STATE LAW SUMMARY
Overview of the State of Louisiana

Preparer:

C. David Vasser, Jr., Esq.
Vasser & Vasser
Baton Rouge, Louisiana

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OVERVIEW OF THE LOUISIANA COURT SYSTEM

A. Trial Courts:

Most civil cases will be filed in one of the state's forty judicial district courts, some of which serve only a single parish while others serve multiple parishes. All of them have unlimited dollar amount jurisdiction. No party has a right to a jury except as to the claims of each plaintiff who is seeking more than fifty thousand ($50,000.00) dollars, exclusive of interest and costs. La. Code Civ. Proc. art. 1732. The forty different district courts range in judge and typical juror temperament from liberal to conservative, but in all jury trials in Louisiana state courts it requires 9 out of 12 jurors to agree on each jury question in order to reach a verdict. La. Code Civ. Proc. art. 1797.

Many of the cities located within the state's sixty-four parishes also have their own separate city, small-claims and/or justice of the peace courts which are authorized by state law. The maximum dollar amount of those smaller courts' jurisdiction varies in part based upon the size of the population in each venue and based also partly on simple politics. For instance, while most small claims and justice of the peace courts have jurisdictional limits of about $2,500.00 to $5,000.00 per claim, and while most city courts have jurisdiction up to about $15,000.00 to $35,000.00 per claim, a few city courts have jurisdiction up to $50,000.00 per claim, even though they are located in cities whose populations are no larger (and in some instances are even smaller) than those whose city courts have much lower jurisdictional limits. However, since no city, small claims or justice of the peace court has jurisdiction over any claim seeking more than $50,000.00 - which is the minimum amount required for trial by jury in LA - no jury trial is available in any city, small claims or justice of the peace court.

B. Appellate Courts:

Prior to trial on the merits, parties in Louisiana state courts have the right to ask the governing appellate court to exercise its discretionary review of any trial court pre-trial ruling which may not otherwise be deemed legally final and appealable of right until after the trial. Or parties can wait and include any not immediately appealable pre-trial rulings in their post-trial appeal, provided of course that at trial they properly preserve all appealable issues up to and through that point, including possibly needing to proffer at trial evidence which was excluded by pre-trial ruling. After trial, each party has seven days to ask the trial court for a new trial, and thereafter each party has another 30 days to file a suspensive appeal to the appellate court, by posting bond to pay the judgment whose execution is being suspended by the appeal, in the event the appellant loses the appeal. La. Code Civ. Proc. art. 2123. Or parties have 60 days after the deadline for new trial motions to file

a devolutive appeal, which does not suspend the plaintiff's right to execute upon the judgment while the appeal is pending but which likewise does not require the appellant to post any appeal bond. La. Code Civ. Proc. art. 2087. The appellate court must decide the appeal of every trial court final judgment, unless the parties settle the case prior to the appellate court rendering a decision.

The appellate courts do not have authority to compel mediation. Three appellate court judges in whichever one of Louisiana's five courts of appeal in which the case is pending will decide the appeal, as well as whether they want to hear any oral argument, and 2 of those 3 appellate judges must agree to reach a decision. The standard of review differs for questions of fact and questions of law. The appellate court defers heavily to the trial judge or jury's findings of fact, unless it finds that no rational judge or jury could have found those facts to be true based upon the evidence in the record. But the appellate court gives no deference to the trial judge's or jury's conclusions of law and instead it decides all questions of law de novo. If the appellate court finds an error of fact or law, after applying the review standards just stated, it may remand the case for re-trial in whole or in part and/or for further decision by the trial judge or the appellate court may simply decide the case on its own.

"Appellate review of a question of law is simply a decision as to whether the trial court's decision is legally correct or incorrect. If the trial court's decision was based on its erroneous application of law, rather than on a valid exercise of discretion, the trial court's decision is not entitled to deference by the reviewing court. If an appellate court finds that a reversible error of law was made by the trial court, it must review the facts *de novo* and render a judgment on the merits. *Lasha v. Olin Corp.,* 625 So.2d 1002 (La.1993)."*Berard v. St. Martin Parish Gov't,* 2013-114 (La. App. 3 Cir. 6/5/13).

However, "[a] court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. Under the manifest error standard, in order to reverse a trial court's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the fact finder is clearly wrong or manifestly erroneous. *Stobart v. State through Dept. of Transp. And Development,* 617 So.2d 880, 882 (La.1993). On review, an appellate court must be cautious not to reweigh the evidence or to substitute its own factual findings just because it would have decided the case differently." *In re Etienne*, 2012-1120 (La. App. 4 Cir. 6/5/13)

An appellate court cannot and will not amend the amounts awarded for damages, unless the amount awarded is so high or so low that it shocks the judicial conscience. *Youn v. Maritime Overseas Corp.,* 623 So.2d 1257, 1261 (La. 1993) *cert denied,* 510 U.S. 1114 (1994). "It is well-settled that a judge or jury is given great discretion in its assessment of quantum, both general and special damages. Louisiana Civil Code article 2324.1 provides: 'In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury.' Furthermore, the assessment of quantum, or the appropriate amount of damages, by a trial judge or jury is a determination of fact, one entitled to great deference on review. The reviewing court must give **great weight to factual conclusions of the trier of fact**; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts. Because the discretion vested in the trier of fact is so great, and even vast, an appellate court should rarely disturb an **award** on review. The role of an appellate court in reviewing a general damages award, one which may not be fixed with pecuniary exactitude, is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Before a Court of Appeal can disturb an award made by a factfinder, the record must clearly reveal that the trier of fact abused its discretion in making its award. **Only after making the finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court."** *Guillory v. Lee*, 2009-0075 (La. 6/26/09), 16 So. 3d 1104, 1116-17.

LOUISIANA JUDICIAL PROCEDURES

A. Venue

Determining proper legal venue (or a place where the dispute is properly heard) depends upon the connection between each court and the events, parties and property involved in the dispute. A civil tort suit for damages can always be filed in the district court of the parish in which the accident occurred. La. Code Civ. Proc. art. 74. It also can be properly filed in any parish in which a defendant resides. *See* La. Code Civ. Proc. art. 42 and art. 73. Or if no defendant resides in Louisiana, a Louisiana plaintiff can file suit (against a non-resident) in the plaintiff's home parish of residence.

B. Statute of Limitations

All tort claims for bodily injury, wrongful death, property damage and bad faith must be filed within one (1) year from the date of the event giving rise to the claim (*see* La. Civ. Code Art. 3492), except that any claim for damages under the uninsured or underinsured motorist provisions of a liability policy can be filed up to two (2) years from the date of the accident. *See* LSA-R.S. 9:5629. All claims for breach of contract must be filed within ten (10) years from the date of the breach, and this time period has been held to be applicable to "bad faith" claims asserted by an insured against his own insurer for breach of their insurance contract and the insurer's statutorily imposed claims handling duties. La. Civ. Code art. 3499; *Cantrelle Fence, Inc. v. Allstate Ins. Co.*, 550 So.2d 1306 (La. App. 1 Cir.) *writ denied*, 559 So.2d 123 (La. 1989); *Hampton v. Audubon Ins. Co.*, 948 So.2d 332, 335 (La. App. 2 Cir. 2007).

Interruption of prescription (which is Louisiana's legal term for statute of limitations) against one joint tortfeasor is effective against all joint tortfeasors as long as the suit remains pending. *See* La. Civ. Code art. 3463 and 1799. Likewise, interruption of prescription against any solidarily/jointly and severally liable obligor (such as the plaintiff's employer and/or workers' compensation insurer and any liability or UM insurer – all of which are deemed by law to have coextensive obligations to reimburse him for lost wages and medical expenses he incurred as a result of his injury caused by the tortfeasor) is effective against all joint obligors. *See* La. Civ. Code art. 2324, art. 1794 and art. 1799. *See also Cutsinger v. Redfern*, 12 So.3d 945 (La.

2009). Thus, as long as a suit is pending against any of those obligors, the plaintiff can amend the lawsuit to add all other obligors as defendants. Such amendment then relates back to the date the original petition was filed, for purpose of determining timeliness of the claim(s) asserted (*see* La. Code Civ. Proc. art. 1153) and also the running of legal interest (which automatically accrues on all Louisiana filed claims from the date of filing until the date that any judgment on that claim is paid, *see* La. R.S. 13:4203).

C. Time for Filing an Answer

In Louisiana state judicial district courts, a defendant shall file an Answer within fifteen (15) days after in-state service of citation upon him. La. Code Civ. Proc. art. 1001. In parish and city courts, however, the Answer is due within only ten days after in-state service. La. Code Civ. Proc. art. 4903. When an out-of-state defendant receives service of the petition and citation by long-arm/certified mail return receipt requested, that defendant has thirty days within which to file an Answer or other responsive pleadings. La. R.S. 13:3205. When an exception is filed prior to answer and is overruled or referred to the merits, or is sustained and an amendment of the petition ordered, the answer shall be filed within ten days after the exception is overruled or referred to the merits, or ten days after service of the amended petition. La. Code Civ. Proc. art. 1001.

D. Dismissal & Re-Filing of Suit

A plaintiff can voluntarily dismiss his lawsuit without prejudice, before any defendant has made an appearance in the lawsuit. But thereafter, the plaintiff needs leave of court to dismiss his suit, without prejudice, if any defendant has already made an appearance and objects to the action being dismissed without prejudice to the plaintiff's right to re-file it again later. La. Code Civ. Proc. art. 1001. An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. La. Civ. Code art. 3463. But interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses the action at any time either before the defendant has made any appearance of record or thereafter, or if the plaintiff fails to prosecute the suit at the trial. *Id*. Interruption of prescription also is considered never to have occurred as to a person named as a defendant who is dismissed from a suit because service of citation was not timely requested within ninety days from when the suit was filed and the court finds that the failure to timely request service of citation was due to bad faith. Nonetheless, as to any other defendants or obligors, an interruption of prescription shall continue. La. R.S. 9:5801. An action is abandoned in Louisiana when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years, unless it is a succession proceeding. The suit is deemed abandoned without formal order, but, on ex parte motion of any party or other interested person by affidavit which provides that no step has been timely taken in the prosecution or defense of the action for a period of three years, the trial court shall enter a formal order of dismissal as of the date of its abandonment. The sheriff shall serve the order on all parties and shall execute a return. La. Code Civ. Proc. art. 561.

LOUISIANA LIABILITY

A. Negligence

Louisiana's concept of legal fault is based primarily upon the negligence standard, which asks whether the person's or entity's conduct fell below the standard of care expected of a reasonably competent person or entity in that particular position and under those particular circumstances. Negligence cases are resolved under the duty/risk analysis which entails five separate elements: (1) whether the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) whether the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) whether the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) whether the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of protection element); and (5) whether the plaintiff was damaged (the damages element). If the plaintiff fails to prove any one element by a preponderance of the evidence, the defendant is not liable. *See* La. Civ. Code art. 2315; *Hornsby v. Bayou Jack Logging,* 902 So.2d 361, 367 (La. 2005); *Perkins v. Energy Corp.*, 782 So.2d 606, 611 (La. 2001).

Violation of a safety statute can be considered as evidence of negligence, but proof of the violation is not, by itself, sufficient to carry the plaintiff's burden of proving negligence by a preponderance of the evidence. It is well settled in Louisiana that violation of a criminal safety statute is not negligence per se. In order for the violation of a statute to constitute actionable negligence, the violation must be encompassed within the scope of risks that the statute was designed to protect against, and the violation must be a cause-in-fact of the accident. Furthermore, the violation of the statute must be unreasonable under the circumstances. *Stephens v. Louisiana Department of Transportation and Development*, 440 So.2d 920, 928 (La. App. 2 Cir.) *writ denied*, 443 So.2d 1119 (La. 1983); *Blunck v. Lloyds Underwriters at London*, 640 So.2d 466, 468 (La. App. 3 Cir.) *writ denied*, 642 So.2d 1290 (La. 1994).

A tortfeasor is liable not only for the injuries which he causes directly to the tort victim, but also for additional suffering caused by inappropriate medical treatment. *Lasha v. Olin Corp*., 625 So.2d 1002, 1006 (La. 1993).

B. Negligence Defenses

Each defendant's Answer must set forth affirmatively the comparative fault (if any) of the plaintiff and others, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, lack of consent, employee not in the course and scope of employment, and any other matter constituting an affirmative defense, such as the plaintiff's breach of his or her legal duty to reasonably mitigate the alleged damages. La. Code Civ. Proc. art. 1005; La. Civ. Code art. 2002. However, failure to wear a seatbelt is not a defense and is not considered negligence in a civil tort suit for damages arising out of an auto accident. La. R.S. 32:295.1. An employer generally is not liable for accidental injuries suffered by an unauthorized passenger riding in the employer's vehicle without the employer's knowledge or consent, even if the injury is caused by the negligence of the employee driver. *Rivard v. Petroleum Transport Co., Inc.*, 571 So.2d 174 (La. App. 4 Cir 1990). *See also* 49 CFR § 392.60. Unauthorized persons not to be transported.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Allegations of gross negligence, recklessness and willful and wanton conduct against the alleged tortfeasor and/or his employer do not get a plaintiff anything extra, beyond whatever general and special damages the plaintiff is already entitled to recover from any defendant which was merely negligent in causing his damages. The only time a plaintiff is entitled to seek any extra damages (specifically any "exemplary" or "punitive" damages) against an alleged tortfeasor and, potentially, those vicariously responsible for the tortfeasor, is when the plaintiff proves that his injuries were caused by either (1) a "wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries" or (2) a defendant guilty of child molestation or intentional violation of federal civil rights. *See* La. Civ. Code arts. 2315.3 and 2315.4.

D. Vehicle Ownership & Negligent Entrustment

"Generally, an owner of a vehicle is not personally liable for damages which occur while another is operating the vehicle. *Harris v. Hamilton,* 569 So.2d 1, 3 (La. App. 4th Cir.1990). Exceptions to this rule occur only when the driver is on a mission for the owner of the vehicle, when the driver is an agent or employee of the owner, and when the owner is himself negligent in entrusting the vehicle to an incompetent driver. *Jones v. Western Preferred Casualty Company,* 633 So.2d 667, 669 (La. App. 1 Cir.1993) *writ denied,* 94-0273 (La. 4/4/94), 635 So.2d 1123." *Stokes v. Stewart,* 774 So. 2d 1215, 1218 (La. App. 1 Cir. 2000). *See also Stubblefield v. Fidelity & Casualty Company of New York*, 157 So.2d 583, 588 (La. App. 2 Cir. 1963).

To prove a claim of negligent entrustment of a vehicle under Louisiana law, a plaintiff must show that the owner or lessor of the vehicle had actual or constructive knowledge that the driver or lessee was incompetent or had an apparent disability at the time he was given permission to drive the vehicle. *Brown v. Unknown Driver*, 2005-0421 (La. App. 4 Cir. 1/18/06); 925 So. 2d 583, 588-89; *Joseph v. Dickerson*, 1999-1046 (La. 1/19/00), 754 So. 2d 912, 916. *Accord Thistlethwaite v. Gonzalez*, 12-130 (La. App. 5 Cir. 12/18/12), 106 So. 3d 238, 257, reh'g withdrawn (Feb. 14, 2013) ("Under the negligent entrustment theory, 'the lender of a vehicle is not responsible for the negligence of the borrower, unless he had or should have had knowledge that the borrower was physically or mentally incompetent to drive.' *Stokes v. Stewart,* 774 So.2d 1215, 1219 (La. App. 1 Cir. 2000) (citations omitted). However, one who entrusts an automobile 'to an intoxicated, or otherwise incompetent, driver is responsible for the harm resulting from the incompetent operation of the vehicle.' *Id.* One who loans a car to another when the lender knows or has reason to know that the borrower is likely to use the car in a manner involving an unreasonable risk of physical harm, because of the borrower's youth, inexperience, intoxication, incompetence, or otherwise, can be held liable to a third party for damage caused by the borrower. *Joseph v. Dickerson,* 99–1046 (La. 1/19/00), 754 So.2d 912, 916)." In *Thistlethwaite, supra*, even though the intoxicated driver was off duty when the accident occurred and was not intoxicated when his employer initially entrusted its vehicle to him, the vehicle owner was held liable for negligent entrustment, The court stated: "We find that Louisiana law does not prohibit a finding of negligent entrustment against Veolia in this instance, taking into account the conduct of Veolia in providing a vehicle to an employee with a prior history of two DUI convictions, and substance abuse, along with Veolia's failure to perform even a minimal investigation to discover this prior history. Accordingly, given the specific facts and circumstances of this case, we find no error in the jury's finding that Veolia is liable for negligent entrustment." *Id.* at 257-58.

E. Negligent Hiring and Retention

LA law recognizes a cause of action for breach of an employer's duty to exercise reasonable care in hiring, training and retaining employees, and such cause of action is independent of a cause of action for *respondeat superior* (or vicarious liability) and it may be asserted directly against an employer. *Roberts v. Benoit*, 605 So.2d 1032 (La. 1991); *Central Mutual Insurance Co. v. Caine*, 377 So.2d 579 (La. 1979). Thus, although no Louisiana decision directly on point has been found by this author, presumably an employer's stipulation to vicarious liability for any fault placed on its employee for a tort committed within the course and scope of the employment relationship would not preclude a plaintiff from also asserting direct negligence claims against the employer, such as for negligent hiring, training, retention or entrustment. But for a contrary holding by a federal district court in LA, *see Southern Pacific Transp. Co. v. Builders Transp., Inc.*, No. CIV.A 90-3177, 1993 WL 185620, at *10 (E.D. La. May 25, 1993) *aff'd,* 48 F.3d 531 (5th Cir.1995) ("The Court is not aware of any Louisiana decisions on the question of whether a party may assert a negligent entrustment or negligent hiring cause of action where it is not disputed that the negligent actor was acting within the scope of its duties as an employee of the defendant. Most courts in other jurisdictions have determined that the two causes of action are mutually exclusive where the agency relationship is conceded by the defendant and punitive damages are unavailable. *Hackett v. Washington Metropolitan Area Transit Authority,* 736 F. Supp. 8, 9–11 (D. D.C.1990); *Whidby v. Columbine Carrier, Inc.,* 182 Ga. App. 638, 356 S.E.2d 709, 711 (1982); *Estate of Earl Arrington v. Fields,* 578 S.W.2d 173, 178 (Tex. App. 12th Dist.1979)"). In the Texas suit (i.e. *Arrington*) cited by the LA federal court in *Southern Pacific, supra*, the court explained, at 178-79: "Where only ordinary negligence is alleged, the case law supports appellants' contention that negligent hiring and respondeat superior are mutually exclusive modes of recovery. In cases where the plaintiff was relying upon the theory of negligent entrustment of a motor vehicle, the courts have refused to permit the plaintiff to proceed with this separate ground of recovery against the owner where the derivative liability of the owner has already been established by an admission or stipulation of agency or course and scope of employment. The rationale of this rule is equally applicable to a case involving negligent hiring. Once the applicability of the respondeat superior doctrine is established, the competence or incompetence of the servant and the care which was exercised in his employment are immaterial issues. The master is liable for the acts of his servant whether the servant is competent or not. However, a different situation is presented where the plaintiff has alleged ordinary negligence against the driver and gross negligence against the owner for entrusting his vehicle to a reckless or incompetent driver. In such cases, the courts have recognized that the negligent entrustment cause of action would be an independent and separate ground of recovery against the owner for exemplary damages." *See also Williams v. McCollister*, 671 F. Supp. 2d 884, 889 (S.D. Tex. 2009) ("What distinguishes gross negligence from ordinary negligence, and justifies the imposition of exemplary (punitive) damages, is the mental attitude of the defendant").

F. Dram Shop Liability

The LA legislature has declared that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an

intoxicated person upon himself or upon another person. LSA-R.S. 9:2800.1 (Limitation of liability for loss connected with sale, serving, or furnishing of alcoholic beverages). Notwithstanding any other law to the contrary, no person holding a permit to sell alcoholic beverages, nor any agent, servant, or employee of such a person, who sells or serves intoxicating beverages of either high or low alcoholic content to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served. Nor shall any social host who serves or furnishes any intoxicating beverage of either high or low alcoholic content to a person over the age for the lawful purchase thereof shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were served or furnished. Nor shall any social host who owns, leases, or otherwise lawfully occupies premises on which, in his absence and without his consent, intoxicating beverages of either high or low alcoholic content are consumed by a person over the age for the lawful purchase thereof be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person who consumed the intoxicating beverages. *Id.* The insurer of the intoxicated person shall be primarily liable with respect to injuries suffered by third persons. The limitation of liability provided by the LA Dram Shop Law shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol. *Id*.

G. Vicarious Liability

An employer is liable for the acts of his employee if the acts are committed during the course of the employment and within the scope of the employment. La. Civ. Code art. 2320. These two requirements are closely intertwined, but must each be proved by the plaintiff. An accident occurs during the course of employment if it happens during the time of employment and at a place contemplated by the employment. An accident occurs within the scope of employment if it occurs while the employee is engaged about his employer's business, at least in part, instead of merely pursuing his own business or pleasure. *Brasseaux v. Town of Mamou*, 752 So. 2d 815, 820 (La. 2000); *Reed v. House of Decor, Inc.*, 468 So.2d 1159 (La. 1985); *Busby v. St. Ronald Ins. Co.*, 673 So.2d 320, 331 (La. App. 1st Cir.) *writ denied*, 679 So.2d 443 (La. 1996); *Yates v. Naylor Industrial Service, Inc.*, 569 So.2d 616 (La. App. 2d Cir. 1990) *writ denied*, 572 So.2d 92 (La. 1991). If an employee uses an employer's vehicle for a personal mission, the employee is deemed to be outside of the course and scope of his employment for the duration of the personal mission. *Timmons v. Silman*, 761 So.2d 507 (La. 2000); *Macaluso v. Travelers Cas. & Sur. Co.*, 59 So. 3d 454 (La. App. 1 Cir. 2011); and *Stubblefield v. Fidelity & Casualty Company of New York*, 157 So.2d 583, 588 (La. App. 2d Cir. 1963). And as stated hereinabove under Negligence Defenses, an employer generally is not vicariously liable for accidental injuries suffered by an unauthorized passenger riding in the employer's vehicle without the employer's knowledge or consent, even if the injury is caused by the negligence of the employee driver. *Rivard v. Petroleum Transport Co., Inc.*, 571 So.2d 174 (La. App. 4 Cir 1990).

H. Joint and Several Liability

Louisiana has a pure comparative fault tort system, such that each party generally pays only for the percentage of the plaintiff's damages that was caused by its fault. La. Civ. Code art. 2324. Louisiana's concept of legal fault is based primarily upon the negligence standard, which asks whether the person's or entity's conduct fell below the standard of care expected of a reasonably competent person or entity in that particular position and under those particular circumstances. La. Civ. Code art. 2315 and art. 2317.1. When the plaintiff's damages are caused by two or more persons, each is liable for the portion of the plaintiff's damages equal to that person's percentage of fault for the accident, except that when two or more persons conspire to injure the plaintiff they each are solidarily liable (which is Louisiana's legal term for joint and several liability) for the whole damages. If liability is not solidary, then liability for damages caused by two or more persons shall be a joint and divisible obligation. La. Civ. Code art. 2324. And as previously stated, no joint tortfeasor shall be liable for more than his degree of fault or be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity, or that the other person's identity is not known or reasonably ascertainable. Each plaintiff is likewise responsible for whatever percentage of his or her own damages that were caused by his or her own share of fault for the injury. La. Civ. Code art. 2323.

I. Contribution and Indemnity

Because unintentional tortfeasors cannot be made to pay more than their own share of damages to a plaintiff (which is determined by multiplying the plaintiff's total damage award by each defendant's own percentage of fault for the accident) it is very rare for a tort defendant in Louisiana to have any legal claim for contribution. La. Civ. Code art. 2324. Furthermore, a cause of action for indemnity does not arise under Louisiana law until the lawsuit is concluded and the party seeking indemnity has actually made payment to the plaintiff or sustained any loss (such as payment of defense costs). *Suire v. Lafayette City-Parish Consol. Gov't*, 907 So. 2d 37, 51 (La. 2005). And even then, It is against the public policy of Louisiana to require a contractor or motor carrier to indemnify or hold harmless anyone against claims arising out of the indemnitee's own negligence. *See* LSA-R.S. 9:2780.1 and LSA-R.S. 38:2216(G). All other contracts of indemnity, although not against public policy, will be strictly construed and will be enforced only if the duty to indemnify against claims arising out of the indemnitee's own negiglence is expressed in clear and unequivocal terms. *Berry v. Orleans Parish Sch. Bd*., 830 So. 2d 283, 285 (La. 2002).

J. Wrongful Death and Survival Actions

If a person dies due to the fault of another, certain statutorily enumerated classes of persons each may file a wrongful death claim to recover damages they sustained as a result of the death. The surviving spouse and any child or children not given away in adoption by the decedent may always file a wrongful death claim. If no surviving spouse or child exists, the deceased's father and/or mother may file a claim. If no parent exists, the surviving brothers and sisters of the deceased may file a claim. La. Civ. Code art. 2315.2. Only if no spouse or child survives the decedent can anyone in the next class of wrongful death claimants assert a claim for wrongful death. A claim for wrongful death must be filed within one (1) year from the date of death. *Id*.

Similarly, a survival action for a deceased victim's damages also belongs to certain statutorily enumerated classes of persons, beginning with the spouse and any children not given away in adoption by the decedent, before rolling next to the

decedent's surviving parents if no spouse or child exists, and then to the decedent's siblings if no spouse, child or parent exists. A survival action must be filed within one year from the date of the death. La. Civ. Code art. 2315.1. *Accord Guidry v. Theriot*, 377 So.2d 326 (La. 1979). A father or mother who has abandoned the deceased during his minority is deemed not to have survived him. La. Civ. Code art. 2315.1(f).

The Louisiana courts must give full-faith and credit to a marriage that is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife. LSA-C.C. Art. 3520. This includes valid common-law marriages, even though no common law marriage can first occur in Louisiana. *Ghassemi v. Ghassemi*, 998 So. 2d 731, 739 (La. App. 1 Cir. 2008) *writ denied*, 998 So. 2d 104 (La. 2009) and *writ denied*, 998 So. 2d 104 (La. 2009); *Fritsche v. Vermilion Parish Hosp. Serv. Dist. No. 2*, 893 So. 2d 935 (La. App. 3 Cir.) *writ denied*, 899 So. 2d 576 (La. 2005); *Wingfield v. DOTD*, 835 So.2d 785, 795 (La. App. 1 Cir. 2002) *writ denied*, 845 So.2d 1060 (La. 2003). Also *see Jenkins v. Mangano Corp.*, 2000-0790 (La. 11/28/00), 774 So. 2d 101, 105 (recognizing right of decedent's illegitimate non-filiated child to make claim for his father's death and dismissing decedent's mother's claim on that basis).

K. Exclusivity of Workers' Compensation

If an employee is injured on the job, workers' compensation is his exclusive legal right to recovery for same from his employer and co-workers, unless he can prove that they intended his injury to occur, in which case he can sue them in tort. *See* La. R.S. 23:1032. It is well-settled under Louisiana workers' compensation law that a *self-employed, independent contractor*, professional truck driver is not an employee of any company (other than her own, if any) for which she hauls freight and thus she is not entitled to wc benefits. *See*, e.g., *McGrew v. Quality Carriers, Inc.*, 74 So.3d 1253 (La. App. 3 Cir. 2011); *Hair v. Louisiana Crane & Trucking Co*., 996 So.2d 435 (La. App. 2 Cir. 2008); and *Coleman v. Landstar Ranger*, 886 So.2d 472 (La. App. 1 Cir. 2004). "**Independent contractor**" means any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished, and **are expressly excluded from the provisions of this Chapter** unless a substantial part of the work time of an independent contractor is spent in manual labor by him in carrying out the terms of the contract, in which case the independent contractor is expressly covered by the provisions of this Chapter. **The operation of a truck tractor or truck tractor trailer, including fueling, driving, connecting and disconnecting electrical lines and air hoses, hooking and unhooking trailers, and vehicle inspections are not manual labor within the meaning of this Chapter."** LSA-R.S. 23:1021 (7).

LOUISIANA DAMAGES

A. Statutory Cap on Damages

There is no cap on compensatory or punitive damages, except in limited instances such as medical malpractice (La. R.S. 40:1299.42) and claims against public entities in Louisiana (La. R.S. 13:5106) – which in turn are capped at $500,000.00) - and an injured person may recover all special and general damages (including physical and mental pain and suffering) which are proximately caused by the accident. La. Civ. Code art. 2315.

B. Compensatory Damages for Bodily Injury, and Evidentiary Presumption of Medical Causation

The computation of general and special damages is left to the sound discretion of the judge or the jury. They are to award whatever amount of general and special damages they decide is fair and reasonable based upon the evidence presented. La. Civ. Code art. 2324.1. Past and future wage loss, medical expenses, pain and suffering, disability and loss of enjoyment of life are typical elements of recoverable damages. Loss of earning capacity is also recoverable and is not necessarily determined by actual loss. While the plaintiff's earnings at the time of the accident may be relevant, such figures are not necessarily determinative or indicative of his past or future lost earning capacity. In fact, the plaintiff need not even have been working to recover for alleged lost ability to earn a certain amount. What is being compensated is the plaintiff's lost ability to earn a certain amount, and he may recover such damages even though he may never have seen fit to take advantage of that capacity. He is entitled to recover the difference between the amounts he reasonably could have expected to earn in the future (had his injuries not occurred) versus the amount he can now reasonably expect to earn. *Batiste v. New Hampshire Ins. Co.*, 657 So.2d 168, 170 (La. App. 3 Cir.) *writ denied,* 660 So.2d 472 (La. 1995).

"The tortfeasor is [also] required to pay the victim for the cost of [all necessary and even] unneeded medical treatment, including chiropractic care, unless the over treatment is attributable to [the victim's] bad faith." *Marshall v. Caddo Parish Sch. Bd.*, 32,373 (La. App. 2 Cir. 10/29/99), 743 So. 2d 943, 947.

"True, excessive medical charges or treatments that are causally related to the tortfeasor's conduct and not to a litigant's fraud are assessed to the tortfeasor In the absence of fault on the part of the patient in accepting the treatment, the fault which causes the patient's predicament is not that of the doctor alone, but that of doctor and tortfeasor. And it is foreseeable to the tortfeasor that the tort may place the victim in the hands of an overcharging or overtreating physician, since such physicians are not so unheard of as to make it unreasonably unlikely that overcharge or overtreatment of a tort victim may occur.In our opinion the blameless tort victim should not bear the expense of litigating with his doctor and should certainly not bear the risk of having to pay tort-caused charges the tortfeasor escapes, since neither item is attributable to the victim's fault. A tortfeasor is liable for additional suffering caused his tort victim by inappropriate treatment by the attending physician; The tortfeasor should similarly be liable to the victim for additional monetary damage caused by excessive treatment, which is also the result of the foreseeable cumulation of fault of tortfeasor and doctor. As between tortfeasor and doctor, perhaps the tortfeasor should not ultimately be liable, since no one should have to pay a doctor for overtreatment. But as between tortfeasor and victim (not himself at fault in accepting the treatments) the tortfeasor must be liable." *Dauzat v. Canal Ins. Co.*, 96-1261 (La. App. 3 Cir. 4/9/97), 692 So. 2d 739, 747-48.

So if Ds truly believe that the medical provider(s) overcharged or rendered unnecessary treatment, then if and when the Ds actually pay the charges they can seek reimbursement of the overcharges by suing the allegedly offending medical provider(s).

"An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts, the obligor may demand that the damages be accordingly reduced." La. Civ. Code art. 2002. ""A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigateCto avoid or minimize those damages. If you find the defendant is liable and the plaintiff has suffered damages, the plaintiffs may not recover for any item of damage which they could have avoided through reasonable effort. If you find by a preponderance of the evidence the plaintiffs unreasonably failed to take advantage of an opportunity to lessen their damages, you should deny them recovery for those damages which they would have avoided had they taken advantage of the opportunity." U.S. Fifth Circuit Pattern Jury Instructions. 5.15 MITIGATION OF DAMAGES.

"A plaintiff must minimize his damages by submitting to reasonable corrective surgery necessary to eliminate any permanent disability." *Pisciotta v. Allstate Ins. Co.,* 385 So.2d 1176, 1182 (La.1979)**;** *Lawrence v. City of Shreveport*, 41,825 (La. App. 2 Cir. 1/31/07), 948 So. 2d 1179, 1188 *writ denied*, 2007-0441 (La. 4/20/07), 954 So. 2d 166. "However, Louisiana law is clear that the expense and inconvenience of treatment are proper factors underlying a person's refusal of treatment. Additionally, an injury victim does not fail to mitigate his damages when he refuses to undergo treatment which would not significantly alleviate his disability, carries risks of failure, when the treatment is painful, or when he is unable to pay for the treatment." *Moody v. Cummings,* 2009-1233 (La. App. 4 Cir. 4/14/10), 37 So. 3d 1054, 1063-64 *writ denied*, 2010-1106 (La. 9/3/10), 44 So. 3d 686.

Louisiana has a very unique plaintiff-friendly **medical causation presumption** that states that a plaintiff's alleged injuries and resulting treatment and special damages are *legally presumed to be causally related to the accident*, if he or she testifies that such symptoms did not pre-exist the accident and that they began at or shortly after the accident and have not resolved. It then becomes *the defendants' burden to disprove that presumptive medical causation of the plaintiff's injuries* by proving by a preponderance of the evidence that some other event could have caused the plaintiff's symptoms. *Williams v. Stewart*, 46 So. 3d 266, 271-272 (La. App. 4 Cir. 2010) *writ denied,* 52 So. 3d 905 (La. 2011). It is also irrelevant that the symptoms and resulting need for treatment may be due at least in part to preexisting conditions, if those conditions were asymptomatic until the subject accident. What matters legally are what caused those conditions to become symptomatic. The defendant's burden to disprove the plaintiff's contention and legal presumption that his or her injuries were caused by the subject accident is made even tougher by virtue of Louisiana's jurisprudential legal rule that the testimony of any treating physician is entitled to more weight, as a matter of law, than the testimony of any IME doctor. *Hulbert v Boh Bros*., 751 So.2d 994,997 (La. App. 4th Cir. 2000).

C. Collateral Source

In Louisiana, the collateral source rule provides that a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. *Bellard v. American Central Ins. Co*., 980 So.2d 654, 663-71 (La. 2008) Under this rule, payments received from an independent source are not deducted from the award the aggrieved party would otherwise receive from the wrongdoer. As a result, the tortfeasor is not allowed to benefit from the victim's foresight in purchasing insurance and other benefits. The collateral source rule does not apply to override the principles of solidary liability expressly set forth in the Louisiana Civil Code. For example, where an uninsured motorist carrier and a workers' compensation insurer are solidary obligors, such that payment by one solidary obligor extinguishes the obligation of the other solidary obligor to the extent of the payment, the injured party is provided full recovery of those damages paid by the workers' compensation insurer even when the uninsured motorist carrier is allowed by its policy language to reduce its payments by the amounts paid by the workers' compensation insurer. *Cutsinger v. Redfern*, 12 So.2d 945 (La. 2009).

D. Pre-Judgment & Post-Judgment Interest

Legal interest automatically runs on all judgments from the date the petition was filed to the date the judgment is paid. The judicial interest rate varies annually. La. R.S. 13:4203.

E. Damages for Emotional Distress

A victim who is physically injured by a negligent defendant may recover as one element of damages any emotional distress he suffers as a result of the physical injury. Additionally, family members of the physically injured victim, including spouses, children, parents, siblings, grandparents and grandchildren may recover damages for emotional distress which they suffer as a result of the physically injured person's injury, provided that they view the injury-causing event or come upon the scene of the event soon thereafter. The physically injured person must suffer such harm that one can reasonably expect a person in the claimant's/relative's position to suffer serious mental anguish or emotional distress from viewing the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating and foreseeable. La. Civ. Code art. 2315.6.

F. Wrongful Death and Survival Action Damages

There is no cap under Louisiana law on wrongful death or survival damages (except in medical malpractice actions and in actions against public entities, as indicated previously in this legal summary). Wrongful death damages include loss of love, affection, companionship, any financial support, performance of material personal services, and funeral expenses. *Ritter v. Exxon Mobile Corp*., 20 So. 3d 540, 547 (La. App. 4 Cir. 2009). Lost financial support may include loss of the decedent's social security benefits that he may not have consumed and merely gratuitious payments that he was likely to make to his survivor. *Mackie v. Lalonde*, 598 So.2d 521 (La. App. 1 Cir.) *writ denied*, 600 So.2d 682 (La. 1992); *Smith v. Manchester Ins. & Indem. Co.*, 299 So.2d 517 (La. App. 4 Cir.) *writ denied*, 302 So.2d 617 (La. 1974); and *Freeman v. U. S. Cas. Co.*, 88 So.2d 423 (La. App. 2 Cir. 1956). Survival damages include the decedent's provable pre and post-accident conscious pain and suffering, if any. La. Civ. Code art. 2315 and art. 2315.2; *Taylor v. Giddens*, 618 So.2d 834 (La. 1993).

G. Punitive Damages

"In Louisiana, there is a general public policy against punitive damages; thus a fundamental tenet of our law is that punitive or other penalty damages are not allowable unless expressly authorized by statute." *Romero v. Clarendon America Ins. Co.*, 54 So.3d 789, 791 (La. Ct. App. 3d Cir. 2010) (citing *Ricard v. State,* 390 So.2d 882 (La. 1980); *Killebrew v. Abbott Labs.*, 359 So.2d 1275 (La. 1978)). *Accord International Harvester Credit Corp. v. Seale*, 518 So.2d 1039 (La. 1988) and 18 La. Civ. L. Treatise, Civil Jury Instructions § 18:11 (3d ed.). Currently, the most pertinent LA statutes specifically authorizing a plaintiff to seek "exemplary" or "punitive" damages against an alleged tortfeasor (and possibly those vicariously responsible for the tortfeasor) are found in LSA-C.C. arts. 2315.3, 2315.4 and 2315.7. Article 2315.3 provides for punitive damages against a defendant who causes injury through an act of pornography involving a juvenile. Article 2315.4 provides for punitive damages "upon proof that the injuries upon which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries." And Article 2315.7 provides for punitive damages against a perpetrator of criminal sexual activity with a person 17 years old or younger

The other Louisiana statutes that allow for punitive damages (typically in the form of a fine or penalty and only under limited scenarios) involve the destruction of trees, an insurer who arbitrarily or capriciously fails to pay a claim due to an insured, a maritime injury, a civil rights violation, the sale or distribution of an illegal and controlled substance, the Louisiana Credit Repair Organizations Act, or the interception or disclosure of wire, electronic or oral communications. *See, e.g.,* LSA-R.S. 3:4278.1 (destruction of trees); LSA-R.S. 22:1220 (insurer arbitrarily or capriciously fails to pay an insured's claim); *Edmonds v. Boh Bros. Construction Co.,* 522 So.2d 1166 (La. App. 4 Cir. 1988) maritime injuries; *Booze v. City of Alexandria,* 637 So.2d 91 (La. 1994) and *Smith v. Wade,* 641 U.S. 30, 103 S.Ct. 1625 (1983) (civil rights cases); LSA-R.S. 9:28000.76 (sale or distribution of illegal and controlled substance); LSA-R.S. 9:3573.10 (Louisiana Credit Repair Organizations Act); LSA-R.S. 15:1312 (interception or disclosure of wire, electronic or oral communications). However, *see also* LA's Choice-of-Law provisions (LSA-C.C. Art. 3546 "Punitive Damages" and Arts. 3518 to 3548), which allow for punitive damages against *non-residents* under certain conditions. *Accord Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307, 317 (La. 2012).

It is currently unsettled whether an employer can be vicariously liable for punitive damages awarded against an employee driver. *See*, e.g., 12 La. Civ. L. Treatise, Tort Law § 9:16; LSA-C.C. art. 2320; *Romero v. Clarendon America Ins. Co.*, *supra* (holding "no"); *Curtis v. Rome*, 735 So. 2d 822 (La. App. 4th Cir. 1999) and *Lacoste v. Crochet*, 751 So. 2d 998 (La. App. 4th Cir. 2000) (holding "yes"). *See also Darby v. Sentry Ins. Auto Mut. Co.*, 960 So.2d 226, 230 (La. App. 1 Cir.) *writ denied*, 953 So.2d 59 (La. 2007) ("Our finding [that the intoxicated driver was not in the course and scope of his employment] pretermits a discussion as to whether an employer who is vicariously liable under 2320 is liable for exemplary as well as compensatory damages. [A}s this Court is not bound by the decision of our colleagues on this issue and such a conclusion may be contrary to the principle of strict construction of punitive statutes, we leave that analysis for another day"). *Darby* at 230. The *Darby* court did, however, go on to hold: "[T]his Court finds that Louisiana law prohibits an expansive interpretation of La. Civ. C. art. 2315.4 so as to impose exemplary damages on Lakeshore [i.e. owner of the vehicle being driven by its *off-duty* intoxicated employee] *for entrusting its vehicle to a driver who became intoxicated* and caused an accident"). *Id*. at 234.

Lastly, punitive damages are deemed covered by the defendant's liability policy unless it expressly excludes them. *Creech v. Aetna Cas. & Sur. Ins. Co*., 516 So.2d 1168, 1171 (La. App. 2 Cir. 1987) *writ denied*, 519 So.2d 128 (La. 1988); *Sharp v. Daigre*, 555 So.2d 1361 (La. 1990) *Pike v. Nat'l Union Fire Ins. Co*., 796 So.2d 696, 699-700 (La. App. 1 Cir. 2001); *Yonter v. State Farm Mut. Auto. Ins. Co.*, 802 So.2d 950 (La. App. 5 Cir. 2001); and LSA-R.S. 22:1295(1)(a)(i) (expressly allowing UM policies to exclude coverage for punitive or exemplary damages).

H. Property Damage & Diminution in Value of Damaged Vehicle

Louisiana also allows a vehicle owner to recover as tort damages the diminished value of his vehicle. As a general rule, the recovery of damages to a vehicle is limited to the cost of its necessary repair. However, where a vehicle has been totally destroyed or so badly damaged that the cost of repair exceeds its value, the measure of damages is the value of the vehicle just before the accident, less its salvage value, if any. Recoverable damages shall also include any sales taxes paid by the owner on the repair or replacement of the property damaged. *State Farm Mutual Automobile Ins. Co. v. Berthelot*, 732 So.2d 1230 (La. 1999); La. Civ. Code art. 2315. With regard to a first party claim by an insured against his own insurer for the diminished value of his vehicle after it has been repaired, although it is necessary to review the terms of each insurance policy under which claim is being made in order to make a proper determination of coverage for the diminished value of the vehicle involved in an given case, the insurer is not liable to its insured for the vehicle's alleged diminished value if the policy contains language such as "Our limit of liability for loss will be the lesser of the 1. Actual cash value of the stolen or damaged property; or 2. Amount necessary to repair or replace the property with other property of like kind and quality." *Johnson v. Illinois National Ins. Co.*, 818 So.2d 100 (La. App. 1 Cir. 2001).

I. Loss of Use of Motor Vehicle

Louisiana law allows for the recovery of the reasonable value of the loss of use of a damaged vehicle during the reasonable period of time that it should have taken for the adjustment and repair of the vehicle or for the replacement of a total loss vehicle, and in most cases involving a total loss the reasonable replacement period is deemed to have a limit of about 30 days after notice of the total loss. *See*, e.g., *Sheridan v. C.E.C., Inc.*, 2008-0598 (La. App. 4 Cir. 1/7/09), quoting *Roberts v. Chargois,* 98–1073, p. 5 (La. App. 3 Cir. 2/24/99), 736 So.2d 910, 913: "Any accident in which a plaintiff's vehicle either requires repair or is 'totaled' will result in some loss of use of that vehicle. This loss is an inevitable consequence, even when an insurer reasonably investigates and adjusts the claim. To remedy this situation, Louisiana tort law permits the plaintiff to recover this element of damages. Damages for loss of use are usually measured by the cost of renting a substitute vehicle, although the award need not be restricted to rental. If the wrecked vehicle is totally destroyed, damages for loss of its use are recoverable only for a reasonable time, that period in which the owner becomes aware of the situation and secures a replacement therefor. Sixty days rental after the plaintiff becomes aware of the vehicle's total loss has been found reasonable." (citations omitted)); *Riser v. Shelter Mutual Ins. Co.*, 997 So.2d 675, 680 (La. App. 2 Cir. 2008) ("Citing prior jurisprudence of this court, Shelter further asserts as trial court error that the award of loss of use of the vehicle should not extend beyond a thirty-day rental value when the vehicle is a total loss. Those cases indicate that the plaintiff should be able to obtain a replacement vehicle within thirty days under most circumstances." citations omitted)).

See also *Lowery v. Safeway Ins. Co. of* LA, 865 So.2d 1060 (La. App. 3d Cir. 2004) (Holding that although plaintiff knew his vehicle was a total loss within two weeks after the accident, it was not unreasonable for the trial court to order the tortfeasor driver's liability insurer to reimburse plaintiff for the 71 days of rental of a temporary replacement car, where it took that many days for the insurer to issue payment for the total loss); and see *Riser v. Shelter Mutual Ins. Co.*, *supra* (Addressing liability insurer's duty to timely reimburse plaintiff for rental charges or make settlement offer within 30 days after receiving satisfactory proof and demand or else face the possibility of penalties and attorney fees under La. R.S. 22:1892); *Washington v. Lake City Beverage, Inc.*, 352 So. 2d 717, 722 (La. Ct. App. 1977) *writ denied*, 354 So. 2d 1050 (La. 1978) ("[I]n determining reasonableness of time needed to make the repairs the uncontrollable delay of the repairmen in securing the parts necessary to complete the work should be considered"); *Bonner v. Louisiana Indemnity Co.,* 607 So.2d 915, 917 (La. App. 2 Cir.1992) ("Neither a plaintiff's financial straits in general, nor an insurer's failure to negotiate an acceptable settlement of the claim, may be used to extend the recovery period for loss of use damages").

LA law also expressly provides that recoverable damages shall include sales taxes paid by the owner on the repair or replacement of his damaged property. La. Civ. Code art. 2315. However, if the owner buys a more expensive replacement vehicle, he shall recover sales taxes paid only the amount of the value of his total loss vehicle. *Lowery, supra*.

LOUISIANA EVIDENTIARY ISSUES

A. Preventability Determination

A company's determination that its driver could have prevented the accident may be admissible as a statement by a party opponent (which is not hearsay when offered against that party). *See* LSA-C.E. art. 801.

B. Traffic Citation from Accident

Evidence that a traffic citation was or was not issued, and evidence of a finding of guilty or not guilty on a citation, is not admissible in a civil negligence case. Nor is a plea of nolo contendre to a traffic citation admissible in a civil suit. However, a plea of guilty to a traffic citation (which includes payment of it) is admissible as a statement against interest. La. Code Evid. art. 410; *American Medical Enterprises, Inc. v. Audubon Ins. Co.*. 964 So.2d 1022, 1023, 1029 (La. App. 1 Cir.) *writ denied*, 966 So.2d 575 (La. 2007):

> Ordinarily, evidence is not admissible in a civil tort action to prove either that a party was charged with, or convicted of, a criminal offense arising out of the same accident. However, the usual rule is that, in the absence of a prohibitory statute, a plea of guilty in a criminal case is considered an admission against interest and is competent evidence in a civil action involving the same subject matter. Although a guilty plea is admissible as relevant evidence to show fault and may be given some weight, it is not conclusive. The amount of weight to be given to such plea must be determined by other evidence offered, including the reason for the plea.

See also LSA-C.Cr.P. art. 552 (Pleas at the arraignment), which states:

> There are four kinds of pleas to the indictment at the arraignment: (1) Guilty; (2) Not guilty; (3) Not guilty and not guilty by reason of insanity; or (4) **Nolo contendere**, which **plea a court may in its discretion accept** only if the offense charged is not a capital offense. If a court accepts such a plea, it shall impose sentence or place the defendant on probation, or release him during his good behavior, in accordance with the laws applicable to the offense. A sentence imposed upon a plea of nolo contendere is a conviction and may be considered as a prior conviction and provide a basis for prosecution or sentencing under laws pertaining to multiple offenses, and shall be a conviction for purposes of laws providing for the granting, suspension or revocation of licenses to operate motor vehicles.

C. Failure to Wear a Seat Belt

Failure to wear a seatbelt is not a defense and is not considered negligence in a civil tort suit for damages arising out of an auto accident. La. R.S. 32:295.1.

D. Failure of Motorcyclist to Wear a Helmet

In Louisiana, except in the case of specially permitted temporary exemptions available to motorcycle operators in public parades, no person shall operate or ride upon any motorcycle, motor-driven cycle, or motorized bicycle unless the person is equipped with and is wearing on the head a safety helmet of the type and design manufactured for use by operators of such vehicles, which shall be secured properly with a chin strap while the vehicle is in motion. All such safety helmets shall consist of lining, padding, visor, and chin strap and shall meet such other specifications as shall be established by the commissioner. La. Rev. Stat. Ann. § 32:190.

E. Evidence of Alcohol or Drug Intoxication

Evidence of a driver's intoxication is admissible in Louisiana civil suits and does not require an alcohol or drug test result to prove intoxication, but rather same can be proved by less direct evidence. *State v. Kestle*, 996 So. 2d 275, 279 (La. 2008): *Gonazales v. GEICO*, 32 So.3d 919, 927 (La. App. 5 Cir. 2010). However, proof of the effects of intoxication on a driver's ability to drive must be established through competent expert testimony. *Harris v. State ex rel. Dept. of Transp. & Dev.*, 997 So. 2d 849, 867 (La. App. 1 Cir. 2008) *writ denied*, 999 So. 2d 785 (La. 2009).

F. Testimony of Investigating Police Officer

Police officers are allowed to testify to personal observations and any expert opinions that they are qualified to give and that are relevant to the disputed issues. But it is not proper and admissible for an officer to testify that a motorist was cited or believed to be in violation of a traffic law, because that is irrelevant, unduly prejudicial and a legal conclusion. E.g., *Domingo v. State Farm Mut. Auto. Ins. Co.*, 54 So. 3d 74 (La. App. 5 Cir. 2010); *Iglinsky v. Player*, CIV.A. 08-650-BAJ-CN, 2010 WL 4925000 (M.D. La. July 16, 2010) report and recommendation adopted, CIV.A. 08-650-BAJ-CN, 2010 WL 4905984 (M.D. La. Nov. 24, 2010).

G. Expert Testimony

Same competence, reliability and relevance requirements in Louisiana as under federal law. Experts are allowed to attend the taking of testimony and to express opinions of matters within their areas of expertise. At least one IME is typically allowed the defense in a civil personal injury suit. *See* LSA-C.E. art. 702.

H. Collateral Source

As previously stated, in Louisiana the collateral source rule provides that a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. *Bellard v. American Central Ins. Co*., 980 So.2d 654, 663-71 (La. 2008). However, a plaintiff's settlement with a defendant reduces P's recoverable damages by the percentage of fault that the judge or jury assigns at trial to that former defendant/empty chair and it cuts off any claim for contribution or indemnity that the remaining defendant(s) may have had against the released defendant, except for indemnity claims that are based upon a contract of indemnity. La. Civ. Code art. 2323, La. Civ. Code art. 2324 and *Harvey v. Travelers Ins. Co.*, 163 So.2d 915 (La. 1964). *See also* Louisiana Civil Code article 1794, which defines a solidary obligation as follows:

> An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.

Andrade v. Cooper/T. Smith Stevedoring Co., 2009 WL 3010108 at 1 (M.D. La. 2009):

> "The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor." *Giles v. General Electric Company,* 245 F.3d 474, 495, n. 37 (5th Cir. 2001) (quoting *Davis v. Odeco, Inc.,* 18 F.3d 1237, 1243 (5th Cir. 1994). "Properly interpreted ..., the collateral source rule ... prevents torfeasors from paying twice for the same injury-a result that would achieve both over-deterrence and overcompensation." *Id.* at 495.

I. Recorded Statements

The statement of any party or witness must be produced to him when he requests it. Statements of truck drivers, whether or not a party, are not discoverable by the plaintiff or other parties if the statements were taken in anticipation of litigation or in connection with trial preparation, unless failure to produce the statement will subject the plaintiff to undue hardship or injustice. However, initial reports to the company by the truck driver contained in the initial accident report are often ruled admissible under the theory that the document is a company record kept in the ordinary course of business and was not truly prepared solely in anticipation of litigation. La. Code Civ. Proc. art. 1424; La. R.S. 13:3732; *Simmons v. TMSL, Inc.*, 780 So.2d 1074 (La. App. 4 Cir.) *writ denied*, 786 So.2d 106 (La. 2001); *Ogea v. Jacobs*, 344 So.2d 953 (La. 1977); *Landis v. Moreau*, 779 So.2d 691 (La. 2001).

J. Prior Convictions

For the purpose of attacking the credibility of a witness in civil cases in Louisiana state courts, no evidence of the details of the crime of which he was convicted is admissible. However, evidence of the name of the crime of which he was convicted and the date of conviction is admissible if the crime: (1) Was punishable by death or imprisonment in excess of six months under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party; or (2) Involved dishonesty or false statement, regardless of the punishment. La. Code Evid. art. 609. Evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction. Evidence of juvenile adjudications of delinquency is generally not admissible. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible, but evidence of the pendency of an appeal is also admissible. Evidence of the mere arrest, indictment, or prosecution of a witness is not admissible for the purpose of attacking his credibility. *Id*.

K. Driving History

A driver's driving history may be discoverable and admissible if it is relevant to a fact in issue, but not simply to show that the driver has been involved in other accidents or received any tickets.

L. Fatigue

HOS violations are admissible into evidence if relevant to an issue in the suit, particularly an allegation of fatigued driving.

M. Spoliation

Beyond the inherent power of every state and federal court in Louisiana to sanction any litigant or non-party that is subject to its lawful jurisdiction and that has intentionally failed to preserve evidence which it had a legal duty to preserve (by reason of prior receipt of lawful service of a court order, or, in the case of litigants, simply by reason of an applicable court rule

or receipt of a proper preservation request), it is currently unsettled whether and to what extent Louisiana tort law provides an independent legal cause of action for spoliation, and if so whether Louisiana will recognize a tort claim for damages caused only by intentional spoliation, or whether Louisiana will also recognize a tort claim for damages caused by merely negligent spoliation. All five Louisiana circuit courts of appeal have recognized a legal cause of action for spoliation, but they are split on whether such a claim is available only when there is proof of intentional spoliation or whether a litigant or non-litigant can be also sued in tort for damages caused by merely negligent spoliation of evidence that the spoliatior had a legal duty to preserve. The Louisiana Supreme Court has not decided that issue yet. *See*, e.g., *Arnold v. Brookshire Grocery Co*., 10 So. 3d 1279 (La. App. 3d Cir. 2009); *Zurich American Ins. Co. v. Queen's Machinery Co., LTD*, 8 So.2d 91 (La. App. 5 Cir. 2009); *Jackson v. Home Depot, Inc*., 906 So.2d 721 (La. App 1st Cir. 2005); *Randolph v. General Motors Corp.,* 646 So.2d 1019 (La. App. 1st Cir.1994) *writ denied,*651 So.2d 276 (La. 1995)*; Carter v. Exide Corp.,* 661 So.2d 698 (La. App. 2d Cir. 1995); *Bethea v. Modern Biomedical Services, Inc.,* 704 So.2d 1227 (La. App. 3d Cir. 1997); *Guillory v. Dillard's Dept. Store, Inc.,* 777 So.2d 1 (La. App. 3d Cir. 2000); *Williams v. General Motors Corp.,* 639 So.2d 275 (La. App. 4th Cir. 1994)*; Pham v. Continco International, Inc.,* 759 So.2d 880 (La. App. 5th Cir. 2000).

LOUISIANA SETTLEMENT LAW

A. Offer of Judgment

Any time more than 20 days before trial an offer of judgment can be made in suits pending in Louisiana state courts, but it must be in writing, state that it is being made pursuant to La. C.C.P. Art. 970 and whether the amount of money being offered to settle all claims between the parties is inclusive or exclusive of costs, interest, attorney fees and any other amount which may be awarded at trial. If not accepted within 10 days, it is deemed withdrawn and evidence of the offer is not admissible at trial. If the final judgment is within 25 percent of the offer, the offeree must pay the offeror's "costs" of litigation (which can include court costs, expert fees and deposition charges, but not attorney fees) incurred after the offer was made. La. Code Civ. Proc. Art. 970; *Hacienda Construction, Inc. v. Newman*, 44 So. 3d 333, 337 (La. App. 5 Cir. 2010). In federal court in Louisiana, the usual federal rule applies. FRCP 68.

B. Liens

Anyone who has treated or represented an injured person for injuries caused by an accident, **or anyone who has been subrogated to part of an accident victim's claim for medical expenses, can assert a claim for reimbursement-lien** of that amount.

However, except in the case of the automatic statutory liens in favor of public trusts such as those in favor of Medicare and Medicaid, a defendant generally is not bound by any claim for reimbursement/lien by any medical provider, employer or insurer which has not been filed by way of formal petition of intervention in the plaintiff's tort suit. An exception to this rule exists in favor of any **medical provider** who has given the defendant written notice of its lien and certain details thereof in accordance with the medical lien statute. "A[ny] health care provider, hospital, or ambulance service that furnishes services or supplies to any injured person shall have a privilege for the reasonable charges or fees of such health care provider, hospital, or ambulance service on the net amount payable to the injured person, his heirs, or legal representatives, out of the total amount of any recovery or sum had, collected, or to be collected, whether by judgment or by settlement or compromise, from another person on account of such injuries, and on the net amount payable by any insurance company under any contract providing for indemnity or compensation to the injured person. The privilege of an attorney shall have precedence over the privilege created under this Section." La. R.S. 9:4752. "A. The privilege created by R.S. 9:4752 shall become effective if, prior to the payment of insurance proceeds, or to the payment of any judgment, settlement, or compromise on account of injuries, a written notice containing the name and address of the injured person and the name and location of the interested health care provider, hospital, or ambulance service is delivered by certified mail, return receipt requested, or by facsimile transmission with proof of receipt of transmission by the interested health care provider, hospital, or ambulance services, or the attorney or agent for the interested health care provider, hospital, or ambulance service, to the injured person, to his attorney, to the person alleged to be liable to the injured person on account of the injuries sustained, to any insurance carrier which has insured such person against liability, and to any insurance company obligated by contract to pay indemnity or compensation to the injured person. This privilege shall be effective against all persons given notice according to the provisions of this Section and shall not be defeated nor rendered ineffective as against any person that has been given the required notice because of failure to give the notice to all those persons named in this Subsection. B. If delivery of the notice required by this Section is made by facsimile transmission, and the sender fails to obtain a signed proof or receipt within seven days, then delivery shall be made by certified mail, return receipt requested, and costs of mailing shall be taxed as court costs." La. Rev. Stat. Ann. § 9:4753. "A. Upon receipt of a written request, mailed by certified mail, return receipt requested, from any person who has been given notice, the licensed health care provider, hospital, or ambulance service having the privilege shall, within thirty days after receipt of such request, furnish an itemized statement of all charges having reference to the injured person. B. If such licensed health care provider, hospital, or ambulance service fails to comply with the provisions of this Section, the privilege created shall be dissolved and ineffective." La. Rev. Stat. Ann. § 9:4755. If a defendant settles with the plaintiff without the lienholder's consent and without placing the lienholder's name on the draft, the defendant remains liable to the lienholder. "Any person who, having received notice in accordance with the provisions hereof, pays over any monies subject to the privilege created herein, to any injured person, or to the attorney, heirs, or legal representatives of any injured person, shall be liable to the licensed health care provider, hospital, or ambulance service having such privilege for the amount thereof, not to exceed the net amount paid." La. Rev. Stat. Ann. § 9:4754

Similarly, if an **attorney** discharged by the plaintiff files his retention contract into the suit record or into the court records of the parish where the plaintiff lives (before any settlement between the plaintiff and the defendant has been consummated), the attorney thereby perfects his legal lien against the plaintiff's right to recovery in the lawsuit. And if the attorney's contract expressly gives him the power to approve or reject settlement of the claim, then any settlement without that attorney's consent shall be null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition has been made. La. R.S. 37:218.

A private medical-health insurer or an employer of an accident victim has no automatic statutory lien. However, the Louisiana Department of Health and Hospitals (DHH) – which administers Louisiana's Medicare program – has an automatic statutory right to enforce the rights of assignment which it acquires from the recipient of medical services in third-party liability cases pursuant to LSA R.S. 46: 153(E), 46:446, 446.1 and 446.2. Much like in the Medicare arena, the legal burden is placed upon the tortfeasor and his masters and insurers to notify Medicaid and/or Medicare of liability-indebtedness to an accident victim-beneficiary whose medical expenses have been paid by Medicaid or Medicare, failing which they remain liable to those entitles in the event they settle with the plaintiff and the governmental liens are not satisfied. *Id*. A similar rule applies with respect to liens/reimbursement entitlement by workers' compensation payers (i.e. to WC insurers and self-insurers), except that the WC lienholder must formally intervene into the injured worker's tort suit in order to perfect its lien against the tortfeasor and/or those responsible for his liability. *See*, e.g., La. Rev. Stat. Ann. § 23:1102. "When a suit has been filed against a third party defendant *in which the employer or his insurer has intervened*, if the third party defendant or his insurer fails to obtain written approval of the compromise from the employer or his insurer at the time of or prior to such compromise and the employee fails to pay to the employer or his insurer the total amount of compensation benefits and medical benefits out of the funds received as a result of the compromise, the third party defendant or his insurer shall be required to reimburse the employer or his insurer to the extent of the total amount of compensation benefits and medical benefits previously paid to or on behalf of the employee to the extent said amounts have not been previously paid to the employer or his insurer by the employee."

Regarding deduction of recovery costs from the lienholder's recovery, *see Barreca v. Cobb*, 668 So. 2d 1129, 1130-32 (La. 1996), in which the Louisiana Supreme Court held:

> "At issue is whether the health insurer, pursuant to a clause in its policy with the insured plaintiff, is entitled to full reimbursement of the benefits it paid on plaintiff's behalf, or whether the plaintiff is entitled to deduct a proportionate share of the attorney fees from that amount.
> ….
> In order to properly resolve the issue in this case, we must first decide whether this provision is a subrogation agreement or a reimbursement agreement [because the latter typically is written to require reimbursement without deduction of recovery costs].
> ….
> In sum, we hold that **an insurer who has notice of the insured's claim but fails to bring its own action or to intervene in plaintiff's action will be assessed a proportionate share of the recovery costs incurred by the insured, including *reasonable* attorney fees.** However, we also note that the insurer is not bound by the fee contract between the insured and his attorney. Rather the amount and nature of the services rendered and all factors relevant, including the contingency fee contract, must be considered. *See, e.g., Leenerts Farms Inc. v. Rogers,* 421 So.2d 216 (La.1982)."

C. Minor's Settlement

The natural mother or father of a child may settle the child's claim without any required court involvement if the claim is not for more than **ten thousand dollars actually received by the minor**, exclusive of court costs, attorney fees, and other expenses. For all other minor claims, court approval of the reasonableness of the settlement must be obtained. La. R.S. 9:196.

D. Negotiating with Attorneys

Yes, adjusters may communicate with all attorneys.

E. Confidentiality Agreements

Confidentiality agreements are enforced in Louisiana. Louisiana basically follows the federal rules of evidence and civil procedure, although some differences exist between federal and Louisiana evidence and procedure law. LSA-C.E. art. 506(B)(3).

F. Releases

A compromise shall be made in writing or recited in open court, in which case the recitation shall be susceptible of being transcribed from the record of the proceedings. La. Civ. Code art. 3072. A compromise entered into by one of multiple persons with an interest in the same matter does not bind the others, nor can it be raised by them as a defense, unless the matter compromised is a solidary obligation. La. Civ. Code art. 3075. A compromise settles only those differences that the parties clearly intended to settle, including the necessary consequences of what they express. La. Civ. Code art. 3076. In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, anything of value in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations. LSA-C.E. art. 408.

Every master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed, and any remission, transaction, compromise, or other conventional discharge in favor of the employee, or any judgment rendered against him for such damage, shall be valid as between the damaged creditor and the employee, and the employer shall have no right of contribution, division, or indemnification from the employee nor shall the employer be allowed to bring any incidental action against such employee after the employee has been released by the creditor/plaintiff. La. R.S. 9:3921.

G. Voidable Releases

If an attorney discharged by the plaintiff files his retention contract into the suit record or into the court records of the parish where the plaintiff lives (before any settlement between the plaintiff and the defendant has been consummated),

and if the attorney's contract expressly gives him the power to approve or reject settlement of the claim, then any settlement without that attorney's consent is null and void. La. R.S. 37:218. Otherwise, for a competent adult releasor to void its own signed compromise he must prove error of fact or fraud.

Furthermore, in Louisiana any provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract or a construction contract that purports to indemnify, defend, or hold harmless the indemnitee from liability for loss or damage resulting from the indemnitee's negligence or intentional acts is contrary to the public policy of the state and is null, void, and unenforceable. This applies to the acts or omissions of the indemnitee, an agent or employee of the indemnitee, and a third party over which the indemnitor has no control. This law also states that Louisiana law shall govern any motor carrier transportation contract or construction contract to be performed in the state, and that any provision in such contracts which conflicts with the law shall be null, void, and unenforceable. La. R.S. 9:2780.1.

LOUISIANA TRANSPORTATION LAW

A. State DOT Regulatory Requirements

Louisiana's DOTD has adopted and enforces the FMCSA regulatory requirements for commercial motor vehicles and those in the industry. 33 La. Admin. Code 10301, et seq.

B. State Speed Limits

Violation of a speed or other safety statute can be considered as evidence of negligence, but proof of the violation is not, by itself, sufficient to carry the plaintiff's burden of proving negligence by a preponderance of the evidence. In other words, in Louisiana, violation of a criminal safety statute is not negligence per se. In order for the violation of a statute to constitute actionable negligence, the violation must be encompassed within the scope of risks that the statute was designed to protect against, and the violation must be a cause-in-fact of the accident. Furthermore, the violation of the statute must be unreasonable under the circumstances. Violation of a safety statute can be considered as evidence of negligence, but proof of the violation is not, by itself, sufficient to carry the plaintiff's burden of proving negligence by a preponderance of the evidence. *Stephens v. Louisiana Department of Transportation and Development*, 440 So.2d 920, 928 (La. App. 2 Cir.) *writ denied*, 443 So.2d 1119 (La. 1983); *Blunck v. Lloyds Underwriters at London*, 640 So.2d 466, 468 (La. App. 3 Cir.) *writ denied*, 642 So.2d 1290 (La. 1994).

C. Overview of State CDL Requirements

CDL applicants in Louisiana must meet certain residency, age (i.e. 18 or above) and competency requirements and pass certain written and on-road tests which shall be at least as stringent as the standards established by the Federal Highway Administration in 49 CFR Part 383. *See* La. R.S § 32:405.1 and § 32:408.

An applicant in Louisiana for a commercial driver's license must be a domiciliary of Louisiana, unless applying for a nonresident commercial driver's license. A person domiciled in and holding a valid commercial driver's license from another jurisdiction meeting the standards contained in 49 CFR Part 383, shall not be required to obtain a Louisiana driver's license while operating in Louisiana. However, a holder of a commercial driver's license who has been a resident of Louisiana for thirty days or longer shall be considered a Louisiana domiciliary and shall obtain a Louisiana commercial driver's license within no more than thirty days after establishing a domicile in Louisiana. La. R.S. 32:404.1. Any person applying for a commercial driver's license in Louisiana shall not have any physical or mental disability affecting the ability to exercise ordinary and reasonable control in the operation of a commercial motor vehicle. Such person, unless exempted by the office of motor vehicles or by a rule or regulation, shall provide a current medical report, on a form approved by the office of motor vehicles, prepared by a duly licensed medical examiner, certifying that he is capable of exercising ordinary and reasonable control in the operation of a commercial motor vehicle. Such person shall submit a valid medical report at every renewal and shall carry a current medical certificate on his person at all times when driving a commercial motor vehicle requiring a commercial driver's license. La. R.S. 32:403.4.

LOUISIANA INSURANCE LAW

A. State Minimum Limits of Financial Responsibility

In Louisiana, it is illegal to operate any motor vehicle without proof of liability coverage of at least $15,000 per person and $30,000 per accident for bodily injury or death, and $25,000 for property damage. If a vehicle owner or operator fails to maintain at least these minimum amounts of auto liability coverage, then under Louisiana's "no pay-no play" statute (La. R.S. 32:866), he shall not be entitled to recovery of the first $15,000.00 of bodily injury and first $25,000.00 of property damage arising out of a motor vehicle accident, regardless of who was at fault for the accident.

B. Uninsured Motorist Coverage

A person injured as the result of a motorist's negligence is entitled to sue not only the motorist, but also the motorist's liability insurer(s) and any insurer which issued an uninsured motorist (UM) policy covering the vehicle in which the plaintiff was riding. The plaintiff can also "stack" one additional UM policy which did not cover the vehicle in which he was riding, but which covered him personally. La. R.S. 22:1295 **(Louisiana UM statute).**

In Louisiana, UM coverage is optional. Self-insured entities are not required to provide UM coverage, but any automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle required to be registered in Louisiana is legally deemed to provide UM coverage which is not less than the limits of bodily injury liability provided by the policy, *unless* any insured named in the policy either rejects coverage, selects lower limits, or selects economic-only coverage, on a form prescribed by the Louisiana commissioner of insurance. The form signed by the named insured or his legal representative which initially rejects such coverage, selects lower limits, or selects economic-only coverage shall be conclusively presumed to become a part of the policy or contract when issued and delivered, irrespective of

whether physically attached thereto. A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected UM coverage, selected a lower limit, or selected economic-only coverage. The form signed by the insured or his legal representative which initially rejects coverage, selects lower limits, or selects economic-only coverage shall remain valid for the life of the policy and a new form is not required when a renewal, reinstatement, substitute, or amended policy is issued to the same named insured by the same insurer or any of its affiliates. An insured may change the original UM selection or rejection on a policy at any time during the life of the policy by submitting a new uninsured motorist selection form to the insurer on the form prescribed by the commissioner of insurance. Any changes to an existing policy, regardless of whether they create new coverage, except changes in the limits of liability, do not create a new policy and do not require the completion of new UM selection forms. *See*, e.g., *Bercy v. St. Martin*, 37 So.3d 400 (La. App. 4 Cir.) *writ denied*, 45 So.3d 1045 (La. 2010); La. R.S. 32:861; La. R.S. 22:1295.

There is no prohibition against a plaintiff recovering under a UM policy simply because he received or is entitled to workers' compensation benefits as a result of the subject accident. However, where the plaintiff is injured in the course and scope of his employment at the hands of a third party tortfeasor, the plaintiff's workers' compensation insurer and any applicable UM insurer are solidary (joint and several) obligors who have coextensive obligations to reimburse him for lost wages and medical expenses he incurred as a result of his injury caused by the tortfeasor, and thus payment by the workers' compensation insurer or UM insurer relieves the other of liability toward the plaintiff, who is thereby prevented from obtaining double recovery of the same damages. La. R.S. 23:1103(A); *Granite State Ins. Co. v. Tyler*, 2010 WL 2757230 (W.D. La. 2010); *Cutsinger v. Redfern*, 12 So.3d 945 (La. 2009); *Kelly v. Scottsdale Ins. Co.*, 2010 WL 2572078 (M.D. La. 2010); *Johnson v. Fireman's Fund Ins. Co.*, 425 So.2d 224 (La. 1982).

Furthermore, a UM policy may legally contain an express exclusion of liability for workers' compensation reimbursement. If the UM policy does not exclude coverage for workers' compensation benefits, the employer or workers' compensation insurer who paid them historically have been entitled to reimbursement from the UM insurer (in preference to the plaintiff's right of recovery), at least when the UM insurance was purchased by the plaintiff's employer. But recent legislative amendments and evolving interpretive case law has called into doubt whether the payor of workers' compensation benefits can recover reimbursement from a UM policy which does not expressly exclude coverage for them, particularly if the UM policy was purchased by the plaintiff and not his employer.

Once a UM insurer receives satisfactory proof of loss (i.e. sufficient evidence for it to determine that the tortfeasor was in fact uninsured or underinsured and sufficient evidence to also reasonably make an initial evaluation of the nature and extent of its insured's injuries and damages resulting from the subject accident), the UM insurer must then tender to its insured at least the minimum amount of damages which any rational fact finder would probably find to be due to the insured by the UM insurer, after taking credit for any and all liability limits that cover the tortfeasor. If a UM insurer fails to make such a tender and such failure is found to have been arbitrary, capricious, or without probable cause, the insurer shall be subject to a penalty of one thousand dollars or fifty percent of the amount found to be due/not timely tendered to the insured, whichever is greater, plus reasonable attorney fees and costs. *See* LSA-R.S. 22:1892, which provides in pertinent part that "A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due *any insured* within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest."

Lastly, the Louisiana Supreme Court has held that under the LA UM statute a passenger's act of riding as permissive guest passenger in an insured's vehicle may constitute a "use" of the vehicle within the terms of insured's automobile liability insurance policy, such that the passenger is an "insured person" within the meaning of statutory omnibus clause and entitled to recover UM/UIM benefits. *Bernard v. Ellis*, 2011-2377, 2012 WL 2512772 (La. 2012).

C. No Fault Insurance

Louisiana does not have true no-fault insurance, other than medical-payment provisions in liability and accident policies. *See* Section herein-below on Bad Faith Claims for information about the med-pay insurer's duty to initiate loss adjustment within days of notification of the claim.

D. Disclosure of Limits and Layers of Coverage

Louisiana has a **"direct action statute"** (La. R.S. 22:1269) which allows the plaintiff to name the defendant's insurers as direct defendants in the initial suit against the insured even before any judgment has been obtained against the insured. Furthermore, a party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse payments made to satisfy the judgment. La. Code Civ. Proc. art. 1423. In a jury trial, the policy will not ordinarily be offered into evidence but rather it will be offered only for use by the judge in confecting a final judgment in the event the jury renders an award to the plaintiff. However, if the policy is offered into evidence without qualification or objection it can be seen by the jury. *Soudelier v. Miller*, 537 So.2d 296 (La. App. 1 Cir. 1988).

E. Unfair Claims Practices/Bad Faith Claims

While insurers owe their own insured a duty of good faith and fair dealing (including the duty to pay any amount due to one of its own insureds within 30 days after receipt of satisfactory proofs of loss or else risk the possibility of being held liable for a penalty of up to fifty percent of the amount that the insurer owes its insured, plus reasonable attorney fees, in the event that the insurer's failure to timely pay its insured is found to have been "arbitrary, capricious or without probable cause"), insurers do not owe any such general duty to third-party claimants. Thus, third-party claimants usually have no cause of action against a tortfeasor's liability insurer for failure to settle or attempt settlement of the third-party's claims, unless the insurer has breached a specific duty that has been created by statute in favor of the third-party claimant. Currently, the most pertinent statutory duties in favor of third-party claimants and against liability insurers include misrepresenting insurance policy provisions or facts relevant to any coverage at issue; failing to pay a settlement within 30 days after the agreement is reduced to writing; misleading a claimant as to the applicable statute of limitations; failing to initiate loss adjustment of property

damage and med-pay claims within 14 days of notification of the claim; and failing to make a written offer to settle a PD claim within 30 days of receiving satisfactory proof of loss. If an insurer knowingly or arbitrarily breaches these duties, the claimant can recover from the insurer certain penalties, the specifics of which vary depending upon the particular duty breached but which typically include the greater of "$5,000.00 or double the amount of any damages that are directly caused by the insurer's breach," or the greater of "$1,000.00 or 50% of the amount due from the insurer," plus reasonable attorney fees for some (but not all) breaches by the insurer of its statutory duties mentioned herein-above. *See* La. R.S. 22:1892 and 1973 (**Louisiana's primary insurance penalty statutes**); *Theriot v. Midland Ins. Co.*, 694 So.2d 184 (La. 1997); *Stanley v. Trinchard*, 500 F.3d 411, 427 (5th Cir. 2007). *See also Reed v. State Farm Mut. Auto. Ins. Co*., 857 So.2d 1012, 1021 (La. 2003) and *Buffman, Inc. v. Lafayette Co*., 36 So.3d 1004, 1024 (La. App. 4 Cir. 2010) *writ granted in part*, 78 So.3d 130 (La. 2012) (Defining "arbitrary and capricious").

F. Coverage – Duty of Insured

An insured has a duty to cooperate with the insurer in his defense, but an insurer must show actual prejudice from lack of cooperation to have any hope of possibly thereby defeating coverage for the insured's negligent injury of the plaintiff. *Trosclair v. CNA Ins. Co.*, 637 So. 2d 1168, 1170 (La. App. 4 Cir.) *writ denied*, 642 So. 2d 874 (La. 1994).

G. Fellow Employee Exclusions

If an employee is injured on the job, workers' compensation is his exclusive legal right to recovery for same from his employer and co-workers or their insurers, unless he can prove that they intended his injury to occur, in which case he can sue them in tort. La. R.S. 23:1032.

H. Excluded Drivers

An auto liability insurer may expressly exclude certain drivers in the household from coverage. LSA-R.S. 32:900.