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In *American International Insurance Co. v. Roberts*,[1] the supreme court spelled out the requirements for effective rejection of uninsured motorist coverage or selection of limits lower than the coverage mandated by statute. Originally, Louisiana Revised Statutes 22:1406(D) required automobile liability policies to provide uninsured motorist coverage within the minimum limits provided under the Motor Vehicle Safety Responsibility Law.[2] This act further provided that the insured could reject the coverage, but it did not describe the form or procedure for such rejection. Act 154 of 1974 increased the mandated coverage to the same limits as provided for in the policy for bodily-injury liability, granting the insured the right to reject such coverage or select lower limits. Again, no form or procedure was provided for the rejection of coverage or the selection of lower limits.[3]

Act 494 of 1975 added the provision that such coverage was not required in "a renewal or substitute policy, where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the insurer."[4] Finally, Act 438 of 1977, effective September 9, 1977, added the following: "Any document signed by the named insured or his legal representative which initially rejects such coverage or selects lower limits shall be conclusively presumed to become a part of the policy or contract when issued and delivered, irrespective of whether physically attached thereto."[5]

In *Roberts*, the insured purchased, in January, 1975, automobile liability insurance with bodily injury limits of $25,000 per person, but he orally selected uninsured motorist (U.M.) limits of only $5,000 per person. The policy was last renewed on June 6, 1978, prior to plaintiff's accident on July 13, 1978. Since the plaintiff's bodily-injury

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1. 404 So. 2d 948 (La. 1981).

2. 1962 La. Acts, No. 187. The Motor Vehicle Safety Responsibility Law is contained in LA. R.S. 32:851-1043 (1950). It requires proof of ability to respond in damages for liability in the amount of $5000 for bodily injury to one person, with a maximum of $10,000 for bodily injury to two or more persons in one accident.

3. LA. R.S. 22:1406(D)(1)(a).

4. *Id.*

5. *Id.*

damages exceeded the purported U.M. limits of $5,000, the issue was whether the oral selection of lower limits in January, 1975, was effective through the subsequent renewals of the policy.

Since the uninsured motorist statute did not specify the form for rejection or selection of lower limits prior to Act 438 of 1977, the supreme court held that the formality requirements had to be determined from general insurance law. The supreme court found that Louisiana Revised Statutes 22:628, which governs any agreement modifying a contract of insurance, requires that a rejection of coverage or selection of lower limits be in writing and attached to the policy. The court reasoned that Louisiana Revised Statutes 22:1406(D) mandated certain coverage which was read into the policy by the terms of the statute. Therefore, the rejection of coverage or selection of lower limits was a modification of the policy which had to meet the formality requirements of Louisiana Revised Statutes 22:628. In *Roberts*, the oral selection of lower limits in 1975 was ineffective, and the plaintiff was entitled to the coverage mandated by the statute.

In summary, an effective rejection of coverage or selection of lower limits prior to September 9, 1977 (the effective date of Act 438 of 1977) must be in writing and attached to the policy in accordance with the requirements of Louisiana Revised Statutes 22:628. Subsequent to September 9, 1977, Louisiana Revised Statutes 22:1406(D)(1)(a) requires a document signed by the named insured or his legal representative for an effective rejection of coverage or selection of lower limits; attachment to the policy, however, is not required.

In *Niemann v. Travelers Insurance Co.*,[6] a sharply divided Louisiana Supreme Court cast a dark cloud of uncertainty over the existence of any subrogation claim for payments made under U.M. coverage. In language indicating that the rights of the insurer under Louisiana Revised Statutes 22:1406(D)(4) were much more restrictive than subrogation rights, the court held that the U.M. carrier had no right to enforce subrogation and consent-to-settle provisions which interfered with its insured's rights to settle with and release the negligent motorist and his liability insurer.

In *Bond v. Commercial Union Assurance Co.*,[7] the weather improved for the insurer, and the skies are now only partly cloudy over its subrogation claim. Suit was filed against the U.M. carrier, who in turn filed a third party demand for indemnity against the allegedly negligent underinsured motorist. Relying on *Niemann*, the court of appeal dismissed the third party demand. On rehearing, the supreme

6. 368 So. 2d 1003 (La. 1979). *See* McKenzie, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Insurance*, 40 LA. L. REV. 676, 678 (1980).

7. 407 So. 2d 401 (La. 1981).

court reversed, holding that upon payment, an insurer, pursuant to a subrogation agreement contained in its policy, becomes conventionally subrogated to its insured's rights against the tort-feasor.[8] The supreme court indicated that the holding in *Niemann* should be limited to the proposition "that an insurer may not enforce a clause excluding uninsured motorist coverage in the event of its insured's failure to obtain its consent before entering a reasonable settlement with an underinsured tortfeasor and his insurer."[9] This conclusion was justified by the court on the ground that such exclusion would conflict with the aim of the U.M. statute to promote full recovery of all damages suffered by innocent motorists.

The net effect of *Niemann* and *Bond* is that an insurer may be conventionally subrogated to its insured's rights against the negligent motorist, but that subrogation right is subject to impairment by an insured who enters into a "reasonable settlement" with the tort-feasor and his liability insurer. Although the insurer is left with a shaky subrogation right, the *Niemann-Bond* rule does strike a balance between the need for expeditious compensation of accident victims and the desirability, where feasible, of making negligent motorists ultimately responsible for the damage they have caused (which encourages the maintenance of adequate liability insurance).

In order for the *Niemann-Bond* rule to function in favor of the accident victim, there must be certainty as to the effect of a settlement with and the release of the tort-feasor and his insurer. The insured who releases the negligent motorist as a condition of the settlement with that motorist's liability insurer must know that such release will not affect his right to pursue an underinsured motorist claim against his own insurer. Therefore, any settlement with the negligent motorist and his liability insurer should be deemed reasonable if it is understood that the U.M. carrier will be entitled to credit the full liability policy limits against its own exposure.[10]

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8. The court indictated that this conventional subrogation right is generally governed by Louisiana Civil Code articles 2159-2162.

9. 407 So. 2d at 411.

10. For example, if the negligent motorist has applicable liability coverage of $10,000, then the uninsured motorist (U.M.) insurer should be entitled to credit $10,000 against the amount of its insured's bodily injury damages regardless of the actual amount of the settlement with the liability carrier. There may be many factors (financial exigency, liability issues, coverage issues, etc.) which influence an insured to accept less than the full liability limits. Giving the insurer full credit would avoid any uncertain, subjective test of reasonableness. Likewise, the financial ability of the negligent motorist to respond in damages in excess of his liability policy limits should not be considered. Again, such a factor would deter settlements because of its uncertain impact on the U.M. claim. Ordinarily, the liability carrier will not pay unless its insured is also released. Of course, the U.M. insurer would be entitled to credit fully

Bond and other recent supreme court decisions[11] emphasize that the claim of the partially subrogated insurer is subordinate to the insured's claim. The insured is entitled to recover the remainder of his damages before the insurer is entitled to recover on its subrogation claim. *Bond* also concludes that the tort-feasor may assert inability to pay in mitigation of a subrogation claim. On the other hand, the court emphasized that the inability-to-pay doctrine cannot be utilized by the insurer to reduce payments under U.M. coverage.

In *Nall v. State Farm Mutual Automobile Insurance Co.*,[12] the supreme court further clarified the jurisprudence on the separate significant issues involved in the recent *Breaux*[13] and *Courville*[14] cases. The plaintiff in *Nall*, who was insured under two separate State Farm policies, was injured while he was a guest passenger in an automobile insured by GEICO. The negligence of the host driver was the sole cause of the accident. The supreme court reaffirmed the holding in *Breaux*[15] that the uninsured motorist statute[16] does not mandate U.M. coverage under the host driver's policy when the sole cause of the accident is the negligence of the host driver, even though the host driver's liability coverage is inadequate. Thus, the plaintiff in *Nall* was entitled to the limits of the GEICO liability coverage, but was not entitled to any award under GEICO's U.M. coverage.[17]

The plaintiff in *Nall* also sought to recover under both State Farm policies. The *Courville* case had indicated that the exception in the

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any amount actually paid individually by the negligent motorist, and the law would otherwise protect it against fraudulent conduct between the negligent motorist and the U.M. insured. One exception to the "full credit" rule may be necessary. If there are multiple claimants and inadequate policy limits, then the U.M. insurer should be entitled to credit only for the actual amount of its insured's settlement with the liability carrier, unless the U.M. carrier can prove lack of good faith. *Cf.* Holtzclaw v. Falco, 355 So. 2d 1279 (La. 1978); Richard v. Southern Farm Bur. Cas. Ins. Co., 254 La. 429, 223 So. 2d 858 (1969).

11. Suhor v. Gusse, 414 So. 2d 1217 (La. 1982) (per curiam), *cert. denied*; Southern Farm Bur. Cas. Ins. Co. v. Sonnier, 406 So. 2d 178 (La. 1981).

12. 406 So. 2d 216 (La. 1981).

13. Breaux v. Government Employees Ins. Co., 369 So. 2d 1335 (La. 1979). *See* McKenzie, *supra* note 6, at 676.

14. Courville v. State Farm Mut. Auto. Ins. Co., 393 So. 2d 703 (La. 1981). *See* McKenzie, *Developments in the Law, 1980-1981—Insurance*, 42 LA. L. REV. 343 (1982).

15. In *Breaux*, the issue had been raised under convoluted facts in which the plaintiffs had released all their rights under the policy on the host vehicle. As such, the plaintiffs sought recovery from their own U.M. insurer. If U.M. coverage on the host vehicle policy was mandated under LA. R.S. 22:1406(D), then the *Breaux* plaintiffs' own insurer would have been entitled to credit for the released insurer's limits.

16. LA. R.S. 22:1406(D).

17. Two justices dissented, suggesting that *Breaux* should be overruled. 406 So. 2d at 220 (Dixon, J., dissenting).

anti-stacking provision[18] in favor of a non-occupant would not be narrowly construed. However, in refusing to bend the provision in favor of the plaintiff in *Nall*, the supreme court noted that three conditions must be present to take advantage of the anti-stacking exception: (1) the injured party must have been occupying an automobile not owned by him; (2) there must be U.M. coverage on the occupied vehicle, which coverage is primary; and (3) there must be at least one other U.M. coverage available to the injured party who has not been fully compensated for his damages.[19] Since the second condition was not present—there was no U.M. coverage available on the host vehicle—the *Nall* plaintiff was limited by the general rule to recovery under one State Farm policy. The court held that State Farm had not waived the benefit of the anti-stacking provision by issuing separate policies on the plaintiff's two vehicles or by attaching an endorsement to each policy which expanded the policy language to include the underinsured motorist protection mandated by statute.[20]

In *Breaux* and *Nall*, the accident was caused solely by the negligence of the host driver. In a footnote in *Breaux*,[21] the supreme court suggested that a guest passenger might be able to recover under both the liability and U.M. coverages on the host vehicle if the host driver were jointly liable with another driver who was underinsured. This issue was presented in *Casson v. Dairyland Insurance Co.*[22] A

18. LA. R.S. 22:1406(D)(1)(c):

> If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance in accordance with the terms of Subsection D(1), then such limits of liability shall not be increased because of multiple motor vehicles covered under said policy of insurance and such limits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy; provided, however, that with respect to other insurance available, the policy of insurance or endorsement shall provide the following:
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> With respect to bodily injury to an injured party while occupying an automobile not owned by said injured party, the following priorities of recovery under uninsured motorist coverage shall apply:
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> (i) The uninsured motorist coverage on the vehicle in which the injured party was an occupant is primary;
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> (ii) Should that primary uninsured motorist coverage be exhausted due to the extent of damages, then the injured occupant may recover as excess from other uninsured motorist coverage available to him. In no instance shall more than one coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant.

19. 406 So. 2d at 218.

20. LA. R.S. 22:1406(D)(2)(c). Two justices dissented on the ground that the endorsement "probably operates as a waiver on the 'anti-stacking' amendment since it appears in both policies." 406 So. 2d at 220.

21. 369 So. 2d at 1338 n.5.

22. 400 So. 2d 713 (La. App. 3d Cir. 1981).

serious accident was caused by the joint negligence of two drivers, each auto being insured with liability and U.M. limits of $5,000 per person and $10,000 per accident. At issue was the coverage available to a guest passenger in one vehicle and three guest passengers in the other vehicle, all with substantial claims.

With respect to the policies on the host vehicles, the court concluded that guest passengers could recover under the liability coverage based upon the negligence of the host driver and under the U.M. coverage based upon the negligence and inadequate coverage of the other driver.[23] Since both drivers were liable *in solido* to all four claimants, the combined liability limit of $20,000 was apportioned among them. The single guest passenger in one auto was entitled to the $5,000 U.M. limit on that vehicle, and the other three shared the $10,000 U.M. limit on the vehicle which they were occupying.

In *Nash v. Western Casualty & Surety Co.*,[24] the supreme court considered whether an alleged insurer was entitled to relitigate the issue of liability that had been determined in a previous action between the plaintiffs and the alleged insured. Initially, the plaintiffs brought suit against their contractor, contending that the fire which destroyed their house was caused by the contractor's improper installation of a gas heater. Western Casualty, the contractor's liability insurer, was notified of the suit, but it declined to defend because of its belief that the loss fell within the excluded completed-operations hazard. A default judgment was taken against the contractor.

The plaintiffs then instituted suit against Western Casualty. Both lower courts rejected the plaintiffs' demands on the ground that the plaintiffs had failed to prove the contractor's liability. However, the supreme court held that Western Casualty, which had refused the opportunity to defend the original action, was not entitled to relitigate the issue of liability. Therefore, Western Casualty could escape liability in the second suit only if there was no coverage under its policy. The court ruled in favor of the insurer on the ground that the fire loss,

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23. *Breaux* held that LA. R.S. 22:1406(D) "contemplates two distinct motor vehicles: the motor vehicle with respect to which uninsured motorist coverage is issued and the 'uninsured or underinsured' motor vehicle." 369 So. 2d at 1338. *Accord* Nall, 406 So. 2d at 220. Unlike the facts in *Breaux* and *Nall*, two distinct motor vehicles existed in *Casson*. In an attempt to prevent recovery under both liability and uninsured motorist coverage, some policies provide that payment under one coverage shall be credited against the limits of liability under the other coverage. Although such a credit provision was not discussed in *Casson*, the courts have generally found other reduction-of-coverage provisions to be contrary to the mandated U.M. coverage. *See, e.g.*, Smith v. Trinity Universal Ins. Co., 270 So. 2d 637 (La. App. 2d Cir. 1972); Williams v. Buckelew, 246 So. 2d 58 (La. App. 2d Cir. 1971). *Cf.* Hebert v. Green, 311 So. 2d 223 (La. 1975).

24. 406 So. 2d 176 (La. 1981).

which occurred three weeks after the execution of a completion certificate, fell within the excluded completed-operations hazard.

If the rule is clearly defined and limited, the court's holding with respect to relitigation of the liability issue appears correct.[25] It should be noted that the plaintiffs in the original suit did not exercise their right of direct action under Louisiana Revised Statutes 22:655. Therefore, the plaintiffs were not entitled to the liberal protection of that statute.[26] In the second suit, the plaintiffs were asserting the insured's rights against his own insurer, and such claim should have been subject to all of the defenses which the insurer could have asserted against its own insured. Particularly, the subsequent claim against the insurer should have been subject to any defenses based upon policy breaches resulting from the failure to give timely notice of claim or suit.[27] In this case, Western Casualty apparently received timely notice and had the opportunity to defend the original action. *Nash* should not be read as an invitation to litigate liability without the knowledge of the insurer. A default judgment taken without an insurer's knowledge cannot be enforced against it.[28] *Nash* should stand only for the proposition that the insurer who rejects the opportunity to defend after proper notice thereafter should not be entitled to relitigate the issue of liability with its alleged insured or his judgment creditors.

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25. *See* 14 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 51:73 (2d ed. 1982).

26. *See, e.g.*, Futch v. Fidelity & Cas. Co. of N.Y., 246 La. 688, 166 So. 2d 274 (1964); West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950).

27. *See, e.g.*, Branzaru v. Millers Mut. Ins. Co., 252 So. 2d 769 (La. App. 1st Cir. 1971); Miller v. Marcantel, 221 So. 2d 557 (La. App. 3d Cir. 1969).

28. Hallman v. Marquette Cas. Co., 149 So. 2d 131 (La. App. 2d Cir. 1963).