Johnson Yacoubian & Paysse

"Where Excellence Matters"™

2020 TORT REFORM AND COVID-19 LEGAL UPDATE

Our attorneys at Johnson, Yacoubian & Paysse followed closely the 2020 Louisiana Legislature's efforts to implement tort reform in Louisiana. The following is a summary of the tort reforms recently passed by the Louisiana Legislature. This tort reform was ultimately accomplished with the passage of HB 57 entitled "the Civil Justice Reform Act of 2020." **The effective date of these new laws is January 1, 2021**. Set forth below is a summary of the pertinent components of this long-overdue tort reform in Louisiana.

In addition, several important laws were passed regarding to legal immunity with respect to the COVID-19 pandemic which are discussed below. We continue to monitor legal developments with respect to the challenges presented by the current COVID-19 pandemic.

2020 TORT REFORM

Earlier in 2020, during the Louisiana Legislature's Regular Session, a tort reform bill was passed, but Governor John Bel Edwards vetoed the bill. When the Legislature reconvened one month later in an "extraordinary session," the sponsors of tort reform prepared another bill which eventually passed, House Bill 57. Through political maneuvering within the Legislature, that bill was approved with a sufficient majority that it could ultimately withstand a potential veto.

House Bill 57 is entitled the "Civil Justice Reform Act of 2020." Essentially, the law provides the following **four** significant forms of tort reform:

1. REDUCED JURY THRESHOLD

The minimum threshold for a party to request a jury trial has been lowered from $50,000 to $10,000.

Old Law: (C.C.P. Art. 1732) authorized a jury trial when the amount in controversy exceeded $50,000.

New Law: Reduces the threshold for a jury trial to $10,000.

Under former law (C.C.P. Art. 4873), where a principal demand was commenced in a parish or city court in which the defendant would otherwise be entitled to a jury trial, the defendant could obtain a jury trial by transferring the action to the district court in the manner provided by present law. This new Act retains the former law and provides that if a party fails to file a motion to transfer within the delays provided by present law, the matter shall not be transferred. The new law further provides that a jury trial shall not be available for non-tort suits originally filed in parish or city court when the amount in controversy does not exceed the parish or city court's jurisdictional limit.

Hancock Whitney Center | 701 Poydras Street | Suite 4700 | New Orleans, Louisiana 70139
www.jyplawfirm.com | 504.528.3001 | Fax 504.528.3030

Alan J. Yacoubian
ajy@jyplawfirm.com
504.589-9669

René S. Paysse, Jr.
rsp@jyplawfirm.com
504.589-9677

Jeffrey C. Brennan
jbrennan@jyplawfirm.com
504.589-9683

Former law (C.C.P. Art. 1733) provided that a party could obtain a trial by jury by filing a pleading demanding a trial by jury and a bond in the amount and within the time set by the court. The new Act retains the former law and provides that in a tort action where a petitioner stipulates or otherwise judicially admits that the amount in controversy exceeds $10,000, but is less than $50,000, a party requesting a jury trial shall provide a cash deposit in the amount of $5,000. The new law further provides that when the case is set for trial, the court may provide for a supplemental bond or cash deposit in accordance with present law.

Practically, the new law will likely result in an increase in requests for jury trials from defendants, and some district courts might struggle with an increased volume of jury trials.

2. EXISTENCE OF LIABILITY INSURANCE BARRED FROM JURY

The existence of liability insurance now **cannot** be communicated to a jury, with certain exceptions.

Old Law: Provided that, under Louisiana Code of Evidence art. 411:

> Although a policy of insurance may be admissible, the amount of coverage under the policy shall not be communicated to the jury unless the amount of coverage is a disputed issue which the jury will decide.

New Law: Retains present law but now additionally provides that the existence of insurance coverage shall not be communicated to the jury, unless any of the following apply:

(1) A factual dispute related to an issue of coverage is an issue which the jury will decide;

(2) The existence of insurance coverage would be admissible to attack the credibility of a witness pursuant to present law (C.E. Art. 607) which provides for attacking and supporting a witness' credibility.;

(3) The cause of action is brought against the insurer alone in the limited circumstances provided by present law direct action statute and bad faith insurance.

This new law further provides that the identity of the insurer shall not be communicated to the jury unless the identity of the insurer would be admissible to attack the credibility of a witness pursuant to present law. Finally, the Act provides that in all cases brought against an insurer, at the opening and closing of the trial, the court shall read instructions to the jury that there is insurance coverage for the damages claimed by the plaintiff.

In prior cases, plaintiffs were able to skirt the prohibition of current LCE art. 411. For instance, in *Mack v. Transport Ins. Co.*, 577 So.2d 112 (La. App. 1 Cir. 1991), plaintiff's counsel was allowed, in both the opening and closing statements to the jury, to mention that the liability policy covering the defendant driver had limits of $1 million. The jury subsequently awarded $342,784.00 to plaintiff. The appellate court noted the Louisiana Code of Evidence article, and found that the references to the policy limits were erroneously allowed by the trial judge. However, the court found that defendants did not suffer prejudice, because the jury award was below the $1 million policy limits.

This new law will hopefully prevent such outcomes in the future, now that the jury will not be made aware of the existence of liability insurance, or the identity of the insurer, except in certain limited circumstances.

3. LIMITED RECOVERY OF MEDICAL EXPENSES BILLED BUT NOT PAID

The recent legislation limiting the recovery of plaintiff's medical expenses is an entirely new law, enacted as R.S. 9:2800.27.

Old Law: Allowed a personal injury plaintiff to recover the "billed" amount of medical expenses by a health care provider regardless of whether it was **actually** paid.

New Law has several components, as we explain. This new law provides that in cases where a claimant's medical expenses have been paid, in whole or in part, by a health insurance issuer or Medicare to a medical provider, the claimant's recovery of medical expenses is limited to the amount actually paid to the medical provider by the health insurance issuer or Medicare, and any applicable cost sharing amounts paid or owed by the claimant, and not the amount billed. Additionally, this new law provides that the court shall award 40% of the difference between the amount billed and the amount actually paid to the contracted medical provider by a health insurance issuer or Medicare in consideration of the plaintiff's "cost of procurement" (premiums and contracted attorney fees) provided that this amount shall not make the award unreasonable.

This new statute further provides that in cases where a claimant's medical expenses have been paid (in whole or in part) by Medicaid to a medical provider, the claimant's recovery of medical expenses paid by Medicaid is limited to the amount **actually** paid to the medical provider by Medicaid, and any applicable cost sharing amounts paid or owed by the claimant, and not the amount billed. Moreover, the new law instructs that, in cases where a claimant's medical expenses are paid pursuant to the Louisiana Workers' Compensation Act ("the Act"), a claimant's recovery of medical expenses is limited to the amount paid under the medical payments fee schedule of the Act. In addition, the new law provides that, in a jury trial, only after a jury verdict is rendered may the court receive evidence related to the limitations of recoverable past medical expenses paid by a health insurance issuer or Medicare. The jury shall be informed only of the amount billed by a medical provider for medical treatment. Whether any person, health insurance issuer, or Medicare has paid or has agreed to pay, in whole or in part, any of a claimant's medical expenses shall not be disclosed to the jury. In trial to the court alone, the court may consider such evidence. Finally, the new statue does not apply in medical malpractice claims or in claims brought pursuant to the Governmental Claims Act.

This new area of law should serve to legislatively overrule the decision in *Griffin v. Louisiana Sheriff's Auto Risk Association*, 99-2944 (La.App. 1st Cir. 6/22/01), 802 So.2d 691, writ denied, 01–2117 (La.11/9/01), 801 So.2d 376. There, the Court reviewed a contractual write-off procured by the plaintiff's medical insurer, and held that the plaintiff was entitled to recover the full amount of the medical bills prior to any discount given by virtue of plaintiff's health insurance.

The provision of the new law requiring an award of 40% of the difference between the amount billed and the amount paid appears to represent a legislative compromise between the business community and trial lawyers. However, in sum, this section of this new law should result in lower exposure for medical expenses.

4. ADMISSIBILITY OF SEAT BELT EVIDENCE

The seat belt gag rule (failure to wear a seat belt cannot be considered as comparative fault or failure to mitigate damages) is now eliminated.

Old Law: La. R.S. 32:295.1(E) provided:

> In any action to recover damages arising out of the ownership, common maintenance, or operation of a motor vehicle, failure to wear a seat belt in violation of this Section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this Section shall not be admitted to mitigate damages.

The statute has existed since the 1980's. With respect to the jurisprudential interpretation of the statute, the Louisiana Supreme Court enforced the subject statute, holding that it applies in automobile personal injury cases, as well as in product liability actions involving allegations of design defect in an automobile. (*Rougeau v. Hyundai Motor America* (La. 2002), 805 So.2d 147). The Supreme Court found that, not only did the statute prohibit the introduction of evidence to show comparative fault or to mitigate damages, but also prohibited the use of such evidence to prove that the plaintiff's seat belt non-use caused the plaintiff's injuries.

New Law: Repeals the entire statutory section of R.S. 32:295.1(E). Accordingly, evidence of a plaintiff's non-use of a seat belt should soon be admissible as evidence regarding comparative fault and mitigation of damages.

The Governor of Louisiana has recently signed the Civil Justice Reform Act of 2020, and these tort reform provisions are now enacted as Louisiana law. These provisions will take effect on January 1, 2021. We fully expect challenges to the law by the plaintiffs' bar, but as it stands, the tort reform is the law of the land.

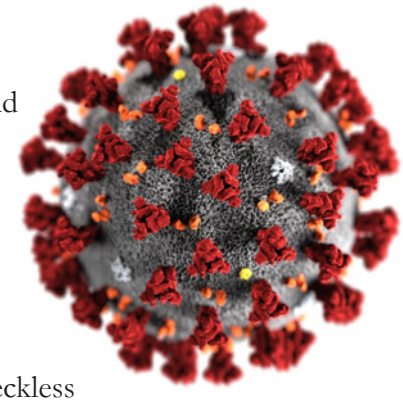
SUSPENSION OF LEGAL DEADLINES – HOUSE BILL 5

In addition to tort reform, the Louisiana Legislature has addressed challenges and concerns created by the COVID-19 pandemic including the necessity to suspend legal deadlines and provide for tort immunity presented by COVID-19 claims. House Bill 5, Act 3 has been enacted. This law provides for the suspension of prescriptive, peremptive, and abandonment periods by the Louisiana Supreme Court in the event of a declaration of emergency or disaster by the Governor.

The former law provided for various prescriptive, peremptive, and abandonment periods. This new law provides that the Supreme Court of Louisiana may suspend the running of prescriptive, preemptive, and abandonment periods for a period up to ninety (90) days if a state of emergency or disaster is declared by the governor. House Bill 5 further provides for continuing suspensions if the Governor issues further executive orders after the 90 days have run. This bill provides for the period of suspension to terminate upon the earlier of an order of the Supreme Court of Louisiana or termination of the declared state of emergency or disaster. Finally, the new law provides that the right to file any pleading subject to the suspension shall terminate sixty days after the termination of the suspension. This law was signed by the Governor, and is effective upon the signature of the Governor or lapse of time for gubernatorial action.

TORT IMMUNITY FOR COVID-19 LIABILITY – ACT 336

1. BUSINESS AND GOVERNMENTAL AGENCIES



This is a broad-based COVID-19 law which ostensibly protects all businesses and government agencies from legal exposure.

Act 336 provides that no person, or local or state government, or political subdivision thereof, shall be liable for civil damages for injury or death resulting from exposure to COVID-19 in the course of or through the performance of a person's business operations unless it is proven that the person, government, or political subdivision was not in substantial compliance with applicable COVID-19 procedures, and unless such damage was caused by gross negligence or wanton or reckless misconduct. This new law further provides that no person, or local or state government, or political subdivision thereof, business event strategist, association meeting planner, corporate meeting planner, independent trade show organizer or owner, or other entity shall be liable for civil damages for injury or death resulting from exposure to COVID-19, in the course of or through the performance of hosting, promoting, producing or otherwise organizing, planning, or owning a trade show, convention, meeting, association produced event, corporate event, sporting event, or exhibition of any kind, unless such damage was caused by gross negligence or willful or wanton misconduct.

Act 336 additionally provides that during the public health emergency declared during the outbreak of COVID-19, no designers, manufacturers, labelers, or distributors of personal protective equipment shall be liable for civil damages for injury caused by personal protective equipment unless such damages were caused by gross negligence or willful or wanton misconduct. The new law further provides that during the COVID-19 public health emergency, no person who uses, dispenses, or administers personal protective equipment shall be liable for civil damages for injury or death related to the personal protective equipment unless the person was not in substantial compliance with applicable COVID-19 procedures and unless such damage was caused by gross negligence or

wanton and reckless misconduct. The new law also provides that when two or more sets of COVID-19 procedures apply to a business operation or to the use, dispensing, or administering of personal protective equipment, the responsible party need only substantially comply with one applicable set of procedures. Finally, the new law provides that employees, whether or not covered by worker's compensation, shall have no remedy in tort against their employer for exposure to COVID-19 unless caused by an intentional act.

Act 336, enacted from House Bill 826, is retroactive to March 11, 2020, and was effective upon signature of the Governor on June 13, 2020. The law adds La. R.S. 9:2800.25 and La. R.S. 29:773.

2. RESTAURANT INDUSTRY – ACT 305

This new law is specifically directed at immunity for the restaurant industry.

Act 305 provides that no owner, operator, employee, contractor, or agent of a restaurant which is in substantial compliance with Proclamation Number 25 JBE 2020 and any subsequent related proclamations and applicable to COVID-19 procedures established by a federal, state, or local agency, shall have civil liability for injury or death due to COVID-19 infection transmitted through the preparation and serving of food and beverage products by the restaurant during the COVID-19 public health emergency as declared by the proclamation, unless the injury or death was caused by gross negligence or willful and wanton misconduct. Act 305 further provides that if two or more sources of procedures are applicable to the restaurant operations at the time of the actual or alleged exposure, the owner, operator, employee, contractor, or agent of a restaurant shall substantially comply with any one applicable set of procedures. Furthermore, the new law provides that the provisions of new law shall include the serving of the prepared food and beverage products by dine-in, takeout, drive-through, or delivery throughout the duration of the COVID-19 public health emergency. Finally, Act 305 requires that employees under new law retain the rights and remedies granted under the Louisiana Workers' Compensation Law. This new law defines "restaurant" to mean an eating establishment which gives or offers for retail sale prepared food to the public within its premises.

Act 305, arising from Senate Bill 508, is enforceable retroactive to March 11, 2020, due to the imminent threat posed by COVID-19, and any subsequent proclamation declaring the existence of a statewide public health emergency. It was effective upon signature of the Governor on June 12, 2020. The law adds La. R.S. 29:773.

3. DISASTER RELIEF / RECOVERY SERVICES – ACT 303

This law is aimed at those who provide disaster relief and recovery services.

The former law provided that during a declared state of emergency, any natural or juridical person, who gratuitously and voluntarily renders any disaster relief or recovery services in coordination with the state or its political subdivisions, shall not be liable to the recipient thereof for any injury or death to a person or any damage to property resulting therefrom, except in the event of gross negligence or willful misconduct.

This new law expands the scope of prior law to provide that, during a declared state of emergency, any natural or juridical person, who gratuitously and voluntarily renders disaster relief, recovery services, or products in coordination with the state or its political subdivisions, shall not be liable to the recipient thereof for any injury or death to a person or any damage to property resulting therefrom, except in the event of gross negligence or willful misconduct. Act 303 further provides that, during a declared state of emergency, any natural or juridical person, who renders disaster relief, recovery services, or products outside of the typical course and scope of their operations in coordination with the federal government, the state, or its political subdivisions, shall not be liable to the recipient thereof for any injury or death to a person or any damage to property resulting therefrom, except in the event of gross negligence or willful misconduct.

Act 303, enacted from Senate Bill 491, is retroactive to March 11, 2020, and is effective upon signature of the Governor on June 12, 2020.

4. PUBLIC AND PRIVATE SCHOOLS – HOUSE BILL 59

House Bill 59 provides new law in Louisiana, regarding limitations of liability for public and private school districts and post-secondary institutions during a declared state of emergency or a public health emergency related to COVID-19.

House Bill 59 provides for immunity for public, nonpublic, and charter schools from civil liability from damages resulting from exposure to COVID-19 or acts undertaken in an effort to respond to the COVID-19 public health emergency. The new law prohibits causes of action related to the contraction of COVID-19 at a public, nonpublic, or charter school facility, bus, or event and at a public or nonpublic postsecondary education facility or event based on the actions or failure to act of school agents.

Additionally, House Bill 59 provides that schools and post-secondary institutions shall not be immune from civil liability for damages resulting from actions or inactions that (1) are in violation of a policy adopted by the school and (2) are determined to be grossly negligent or wanton or reckless misconduct. The new law prohibits a public school governing authority from adopting a policy, rule, or regulation that imposes a lesser standard than what is prescribed in a rule or regulation adopted by the State Board of Elementary and Secondary Education, in accordance with the Administrative Procedure Act. The new law further provides that the State Board of Elementary and Secondary Education adopt policies that are informed by the Centers for Disease Control and Prevention guidelines regarding COVID-19 by July 15, 2020. Finally, the new law provides that the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, University of Louisiana System, and Community and Technical Colleges adopt policies that are informed by the Centers for Disease Control and Prevention guidelines regarding COVID-19.

This law was signed by the Governor, and is now enacted as La. R.S. 17:439.1 and 3391. The provisions are retroactive to March 11, 2020.

5. NON-PROFIT AND RELIGIOUS ORGANIZATIONS – HOUSE BILL 58

House Bill 58 addresses immunity of nonprofit organizations and religious institutions from COVID-19 liability.

This proposed law provides that nonprofit organizations or religious institutions or employees thereof shall not be liable for civil damages for injury or death resulting from exposure to COVID-19 in the course of business operations, unless it is proven that the nonprofit organization or religious institution was not in substantial compliance with applicable COVID-19 procedures, and unless such damage was caused by gross negligence or willful or wanton misconduct. The proposed law further provides that nonprofit organizations or religious institutions or employees thereof shall not be liable for civil damages for injury or death resulting from exposure to COVID-19 in the course of hosting or producing meetings and other events, unless such damage was caused by gross negligence or willful or wanton misconduct.

Additionally, the proposed law provides that when two or more sets of COVID-19 procedures apply to a business operation, the responsible party need only substantially comply with one applicable set of procedures. Finally, this proposed law exempts from the limitation of liability the right to receive benefits provided by the Workers' Compensation Law.

This bill was referred to, and is pending before, the House Civil Law Committee, but was not enacted. It may be taken up at the next legislative session.