Department and the Commissioner of Insurance may revoke an insurer's license, and assess fines up to $10,000 per year per licensee, for violations of the Louisiana insurance licensing laws, Louisiana insurance regulations, and other offenses listed in La. R.S. 22:1554 (including but not limited to fraud, misappropriating premiums, and misrepresenting the terms of an insurance contract).

Rules of procedure before the Commissioner of Insurance and the Department are covered by La. Admin. Code tit 37, Part XI, § 1101 *et seq*. The complained-of insurer must be given notice at least 20 days prior to the hearing, and evidence may be subpoenaed. La. Admin. Code tit 37, Part XI, § 1121, 1129. The Commissioner's decisions may be appealed to the 19th Judicial District Court in East Baton Rouge Parish. La. Admin. Code tit 37, Part XI, § 1143.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

1. First Party

Under Louisiana Revised Statute 22:1892, all insurers, except those specified in Louisiana Revised Statutes 22:1811 and 22:1821 and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, must:

- Initiate adjustment of property loss and medical expenses within fourteen days of notice of loss, except in cases of catastrophic loss and certain emergencies;
- Pay the amount of any claim due to the insured within thirty days of receipt of satisfactory proof of loss.
- Make a written offer to settle any property damage claim within thirty days of receipt of satisfactory proof of loss.

Arbitrary, capricious, or without probable cause violation of the second and third duties above duties may subject the insurer to penalties of 50% of the difference between the amount due to

the claimant and the amount tendered to claimant by the insurer.

Louisiana Revised Statute 22:1892 was amended in 2003, and again in 2006, increasing the penalty effective August 15, 2006 to fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater . . . or in the event a partial payment has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due, as well as reasonable attorney fees and costs. La. R.S. 22:1892(B)(1).

The insurer is subject to the version of Louisiana Revised Statute 22:1892 or 22:1973 in place at the time the cause of action arises, not the version in place when the policy was issued. *See Sher v. Lafayette Ins. Co.*, 988 So.2d 186, 199-200 (La. 2008); *Lewis v. State Farm Ins. Co.*, 41,527 (La. App. 2 Cir. 12/27/06), 946 So.2d 708; *Royal Cloud Nine, L.L.C. v. Lafayette Ins. Co.*, 2008-0034 (La. App. 4 Cir. 06/11/08), 987 So.2d 355.

Under Louisiana Revised Statute 22:1973, an insurer who fails to pay the amount of any claim due within sixty days of receipt of satisfactory proof of loss is liable for any damages sustained as a result of the delay in payment if such delay is arbitrary, capricious, or without probable cause. Such failure may also subject the insurer to penalties of up to twice the sustained as a result of the delay (not the amount due under the insurance contract). *Durio v. Horace Mann Insurance Company*, 2001-C-0084 (La. 10/25/11) 74 So.3d 1159, 15; *Williams v. Security Plan Fire Insurance Co.*, 222 So.3d 200, 203-04 (5th Cir. 2017).

Louisiana Revised Statute 22:1821 requires an insurer to pay health and accident insurance claims within 30 days following the insurer's receipt of written notice unless just and reasonable grounds exist such as would put a reasonable businessman on his guard. Disability payments must be made at least every thirty days. The insurer's failure to comply allows the recovery of double insurance benefits, and attorney's fees. Claims for accidental death must be paid within 60 days of the insurer's receipt of proof of death, and the failure to settle without just cause allows the insured to recover interest on the amount due at 6% from the date of death until paid. These are the sole remedies for penalty damages in claims involving health, life and accident policies under Louisiana law.

Attorney fees are not available to the insured under La. R.S. 22:1973. However, if both have been violated, an insured may recover both penalties under Louisiana Revised Statute 22:1973, and attorney's fees under Louisiana Revised Statute 22:1892. *Calogero v. Safeway Ins. Co.*, 99-1625 (La. 10/1/99), 753 So.2d 170, 173-74.

The Louisiana Supreme Court and numerous Louisiana federal district court decisions have held that ERISA preempts Louisiana Revised Statute 22:1821 for any claims against insurers in connection with group employee benefits plans. *Cramer v. Assoc. Life Ins. Co.*, 569 So.2d 533, 537 (La. 1990*); Clancy v. Employers Health Ins. Co.*, 101 F.Supp.2d 463 (E.D. La. 2000). A few federal district courts interpreting similar laws in other states have concluded that state law provisions on claims handling practices are saved from preemption. *See, e.g., Lewis v. Aetna U.S. Healthcare, Inc.,* 78 F.Supp.2d 1202 (N.D. Okla. 1999).

"An insurer which hastily enters a questionable settlement simply to avoid further defense obligations under the policy clearly is not acting in good faith and may be held liable for damages caused to its insured." *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 423 (La. 1988).

Most recently, the Louisiana Supreme Court has also held that "first-party bad faith claims against an insurer are governed by the ten-year prescriptive period" set forth in Louisiana Civil Code art. 3499. *Smith v. Citadel Ins. Co.*, 2019-00052 (La. 10/22/19), 285 So. 3d 1062, 1073.

2. Third-Party

"The relationship between the insurer and the third-party claimant is neither fiduciary nor contractual; it is fundamentally adversarial. For that reason, a cause of action directly in favor of a third-party claimant is generally not recognized absent statutory creation." *Langsford v. Flattman*, 864 So.2d 149, 151 (La. 2004) (citation omitted). The statutes imposing a good faith duty on insurers create a right of action directly in favor of third-party claimants, but only as to those specific acts enumerated by statute. La. R.S. 22:1892, 22:1963, 22:1964, 22:1964(14), and 22:1973. These circumstances are limited to property damages and other minor matters. Louisiana law does ***not*** generally afford a third-party claimant a right to assert a bad faith claim against an insurer. See *Langsford*, 864 So.2d 149.

As discussed at Section IV.A.1, the duty of an insurer when faced by multiple claims likely to exceed policy limits has been summarized as to "treat the claims as if it policy was unlimited." Thomas R. Newman, *Ending the Duty to Defend*, 55 NO. 3 DRI FOR THE DEFENSE 38, March 2013, at 8. If the insurer does settle in good faith, exhausting the policy limits, it is without further liability either to the insured or the remaining claimants, for either payment of damages or defense costs. *Holtzclaw v. Falcon, Inc.*, 355 So.2d 1279 (La. 1977); *Pareti v. Sentry Indemnity Co.*, 536 So.2d 417, 423 (La. 1988). The insurer is under no obligation to settle equally or pro rata with the claimants, even if the remaining claimants may be unable to satisfy their claims. *Holtzclaw*, 355 So.2d at 1287. This is the "first to settle" or "first in time, first in right" rule also adopted by most jurisdictions in the United States. Douglas R. Richmond, *Too Many Claimants and Too Little Money*, TORT TRIAL AND INSURANCE PRACTICE LAW JOURNAL, Spring/Summer 2009, at 897; Thomas R. Newman, *Ending the Duty to Defend*, 55 NO. 3 DRI FOR THE DEFENSE 38, March 2013, at 2.

Further, the Louisiana Supreme Court recently held that third party delictual actions brought by an insured based on the breach of a duty created by law are subject to a one year prescription period running from the day the injury or damage was sustained. *DePhillips v. Hospital Serv. District No. 1 of Tangipahoa Parish*, 2020 WL 3867212 (La. 7/9/20) (citing La. Civ. Code art. 3492).

Fraud

Generally, Louisiana law allows a contract to be rescinded for vices of consent where the contract would not have been issued but for the fraud of one of the contracting parties, or due to mutual mistake. "Consent may be vitiated by error, fraud, or duress." La. Civ. Code art. 1948. "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." La. Civ. Code art. 1953. "Error induced by fraud need not concern the cause of the obligation to vitiate consent, but it must concern a circumstance that has substantially influenced that consent." La. Civ. Code art. 1955. Fraud need only be proved by a preponderance of the evidence. La. Civ. Code art. 1957.

Elements of fraud in Louisiana are: (1) a misrepresentation, suppression or omission of true information; (2) made with the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract. *McCarthy v. Evolution Petro. Corp.*, 47,907 (La. App. 2 Cir. 02/27/13), 111 So.3d 446;

Shelton v. Standard/700 Assocs., 01-587 (La. 10/16/01), 798 So.2d 60, 64. The party alleging fraud must prove the other party's intent to defraud of gain an unfair advantage; and, the loss or damage caused thereby. *Heyl v. Heyl*, 445 So.2d 88, 90 (La. App. 2 Cir. 1984), *writ denied*, 446 So.2d 1228 (La. 1984). To establish fraud from silence or inaction, there must exist a duty to speak or disclose information. *First Downtown Dev. v. Cimochowski*, 24,328 (La. App. 2 Cir. 1/28/93), 613 So.2d 671, 677, *writ denied*, 93,471 (La. 4/2/93), 615 So.2d 340 (citing *Greene v. Gulf Coast Bank*, 593 So.2d 630, 632 (La. 1992). A duty to provide correct information exists where there is privity of contract between the parties, as is the case with insurance contracts. *Barrie v. V.P. Exterminators, Inc.*, 93,679 (La. 10/18/93), 625 So.2d 1007, 1015-16, *reh'g denied*, (La. 11/18/93).

An insurer who establishes fraud should be able to recover attorney's fees and damages against the insured if the court rescinds the policy based on the insured's fraud. La. Civ. Code art. 1958. However, no reported case has granted attorney's fees for such fraud. *See Independent Fire Ins. Co. v. Lea*, 979 F.2d 377 (5th Cir. 1992)..

Intentional or Negligent Infliction of Emotional Distress

Insureds in Louisiana may recover emotional distress damages resulting from an insurer's violation of La. R.S. 22:1973. In *Wegener v. Lafayette Ins. Co.*, 2010-0810 (La. 3/15/11), 60 So.3d 1220, the Louisiana Supreme Court addressed the ability of an insured to collect damages for mental anguish and emotional distress based upon an insurer's bad faith. In *Wegener*, the Court concluded that La. R.S. 22:1973 is "worded to permit 'any general or special damages with no limitation or requirement other than the breach of duty by the insurer," and that a plaintiff is not required to prove the insurer's intent to aggrieve the plaintiff in order to collect damages for mental anguish pursuant to La. R.S. 22:1973. *Id.* at *1230-1231; *see also Guidry v. State Farm Fire & Cas. Co.*, 11-262 (La. App. 3 Cir. 10/5/11), 74 So.3d 1276. La. C.C. art. 1998 has no application to claims for emotional distress arising out of a breach of insurance contract dispute. *Wegener*, 60 So.3d at 1230.

In *Lewis v. State Farm Ins. Co.*, the Louisiana Third Circuit Court of Appeal found that "[p]laintiffs sustained extra-contractual general damages in the form of mental anguish and emotional distress associated with pursuing [their] claim that [the insurer], in bad faith, failed to timely pay." 41,527 (La. App. 2 Cir. 12/27/06), 946 So.2d 708, 728. The court awarded plaintiff $8,000.00 in general damages for the insurer's breach of its duty of good faith and fair dealing, and then doubled the amount to $16,000.00 pursuant to Subsection (C) of Louisiana Revised Statute 22:1973, which measures the penalty as "twice the amount of damages sustained or $5,000, whichever is greater." *Id*. The Third Circuit also held that insureds are entitled to the damages as set forth in the version of the statute in effect at the time the cause of action arises. *Id*.

State Consumer Protection Laws, Rules and Regulations

Louisiana Revised Statute 22:1973 is generally applicable to "claims handling" by health and accident insurers which are not ERISA plans, and has been discussed above. Otherwise, unfair trade practices by insurers, HMOs or other plans are subject to review and sanction only by the Louisiana Commissioner of Insurance, and do not give rise to private causes of action to individuals. La. Rev. Stat. 22:1962-1972; *Riley v. Transamerica Ins. Group*, 923 F. Supp. 882 (E.D. La. 1996), *aff'd*, 117 F.3d 1416 (5th Cir. 1997) (Table); *Clausen v. Fid. & Deposit Co. of Md.*, 950504 (La. App. 1 Cir. 8/4/95); 660 So.2d 83, 86 *writ denied*, 95-2489 (La. 1/12/96), 666 So.2d 320.

Likewise, the various claims handling and other duties imposed on insurers by Louisiana Revised Statute 22:1973(A) & (B) are "not applicable to claims made under health and accident insurance policies." La. Rev. Stat. 22:1973(D). Finally, because insurers, HMOs and other plans are subject to regulation by the Louisiana Insurance Commission, Louisiana's general statute prohibiting unfair and deceptive trade practices, Louisiana Revised Statute 51:1401, et seq., is not applicable to such insurers, HMOs and other plans. La. Rev. Stat. 51:1406(1).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

The discovery statutes are to be liberally and broadly construed to achieve their intended objectives. *Sercovich v. Sercovich*, 2011-1780 (La. App. 4 Cir. 06/13/12), 96 So.3d 600, 603. These objectives include affording all parties a fair opportunity to obtain facts pertinent to the litigation, and allowing the discovery of the true facts and compelling disclosure of these facts wherever they may be found. *Hodges v. S. Farm Bureau Cas. Ins. Co.*, 433 So.2d 125, 129 (La. 1983). An objecting party has the burden of proof to establish good cause to justify its refusal to produce documents. *Chesson v. Hungerford*, 228 So.2d 332, 334 (La. App. 3 Cir. 1969).

Discoverability of Claims Files Generally

> "[A]ny documents which contain information regarding settlement of the claim and actions or inactions taken or discussed by [the insurer] are relevant to the subject matter of the arbitrary and capricious refusal to settle the insurance claim. The claim files which the [plaintiffs] seek to discover represent, perhaps, the only records of [the insurer's] actions regarding settlement of the [plaintiffs'] claim. For the most part, the [plaintiffs] will be unable to obtain the substantial equivalent of the file information since the accuracy of the materials cannot be duplicated by depositions of the [insurer's] officers or agents who must rely on their memories. Thus, the non-production of these documents would unfairly prejudice the [plaintiffs] in preparing their claim against [the insurer]."

Lehman v. Am. S. Home Ins. Co., 921101 (La. App. 1 Cir. 3/5/93), 615 So.2d 923, 926, *writ denied*, 93-0867 (La. 5/7/93), 617 So.2d 913; *see also Fuqua v. Aetna Casualty & Surety Company*, 542 So.2d 1129, 1132-1133 (La. App. 3 Cir. 1989), *writ denied*, 548 So.2d 310 (La. 1989); *Brown-Knight v. Just Add Gas*, 11- 2269 (La. App. 1 Cir. 11/29/12) 2012 WL 5990273.

Discoverability of Reserves

Louisiana federal court decisions reflect that reserve information is discoverable in the context of a bad faith claim against an insurer. "The setting of reserves bears some relationship to the insurer's calculation of potential liability, and have been found to be discoverable when bad faith is asserted." *Bros. Petroleum, LLC v. Underwriters at Lloyd's London*, 2008 U.S. Dist. LEXIS 51389 at *8 (E.D.La. Jul 2, 2008) (citations omitted). Where a plaintiff shows substantial need for reserve materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means, the court may order the production of reserve information. *Id*. (citing Fed.R.Civ.P. 26(b) (3) (A) (iii)); *see also Harris Chevrolet, Inc. v. Hanover Ins. Co.*, 2008 WL 11351443 at *3 (E.D.La. Feb. 28, 2008) (ordering the production of "*all* documents related to the loss reserves" as relevant to a first-party suit of an insured against an insured on an alleged bad faith claim).

Meanwhile, Louisiana state courts have not made any direct pronouncements on the subject. In *Molony v. USAA Prop. & Cas. Ins. Co.,* 97-1836 (La. App. 4 Cir. 3/4/98), 708 So.2d 1220, the plaintiff's injury claim was tried to a jury and his claim for penalties and attorney's fees was subsequently tried to the judge. After considering the evidence concerning the bad faith claim, the Judge awarded penalties and attorney's fees in accordance with Louisiana Revised Statutes 22:1892 and 22:1973. In order to decide whether USAA was arbitrary and capricious, the Judge compared USAA's "reserves" to the tenders that were issued. The Fourth Circuit held that "reserves" do not equate to the "undisputed amount" regarding the value of a claim and noted that the Judge's comparison

was improper. *Id*. at 1226. However, the trial Judge was allowed to consider the amount of the "reserves" as a factor regarding the bad faith claim. The *Molony* decision does not hold that evidence regarding "reserves" is inadmissible.

The Fourth Circuit's decision simply provides a caution as to how the "reserves" should and/or should not be used in deciding a bad faith claim. In other words, the amount of the "reserves" is admissible, but the court must safeguard that the "reserve" amount is used properly.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

"[D]iscovery of communications between [an insurer] and its reinsurers regarding plaintiffs' insurance claims is relevant to plaintiffs' claims for bad faith penalties." *Imperial Trading Co. v. Travelers Prop. Cas. Co.*, 2009 WL 2242380 at *3 (E.D. La. May 5, 2009); *see also Cameron Parish Sch. Bd. V. RSUI Indemn. Co.*, 2008 U.S. Dist. LEXIS 56069 at *7-*8 (W.D. La. Jul. 23, 2008) (finding that "information on the nature and scope of RSUI's reinsurance strategy as to Plaintiff's policy is discoverable"). The *Imperial Trading* court explained:

> [C]ommunications between [an insurer] and its reinsurers regarding plaintiffs' insurance claims contain information that is relevant to [an insurer's] good faith to the extent that [the insurer] explained its reasons for granting or denying portions of plaintiffs' claims or otherwise described or explained its handling of plaintiffs' claims. *Cf. U.S. Fire Ins. Co.*, 244 F.R.D. at 643 ("The Insurers may well have discussed various positions or issues with their reinsurers. The timing and content of those communications could readily lead to the discovery of admissible evidence regarding the Insurers' handling and investigation of [the insured's] claims . . . ."). Plaintiffs may be able to use that information to point out inconsistencies in [the insurer's] stated positions, or to otherwise show that [the insurer] did not act in good faith reliance on a reasonable defense in adjusting plaintiffs' claims.

Id. at *7-*8 (citing *Reed v. State Farm Mut. Auto. Ins. Co.*, 857 So.2d 1012, 1021 (La. 2003)).

The *Imperial Trading* court also ordered the production of reinsuring agreements "to the extent that [an insurer] is party to any agreement that obligates a reinsurer 'to satisfy all or part of a possible judgment [against [an insurer]] in the action to indemnify or reimburse [an insurer] for payments made to satisfy the judgment.'" *Imperial Trading* 2009 WL 2242380 at *2 (citing Fed. R. Civ. P. 26(a)(1)(A)(iv)).

Attorney/Client Communications

In Louisiana, discovery statutes are liberally and broadly construed to afford all parties a fair opportunity to obtain facts pertinent to the litigation. *See, e.g., Hodges v. S. Farm Bureau Cas. Ins. Co.*, 433 So.2d 125, 129 (La. 1983); *Chesson v. Hungerford*, 228 So.2d 332, 334 (La. App. 3 Cir. 1969). *Simmons v. Transit Mgmt. of Southeast La., Inc.*, 2000-2530 (La. App. 4 Cir. 02/07/01), 780 So.2d 1074, 1077.

In *Dixie Mill Supply Co. v. Continental Cas. Co.*, 168 F.R.D. 554 (E.D. La. Jul. 10, 1996), plaintiff contended that "all 'bad faith' insurance litigation necessarily requires investigation into the insurers' state of mind when they were deciding to what extent they were obligated to defend [the plaintiff] . . . and how to undertake that defense." *Dixie Mill*, 168 F.R.D. at 556. For this reason, they sought communications with the insurers' coverage counsel. The court disagreed, stating that the focus must be on the insurers' use of protected communications, "i.e., on 'whether the privilege holder[s] have committed [themselves] to a course of action that will require the disclosure of a privileged communication,' not on [plaintiff's] alleged need for the materials to prove its own allegations of

bad faith." *Id*. at *9 (quoting *Succession of Smith v. Kavanaugh, Pierson & Talley*, 513 So.2d 1138, 1145 (La. 1987)).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Louisiana Revised Statute 22:983, 22:860 and 22:875 set forth the basis for rescission of policies, as do Articles 1953 to 1958 of the Louisiana Civil Code. The Louisiana Supreme Court has held that the insurer must prove that the false statement was made with the intent to deceive ***and*** that the false statement materially affected the risk. *Coleman v. Occidental Life Ins. Co. of N.C.*, 418 So.2d 645, 646 (La. 1982); *Antill v. Time Ins. Co.*, 460 So.2d 677, 679 (La. App. 1 Cir. 1984).

An insurer must meet a three-tiered burden of proof to deny coverage for misrepresentation in policy application: (1) the insurer must show that the applicant's statements were false; (2) the insurer must establish that the misrepresentations were made with an actual intent to deceive; and (3) the insurer must establish that these misstatements materially affected the risk assumed by the insurer. *Talbert v. State Farm Fire and Cas. Ins. Co.*, 2007-0211 (La. App. 4 Cir. 11/14/07), 971 So.2d 1206, 1212-1213. "Strict proof of fraud is not required to show the applicant's intent to deceive . . . ." *Watson v. Life Ins. Co. of La.*, 335 So.2d 518, 521 (La. App. 1 Cir. 1976); *see also Johnson v. Occidental Life Ins. Co. of Cal.*, 368 So.2d 1032, 1036 (La. 1979); *Green v. Pilot Life Ins. Co.*, 450 So.2d 406, 408 (La. App. 3 Cir. 1984).

> The difficulty of proving intent to deceive is recognized by the court. Thus, the courts look to the surrounding circumstances indicating the insured's knowledge of the falsity of the representation made in the application and his recognition of the materiality of his misrepresentations, or to circumstances which create a reasonable assumption that the insured recognized the materiality.

Perault v. Time Ins. Co., 92-2115 (La. App. 1 Cir. 11/24/93), 633 So.2d 263, 266, *writ denied*, 93-3133 (La. 2/11/94), 634 So.2d 833; *see also Watson*, 335 So.2d at 521; *Johnson*, 368 So.2d at 1036; *Green*, 450 So.2d 406 at 408. "Anti-technical statutes such as Revised Statute 22:860 have been enacted to preclude an insurer from denying coverage by use of complex policy provisions concerning facts the untutored insured would find relevant to his coverage." *Id.*

The test of materiality is whether knowledge of the facts would have influenced the insurer in determining whether to assume the risk or in fixing premiums. *Green*, 450 So.2d at 408. Under Louisiana Revised Statutes 22:983 and 22:860, the insurer has the burden of proof to establish that the misrepresentation or omission was material to the insurer *and* that the insured intended to deceive the insurer. *Breaux v. Bene*, 95-1004 (La. App. 1 Cir. 12/15/95), 664 So.2d 1377, 1380. No causal relation between the misrepresentation and the loss is necessary for the insurer to avail itself of defense based on misrepresentation in negotiation of insurance contract. *West v. Safeway Ins. Co. of Louisiana*, 42,028 (La. App. 2 Cir. 3/21/07), 954 So.2d 286, 290.

Louisiana Revised Statute 22:983 provides that false statements made in an application for a health insurance policy do not bar coverage unless the false statements materially affect either the acceptance of the risk or the hazard assumed by the insurer; however, the application must be attached to the policy in order to cancel the policy based on such a misstatement. Louisiana Revised Statute 22:975(A)(13) provides that after three years of the issuance of the policy that only fraudulent misstatements may be used to void a policy or deny a claim.

Louisiana Revised Statute 22:860 concerns warranties and misrepresentations in applications and during negotiations, and states as follows:

- Except as provided in Subsection B of this Section and R.S. 22:1314 and R.S. 22:1315 [*which concern standard fire* policies only], no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or on his behalf, shall be deemed material or defeat or void the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive.
- In any application for life or health and accident insurance made in writing by the insured, all statements therein made by the insured shall, in the absence of fraud, be deemed representations and not warranties. The falsity of any such statement shall not bar the right of recovery under the contract unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.

Louisiana Revised Statute 22:875 addresses an insurer's right to void and rescind a policy based on intervening breaches of warranty or conditions in an insurance contract:

If any breach of a warranty or condition in any insurance contract occurs prior to a loss under the contract, such breach shall not avoid the contract nor avail the insurer to avoid liability, unless the breach exists at the time of the loss.

Failure to Comply with Conditions

"Absent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and enforce reasonable conditions upon the policy obligations they contractually assume." *La. Ins. Guar. Assn v. Interstate Fire & Cas. Co.*, 93-0911 (La. 1/14/94), 630 So.2d 759, 763 (citations omitted). Subject to these provisions, an insurance contract forms the law between the parties and the obligations set forth therein are enforceable. *Id*. "In Louisiana, insurance policies issued in the state are considered to contain all provisions required by statute." *Simms v. Butler*, 97-0416 (La. 12/2/97), 702 So.2d 686, 688.

In *Hood v. Cotter*, 2008-0215 (La. 12/2/08), 5 So.3d 819, the Louisiana Supreme Court resolved a longstanding split in the circuits regarding the impact of La. R.S. 22:868 (previously La. R.S. 629) on claims-made policies. La. R.S. 22:868 provides that no insurance contract shall contain any condition, stipulation or agreement limiting the right of action against an insurer to a period of less than one year from the time when the cause of action accrues. Holding that the "claims-made policy denies coverage to defendant for plaintiff's claim, but it does not itself limit plaintiff's right of action," the *Hood* court held that La. R.S. 22:868 was not violated, and that "[t]o hold otherwise would effectively convert a claims-made policy into an occurrence policy and change the bargained-for exchange between the insurer and the insured. . ." *Id*. at 830.

Moreover, an insured's failure to comply with the terms of its own policy does not defeat a third party's claims against the insurer pursuant to the Louisiana Direct Action Statute, La.R.S. 22:1269(D). *Auster Oil & Gas, Inc. v. Stream*, 891 F.2d 570, 578 (5th Cir. 1990) (citing *West v. Monroe Bakery*, 46 So.2d 122, 123 (La. 1950)). The Louisiana Direct Action Statute will protect third parties absent fraud or collusion involving the third party and the insured or a showing of prejudice to the insurer. *National Union Fire Insurance Company of Pittsburgh, Pa. v. Cagle*, 68 F.3d 905, 912 (5th Cir. 1995); *Auster Oil & Gas*, 891 F.2d at 576-579; *King v. King*, 217 So.2d 395, 400 (La. 1968); *Futch v. Fidelity & Casualty Company of New York*, 166 So.2d 274, 278-279 (La. 1964); *see also Haynes v. New Orleans Archdiocesan Cemeteries*, 805 So.2d 320, 323 (La. App. 4 Cir. 2001) ("As a general rule, an insurer may not raise the failure of its insured to give notice of the accident or suit as a valid defense to claims of an

injured third party."). Louisiana courts generally only find actual prejudice where the insurer had no notice of the claim or suit until after a judgment against the insured became final and executory. *Haynes*, 805 So.2d at 323-325; *Elrod v. P.J. St. Pierre Marine, Inc.*, 663 So.2d 859 (La. App. 5 Cir. 1995); *see also Resolution Trust Corp. v. Miramon*, 1993 WL 292833 at *4 (E.D.La. July 27, 1993) (citing *Auster Oil*, 891 F.2d at 578-79) (a finding of prejudice would only be justified when the insurer is denied an opportunity to assert all possible defenses to the injured third party's claims).

Challenging Stipulated Judgments: Consent and/or No-Action Clause

"No action clauses shield insurers from paying damage judgments against insolvent insureds. Since 1918, the Direct Action Statute has protected tort claimants against insolvent insureds by allowing direct actions against insurers." *Black v. First City Bank*, 642 So.2d 151, 153 (La. 1994). "Direct action statutes are remedial legislation which void no action clauses but do not otherwise alter insurers' liabilities." *Id*. In *Quinlan v. Liberty Bank and Trust Co.*, 575 So.2d 336 (La. 1990), the Louisiana Supreme Court permitted a plaintiff to file suit against an insurer pursuant to the Louisiana Direct Action Statute, despite the existence of a "no action" clause in the insurance policy. The Court explained that "[i]t would lead to absurd consequences to interpret the statute [the Louisiana Direct Action Statute] as permitting an insurer to insulate itself from such an action by framing its policy as an indemnity contract or by inserting a "no action" clause in its policy." *Quinlan*, 575 So.2d at 352.

Preexisting Illness or Disease Clauses

ouisiana Revised Statute 22:1062 became effective on July 1, 1997, and allows group health plans and group health insurers to impose a preexisting condition exclusion only if: the exclusion relates to a physical or mental condition for which medical advice, diagnosis, care or treatment was received within 6 months prior to the enrollment date; such exclusion precludes coverage for 12 months unless the insured is a late enrollee, in which case the limit is 18 months; and, the period of the preexisting condition exclusion is reduced by the aggregate of the periods of creditable coverage as defined by Louisiana Revised Statute 22:1061(4).

Louisiana Revised Statute 22:1072 provides the portability requirements for non-group health and accident insurance policies and HMO subscriber agreements, and allows the inclusion of "the standard twelve-month pre-existing condition exclusions when the covered person initially becomes covered under a health and accident policy, or when any such person lacks continuous health insurance coverage for more than 60 days." Any non-group health and accident insurance policies and HMO subscriber agreements issued after July 1, 1997 "shall be portable without preexisting conditions or limitations except as otherwise provided in this Section." The Fifth Circuit has held that an exception endorsement is separate and apart from a preexisting condition limitation. In *Wynn v. Washington Nat. Ins. Co.*, the court held that an exception endorsement to group health insurance policy, excluding coverage for insured's spinal disorder, was separate and independent from preexisting condition limitation and, thus, was not subject to statutory restrictions on limiting coverage for losses due to preexisting condition incurred more than 12 months following effective date of coverage. 122 F.3d 266 (5th Cir. 1997); *see also Carthane v. Continental Cas. Co.*, 2000 U.S. Dist. LEXIS 12488, *8 (E.D. La. 2000). However, when an exclusionary clause is ambiguous, the policy must be interpreted liberally in favor of coverage. *Oxner v. Montgomery*, 34,766 (La. App. 2 Cir. 8/1/01), 794 So.2d 86, 90, *writ denied*, 803 So.2d 36.

Louisiana Revised Statute 22:975(A)(13)(b) was enacted in 1995 and includes the provision that "[n]o claim for loss incurred or disability (as defined in the policy) commencing after three years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or description effective on the date of the loss had existed prior to the effective coverage of this policy."

This in large measure conflicts with Louisiana Revised Statute 22:1072(D), enacted in 1997, which states that all hospital, health, medical expense policies and employee welfare benefit plans issued or delivered in Louisiana on or after January 1, 1999 "shall not deny, exclude or limit benefits for a covered individual for losses due to a preexisting condition incurred more than 12 months following the effective date of the covered persons coverage." This restriction does not apply to limited benefit and supplemental benefit insurance policies nor to short-term major medical policies with a duration of 6 months or less. Louisiana Revised Statute 22:1072(D) is the last enacted statute and should govern in any dispute.

Louisiana law makes it clear that it is not sufficient to establish merely that a condition or an illness is related to a pre-existing condition. *Rabalais v. La. Health Serv. and Indem. Co.*, 95-545 (La. App. 5 Cir. 2/14/96), 671 So.2d 7, 9; *Savage v. Louisiana Health Serv. & Indem. Co.*, 33,853 (La. App. 2 Cir. 09/27/00), 768 So.2d 760, 765. The claimant must have been treated "for the same condition in both instances." *Id.*; *see also, Hoffpauir v. Time Ins. Co.*, 536 So.2d 699, 702 (La. App. 3 Cir. 1988); *Dorsey v. Board of Trustees*, 482 So.2d 735, 738 (La. App. 1 Cir. 1986), *writ denied*, 486 So.2d 735 (La. 1986). The insurer has the burden of establishing that the alleged pre-existing condition did in fact pre-date the effective date of the policy through "certain and decisive" proof, "leaving no room for doubt." *Cramer v. Ass'n Life Ins. Co., Inc.*, 619 So.2d 821, 824 (La. App. 1 Cir. 1993).

In *Wynn v. Washington Nat'l Ins. Co.*, 122 F.3d 266 (5th Cir. 1997), the insured disclosed on her application that she had experienced some back pain a year earlier. Washington National issued a rider ***excluding*** all coverage for her back (other than fractures or cancer). *Id*. at 267-68. This rider exclusion disallowed benefit payments indefinitely into the future and therefore ***beyond*** the twelve month period set out in Louisiana Revised Statute 22:1029 as the maximum period in which an insurer can deny claims based upon a pre-existing condition. About two years after the effective date of the policy, Wynn underwent surgery for a cervical disc problem. The court concluded that the insurer was free to condition its acceptance of the insured's application upon the insured's agreement that her coverage would not extend to some future back injury claims ***even beyond*** the statutory twelve month pre-existing condition period set forth in Louisiana Revised Statute 22:1029. *Id.*

Prescription (Statutes of Limitations and Repose)

Prescription in an insurance coverage depends upon whether the plaintiff asserts a cause of action in delict (tort) or in contract. Actions based in delict are subject to liberative prescription of one year. This prescription begins to run from the day injury or damage is sustained. La.C.C. Art. 3492. Actions based in contract are considered personal actions and are subject to a liberative prescription of ten years. La. C.C. Art. 3499.

Furthermore, Louisiana Revised Statute 22:868 provides that no insurance contract delivered or issued for delivery in this state and covering subjects located, residing, or to be performed in this state, or any group health and accident policy insuring a resident of this state, regardless of where made or delivered, shall contain any condition, stipulation, or agreement limiting the right of action against the insurer to a period of less than twelve months next after the inception of the loss when the claim arises under any insurance classified and defined in Revised Statute 22:6(10), (11), (12), and (13), or to a period of less than one year from the time when the cause of action accrues in connection with all other insurances unless otherwise specifically provided in this Code.

As discussed in Section III above, in most circumstances Louisiana courts will apply Louisiana liberative prescription if the substantive law of another state will otherwise apply to the substance of the claims.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

The trigger of coverage is the event or condition that determines whether and when a policy responds to a specific claim. *Mangerchine v. Reaves*, 10-1052 (La. App. 1 Cir. 3/25/11), 63 So.3d 1049, 1054. "The determination of when coverage for a loss is triggered by an event should not be made without initial analysis of the policy language, as the policy expresses the parties' mutual intent and its language determines the operative conditions upon which the insurer's obligation to indemnify the insured is based. The application of the appropriate theory of the trigger of coverage also depends upon the specific policy language of the particular policy at issue, as the various trigger theories developed by the courts are themselves direct outgrowths of the interpretation of relevant terms used in policies, such as 'occurrence.'" *Id*. at 1055. *See also, Anderson v. Laborde Constr. Indus., L.L.C.*, 2019-0356 (La. App. 1 Cir. 3/12/20), 311 So. 3d 1072, 1081; *M & R Drywall, Inc. v. MAPP Constr., LLC*, 2017-0186 (La. App. 1 Cor. 4/29/19), 280 So. 3d 260, 276.

"A review of Louisiana jurisprudence involving third-party claims for construction defects under commercial general liability (CGL) policies shows that the manifestation theory is the most generally-accepted trigger theory for such claims." *Id*. at 1058 (citations omitted). However, it has not been adopted as a bright line rule in such cases. *Id*. (citing *Orleans Parish School Bd. v. Scheyd, Inc.*, 95-2653 (La. App. 4 Cir. 1996), 673 So.2d 274, 277-78). Manifestation theory has also been utilized in first party property damage claims. *See, e.g., Davidson v. United Fire & Cas. Co.*, 576 So.2d 586 (La. App. 4 Cir. 1991); *Korossy v. Sunrise Homes, Inc.*, 653 So.2d 1215 (La. App. 5 Cir. 3/15/95), *writ denied*, 660 So.2d 878 (La. 1995).

In *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992), an asbestos exposure case, the Louisiana Supreme Court adopted the "exposure theory" under which "coverage is triggered by the mere exposure to harmful conditions during the policy period" due to the difficulties inherent in trying to apply traditional tort liability doctrines to long-latency diseases. *Cole*, 599 So.2d at 1076. In *Norfolk Southern Corp. v. Cal. Union Ins. Co.*, 02-0369 (La. App. 1 Cir. 9/11/03) 859 So.2d 167, the court applied the exposure theory in long-term environmental property damage cases, as "the property damage is generally not due to a single catastrophic event, but to numerous releases and discharges taking place over an extended period of time." *Norfolk Southern*, 859 So.2d at 192. "The property damage may or may not be apparent immediately, and it is virtually impossible to determine the specific damage in existence at any given time or the specific cause of any particular damage." *Id*.

Allocation Among Insurers

Discussing the horizontal stacking of all policies in effect when using the exposure theory, the Louisiana Supreme Court stated as follows:

> The general economic effect of the exposure theory is to spread losses back over numerous years of primary insurance coverage, with the result that manufacturers, particularly those which are no longer in the asbestos business, will not be faced with increased liability insurance costs. It is also, however, a clear benefit to the more recent excess insurers, which will not be forced to make indemnity payments since all applicable primary limits will not be exhausted as rapidly as they would be under a manifestation approach.

Cole v. Celotex Corp., 599 So.2d 1058, 1079 (La. 1992); *see also Norfolk S. Corp. v. Cal. Union Ins. Co.*, 02-0369 (La. App. 1 Cir. 9/12/2003), 859 So.2d 167.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

In Louisiana, the right to contribution, if available, is based on the provisions of the Civil Code. "The substantive basis for the right to claim contribution is subrogation to the plaintiff's rights against the remaining tortfeasors." *Hamway v. Braud*, 01-2364 (La. App. 1 Cir. 11/08/02), 838 So.2d 803, 806 (citing La. Civ. Code arts. 1804, 1805). The civil code rests the right of contribution upon the foundation of legal subrogation, which results from the discharge of a common obligation "owed with others or for others." La. Civ. Code art 1829. Pursuant to La. Civ. Code art 1805, "[a] party sued on an obligation that would be solidary if it exists may seek to enforce contribution against any solidary co-obligor by making him a third party defendant according to the rules of procedure, whether or not that third party has been initially sued, and whether the party seeking to enforce contribution admits or denies liability on the obligation alleged by plaintiff."

Elements

Because Louisiana now follows a regime of modified comparative fault, contribution is largely unavailable in tort cases. "Contribution permits a tortfeasor who has paid more than his share of a *solidary obligation* to seek reimbursement from the other tortfeasors for their respective shares of the judgment, which shares are proportionate to the fault of each. Therefore, contribution is allowed only among tortfeasors who are solidarily liable." *Hamway* 838 So.2d at 807 (citations omitted; emphasis in original).

"In 1996, La. C.C. art. 2324 was amended to eliminate solidary liability, except where tortfeasors conspire to commit an intentional or willful act. Nonintentional tortuous acts are now considered joint and divisible, and each joint tortfeasor is liable only for the degree of fault attributed to his actions." *Id.* at 806. Specifically, Louisiana Civil Code article 2323 now provides that:

> (A) In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss." (B) The provisions of Paragraph A [] apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

Louisiana Civil Code 2324(A), provides that "[h]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for damage caused by such act." "If liability is not solidary pursuant to Paragraph A, then the liability for damages caused by two or more persons shall be a joint and divisible obligation." La. Civ. Code art 2324 (B)

In *Dumas v. La. DOTD*, the Louisiana Supreme Court explained that Louisiana's comparative fault regime precludes joint tortfeasors from asserting non-contract based claims for contribution against each other. 2002-0563 (La. 10/15/02), 828 So.2d 530. The Court reasoned that since a defendant is not liable for more than his/her own degree of fault, situations will not arise where one tortfeasor pays the liability of another. *Id*. at 538. "With the advent of this new policy [*i.e.*, the comparative fault regime] the right of contribution among solidary tortfeasors also disappeared since it is no longer necessary in light of the abolishment of solidarity. The legislature

has struck a new balance in favor of known, present and solvent tortfeasors instead of the previous priority that fully compensated injured victims." *Id*.; *see also Benton v. Clay*, 48,245 (La. App. 2 Cir. 08/07/13),123 So.3d 212, 226.

DUTY TO SETTLE

"Louisiana jurisprudence establishes that a duty is placed upon the insurer to consider the interest of the insured as paramount when an offer to settle is made. The insurer has a duty to act in good faith and to deal fairly when handling and settling claims in order to protect the insured from exposure to excess liability." *Domangue v. Henry*, 394 So.2d 638, 640 (La. App. 1st Cir.1980), *writs denied*, 399 So.2d 602 (La. 1981); *see also Katie Realty v. La. Citizens Prop. Ins. Corp.*, 2012-0588 (La. 10/16/12), 100 So.3d 324.

The Louisiana Supreme Court examined an insurer's duty to settle in *Smith v. Audubon Ins. Co.*, 95-2057 (La. 9/5/96), 679 So.2d 372, *reh'g denied*, 10/4/96. The Court held that, absent bad faith, a liability insurer is generally free to settle or to litigate at its own discretion, without liability to its insured for a judgment in excess of the policy limits. *Id.* at 679 (citing MCKENZIE & JOHNSON, LOUISIANA CIVIL LAW TREATISE: INSURANCE LAW & PRACTICE, § 218 (1986)). The Court stated that the insurer must carefully consider the interests of the insured when making such determination. Factors to consider in whether to proceed to trial include, but are not limited to "the probability of the insured's liability, the extent of the damages incurred by the claimant, the amount of the policy limits, the adequacy of the insurer's investigation and the openness of communications between the insurer and the insured." *Id*. at 376-77. "[O]nce the liability insurer exhausted its policy limits through a good faith settlement, it was no longer obligated to defend the insured in the separate action based on the same accident. We do not suggest, however, that a liability insurer's duty to defend its insured will always be discharged by exhaustion of its policy limits." *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 418-419 (La. 1988).

When multiple claims are filed against the insured that have the potential for exceeding the insurer's policy limits, the insurer must act in good faith and with due regard for the insured's best interest in considering whether to settle one or more of the claims. *Holtzclaw v. Falco*, 355 So.2d 1279, 1286-87 (La. 1978); *Pareti v. Sentry Indemnity Co.*, 536 So.2d 417, 423 (La. 1988). If the insurer does settle in good faith, exhausting the policy limits, it is without further liability either to the insured or the remaining claimants, for either payment of damages or defense costs. *Holtzclaw*, 355 So.2d 1279; *Pareti*, 536 So.2d at 423 (La. 1988). The insurer is under no obligation to settle equally or pro rata with the claimants, even if the remaining claimants may be unable to satisfy their claims. *Holtzclaw*, 355 So.2d at 1287. This is the "first to settle" or "first in time, first in right" rule also adopted by most jurisdictions in the United States. Douglas R. Richmond, *Too Many Claimants and Too Little Money*, TORT TRIAL AND INSURANCE PRACTICE LAW JOURNAL, Spring/Summer 2009, at 897; Thomas R. Newman, *Ending the Duty to Defend*, 55 NO. 3 DRI FOR THE DEFENSE 38, March 2013, at 2.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Louisiana Revised Statute § 22:877 is the Louisiana Insurance Code's facility of payment statute,[3] and states as

follows:

> Whenever the proceeds of, or payments under a life endowment or health and accident insurance policy or any annuity contract issued by a life insurance company become payable and the insurer makes payment thereof in accordance with the terms of the policy or contract or in accordance with any written assignment thereof or of any interest thereunder, hereafter made, the person then designated in the policy or contract or by such assignment as being entitled thereto, shall be entitled to receive such proceeds or payments and to give full acquittance therefor, and such payment shall fully discharge the insurer from all claims under the policy or contract unless, before payment is made, the insurer has received at its home office, written notice by or on behalf of some other person that such other person claims to be entitled to such payment or some interest in the policy or contract. Nothing contained in this Section shall affect any claim or right to any policy or contract or the proceeds thereof or payments thereunder as between persons other than the insurer.

The purpose of Louisiana Revised Statute § 22:877 is to protect insurers, "even should it later appear that someone else was in fact possessed of a superior right to the proceeds." *Smooth v. Metropolitan Life Ins. Co.*, 157 So. 298, 299 (La. App. Orl. 1937); *see also Hooks v. Metropolitan Life Ins. Co.*, 171 So. 601, 604 (La. App. Orl. 1937) (An insurer is protected from liability "if, in the exercise of its discretion and acting on such information as it has before it, it makes payment in good faith to the person apparently equitably entitled thereto.").

In *Morein v. North Am. Co. for Life & Health Ins.*, 271 So.2d 308, 316 (La. App. 3 Cir. 1973), the court absolved the insurer of liability based upon its compliance with § 22:877.

Plaintiff in *Morein* was a mother who filed suit against her deceased son's life insurer, claiming she was the proper beneficiary of her son's life insurance policy. The insurer had
previously paid the policy to the decedent's estranged wife, who was listed as the policy's beneficiary. *Morein*, 271 So.2d at 310. The court ultimately held that payment to the listed beneficiary "fully discharged [the insurer] from all further claims under the policy, since no written notice of any other claim had been received by the defendant at its home office before such payment was made." *Id*. at 316; *see also Schwartz v. Mony Group, Inc.*, 03-2578 (E.D. La. 7/28/04) 2004 WL 1698675 (court relied upon § 22:877 (then § 22:647) and *Morein* to grant the insured's motion for summary judgment and dismiss plaintiff's claims for based upon the facility of payment statute).

Further, it is well-established in Louisiana that disputes surrounding a named beneficiary of a given life insurance policy are to be resolved strictly according to the provisions of the policy. In the majority of cases this rule of "strict construction" has been followed in Louisiana on the theory that the policy of insurance is a contract which constitutes the law between the parties; thus, if the policy provides that a change of beneficiary is not effective until the policy itself is endorsed, then strict construction requires nothing less than its accomplishment. *See Wickham v. Prudential Ins. Co. of America*, 366 So.2d 951 (La. App. 1st Cir. 1978) and cases cited therein. Thus, pursuant to Louisiana law, the determination of when a change in the named beneficiary takes effect hinges solely on the court's interpretation of the applicable provisions of the policy.

Specifically, under Louisiana law, "[t]he proceeds of life insurance form no part of a decedent's estate, and the rules of the Civil Code relating to donations inter vivos or mortis causa have no application to life insurance policies, nor are the proceeds of such policies subject to community rights." *Succession of Rockvoan*, 141 So.2d 438 (La. App. 1962). The only situation where Louisiana's Civil Code articles governing donations, succession, and community property are implicated is where a policy owner names his estate as the beneficiary. In this situation, the proceeds of the insurance policy will comprise part of the assets of the policy owner's estate at death, and will

thus become subject to any applicable Louisiana laws.

Thus, in Louisiana, courts "need only examine the contract of insurance, therefore, to determine to whom are due the funds on deposit." *Standard Life Ins. Co. v. Franks*, 278 So.2d 112, 114 (La. 1973) ("Death benefits payable to one other than the estate are not part of the community of acquets and gains"). For example, where a contract of insurance contains a provision for change of beneficiary and the policy owner fails to exercise the right to change the beneficiary prior to his death, Louisiana courts will "not inquire into whether he desired to change the beneficiary," for they are bound by the unambiguous contract which names the beneficiary. *Franks*, 278 So.2d at 114.

Louisiana jurisprudence does recognize, however, that in rare circumstances, justice may require that the proceeds of an insurance policy be awarded to one other than the named Beneficiary on the policy. *See Sbisa v. Lazar*, 78 F.2d 77 (5th Cir. 1935); *Smith v. American National Ins. Co.*, 25 So.2d 352 (La. App. 2d Cir. 1946); *Ahrens v. First National Life, Health and Accident Ins. Co.*, 6 La. App. 661 (1927). Specifically, it is well settled in Louisiana law that one is not allowed to profit from his own wrongdoing. *See, e.g., Lloyd v. Dickson, et al*, 40 So. 542 (La. 1906); *Fuselier v. United States Fidelity and Guaranty Co.*, 301 So.2d 681 (La. App. 3d Cir. 1974). Thus, pursuant to this rule of law as a matter of public policy, a beneficiary named in a life insurance policy is not entitled to the proceeds of the insurance if he or she feloniously kills the insured; and arson has been recognized for many years in this state as a defense to a claim on a fire insurance policy. *American National Life Ins. Co. v. Shaddinger*, 205 La. 11, 16 So.2d 889 (1944).

Effect of Divorce on Beneficiary Designation

If a policy-holder names a current spouse as the beneficiary, a subsequent divorce will have no effect on the former spouses' rights as the named beneficiary. To divest a former spouse of his or her rights as the named beneficiary, the policy-owner must execute his or her right to change the named beneficiary in accordance with the applicable provisions of the specific policy. However, when a life insurance policy has some provable cash value on the date the community is dissolved, the jurisprudence of this Louisiana "is clear that a plaintiff-[former spouse] would be entitled to one-half of that proven value. *Smith v. Succession of Smith*, 298 So.2d 146, 149 (La .App. 1 Cir. 1974).

In *Standard Life Ins. Co. v. Franks*, the Louisiana Supreme Court reversed the decision granting life insurance proceeds to decedent's surviving minor child, because defendant former spouse was the named beneficiary of the policy and because she had not agreed to divest herself of the policy's benefits when she signed the parties' divorce settlement. 278 So.2d at 114. The Court concluded that only the actual ownership of the insurance policy, as opposed to the death benefits, was transferred in a community settlement upon a couple's divorce. *Id*. The court reasoned that while, "the deceased was in fact vested with all the rights and obligations under the policy of insurance," he owned only the policy, not the death benefits. Thus the court held that "[i]nsofar as the death benefits were concerned, he retained only the contractual right to change the beneficiary. The death benefits of the life insurance policy were never community property, for there was a named beneficiary other than the estate of the [policy holder]." *Id*.

In *USAA Life Ins. Co. v. Krake*, upon a couple's divorce, the trial court issued an injunction to maintain the status quo until remaining community property issues could be resolved. 08-775 (La. App. 5 Cir. 03/24/09), 7 So.3d 78, 85. The decedent policy-owner stipulated that he would refrain from "disposing of the community property previously existing between the parties." *Id*.

At issue was whether this injunction prevented the decedent policy-holder from changing the beneficiary on his

life insurance policy. The court held that the injunction did not prevent a beneficiary change on a life insurance policy at issue and therefore rejected the former spouse's arguments that she was entitled to the proceeds as opposed to the named beneficiary. *Id*.

In another instance of when justice may require the proceeds go to one other than the named beneficiary, in *Standard Life & Acci. Ins. Co. v. Pylant* the court held that former-spouse named beneficiary was not entitled to the proceeds of the policy. 424 So.2d 377, 380-382 (La. App. 2 Cir. 1982). There the decedent acquired two life insurance policies which named the wife as the beneficiary. *Id*. Subsequently, the decedent and the wife were judicially separated and the decedent wrote a letter to the insurance company informing it of the legal separation, and requesting that his mother become the beneficiary on both policies. *Id*. While hospitalized shortly before his death, the insurance company forwarded the decedent its company prepared and printed change of beneficiary form for him to execute; however, prior to the decedent's death the former wife intercepted the forms without permission and never advised the decedent that she had the forms. *Id*. As such, the forms were never executed and the former wife remained the named beneficiary upon the decedent's death. *Id*. The court held that under these facts the proceeds of both policies were to go to the decedent's mother due to the named beneficiary's wrongdoing. *Id*.; *see also Sbisa v. Lazar*, 78 F.2d 77 (5th Cir. 1935) (refusing to award the death proceeds to the named beneficiary former spouse, where she had retained possession of the policy and refused to surrender it to enable the policy-owner to change the beneficiary thereon in accordance with the terms of the policy).

INTERPLEADER ACTIONS

Louisiana Code of Civ. Proc. art. 4651 defines a concursus (interpleader) proceeding as "One in which two or more persons having a competing or conflicting claims to money, property, or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding." "Persons having competing or conflicting claims may be impleaded in a concursus proceeding even though the person against whom the claims are asserted denies liability in whole or in part to any or all of the claimants, and whether or not their claims... have a common origin, or are identical or independent of each other." La. Code of Civ. Proc. art. 4652.

"The primary purpose of the concursus proceeding is to protect a stakeholder from multiple liability from conflicting claims and from vexation attending involvement in multiple litigation in which the stakeholder may have no direct interest." *Cimarex Energy v. Mauboules*, 09-1170 (La.04/09/10), 40 So.3d 931, 940 (citations omitted). "This Court has noted that concursus can be used not only to prevent multiple liability, but also to prevent multiple litigation, and therefore can be used by a person against whom multiple claims are asserted, even though liability on some or even all of the claims is denied." Id.

"The Louisiana Supreme Court has held that a liability insurer is not entitled to be discharged form its obligation to tort victims by filing a concursus proceeding and admitting liability until the insurer deposits into the registry of the court both the full amount of the insurance coverage and the legal interest from the date of the demand until the date of deposit." *Jones v. La. Farm Bureau Mut. Ins. Co.*, 2007-2353 (La. App. 1 Cir. 07/30/08), 993 So.2d 319, 323 (*citing Brumfield v. State Farm Ins. Co.*, 590 So.2d 575 (La. 1991)).

Availability of Fee Recovery

There is no special basis to recover costs and attorneys' fees in a concursus action. Louisiana courts have long

held that attorney fees are not allowed except where authorized by statute or contract." *Stutts v. Melton*, 13--0557 (La. 10/15/13), 130 So.3d 808, 814; *see also Maloney v. Oak Builders, Inc.*, 235 So.2d 386, 393 (La. 1970), ("It is well recognized in the jurisprudence of this Court that as a general rule attorney's fees are not allowed except where authorized by statute or contract."). Thus, because there is no special statutory authorization for the recovery of attorneys' fees in concursus actions, they are unavailable absent some independent basis therefore.

Louisiana law does, however, protect an insurer who deposits the disputed funds with the court from the possibility of further exposure for costs. Pursuant to La. Code of Civ. Proc. art. 4659, "[w]hen money has been deposited into the registry of the court by the plaintiff, neither he nor any other party shall be required to pay any of the costs of the proceeding as they accrue, but these shall be deducted from the money on deposit." Pursuant to this statute, where the funds at issue have been deposited with the court, the court does not have authority to impose any subsequent costs on the depositor. *Jones v. La. Farm Bureau Mut. Ins. Co.*, 2007-2353 (La. App. 1 Cir. 07/30/08), 993 So.2d 319, 324; *American Deposit Ins. Co. v. Walker*, 450 So.2d 33 (La. App. 3 Cir. 1984).

Differences in State vs. Federal

"Concursus in Louisiana is substantially the same as common law interpleader." *Hibernia Nat'l Bank v. Blossman*, 583 So.2d 5, (La. 1991). "[T]he language of the first paragraph [of art. 4652] is based on Federal Rule of Civil Procedure 22(1), which combines interpleader with the bill in the nature of interpleader and removes the former limitations and restrictions on the use of the same remedy." *Cimarex Energy v. Mauboules*, 09-1170 (La. 04/09/10), 40 So.3d 931, 940. Given the common origins or the Louisiana concursus statutes and the Federal interpleader provisions, Louisiana courts have relied on Federal jurisprudence in interpreting the law with respect to concursus proceedings. *See, e.g., Landry & Passman Realty, Inc. v. Beadle, Swartwood Wall & Assoc., Inc.*, 303 So.2d 761, 763 (La. App. 1 Cir. 1974) ("Appellant correctly argues that where our laws are patterned on Federal law, our courts may look to the Federal jurisprudence in the interpretation and application of such laws.").

[1] Act Number 415 of the 2008 regular session of the Louisiana legislature renumbered the code provisions of the Louisiana Insurance Code. The new code provisions are effective January 1, 2009, and are referenced herein. However, many cases cited herein refer to the code provisions by using the pre-Act 415 numbering system. The substantive language of the code sections were not changed by Act Number 415.
[2] The *Cumis* Rule refers to a California case which opined on this issue, *San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal.App. 358, 208 Cal.Rptr. (1984).
[3] Redesignated from 22:643 by Acts 2008, No. 415, § 1, eff. Jan. 1, 2009.