JUGE NAPOLITANO

GUILBEAU RULI FRIEMAN APLC

INSURANCE COVERAGE DISPUTES

I. Insurer’s Duty to Defend

Louisiana courts have made the distinction between insurer's duty to defend and its duty to indemnify. Generally, an insurer's obligation to defend suits against its insured is broader than its liability for damage claims; the insurer's duty to defend suits brought against its insureds is determined by the allegations of the plaintiff's petition, and the insurer is obligated to defend the insured, unless the petition unambiguously excludes coverage. *See Henley v. Phillips Abita Lumber Co.*, 971 So. 2d 1104 (La. Ct. App. 2007). Assuming all allegations of the petition are true and that there would be both coverage under the policy and liability of the insured to the plaintiff, the insurer must defend regardless of the outcome of the suit. *Arceneaux v. Amstar Corp.*, 200 So. 3d 277, 281 (2016). This good faith duty to defend is laid out in L.R.S. 22 §1973, which states that: (A) an insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach. (B) Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A of this Section: (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue. (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing. (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or

consent of, the insured. (4) Misleading a claimant as to the applicable prescriptive period. (5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause. (6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

The applicability of L.R.S. 22 §1973 in workers' compensation cases has recently been addressed by the 3rd Circuit in *Cox v. LWCC*. The court held as a matter of first impression, the statute setting out that insurers owe their insureds a duty of good faith and fair dealing applies to first party claims by an insured for arbitrary and capricious refusal of the workers' compensation insurer to defend; and damages and penalties awarded to employer for carrier's violation of statutory duty to defend employer were lost revenue generated by an attorney's efforts on behalf of the firm. *Cox, Cox, Filo, Camel & Wilson, LLC v. Louisiana Workers' Compensation Corporation*, 2020-408 (La.App. 3 Cir. 3/31/21). Similarly, in *Quick v. Ronald Adams Contractor, Inc.*, the court held that an Insurer had a duty, under workers' compensation liability policy, to defend insured employer against employee's action to recover for injuries sustained in the course and scope of his employment as a result of employer's alleged negligence, even though employee had previously claimed and been awarded workers' compensation benefits under workers' compensation liability policy, where insurer had also issued employer a liability insurance policy, and coverage under that policy was precluded by exclusion for any obligation imposed by workers' compensation law). *Quick v. Ronald Adams Contractor, Inc.*, 861 So. 2d 278 (La. Ct. App. 2003).

II. Penalties

Pursuant to L.R.S. 22 §1973 (C) in addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties

assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings. However, attorney fees are not awardable under this statute. (D) The provisions of this Section shall not be applicable to claims made under health and accident insurance policies.

III. Necessity of Reservation of Rights

The Louisiana Supreme court has held that an insurer's breach of the duty to defend does not result in a waiver of all coverage defenses when the insured seeks indemnity under the policy. Waiver of coverage defenses results when an insurer, with knowledge of facts indicating non-coverage, undertakes to defend an insured without reserving its rights to deny coverage. *Arceneaux v. Amstar Corp.*, 66 So. 3d 438, 455 (2011). In order to reserve its rights to assert coverage defenses while undertaking the representation of its insured, the insurer must reserve its rights to do so, typically by the issuance of a reservation of rights letter. *Id.* Further, the insurer cannot later avoid liability based on a coverage defense if it has assumed the defense without a reservation of rights and with knowledge of facts which would bring the claim outside the policy based on that defense; a belated disclaimer may prejudice the insured because it loses the opportunity to assume and manage its own defense. *Id.*

IV. CANCELLATION OF POLICY

LAW

Pursuant to LRS 22§1267 A. This Section shall apply to… workers' compensation insurance. It shall not apply to reinsurance, excess and surplus lines insurance, residual market risks, multistate location risks, policies subject to retrospective rating plans, excess or umbrella policies, and such other policies that are exempted by the commissioner of insurance.

B. For the purposes of this Section, the following terms shall mean: (1) "Cancellation" means termination of a policy at a date other than its expiration date. (2) "Expiration date" means the date upon which coverage under a policy ends. It also means, for a policy written for a term longer than one year or with no fixed expiration date, each annual anniversary date of such policy. (3) "Nonpayment of premium" means the failure or inability of the named insured to discharge any obligation in connection with the payment of premiums on a policy of insurance subject to this regulation, whether such payments are payable directly to the insurer or its producer or indirectly payable under a premium finance plan or extension of credit. (4) "Nonrenewal" means termination of a policy at its expiration date. (5) "Renewal" or "to renew" means the issuance of or the offer to issue by the insurer a policy succeeding a policy previously issued and delivered by the same insurer or an insurer within the same group of insurers, or the issuance of a certificate or notice extending the term of an existing policy for a specified period beyond its expiration date.

C. (1) If coverage has not been in effect for sixty days and the policy is not a renewal, cancellation shall be effected by mailing or delivering a written notice to the first-named insured at the mailing address shown on the policy at least sixty days before the cancellation effective date, except in cases where cancellation is based on nonpayment of premium. Notice of cancellation based on nonpayment of premium shall be mailed or delivered at least ten days prior to the effective date of cancellation. After coverage has been in effect for more than sixty days or after the effective date of a renewal policy, no insurer shall cancel a policy unless the cancellation is based on at least one of the following reasons: (a) Nonpayment of premium. (b) Fraud or material misrepresentation made by or with the knowledge of the named insured in obtaining the policy, continuing the policy, or in presenting a claim under the policy. (c) Activities or omissions on the part of the named insured which change or increase any hazard insured against, including a failure to comply with loss control recommendations. (d) Change in

the risk which increases the risk of loss after insurance coverage has been issued or renewed, including an increase in exposure due to regulation, legislation, or court decision. (e) Determination by the commissioner of insurance that the continuation of the policy would jeopardize a company's solvency or would place the insurer in violation of the insurance laws of this state or any other state. (f) Violation or breach by the insured of any policy terms or conditions. (g) Other reasons that are approved by the commissioner of insurance. (2)(a) A notice of cancellation of insurance coverage by an insurer shall be in writing and shall be mailed or delivered to the first-named insured at the mailing address as shown on the policy. Notices of cancellation based on R.S. 22:1267(C)(1)(b) through (g) shall be mailed or delivered at least thirty days prior to the effective date of the cancellation; notices of cancellations based upon R.S. 22:1267(C)(1)(a) shall be mailed or delivered at least ten days prior to the effective date of cancellation. The notice shall state the effective date of the cancellation. (b) The insurer shall provide the first-named insured with a written statement setting forth the reason for the cancellation where the insured requests such a statement in writing and the named insured agrees in writing to hold the insurer harmless from liability for any communication giving notice of or specifying the reasons for a cancellation or for any statement made in connection with an attempt to discover or verify the existence of conditions which would be a reason for cancellation under this regulation. (3) An insurer shall provide a notice of cancellation or a statement of reasons for cancellation where cancellation for nonpayment of premium is effected by a premium finance company or other entity pursuant to a power of attorney or other agreement executed by or on behalf of the insured.

D. (1) An insurer may decide not to renew a policy if it delivers or mails to the first-named insured at the address shown on the policy written notice it will not renew the policy. Such notice of nonrenewal shall be mailed or delivered at least sixty days before the expiration date. Such notice to the insured shall include the insured's loss run information for the period the

policy has been in force within, but not to exceed, the last three years of coverage. If the notice is mailed less than sixty days before expiration, coverage shall remain in effect under the same terms and conditions until sixty days after notice is mailed or delivered. Earned premium for any period of coverage that extends beyond the expiration date shall be considered pro rata based upon the previous year's rate. For purposes of this Section, the transfer of a policyholder between companies within the same insurance group shall not be a refusal to renew. In addition, changes in the deductible, changes in rate, changes in the amount of insurance, or reductions in policy limits or coverage shall not be refusals to renew. (2) Notice of nonrenewal shall not be required if the insurer or a company within the same insurance group has offered to issue a renewal policy, or where the named insured has obtained replacement coverage or has agreed in writing to obtain replacement coverage. (3) If an insurer provides the notice described in Paragraph (1) of this Subsection and thereafter the insurer extends the policy for ninety days or less, an additional notice of nonrenewal is not required with respect to the extension.

E. (1) An insurer shall mail or deliver to the named insured at the mailing address shown on the policy written notice of any rate increase, change in deductible, or reduction in limits or coverage at least thirty days prior to the expiration date of the policy. If the insurer fails to provide such thirty-day notice, the coverage provided to the named insured at the expiring policy's rate, terms, and conditions shall remain in effect until notice is given or until the effective date of replacement coverage obtained by the named insured, whichever first occurs. For the purposes of this Subsection, notice is considered given thirty days following date of mailing or delivery of the notice. If the insured elects not to renew, any earned premium for the period of extension of the terminated policy shall be calculated pro rata at the lower of the current or previous year's rate. If the insured accepts the renewal, the premium increase, if any, and other changes shall be effective the day following the prior policy's expiration or anniversary date. (2) This Subsection shall not apply to the following: (a) Changes in a rate or plan filed with

the commissioner of insurance and applicable to an entire class of business. (b) Changes based upon the altered nature or extent of the risk insured. (c) Changes in policy forms filed and approved with the commissioner and applicable to an entire class of business. (d) Changes requested by the insured.

F. Proof of mailing of notice of cancellation, or of nonrenewal or of premium or coverage changes, to the named insured at the address shown in the policy, shall be sufficient proof of notice.

G. (1) An insurance premium finance company that finances any part of an insurance policy governed by this Section shall cooperate with the department in any investigation regarding such insurance policy. (2) Upon request by the department, the insurance premium finance company shall make available to the department all documents, correspondence, and cancellation notices related to the insurance policy that have been received or sent by the insurance premium finance company. (3) An insurance premium finance company that violates any provision of this Section shall be subject to the monetary penalties provided for in R.S. 22:13(A).

CASES

In *Jones v. Clesi Foundations*, Mr. Jones filed a disputed claim for compensation against Clesi Foundations, asserting that he was injured on the job on October 25, 2012. *Jones v. Clesi Foundations, L.L.C.*, 183 So. 3d 532, 533-34 (La. Ct. App. 2015). Mr. Jones discovered that Clesi Foundations' workers' compensation coverage was underwritten by American Interstate, and on March 25, 2014, he filed a supplemental and amended disputed claim for workers' compensation against American Interstate. *Id.* American Interstate filed an answer maintaining that it did not insure Clesi Foundations at the time of Mr. Jones' accident and asking that the claim be dismissed. *Id.* Both parties proceeded to file motions for summary judgement. *Id.* The

workers' compensation judge denied Mr. Jones's motion for summary judgment and granted American Interstate's motion for summary judgment, finding that Clesi Foundations "did not have in effect a workers' compensation insurance policy with American Interstate Insurance when the alleged work accident occurred." *Id.* On appeal, the court found that American Interstate's cancellation of Clesi Foundations' workers' compensation insurance policy for nonpayment of premium was effective on October 25, 2012 at 12:01 a.m., and the policy was no longer in effect at the time of Mr. Jones' accident later that same day. *Id.* at 536; *see also Peters v. Ray-Bar Const.*, LLC, 193 So. 3d 165 (La. Ct. App. 2016) (rendering summary judgment in favor of LWCC, finding that Ray–Bar's workers' compensation insurance policy was effectively cancelled on January 12, 2013, and was not in full force and effect on the day of Mr. Peter's work-related accident on January 24, 2013); *compare* Rodriguez v. Integrity Contracting, 38 So. 3d 511, 526 (La. Ct. App. 2010) (holding that the undocumented claimant was not statutorily excluded from receiving workers' compensation benefits from statutory employer because the insurer's exhibits indicated that the alleged cancellation notice was not mailed within ten days prior to the effective date of cancellation as required by statute, and the insurer continued to send invoices for the policy and continued to receive payments from subcontractor after policy was allegedly cancelled).

V. EXTRATERRITORIAL COVERAGE and INSURANCE COVERAGE DISPUTES

LAW

Pursuant to 23 §1035.1.(1) if an employee, while working outside the territorial limits of this state, suffers an injury on account of which he would have been entitled to workers' compensation had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this Chapter, provided that at the time of such injury **(a) his employment is principally localized in this state, or (b) he is working under a contract of hire made in this state.**

Thus, according to this statute, workers' compensation coverage for an injured employee working outside the territorial limits of the state is only available if, at the time of the injury, his employment is principally “localized” in Louisiana, or he is working under a contract of hire made in this state. *Kennington v. H. Blume Johnson*, *Inc.,* 638 So. 2d 1066, 1067 (1994). In determining whether a contract of hire is a Louisiana contract for purpose of providing extraterritorial coverage in a workers' compensation case, the parties' intent should be paramount. *Dodd v. Merit Elec., Inc.*, 8 So.3d 849 (La. Ct. App. 2009). Further, some factors to consider in determining the intent of the parties include domicile of the parties, the nature of the work to be done, and the place where the employment was initiated. *Id.*

However, what happens if the employer/insured hires the employee in another state to perform services in the other state? The WC policy may not afford coverage for the injury to the employee who was hired and injured out of state. Many employers are not aware that they are without coverage for such claims, and this frequently result in insurance coverage disputes with their insurer. This is even more so the case when employers open up out of state operations and fail to advise the insurer of such operations.

CASES

In *Bridgefield Cas. Ins. Co. v. River Oaks Mgmt., Inc.*, the court granted summary judgement in favor of Bridgefield. On September 30, 2011, River Oaks began work in Mississippi and opened up a business operation in Mississippi, which is one of the states listed for “other states insurance” under its policy. The effective date of the Policy was January 1, 2012. Pursuant to the clear and unambiguous language of the Policy, River Oaks was required to notify the insurer within thirty (30) days of the effective date of the Policy of its work in Mississippi. It did not. On Bridgefield’s Motion for Summary Judgment, the US District Court

Judge ruled that River Oaks was not entitled to insurance coverage by Bridgefield for the workers' compensation claim filed by Ernest Stoltz.

In this case, River Oaks started operations in Mississippi and did not put Bridgefield on notice. The relevant portion of the policy on "Other States Coverage" provided:

> *A. How This Insurance Applies*
>
> *1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.*
>
> *2. If you begin work in any one of those states after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in item 3.A. of the Information Page.*
>
> *3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.*
>
> *4. **If you have work on the effective date of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.***
>
> *B. Notice*
>
> ***Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page.***

When River Oaks originally sought workers compensation insurance in 2005, it was providing property management services for apartment communities located exclusively in the State of Louisiana. River Oaks provided location information to Bridgefield for only Louisiana locations. River Oaks sought workers' compensation insurance for Louisiana only. On at least one renewal app, River Oaks had notified of a new location in Louisiana. Prior to River Oaks' receipt of its 2012 policy and account documents, River Oaks entered into a property management agreement on September 30, 2011, with TJWJ, III, LLC d/b/a Madison Apartments which operate apartments in the State of Mississippi. (Unlike it had previously done when adding a new location, **this time River Oaks failed to notify Bridgefield** of its new location. On December 15, 2011, River Oaks entered into a property management agreement with TJO, III, LLC to perform services for the Andrew Apartments in Mississippi. **River Oaks again failed to notify Bridgefield of its Mississippi operations within 30 days of January 1, 2012**, the effective date of the Policy. On January 27, 2012, River Oaks entered into a contract to perform work in Mississippi for CP Apartments, LLC. **River Oaks once again failed to tell Bridgefield that it had begun to work in or had ongoing operations in Mississippi.**

Despite having been notified that the Policy issued on November 11, 2011 was based upon information that it only had Louisiana locations and Louisiana payroll, River Oaks failed to notify Bridgefield it was already working in Mississippi or paying salaries for work performed in Mississippi. Despite being provided a copy of the Policy which contained the provisions requiring River Oaks to notify Bridgefield if it has work on the effective date of the policy within thirty (30) days of that effective date, River Oaks failed to abide by the contract required to notify Bridgefield that it began work in Mississippi. River Oaks failed to notify Bridgefield at the time it started working in Mississippi, when it signed contracts to work in Mississippi, or within 30 days of the effective date of the Policy that it had ongoing operations in Mississippi.

Part Three of the Policy required River Oaks to notify Bridgefield within thirty (30) days after the effective date of the Policy of any work it has in any states not listed in Item 3.A. but listed in Item 3.C. Otherwise, the Policy would not provide coverage for claims made in these states. Furthermore, the "Notice" section of the Policy indicates that in order for River Oaks to effectively notify Bridgefield of its work in any state listed in Item 3.C, it was to "tell" Bridgefield of such work.

In *B&K Mechanical, Inc. v. Federal Insurance Company*, 33 F. Supp 2d 941 (D. Kan. 1998), the United District Court for the District of Kansas considered the issue of 3.A. and 3.C. coverage in a premium dispute and coverage dispute surrounding a Kansas company. B&K was based in Kansas, but all of its job sites were located in Iowa. B&K estimated payroll only in Iowa. Federal bound the policy for Iowa but not for Kansas for the 1995-96 period. The policy lapsed at the end of the period. Federal later issued a policy for the period February 9, 1996, through January 26, 1997.The matter before the Court involved a coverage dispute under the 96-97 policy and premiums due. B&K argued it was entitled to apply the amount retained by Federal on the 96-97 policy to offset the amount due on the 95-96 policy. B&K argued that it cancelled the policy for the 96-97 year when it learned the policy did not provide coverage in Kentucky and it would have never renewed its policy had it known this information. The Court went on to reject B&K's argument noting the policy only listed Iowa as a 3.A. state and that even if Kentucky, the state B&K claimed it desired coverage for its additional operation, had been listed as a 3.C. state, B&K had never informed its insurer that it had begun working in Kentucky.

"Since B&K was already working in Kentucky, it would have needed 3.A. coverage; however, B&K never sought 3.A. coverage for Kentucky." *Id.* at 946.

In *Hornet Exp. V. Zurich American Ins. Group*, 382 N.J. Super. 408, 889 A.2d 483, 486 (N.J. Super.A.D., 2006), the employer stated in its application for insurance that it only operated in New Jersey. As such, the insurance policy provided workers' compensation insurance coverage only for New Jersey and excluded coverage for any other state. However, in actuality, the employer also operated in Pennsylvania, and a Pennsylvania employee was injured while working in Pennsylvania. Nevertheless, the policy included the following language:

> WORKERS COMPENSATION INSURANCE: Part One of the policy applies to the Workers Compensation Law of the state(s) listed here:
> NJ
>
> Item 3C of the information page stated:
>
> OTHER STATES INSURANCE: Part Three of the policy applies to the states, if any, listed here:
> COVERAGE EXCLUDED
>
> In addition, section 3(A)(4) of the policy stated:
>
> If you have work on the effective date of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.

Relying in part on Section 3(A)(4), the court determined that the policy did not provide coverage for the Pennsylvania accident. *Id.*

In *Harrison v. Tobacco Transport, Inc.*, 139 N.C.App. 561, 533 S.E.2d 871, 875-6 (N.C.App., 2000), the North Carolina Court of Appeals reviewed a decision of the North Carolina Industrial Commission. An employee sustained a work-related accident while working for the Tobacco Transport, Inc. the Employer's policy only contained 3.A. coverage for Kentucky and no states were listed in 3.C. The employee was hired, worked in, and resided in North Carolina. The Employer's workers' compensation insurer denied coverage for the workers' compensation claim on the ground that the insurance policy did not provide coverage

for employees working in North Carolina. The employer contended the policy was ambiguous. The North Carolina Commission found the policy was unambiguous with regard to 3.C. coverage. The Court of Appeal agreed with the Commission's decision that the policy was unambiguous. The Court specifically held that even though the policy failed to list any states under 3.C. The Court found no evidence that the employer met the requirements of notifying the insurer within 30 days of the effective date of the policy that it was working in the state it was seeking coverage and as such, would not have been afforded coverage under 3.C. *Id.*