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LOUISIANA UNINSURED MOTORIST COVERAGE— AFTER TWENTY YEARS

W. Shelby McKenzie*

Prior to 1977, automobile liability insurance in Louisiana was not compulsory. Proof of financial responsibility was required only after the motorist had been involved in an accident. Many innocent accident victims, although insured against their own liability, were left uncompensated because the negligent motorist was uninsured and not financially responsible. Recognizing this serious gap in protection, the legislature, in 1962, required insurers to make uninsured motorist (UM) insurance protection available in certain minimal limits to persons purchasing automobile liability insurance.¹ Through legislative and judicial expansion, UM coverage has become a very significant protection for insured Louisiana motorists and a fertile field for litigation. This article reviews the current status of the statutory and jurisprudential law affecting uninsured motorist coverage after twenty years of development.²

LEGISLATIVE HISTORY

1962

Uninsured motorist coverage received its initial legislative endorsement in Act 187 of 1962, which amended Louisiana Revised Statutes 22:1406 to add subsection (D). This act provided that no automobile liability insurance policy would be issued or delivered in Louisiana unless protection for persons insured thereunder was provided "in not less than the limits described in the Motor Vehicle Safety Responsibility Law" for bodily injury damages for which the owner or operator of an uninsured motor vehicle is legally responsible. The Motor Vehicle Safety Responsibility Law³ required proof of ability to

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1. For a discussion of the public policy and industry considerations which gave impetus to uninsured motorist coverage, see the opinion of Judge Minos Miller in *Elledge v. Warren*, 263 So. 2d 912 (La. App. 3d Cir.), *writ refused*, 262 La. 1096, 266 So. 2d 223 (1972). See also *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 218 So. 2d 580 (1968).

2. For an excellent survey of the jurisprudence at an earlier stage of development, see Lane, *The Annotated Uninsured Motorist Coverage*, 24 LA. B.J. 15 (1976).

3. LA. R.S. 32:851-1043 (Supp. 1952).

respond in damages for liability in the amount of \$5,000 for bodily injury to one person, with a maximum of \$10,000 for bodily injury to two or more persons in any one accident.

The insured named in the policy was granted the option of rejecting uninsured motorist coverage.⁴ The Act also provided that the insurer, to the extent of any payment, was entitled to reimbursement out of any settlement or judgment resulting from the exercise of the insured's right of recovery against the person legally responsible for the bodily injury.⁵

1964

Act 118 of 1964 provided that the coverage required under subsection 1406(D) could include provisions for submission of claims to arbitration, but such submission would be at the option of the insured, and such provisions would not deprive the courts of jurisdiction of actions against the insurer.⁶

1970

Act 345 of 1970 amended 22:1406(D) to specify evidence which would constitute prima facie proof that the owner and the operator of the vehicle did not have liability insurance in effect on the date of the accident.⁷

1972

Act 137 of 1972, which became effective January 1, 1973, made two very significant extensions of uninsured motorist coverage. First, although the Act continued to require only the minimal \$5,000 to \$10,000 limits described in the Motor Vehicle Safety Responsibility Law, the insured became entitled to increase his uninsured motorist coverage "to any amount not in excess of the limits of the automobile liability insurance carried by such insured."⁸

Act 137 also introduced the concept of underinsured motorist protection by providing that the statutory definition of *uninsured motor vehicle* would include "an insured motor vehicle when the automobile

4. See text at notes 17-26, *infra* (Mandatory Coverage).

5. LA. R.S. 22:1406(D)(4) (Supp. 1962). See text at notes 154-161, *infra* (Subrogation and the Right to Settle).

6. LA. R.S. 22:1406(D)(5). Compulsory arbitration provisions of preamendment policies were held to be unenforceable. *Spillman v. United States Fid. & Guar. Co.*, 179 So. 2d 454 (La. App. 3d Cir. 1965).

7. LA. R.S. 22:1406(E)(6).

8. LA. R.S. 22:1406(D)(1)(b).

liability insurance coverage on such vehicle [was] less than the uninsured motorist coverage carried by an insured.”⁹

Act 550 of 1972 specified additional evidence which would constitute prima facie proof of uninsured status.¹⁰

1974

Act 154 of 1974 amended the liability limits of mandatory uninsured motorist coverage to require that the insurer provide coverage “in not less than the limits of bodily injury liability provided by the policy,” unless the insured rejected the coverage or selected lower limits. Act 154 also expanded underinsured motorist protection by providing that such coverage was available when automobile liability insurance coverage was “less than the amount of damages suffered by the insured.”¹¹

1975

Act 494 of 1975 provided that mandatory uninsured motorist coverage limits did not need to “be provided in or supplemental to a renewal or substitute policy where the named insured [had] rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer.”¹²

Act 656 of 1975 further expanded the provision for prima facie proof of uninsured status.¹³

1977

Act 438 of 1977, with respect to the rejection of uninsured motorist coverage or the selection of lower limits, provided that “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.”¹⁴

Act 623 of 1977, which is known as the anti-stacking provision, precluded stacking of coverages for multiple vehicles, except under

9. LA. R.S. 22:1406(D)(2)(b). For an application of this provision contrasted with the 1974 amendment of Act 154, see *Doucet v. Insurance Co. of N. Am.*, 302 So. 2d 731 (La. App. 3d Cir.), *writ denied*, 305 So. 2d 134 (La. 1974).

10. LA. R.S. 22:1406(D)(6).

11. LA. R.S. 22:1406(D)(2)(b).

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

13. LA. R.S. 22:1406(D)(6).

14. LA. R.S. 22:1406(D)(1)(a). See text at notes 17-26, *infra* (Mandatory Coverage).

limited circumstances when the injured party was not occupying an automobile owned by him.¹⁵

Act 623 also provided that an insurer would have to permit its insured to increase uninsured motorist coverage "to any amount," thus eliminating the the 1972 Act's limitation on UM coverage to the amount of the automobile liability coverage.¹⁶

Another 1977 act which was not incorporated into the UM statute affects uninsured motorist claims. Act 444, which became effective July 1, 1978, as Louisiana Revised Statutes 9:5629, provides a two-year prescription on claims under uninsured motorist coverages.

MANDATORY COVERAGE

Insured

The UM statute provides that "no automobile liability insurance" shall be issued without uninsured and underinsured motorist protection.¹⁷ The courts have interpreted this requirement to mean that UM coverage must be provided to the same persons who are insured under the automobile liability coverage. If liability coverage is not extended to a particular person, the statute does not require UM coverage for such person.¹⁸ The statute is applicable to any

15. LA. R.S. 22:1406(D)(1)(c). See text at notes 135-153, *infra* (Stacking of Multiple Coverages).

16. LA. R.S. 22:1406(D)(1)(b).

17. LA. R.S. 22:1406(D)(1)(a) provides in part:

No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under the provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; . . .

18. *Robertson v. Cumis Ins. Co.*, 355 So. 2d 1371 (La. App. 3d Cir.), *writ denied*, 357 So. 2d 1153 (La. 1978) (policy excluded liability coverage for a relative who owned a private passenger automobile; thus no UM coverage was required for such relative); *Thomas v. Allstate Ins. Co.*, 321 So. 2d 808 (La. App. 4th Cir. 1975) (court remanded for a determination of whether the employer's policy provided liability coverage for an employee who was using his personal automobile in the course of employment; if so, such policy also must provide UM coverage). In *Meyers v. Gulf Ins. Co.*, 413 So. 2d 538 (La. App. 4th Cir. 1982), the plaintiff, a school board employee, allegedly was injured while riding as a passenger on a school bus because of the negligence of the bus driver. The liability claim against the insurer of the bus was dismissed on a motion for summary judgment, based upon the cross-employee exclusion. The court also dismissed the UM claim because the liability coverage was not applicable to the plaintiff. This analysis is incorrect. The cross-employee exclusion precluded liabili-

automobile liability policy "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state."¹⁹ UM coverage is mandated for such policies whether issued by authorized or surplus line insurers.²⁰ However, self-insured companies are not required to provide UM protection.²¹

The statute makes no distinction between primary and excess automobile liability insurance. Presumably, UM coverage would be mandated in an automobile liability policy which provides coverage in excess of a primary policy or a self-insured retained limit.²² *Southern American Insurance Co. v. Dobson*,²³ however, held that a commercial umbrella liability policy and a commercial umbrella excess policy were not automobile liability insurance within the meaning of the statute, because the statute was not directed toward policies which provide a "broad spectrum" of liability coverages in excess of underlying insurance. Therefore, the court held that UM coverage was not mandated in such policies. The supreme court has granted writs to review this decision.²⁴

Most automobile policies limit all coverages to losses which occur in the United States, its territories and possessions, and Canada. In *Curtis v. Allstate Insurance Co.*,²⁵ the plaintiffs were injured in an automobile accident in Mexico. By the terms of the policy, neither the liability coverage nor the UM coverage was applicable in Mexico. In denying the UM claims, the federal district court upheld the territorial limitations of the policy against the challenge that it was inconsistent with the mandatory coverage required by statute. The UM statute would appear to mandate coverage only within the territorial limits of the liability coverage.²⁶

ty coverage for the bus driver—not the passenger. Under the jurisprudential test, the UM issue should be whether the passenger was a liability insured (as a permissive user). If so, UM coverage must be provided. The result in *Meyers* is correct because the bus driver was not legally liable to the plaintiff because of the exclusive remedy provisions of the Workers' Compensation Act. See, e.g., *Gray v. Margot Inc.*, 408 So. 2d 436 (La. App. 1st Cir. 1981).

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

20. *Veal v. Interstate Fire & Cas. Co.*, 325 So. 2d 795 (La. 1975).

21. *Jordan v. Honea*, 407 So. 2d 503 (La. App. 1st Cir. 1981).

22. See *id.*

23. 415 So. 2d 641 (La. App. 3d Cir. 1982).

24. 420 So. 2d 439 (La. 1982).

25. 473 F. Supp 315 (E.D. La. 1979).

26. It might be argued from decisions such as *Elledge v. Warren*, 263 So. 2d 912 (La. App. 3d Cir. 1972), that the insured should be covered anytime, anywhere. However, there is nothing in LA. R.S. 22:1406(D) to suggest mandatory territorial limits beyond the limits provided for liability coverage. Such geographic restriction is reasonable since the insurer should not be required to defend the issues of liability and coverage for the allegedly negligent motorist arising anywhere in the world.

Amount of Coverage

The original 1962 Act required liability limits of only \$5,000 for any one person and \$10,000 for any one accident.²⁷ In 1972, the mandatory minimum coverage remained the same, but the insured was given the right to increase his UM coverage to any amount not in excess of the limits of his automobile liability insurance.²⁸ In 1974, the insurer was required to issue UM coverage in amounts "not less than" the limits of the bodily injury liability coverage.²⁹ In 1977, the insured was given the right to increase his UM coverage to any amount.³⁰

Rejection and Selection of Lower Limits

The original 1962 Act³¹ permitted the insured named in the policy to reject UM coverage. When the mandatory limits were increased, the insured was given the option of selecting lower limits.³² In 1975, the statute was amended to provide that such coverage was not required in "a renewal or substitute policy where the named insured had rejected the coverage or selected lower limits in connection with a policy previously issued to him by the insurer."³³ Finally, Act 438 of 1977, effective September 9, 1977, provided that "any document signed by the named insured or his legal representative" to that effect would be "conclusively presumed" to become part of the policy, whether or not physically attached to the policy.³⁴

Prior to Act 438 of 1977, the statute did not specify the form or procedure required for effective rejection or selection of lower limits. This omission spawned much litigation,³⁵ and the matter was resolved by the Louisiana Supreme Court in *A.I.U. Insurance Co. v. Roberts*.³⁶ The insured, in January of 1975, purchased automobile liability

27. 1962 La. Acts, No. 187, adding LA. R.S. 22:1406(D). Cf. LA. R.S. 32:851 (Supp. 1952). See text at note 3, *supra*.

28. 1972 La. Acts, No. 137, amending LA. R.S. 22:1406.

29. 1974 La. Acts, No. 154, amending LA. R.S. 22:1406(D)(1)(a).

30. 1977 La. Acts, No. 623, amending LA. R.S. 22:1406(D)(1)(b).

31. 1962 La. Acts, No. 187, adding LA. R.S. 22:1406(D).

32. 1972 La. Acts, No. 137, amending LA. R.S. 22:1406(D)(1) & (2).

33. 1975 La. Acts, No. 494, amending LA. R.S. 22:1406(D)(1)(a).

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

35. See, e.g., *International Ins. Co. v. Masura*, 404 So. 2d 1313 (La. App. 2d Cir. 1981); *Collins v. Employers Ins. of Wausau*, 402 So. 2d 158 (La. App. 1st Cir. 1981); *Ewing v. Sanson*, 394 So. 2d 849 (La. App. 3d Cir. 1981); *LeBoyd v. Louisiana Transit Co.*, 375 So. 2d 749 (La. App. 4th Cir. 1979); *Breaux v. Government Emp. Ins. Co.*, 373 So. 2d 1335 (La. App. 1st Cir. 1979); *Turner v. Allstate Ins. Co.*, 368 So. 2d 797 (La. App. 2d Cir. 1979); *Walker v. Coleman*, 367 So. 2d 395 (La. App. 2d Cir. 1979); *Meyers v. Thibeaux*, 365 So. 2d 266 (La. App. 3d Cir. 1978).

36. 404 So. 2d 948 (La. 1981).

ty insurance with bodily injury limits of \$25,000 per person, but he orally selected UM limits of only \$5,000 per person. Prior to the plaintiff's accident on July 13, 1978, the policy was renewed (on June 6, 1978). Since the plaintiff's bodily injury damages exceeded the purported UM limits of \$5,000, the issue was whether the oral selection of lower limits in January of 1975, was effective through subsequent renewals of the policy. Since the UM statute did not specify the form for rejection or selection of lower limits prior to Act 438 of 1977, the supreme court concluded that for any selection of lower limits, the formality requirements would be determined by Louisiana Revised Statutes 22:628. This statute provides that any agreement modifying a contract of insurance must be in writing and attached to the policy. Since the UM statute should be treated as part of the policy, the court reasoned that rejection of coverage or selection of lower limits was a modification of the policy which had to meet the formality requirements of 22:628. Thus, the oral selection of limits in 1975 was not effective, and the plaintiff in *Roberts* was entitled to the coverage mandated by statute.

Therefore, an effective rejection of coverage or selection of lower limits prior to September 9, 1977, must be in writing and attached to the policy in accordance with 22:628. Subsequent to that date, 22:1406(D)(1)(a) requires a document signed by the named insured or his legal representative, but it does not require attachment of the document to the policy. Once the insured has effectively rejected or reduced coverage, the mandatory coverage is not applicable to a renewal or substitute policy issued to the same insured.³⁷ The effect of an unattached written waiver signed prior to the effective date of the 1977 Act with respect to a renewal of the policy after the act's effective date has not been resolved.³⁸

The statute provides that "any insured named in the policy" may reject UM coverage or may select lower limits. A wife has been held to have the authority to reject UM coverage under a policy issued to her husband, where the policy defined the named insured to include "his spouse, if a resident of the same household."³⁹ Likewise, a rejection executed by an authorized corporate officer has been effective.⁴⁰

A waiver of UM coverage can be executed subsequent to issuance

37. 1975 La. Acts, No. 494, amending LA. R.S. 22:1406(D)(1)(a).

38. The approach of the supreme court to the issue in *A.I.U. Ins. Co. v. Roberts*, 404 So. 2d 948 (La. 1981), implies that prior waivers would be effective. *But see Collins v. Employers Ins. of Wausau*, 402 So. 2d 158 (La. App. 1st Cir. 1981).

39. *Oncale v. Aetna Cas. & Sur. Co.*, 417 So. 2d 471 (La. App. 1st Cir. 1982). *See Rushing v. Protective Nat'l Ins. Co. of Omaha*, 315 So. 2d 876 (La. App. 3d Cir. 1975); *Soileau v. Hartford Acc. & Indem. Co.*, 182 So. 2d 76 (La. App. 3d Cir. 1966).

40. *Johnson v. Ortego*, 408 So. 2d 397 (La. App. 1st Cir. 1981).

of the policy,⁴¹ but a waiver cannot be made retroactive to the prejudice of insureds whose cause of action arose prior to the waiver's execution.⁴²

ELEMENTS OF COVERAGE

The risk insured against under uninsured motorist coverage is generally defined in insurance policies as follows:

The company will pay all sums which the *insured* or his legal representative shall be *legally entitled to recover* as damages from the owner or operator of an *uninsured highway vehicle* because of *bodily injury* sustained by the insured, *caused by accident* and *arising out of the ownership, maintenance or use* of such uninsured highway vehicle.⁴³

Each key element of the insuring agreement will be analyzed separately below.

Insured

For uninsured motorist coverage, the term *insured* is generally defined to mean:

- (a) the named insured and any relative;
- (b) any other person while occupying an insured automobile; and
- (c) any person, with respect to the damages he is entitled to recover because of bodily injury sustained by an insured under (a) or (b) above.

Named Insured and Relative

The *named insured* includes the person named in the declarations of the policy and also his or her spouse, if the spouse is a resident of the same household. A relative is usually defined as a relative of the named insured who is a resident of the same household. Therefore, with respect to both the spouse and the relative, there may be an issue of residency. This issue has generated considerable litigation.⁴⁴

41. *Cooper v. Barnes*, 408 So. 2d 378 (La. App. 1st Cir. 1981).

42. *Id.*; *International v. Masur*, 404 So. 2d 1313 (La. App. 2d Cir. 1981).

43. The policy provisions quoted in this article are taken from a policy form of The Travelers Insurance Company. The Travelers' policy is representative of forms in use in Louisiana, but there are variations among companies which may be significant in a particular case. Also, a new generation of policies is now used by some companies, occasionally referred to as "simplified" forms; these policies seek to restate the coverage in more understandable terms. Time will tell whether litigation will be necessary to "clarify" the simplified forms.

44. The issue of residency also arises under the liability and other coverages of a family automobile policy and under homeowner's policies. *See, e.g., Bond v. Commer-*

It is extremely important to note that there is generally no requirement that the named insured or the relative be occupying an automobile or any particular automobile at the time of the accident. Thus, they are protected while riding in the insured automobile or other automobiles, or when they are pedestrians or when they are otherwise exposed to bodily injury as a result of the fault of the owner or operator of an uninsured highway vehicle.⁴⁵

Other Persons—Occupying

However, other persons are covered only while *occupying an insured automobile*. Policies generally broaden the dictionary definition of *occupying* to include persons "in or upon or entering into or alighting from" the vehicle. *Smith v. Girley*⁴⁶ contains the only supreme court interpretation of the definition of *occupying* in an UM policy. The plaintiff was a deputy sheriff who was attempting to start a stalled vehicle by attaching battery cables between the stalled vehicle and the sheriff's auto. After first attaching the battery cables to the stalled vehicle, the plaintiff was reaching to attach the cables to the sheriff's auto when the stalled vehicle was struck from the rear by a negligent uninsured motorist. UM coverage under the policy issued on the sheriff's auto was applicable to the deputy only if he were "occupying" the sheriff's car at the time of the accident.

Although the first circuit held that the plaintiff had failed to prove he was an "occupant" of the insured car, the supreme court found as a fact that the plaintiff was in physical contact with the sheriff's auto and therefore "upon" the vehicle at the time of the accident. In dicta, the supreme court also approved of *Hendricks v. American Employees Insurance Co.*,⁴⁷ a court of appeal decision, and decisions from other jurisdictions allowing recovery to persons in close proximity to vehicles, even though they were not in actual physical contact with the insured automobile.

The sphere of occupancy was further delineated by the first circuit in *Breard v. Haynes*.⁴⁸ The plaintiff had been an occupant of a

cial Union Assur. Co., 407 So. 2d 401 (La. 1981); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 248 La. 246, 178 So. 2d 238 (1965); *Earl v. Commercial Union Ins. Co.*, 391 So. 2d 934 (La. App. 2d Cir. 1980); *Hobbs v. Fireman's Fund Am. Ins. Co.*, 339 So. 2d 28 (La. App. 3d Cir. 1976); *Ehrhard v. State Farm Mut. Auto. Ins. Co.*, 274 So. 2d 911 (La. App. 1st Cir. 1973); *Dunn v. Government Emp. Ins. Co.*, 229 So. 2d 465 (La. App. 3d Cir. 1969).

45. See *Elledge v. Warren*, 263 So. 2d 912, 918 (La. App. 3d Cir.), writ refused, 262 La. 1096, 266 So. 2d 223 (1972).

46. 260 La. 223, 255 So. 2d 748 (1971), *rev'g & aff'g* 242 So. 2d 32 (La. App. 1st Cir.).

47. 176 So. 2d 827 (La. App. 2d Cir. 1965).

48. 394 So. 2d 1282 (La. App. 1st Cir. 1981). See also *Day v. Coca-Cola Bottling Co.*, 420 So. 2d 518 (La. App. 2d Cir. 1982).

vehicle struck in a rear end collision. Ten to fifteen minutes after that accident, the plaintiff, while standing approximately seventy feet from the vehicle in which he had been riding, was struck by an uninsured highway vehicle. Plaintiff recovered the full policy limits of UM coverage on his own vehicle, even though his vehicle was not involved in either accident. For the named insured under that policy, occupancy of a vehicle was not a requirement of coverage. However, plaintiff also sought to recover under the UM coverage of the vehicle which he had been occupying at the time of the first collision. The court concluded that the plaintiff was no longer occupying that vehicle at the time of the second accident. While physical contact is not essential, the court interpreted the dicta in *Smith v. Girley* to require "some physical relationship" between the person and the vehicle, concluding that plaintiff's distance in time and space from the insured automobile at the time of the second accident had severed any such physical relationship. The court also rejected a contention that the requirement of occupancy was in contravention of the public policy favoring uninsured motorist coverage, as expressed in 22:1406(D).

Insured Automobile

The definition of an *insured automobile* generally includes the automobile described in the declarations, a replacement automobile, and a temporary substitute automobile.⁵⁰ Some policies also define an insured automobile as a nonowned automobile while being operated by the named insured.⁵¹ The insured automobile also includes a trailer attached to a vehicle described as an insured automobile. However, policies generally exclude an automobile or trailer owned by a resident of the same household as the named insured, an automobile while

49. In *Box v. Doe*, 221 So. 2d 666 (La. App. 4th Cir. 1969), a couple was struck by a hit-and-run driver while the man was standing on the sidewalk unlocking the door of the insured car. The woman was on the sidewalk waiting for the door to be opened and not touching the car. The man, but not the woman, was found to be occupying the insured vehicle. The court found that there was "no evidence that she was doing any act which could be remotely considered as entering [the insured vehicle]." *Id.* at 671. However, standing in close proximity to the car while waiting for the door to be unlocked may be occupancy within the expanded *Smith* test.

50. Policies generally define *insured automobile* as follows:

- (a) An automobile described in . . . the declarations for which a specific premium charge indicates that coverage is afforded;
- (b) A private passenger or utility automobile, ownership of which is acquired by the named insured during the policy period, provided . . .
- (c) A temporary substitute automobile for an insured automobile as defined in (a) or (b) above; and
- (d) A non-owned automobile while being operated by the named insured.

See note 43, *supra*.

51. See (d) in the definition of the *insured automobile* quoted in note 50, *supra*. Cf. *Phillips v. Barraza*, 349 So. 2d 347 (La. App. 4th Cir. 1977).

used as public or livery conveyance, and any automobile being used without the permission of the owner.⁵²

Uninsured Highway Vehicle

For UM coverage to exist, the insured must be entitled to recover from the owner or operator of an *uninsured highway vehicle*, and the accident must arise out of the ownership, maintenance, or use of the *uninsured highway vehicle*.⁵³ Policies generally provide that an uninsured highway vehicle includes both a vehicle without applicable liability insurance coverage and a vehicle insured by a company which has denied coverage or become insolvent.⁵⁴ The insolvency protection is required by 27:1406(D)(3), but it is required only for a period of one year.⁵⁵ More restrictive policy definitions are modified by 22:1406(D)(2)(b), which extends the definition of an *uninsured highway vehicle* to include "an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of

52. Policies often exclude from the definition of an *insured automobile*: "(1) any automobile or trailer owned by a resident of the same household as the named insured, (2) any automobile while used as a public or livery conveyance or (3) any automobile while being used without the permission of the owner." See text at notes 112-125, *infra* (Exclusions). For a definition of *public or livery conveyance*, see *Gagnard v. Thibodeaux*, 336 So. 2d 1069 (La. App. 4th Cir. 1976). *Phillips v. Barraza*, 349 So. 2d 347 (La. App. 4th Cir. 1977), upheld an exclusion from the definition of *insured automobile* for "an automobile furnished for the regular use of the principal named insured or any resident of the same household" against the challenge that it conflicted with the UM statute.

53. Some policies use the term *uninsured motor vehicle* instead of *uninsured highway vehicle*. A *highway vehicle* is usually defined as "a land motor vehicle or trailer other than (1) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads or (2) a vehicle operated on rails or crawler-treads." LA. R.S. 22:1406(D)(1)(a) mandates coverage with respect to "insured and underinsured motor vehicles" without any express limitation to highway vehicles. *Posey v. Commercial Union Ins. Co.*, 332 So. 2d 909 (La. App. 2d Cir. 1976), suggests that the protection required by statute may be broader than the policy definition of *highway vehicle*.

For a discussion on the requirement that the insured be "entitled to recover," see text at notes 88-97, *infra* (Legally Entitled to Recover).

54. The definition of *uninsured highway vehicle* often includes a trailer of any type and means: (a) a highway vehicle with respect to the ownership, maintenance or use of which there is, . . . no bodily injury liability bond or insurance applicable at the time of the accident . . . , or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident, but the company writing the same denies coverage thereunder, or is or becomes insolvent, or (b) hit-and-run vehicle;

See note 43, *supra*.

55. More favorable terms are permitted. LA. R.S. 22:1406(D)(3). However, the limitation to one year is enforceable. *DiPaola v. Fernandez*, 270 So. 2d 893 (La. App. 4th Cir. 1972); *Alleman v. Employers Liab. Assur. Corp.*, 253 So. 2d 688 (La. App. 3d Cir. 1971).

damages suffered by an insured."⁵⁶ Thus the definition includes both uninsured and underinsured vehicles.

Hit-and-Run Vehicles

Most policies extend the definition of an *uninsured highway vehicle* to include a hit-and-run vehicle. A *hit-and-run vehicle* is defined as "a highway vehicle that causes bodily injury to the insured arising out of *physical contact* of such vehicle with the insured or with the automobile which the insured is occupying at the time of the accident" when the identity of neither the operator nor the owner of such vehicle can be ascertained. There also may be policy requirements of notification to police authorities and notice of claim to the insurer within specified times.⁵⁷

The physical contact requirement in the policy definition of a hit-and-run vehicle has been upheld. In *Collins v. New Orleans Public Service, Inc.*,⁵⁸ the injured plaintiff was a passenger on a public bus who was injured when the driver of the bus was forced to stop suddenly in order to avoid another vehicle which pulled in front of the bus. The other vehicle continued on, and the identity of its owner and driver could not be determined. The plaintiff brought suit against her own UM carrier, alleging that a cause of the accident was the negligence of the unidentified driver of the car. The insurer filed a motion for summary judgment contending that its UM coverage was inapplicable because there was no physical contact between the bus and the automobile which caused the accident.

The plaintiff contended that there was no provision in the UM statute requiring physical contact and, therefore, the policy requirement was in conflict with the mandatory coverage. The court rejected this contention, finding that the hit-and-run coverage was an extension of coverage beyond that mandated by the statute. The insured bears the burden of proof to establish every fact essential to a cause of action under the policy coverage. One essential element is proof

56. Many companies attach an endorsement which expressly incorporates underinsured motorist protection. For a discussion of such endorsement, see *Nall v. State Farm Mut. Auto. Ins. Co.*, 406 So. 2d 216, 220 (La. 1981).

57. Many policies require that the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof.

See note 43, *supra*.

58. 234 So. 2d 270 (La. App. 4th Cir.), *writ refused*, 256 La. 375, 236 So. 2d 503 (1970).

that the negligent motorist was uninsured.⁵⁹ When the owner and driver of the adverse vehicle cannot be identified, the insured is unable to prove lack of insurance. Therefore, the inclusion of coverage for a hit-and-run vehicle allows recovery under circumstances in which the insured otherwise could not carry the burden of proof, and the insurer may impose the physical contact requirement on this voluntary extension of coverage.

In *Oliver v. Jones*,⁶⁰ the plaintiff was seriously injured when his vehicle collided head-on with the defendant's vehicle, which had swerved from the opposite lane to avoid a left-turning green truck. The court of appeal affirmed the jury verdict in favor of the plaintiff's UM carrier, finding that the accident was caused solely by the negligence of the driver of the unidentified green truck and there was no physical contact between either the plaintiff's or the defendant's vehicle and the green truck. The supreme court granted writs and affirmed with a per curiam opinion observing that the result was correct.⁶¹

The physical contact requirement may be satisfied without actual contact between the insured and the unidentified vehicle. In *Springer v. Government Employees Insurance Co.*,⁶² the defendant's vehicle was struck by an unidentified automobile, causing the defendant to lose control of his vehicle, cross the neutral ground, and collide with the insureds. There was physical contact between the defendant's vehicle and the hit-and-run vehicle, but the insureds collided only with the defendant. In *Ray v. DeMaggio*,⁶³ the insureds were involved in a chain reaction rear-end collision involving four vehicles. The insureds were occupants of the lead car. A hit-and-run driver allegedly rear-ended the third car, propelled it into the second, which in turn collided with the insureds' vehicle.

In both *Springer* and *Ray*, the fourth circuit concluded that the collision with another vehicle involved in the same accident was sufficient to satisfy the physical contact requirement. In *Springer*, the court noted that for the collision with the intermediate vehicle to satisfy the requirement, "the injury causing impact must have a complete,

59. See text at notes 178-183, *infra* (Burden of Proof).

60. 370 So. 2d 638 (La. App. 4th Cir.), *aff'd per curiam*, 376 So. 2d 1256 (La. 1979).

61. See also *Carter v. Leonard*, 413 So. 2d 244 (La. App. 4th Cir. 1982); *Gex v. Doe*, 391 So. 2d 69 (La. App. 4th Cir. 1980); *Hensley v. Government Emp. Ins. Co.*, 340 So. 2d 603 (La. App. 1st Cir. 1976); *Tyler v. State Farm Mut. Auto. Ins. Co.*, 290 So. 2d 388 (La. App. 2d Cir. 1974); *April v. Millers Mut. Fire Ins. Co.*, 273 So. 2d 50 (La. App. 4th Cir. 1973); *Roloff v. Liberty Mut. Ins. Co.*, 191 So. 2d 901 (La. App. 4th Cir. 1966).

62. 311 So. 2d 36 (La. App. 4th Cir. 1975).

63. 313 So. 2d 251 (La. App. 4th Cir. 1975).

proximate, direct and timely relationship with the first impact; the impact must be the result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence."⁶⁴

On rehearing in *Springer*, in answer to the argument that *Springer* was inconsistent with *Collins*,⁶⁵ the court pointed out that *Collins* was a "miss-and-run" case. Exclusion of miss-and-run cases from UM coverage, the court noted, is justifiable because such cases would be "too fraud-fraught." However, if the physical contact requirement were read too restrictively, the court argued, even the clothes on the insured struck by a hit-and-run vehicle would preclude coverage.⁶⁶

As illustrated by *Arceneaux v. Motor Vehicle Casualty Co.*,⁶⁷ proof of hit-and-run alone may not be sufficient to justify UM recovery, since policies require also that the identity of the owner or operator "cannot be ascertained." Although the insured's vehicle was struck and forced off the road by an automobile which did not stop, independent witnesses furnished sufficient evidence, contained in the police report, to identify the owner and operator of the vehicle. Since the identity could be ascertained, the court concluded that the accident was not caused by a "hit-and-run automobile."⁶⁸

Failure to comply strictly with the notice requirements of hit-and-run coverage may not be fatal to the insured's claim. For example, in *Kinchen v. Dixie Auto Insurance Co.*,⁶⁹ the insured did not file a sworn statement of claim within 30 days of the accident. The insurer asserted this notice breach as a defense. In denying this defense, the court pointed to the general jurisprudential rule that breach of a notice provision is not a defense unless the insurer can prove actual prejudice resulting from the delay.⁷⁰

Exclusion of the Insured Vehicle

The policy definition of an *uninsured highway vehicle* generally contains an express exclusion for "an insured automobile." This policy

64. 311 So. 2d at 36.

65. 234 So. 2d 270 (La. App. 4th Cir.), *writ refused*, 256 La. 375, 236 So. 2d 503 (1970).

66. Cases dealing with the adequacy of the proof of physical contact include *Yopp v. Manchester Ins. & Indem. Co.*, 293 So. 2d 520 (La. App. 4th Cir. 1974) and *Shelton v. Travelers Ins. Co.*, 289 So. 2d 255 (La. App. 1st Cir. 1973).

67. 341 So. 2d 1287 (La. App. 3d Cir. 1977).

68. In *Powell v. Hendon*, 308 So. 2d 851 (La. App. 2d Cir. 1975), the court found the requirement that the identity of the motorist could not be ascertained was satisfied by proof that the driver of the vehicle gave a fictitious name and could not be located. On the other hand, in *Frazier v. Jackson*, 231 So. 2d 629 (La. App. 4th Cir. 1970), the court found that the requirement had not been satisfied where the identity of the owner-driver who fled the scene could be determined through car registration.

69. 343 So. 2d 263 (La. App. 1st Cir. 1977).

70. See text at notes 173-175, *infra* (Notice).

exclusion has been upheld against the challenge that it contravenes the uninsured and underinsured coverage mandated by 22:1406(D). This exclusion is best illustrated by example. Suppose the plaintiff, a guest passenger in the insured automobile, was injured solely as a result of the negligence of his host driver, and suppose also that the plaintiff is entitled to recover damages for bodily injury in excess of the liability limits available on the insured automobile, thus leaving the host driver an underinsured motorist. Unless the insured automobile was validly excluded from the definition of an uninsured highway vehicle, the injured guest passenger would be entitled to recover any damages in excess of the liability limits from the UM limits of the same policy on the host vehicle. The issue of whether a claimant could recover under both the liability and UM provisions of the same policy was first presented to the Louisiana Supreme Court in *Breaux v. Government Employees Insurance Co.*,⁷¹ under more complex factual circumstances than the hypothetical case. The plaintiffs were the survivors of a passenger in the insured vehicle who was killed in an accident caused by the negligence of the operator of that vehicle. The plaintiffs entered into a settlement with GEICO, the insurer of the host driver's vehicle, for the amount representing GEICO's share of the liability limits. However, the settlement contained an express release of all claims against GEICO under both the liability and the UM provisions of its policy.⁷² Since the value of their claim exceeded the amount of the settlement, the plaintiffs sought to recover the remainder of their damages from Traders, their own UM carrier. Traders denied responsibility on the ground that GEICO would have provided the primary UM coverage had it not been released by the plaintiffs.⁷³ Therefore, Traders claimed that it was entitled to credit for the amount of GEICO's UM coverage, which coverage would have been sufficient to fully compensate the plaintiffs without resort to Traders' excess policy.⁷⁴

The First Circuit Court of Appeal⁷⁵ agreed with Traders, thus indirectly holding that the claimant could have recovered under both

71. 369 So. 2d 1335 (La. 1979).

72. The liability limits were \$50,000 per person and \$100,000 per accident. The policy afforded UM coverage with the same limits. Since there were multiple injuries and deaths, the full liability limits were not available to the plaintiffs, who settled for \$39,700.00. The trial court concluded that their total damages were \$76,904.65, leaving a claim of \$37,204.65 in excess of the liability limits. *Id.* at 1336-37.

73. The "other insurance" clauses of UM coverage generally provide that the coverage is excess when the insured is occupying a nonowned automobile covered by similar insurance. See note 137, *infra*.

74. Traders contended that the plaintiffs would have been entitled to the same proportion of the UM limits as the liability limits, \$39,700.00. See note 72, *supra*.

75. 364 So. 2d 158 (La. App. 1st Cir. 1978).

the liability and UM provisions of the same policy for damages caused by the negligence of the host driver. The court followed the logic of the third circuit in *Guillot v. Travelers Indemnity Co.*,⁷⁶ where the court held that the policy provisions designed to prevent such multiple recovery were invalid, in derogation of the coverage mandated by statute.

A unanimous supreme court reversed,⁷⁷ concluding that the statute implicitly distinguished between an "insured vehicle" and an "uninsured vehicle" and did not contemplate that a single vehicle could be both the insured and the uninsured vehicle. Thus the statute does not require that the insured automobile be considered an uninsured (underinsured) automobile after exhaustion of the liability coverage for negligence of the host driver. Therefore, policy provisions which exclude the insured automobile from the definition of uninsured motor vehicle are enforceable. Since the GEICO UM coverage was not available to the plaintiffs, Traders was liable under its UM coverage for the plaintiffs' damages in excess of GEICO's liability coverage up to the limits of Traders' policy. Although this decision worked to the benefit of the plaintiffs in *Breaux*, the net effect of the decision is to restrict the amount of UM coverage available to guest passengers.

The supreme court again considered this issue in *Nall v. State Farm Mutual Automobile Insurance Co.*⁷⁸ A guest passenger, injured solely as a result of the negligence of his host driver, sought to recover both liability and underinsured motorist benefits under the policy on the host vehicle. The Louisiana Supreme Court reaffirmed the *Breaux* conclusion that the UM statute does not mandate UM coverage for the insured vehicle.⁷⁹ There were, however, two dissents suggesting that *Breaux* should be overruled.

In *Breaux* and *Nall*, the accident was caused solely by the negligence of the host driver. In *Breaux*, the supreme court suggested in a footnote that a guest passenger might be able to recover under both the liability and UM coverages on the host vehicle if the host driver were jointly liable with another driver who was uninsured or underinsured.⁸⁰ This issue was presented in *Casson v. Dairyland Insurance Co.*,⁸¹ in which a serious accident was caused by the joint negligence of two drivers, each auto being insured with liability and UM limits of \$5,000 per person and \$10,000 per accident. At issue

76. 338 So. 2d 334 (La. App. 3d Cir. 1976).

77. 369 So. 2d 1335 (La. 1979).

78. 406 So. 2d 216 (La. 1981).

79. See also *Shipp v. State Mut. Auto. Ins. Co.*, 415 So. 2d 582 (La. App. 3d Cir. 1982); *Coco v. Allstate Ins. Co.*, 391 So. 2d 50 (La. App. 3d Cir. 1980).

80. 369 So. 2d at 1338 n.5.

81. 400 So. 2d 713 (La. App. 3d Cir. 1981).

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 policy on the host vehicle, the third circuit concluded that a guest passenger could recover under the liability coverage based upon the negligence of the host driver and under the UM coverage based upon the negligence and inadequate coverage of the other driver.⁸² Since both drivers were liable in solido to all four claimants, the combined liability limits of \$20,000 were apportioned among the claimants. The single guest passenger was entitled to the \$5,000 UM limits on that vehicle, and the other three guest passengers shared the \$10,000 UM limits on the vehicle they were occupying. These UM claims were based upon the negligence and inadequate coverage of the other driver—not the negligence and inadequate coverage of the host driver.

Other Excluded Vehicles

Generally, the policy definition of an *uninsured highway vehicle* also excludes: (a) an automobile furnished or available for the regular use of the named insured or a relative, (b) a vehicle owned or operated by a qualified self-insurer, (c) a vehicle owned by any federal, state, or local government, and (d) a vehicle (which includes a trailer) while located for use as a residence or premises and not as a vehicle. Other than the implied distinction between the insured vehicle and the uninsured vehicle recognized in *Breaux* and *Nall*,⁸³ the UM statute does not place any limitations on the definition of an uninsured highway vehicle. Therefore, it is unlikely that a more restrictive policy definition will be given effect. Indeed, the exclusion of an auto furnished or available to the named insured or a relative⁸⁴ has been held to

82. *Nall* 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." 406 So. 2d at 220; accord *Breaux*, 369 So. 2d at 1338. 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*, courts generally have found other reduction of coverage provisions to be contrary to the mandated UM 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). See text at notes 126-134, *infra* (Reduction Clauses).

83. See text at notes 71-82, *supra* (Exclusions of the Insured Vehicle).

84. See text at notes 112-125, *infra* (Exclusions). This exclusion is analogous in purpose and effect to the general exclusion of coverage to an insured while occupying a highway vehicle (other than an insured automobile) owned by the named insured or a relative or through being struck by such an automobile. Both of these exclusions are designed to protect the insurer against the possibility that its insureds will not

be in conflict with the UM statute and unenforceable.⁸⁵ In addition, the exclusion for self-insurers may have no practical effect since very few companies are totally self-insured,⁸⁶ and in *Powell v. Allstate Insurance Co.*,⁸⁷ the exclusion for a vehicle owned by a local government was held to be ineffective. However, the exclusion of a vehicle used as a residence may be effective when the vehicle should no longer be considered a "motor vehicle" within the meaning of the UM statute.

Legally Entitled To Recover

The UM statute mandates coverage only for the damages which the insured is *legally entitled to recover* from the owner or operator of an uninsured or underinsured vehicle. In *Booth v. Fireman's Fund Insurance Co.*,⁸⁸ the supreme court interpreted this requirement to mean only that the "plaintiff must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages."⁸⁹ The courts have permitted UM claims in cases where the insured would not be able to maintain an action against the negligent motorist. In *Booth*, the claim against the negligent motorist was barred by prescription. However, since a longer prescriptive period⁹⁰ applied to UM claims, the insurer was held liable. In *Gremillion v. State Farm Automobile Insurance Co.*,⁹¹ a wife claimed UM coverage for bodily injury resulting from her husband's negligent operation of an uninsured motorcycle. Rejecting the insurer's defense that the wife could not maintain an action against her husband, the court held that a personal defense such as interspousal immunity does not prevent the recovery under UM coverage.⁹²

On the other hand, courts have rejected UM claims based upon

purchase insurance on each vehicle owned by or furnished for the regular use of such insureds or relatives who are members of their household. Through restrictive definitions of *owned* and *nonowned* automobiles, the insurer effectively protects against providing liability insurance for such vehicles.

85. See, e.g., cases cited in note 113, *infra*.

86. By asserting its subrogation rights in a third party demand, the UM insurer should be able to protect itself from any loss, even if the exclusion was held invalid.

87. 233 So. 2d 38 (La. App. 2d Cir. 1970).

88. 253 La. 521, 218 So. 2d 580 (1968).

89. 253 La. at 530, 218 So. 2d at 583.

90. See text at notes 184-193, *infra* (Prescription).

91. 302 So. 2d 712 (La. App. 3d Cir. 1974).

92. The court relied on *Deshotel v. Travelers Indem. Co.*, 257 La. 567, 243 So. 2d 259 (La. 1971), in which the court disallowed personal immunity as a defense in a direct action against a liability insurer. Although the court refused to permit the insurer to assert interspousal immunity to the wife's action in *Gremillion*, it permitted the husband to assert interspousal immunity to the subrogation claim of the insurer. This appears to be an inconsistent application of the concept of "personal" defense.

the negligence of a co-employee.⁹³ As a result of the exclusive remedy provisions of the Workers' Compensation Act,⁹⁴ an employee does not have a cause of action against a fellow employee. This tort immunity is distinguished from personal defenses, such as interspousal immunity, which merely bar a right of action.⁹⁵

When contributory negligence was a defense to tort liability, it likewise precluded recovery under UM coverage.⁹⁶ Since the effective date of the comparative negligence statute,⁹⁷ there have been no reported decisions applying the statute to UM coverage. However, comparative negligence should be applicable to the determination of both legal liability and the extent of recoverable damages.

Bodily Injury Damages

The UM statute limits recovery to damages resulting from *bodily injury*. There is no coverage for property damage, a risk which should be protected against under other insurance coverages. Bodily injury damages include all damages which arise out of personal injury or death of the insured, including not only general damages but also special damages, such as medical or funeral expenses and loss of income or support. Damages for loss of consortium also should be included under Act 202 of 1982.

Recovery of medical expenses under both the medical payments and UM coverages of the same policy may be precluded by policy language.⁹⁸ Such credit or reduction clauses are enforceable insofar as they preclude double recovery.⁹⁹ However, if the limits of the UM coverage are inadequate to compensate the insured for his other damages, the insurer cannot credit payments made under the medical coverage against the UM coverage limits.¹⁰⁰ Furthermore, the collateral source rule is applicable to UM claims; thus the insurer is not entitled

93. Fox v. Commercial Union Ins. Co., 413 So. 2d 679 (La. App. 3d Cir. 1982); Gray v. Margot Inc., 408 So. 2d 436 (La. App. 1st Cir. 1981); Carlise v. State Dep't of Transp. & Dev., 400 So.2d 284 (La. App. 3d Cir.), *writ denied*, 404 So. 2d 1256 (La. 1981).

94. LA. R.S. 23:1032.

95. Gray v. Margot Inc., 408 So. 2d 436 (La. App. 1st Cir. 1981).

96. *E.g.*, Watkins v. Doe, 301 So. 2d 437 (La. App. 4th Cir. 1974); Hernandez v. State Farm Mut. Auto. Ins. Co., 192 So. 2d 679 (La. App. 3d Cir. 1966).

97. LA. CIV. CODE art. 2323 (effective Aug. 1, 1980).

98. Policy provisions vary, but generally both the medical payments coverage and the UM coverage contain provisions for crediting payments made under one coverage against the limits of liability of the other coverage.

99. White v. Patterson, 409 So. 2d 290 (La. App. 1st Cir. 1981), *writ denied*, 412 So. 2d 1110 (La. 1982).

100. Wilkinson v. Fireman's Fund Ins. Co., 298 So. 2d 915 (La. App. 3d Cir. 1974); Taylor v. State Farm Mut. Auto. Ins. Co., 237 So. 2d 690 (La. App. 4th Cir. 1970).

to credit for those payments from other sources for which the tortfeasor would not be entitled to credit.¹⁰¹

The UM claim must be based upon bodily injury to an insured; it cannot be predicated upon damages sustained by an insured as a result of bodily injury to someone who was not an insured under the policy. For example, in *Chapman v. Allstate Insurance Co.*,¹⁰² a father was not permitted to recover under his UM coverage for the wrongful death of his son who was not an insured under that policy.¹⁰³ The "per person" limits of the UM coverage apply to all claims arising out of the bodily injury of one person, even though more than one person may be entitled to recover. For example, if the "per person" limit has been exhausted in payment of a child's bodily injury damages, a father cannot successfully seek recovery for the child's additional medical expenses by claiming entitlement to a separate "per person" limit.¹⁰⁴

Caused by Accident

Insurance policies normally require that the bodily injury be *caused by accident*. In *Redden v. Doe*,¹⁰⁵ the insured, a bank messenger, was intentionally forced off the highway by robbers. Her car landed upside down in a bayou, and she received injuries as she escaped through a broken window. The first circuit held that the issue of whether an injury is accidental must be examined from the victim's standpoint. The UM insurer argued that the accident ended when the car came to rest in the bayou and the injuries resulted from a battery committed by the robber as he "assisted" the insured through the window. However, the court held that the plaintiff's injuries were sustained by escaping from the partially submerged automobile and were a direct consequence of the accident.

On the other hand, the insured in *Mangum v. Weigel*,¹⁰⁶ was involved in a minor accident in the French Quarter. The other driver emerged from his vehicle shouting obscenities at the insured, came to the insured's vehicle, and repeatedly punched the insured in the

101. *Hawthorne v. Southeastern Fid. Ins. Co.*, 387 So. 2d 26 (La. App. 3d Cir. 1980).

102. 306 So. 2d 414 (La. App. 3d Cir. 1975).

103. *See also LaFleur v. Fidelity & Cas. Co. of N.Y.*, 385 So. 2d 1241 (La. App. 3d Cir. 1980) (the insured was not permitted to recover for wrongful death of her mother because the mother did not qualify as an insured under the policy).

104. Generally, this limitation is spelled out clearly in the policy and is enforced by the courts. *Graham v. American Cas. Co. of Reading, Pa.*, 261 La. 85, 259 So. 2d 22 (1972); *Vega v. State Farm Auto. Ins. Co.*, 401 So. 2d 368 (La. App. 1st Cir. 1981); *Crenwelge v. State Farm Mut. Auto. Ins. Co.*, 277 So. 2d 155 (La. App. 3d Cir. 1973).

105. 357 So. 2d 632 (La. App. 1st Cir. 1978).

106. 393 So. 2d 871 (La. App. 4th Cir. 1981).

face through the open window. He then opened the door and continued the assault, causing severe injuries. The UM insurer denied that the injuries were caused by accident or arose out of the use of an uninsured vehicle. The fourth circuit held that the injuries, which resulted solely from the battery committed by the uninsured motorist, were not caused by accident. *Redden* was distinguished because there the injuries were sustained in escaping from the vehicle. The court in *Mangum* also found that the incident did not arise out of the "use" of the uninsured vehicle. The holding on "use" appears to be the more valid distinction between *Redden* and *Mangum*. Otherwise, if determined from the innocent insured's viewpoint, apparently any intentional assault which arose out of the use of an uninsured vehicle would be a covered accident.

Arising out of Ownership, Maintenance, or Use

Policies generally provide that bodily injury damages must be caused by an accident *arising out of the ownership, maintenance or use of such uninsured highway vehicle*.¹⁰⁷ Although there have been few UM cases on this point, the issue of whether an accident arises out of the use of a vehicle has been much litigated in other contexts.¹⁰⁸ Generally, the courts have rejected artificial tests in favor of "common sense" when determining whether the negligent act was a natural and reasonable consequence of the use of the vehicle within the contemplation of the parties to the insurance contract.¹⁰⁹ As pointed out

107. LA. R.S. 22:1406(D)(1)(a) does not use that language, but the requirement is consistent with the mandated coverage: "from owners or operators of uninsured and underinsured motor vehicles because of bodily injury, sickness, or disease, including death, *resulting therefrom*; . . ." (emphasis added). Actually, *resulting therefrom* implies a direct causal connection which may be more restrictive than the policy requirement of *arising out of*.

108. Automobile liability policies cover liability arising out of the ownership, maintenance, and use of automobiles, whereas the personal liability coverage under homeowner's policies and comprehensive general liability policies exclude such liability. There are several cases dealing with the issue of whether an accident arises out of the use of a vehicle. *Picou v. Ferrara*, 412 So. 2d 1297 (La. 1982); *LeJeune v. Allstate Ins. Co.*, 365 So. 2d 471 (La. 1978); *Fertitta v. Palmer*, 252 La. 336, 211 So. 2d 282 (1968); *Curry v. Iberville Parish Sheriff's Office*, 405 So. 2d 1387 (La. App. 1st Cir. 1981), *writ denied*, 410 So. 2d 1130, 1135 (La. 1982); *Young v. E & L Lumber Co.*, 392 So. 2d 136 (La. App. 1st Cir. 1980); *Johns v. State Farm Fire & Cas. Co.*, 349 So. 2d 481 (La. App. 3d Cir. 1977); *Tillman v. Canal Ins. Co.*, 305 So. 2d 602 (La. App. 1st Cir. 1974); *Ramsey v. Continental Ins. Co.*, 286 So. 2d 371 (La. App. 2d Cir. 1973); *Cagle v. Playland Amusement, Inc.*, 202 So. 2d 396 (La. App. 4th Cir. 1967); *Baudin v. Traders & Gen. Ins. Co.*, 201 So. 2d 379 (La. App. 3d Cir. 1967); *Speziale v. Kohnke*, 194 So. 2d 485 (La. App. 4th Cir. 1967); *Bolton v. North River Ins. Co.*, 102 So. 2d 544 (La. App. 1st Cir. 1958).

109. *Fertitta v. Palmer*, 252 La. 336, 211 So. 2d 282 (1968); *Speziale v. Kohnke*, 194 So. 2d 485 (La. App. 4th Cir. 1967). In *Baudin v. Traders & Gen. Ins. Co.*, 201

in the preceding section, the court in *Mangum v. Weigle* concluded that an assault at the hands of an uninsured motorist did not arise out of "use."

Obviously, there must be an uninsured or underinsured motor vehicle involved in the accident. Thus, in *McDaniel v. Moore*,¹¹⁰ there was no coverage for the insureds' collision with a horse based upon the fault of those who permitted its escape. On the other hand, as illustrated by *Duvigneaud v. Government Employees Insurance Co.*,¹¹¹ the motor vehicle need not necessarily be the direct cause of the accident. While riding his motorcycle, the insured was overtaken and overturned by a large dog. In making claim under his UM coverage, the insured was able to trace the dog to the owner of an uninsured vehicle. The owner had negligently permitted the dog to escape from this vehicle. The court affirmed the jury finding that the accident arose out of "use" of the vehicle from which the dog escaped. Arguably, the *Duvigneaud* case is beyond a "common sense" relationship between the accident and the uninsured vehicle.

EXCLUSIONS

UM policies generally contain exclusions similar to those discussed below:

"This policy does not apply to bodily injury to an insured while occupying a highway vehicle"¹¹² (other than an insured automobile) owned

So. 2d 379 (La. App. 3d Cir. 1967), the court listed a number of factors which should be considered in making the *arising out of use* determination:

- (1) The dangerous situation causing injury must have its source in the automobile;
- (2) The chain of events resulting in the accident must originate in the use of the automobile and be unbroken by the intervention of any event which has no direct or substantial relation to the use of the vehicle;
- (3) The accident must be a natural and reasonable incident or consequence of the use of the vehicle for the purposes contemplated by the policy, although not necessarily foreseen or expected;
- (4) The accident must be one which can be "immediately identified" with the use of the automobile as contemplated by the parties to the policy;
- (5) The accident must be of a type reasonably associated with the use of the automobile as contemplated by the contracting parties;
- (6) The accident must be one which would not have happened "but for" the use of the automobile.

201 So. 2d at 384-85.

110. 351 So. 2d 855 (La. App. 2d Cir. 1977).

111. 363 So. 2d 1292 (La. App. 4th Cir. 1978), *writ refused*, 366 So. 2d 560 (La. 1979).

112. Some policies substitute *automobile* for *highway vehicle*. This leads to a discussion of whether a motorcycle is an *automobile* within the meaning of this exclusion. See, e.g., *Brister v. American Indem. Co.*, 313 So. 2d 335 (La. App. 1st Cir. 1975) (holding that the term *automobile* does not include a motorcycle); *Elledge v. Warren*, 263 So. 2d 912 (La. App. 3d Cir.), *writ refused*, 262 La. 1096, 266 So. 2d 223 (1972) (the policy language used the term *automobile* rather than *highway vehicle*; the court noted that in "its general and popular use" the word *automobile* would not comprehend a motorcycle, but in this policy, the definition of *automobile*, while specifically excluding cer-

by the named insured or a relative or through being struck by such an automobile."

The above exclusion has been held to be contrary to the UM coverage mandated by statute.¹¹³ The courts reason that the statute requires UM coverage for an insured regardless of his location at the time of his injury by an uninsured motorist.¹¹⁴ The rationale has been applied to the named insured¹¹⁵ and relatives¹¹⁶ defined as UM insureds without any requirement that they be occupying the insured automobile. The exclusion has been held ineffective for insureds occupying both the insured¹¹⁷ and uninsured vehicles.¹¹⁸

For example, in *Earl v. Commercial Union Insurance Co.*,¹¹⁹ a father owned two automobiles, one insured by Aetna and the other insured by Commercial Union. His daughter, a relative as defined in the policies, was injured through the negligence of an uninsured motorist while operating the auto insured by Aetna. The court refused to apply the exclusion in the Commercial Union policy, thus allowing recovery under the UM provisions of both policies. Likewise, in *Thomas v. Nelson*,¹²⁰ the insured's sons were injured when their unin-

tain types of land vehicles, did not specifically exclude motorcycles; the court found that *automobile* in this policy included a motorcycle.

113. *Earl v. Commercial Union Ins. Co.*, 391 So. 2d 934 (La. App. 2d Cir. 1980); *Bourgeois v. United States Fid. & Guar. Co.*, 385 So. 2d 584 (La. App. 4th Cir. 1980); *Griffin v. Armond*, 358 So. 2d 647 (La. App. 1st Cir. 1978); *Hayden v. Torrence*, 355 So. 2d 1362 (La. App. 1st Cir. 1978); *Guillot v. Travelers Indem. Co.*, 338 So. 2d 334 (La. App. 3d Cir. 1976), *writ dismissed*, 341 So. 2d 408 (La. 1977); *Thomas v. Nelson*, 295 So. 2d 847 (La. App. 1st Cir. 1974), *writ denied*, 299 So. 2d 791 (La. 1974); *Rascoe v. Wilburn*, 295 So. 2d 201 (La. App. 3d Cir. 1974); *Crenwelge v. State Farm Mut. Auto. Ins. Co.*, 277 So. 2d 155 (La. App. 3d Cir. 1973); *Elledge v. Warren*, 263 So. 2d 912 (La. App. 3d Cir.), *writ refused*, 262 La. 1096, 266 So. 2d 223 (1972).

114. *Elledge v. Warren*, 263 So. 2d at 918. This rationale does not appear to be compelled by the statute. Since the mandated coverage is tied to the issuance of automobile liability policies, the issue could be resolved by considering whether the insured would be afforded liability protection while using the vehicle under the excluded circumstances. Liability policies generally exclude coverage for accidents arising out of the use of another automobile owned by the named insured or a relative.

115. *E.g.*, *Guillot v. Travelers Indem. Co.*, 338 So. 2d 334 (La. App. 3d Cir. 1976), *writ dismissed*, 341 So. 2d 408 (La. 1977); *Rascoe v. Wilburn*, 295 So. 2d 201 (La. App. 3d Cir. 1974).

116. *E.g.*, *Earl v. Commercial Union Ins. Co.*, 391 So. 2d 934 (La. App. 2d Cir. 1980); *Bourgeois v. United States Fid. Guar. Co.*, 385 So. 2d 584 (La. App. 4th Cir. 1980).

117. *E.g.*, *Earl v. Commercial Union Ins. Co.*, 391 So. 2d 934 (La. App. 2d Cir. 1980) (different insurers); *Crenwelge v. State Farm Mut. Auto. Ins. Co.*, 277 So. 2d 155 (La. App. 3d Cir. 1973) (same insurer).

118. *Bourgeois v. United States Fid. & Guar. Co.*, 385 So. 2d 584 (La. App. 4th Cir. 1980); *Griffin v. Armond*, 358 So. 2d 647 (La. App. 1st Cir. 1978); *Elledge v. Warren*, 263 So. 2d 912 (La. App. 3d Cir.), *writ refused*, 262 La. 1096, 266 So. 2d 223 (1972).

119. 391 So. 2d 934 (La. App. 2d Cir. 1980).

120. 295 So. 2d 847 (La. App. 1st Cir. 1974).

sured motorcycle was struck by an uninsured motorist. The father owned three automobiles insured under a policy issued by Travelers. The court held that Travelers afforded UM coverage for the sons, since the exclusion for other owned highway vehicles was unenforceable.

"This policy does not apply to bodily injury to an insured with respect to which such insured . . . shall without written consent of the company make any settlement with any person . . . who may be liable therefor." This exclusion has been held to be unenforceable.¹²¹

"This policy does not apply so as to inure directly or indirectly to the benefit of any workmen's compensation or disability carrier. . . ." The Louisiana Workers' Compensation Act reserves the right of injured workmen to recover damages from third persons and further provides that any person obligated to pay compensation may maintain a suit against such third person for recovery of any amount which he has paid or become obligated to pay as compensation to an employee.¹²² Workers' compensation carriers have sought to recoup their payments out of UM coverage available to the injured worker. The courts of appeal have held unanimously that workers' compensation insurers have no right to assert a claim for UM coverage.¹²³ The Louisiana Supreme Court has granted writs in the latest such decision.¹²⁴

Either through a general exclusion or an exclusion from the definition of *insured automobile*, policies generally deny coverage to anyone occupying the automobile without the permission of the owner or while using the insured automobile for public or livery conveyance. These exclusions have not been tested in reported appellate decisions. However, they should be enforceable insofar as they exclude coverage for persons under circumstances in which that person would likewise be excluded from the liability coverage of the policy.¹²⁵

121. *Niemann v. Travelers Ins. Co.*, 368 So. 2d 1003 (La. 1979). See text at notes 154-161, *infra* (Subrogation and the Right to Settle).

122. See LA. R.S. 23:1101-1103 (1950 & Supp. 1976).

123. *Johnson v. Fireman's Fund Ins. Co.*, 411 So. 2d 538 (La. App. 1st Cir.), *writ granted*, 413 So. 2d 906 (La. 1982); *Lute v. City of Lake Charles*, 394 So. 2d 736 (La. App. 3d Cir. 1981); *Bannon v. Edrington*, 392 So. 2d 186 (La. App. 4th Cir. 1980); *Gentry v. Pugh*, 362 So. 2d 1154 (La. App. 2d Cir.), *writ denied*, 363 So. 2d 922 (La. 1978). Cf. *Youngs v. Champagne*, 348 So. 2d 126 (La. App. 4th Cir. 1977) (the court sustained the exception of no cause of action of the UM insurer of the plaintiff to the third party demand for contribution filed by the liability insurer of an alleged cotortfeasor of the uninsured motorist).

124. *Johnson v. Fireman's Fund Ins. Co.*, 411 So. 2d 538 (La. App. 1st Cir.), *writ granted*, 413 So. 2d 906 (La. 1982).

125. *But see* cases cited in note 113, *supra*. The coverage anytime, anywhere approach of *Elledge v. Warren*, and its progeny could be utilized to invalidate the use

REDUCTION CLAUSES

Policies providing UM coverage generally contain reduction clauses which provide that sums received from other sources will be credited against the limits of liability under the UM coverage. Credit is generally provided for sums received from others liable for the bodily injury damages of the insured, from amounts payable under any workers' compensation law, and from sums due under any other coverage of the same policy.¹²⁶

Even before the statutory advent of "underinsured" motorist coverage, *Smith v. Trinity Universal Insurance Co.*¹²⁷ held that the reduction clause for sums received from other persons liable for the insured's bodily injury was unenforceable. The insured had been injured by the joint negligence of an insured motorist and an uninsured motorist. The court held that the credit in effect would reduce the UM coverage below the limits required by statute.

Any credit reducing the UM limits by the amount of the liability insurance of the adverse driver is clearly contrary to the underinsured motorist protection required by statute. The insured is entitled to recover, subject to the limits of his policy, the difference between his damages and the liability insurance of the negligent motorist.¹²⁸

of these exclusions against the named insured and relatives. However, such use would be an illogical extension beyond the scope of the liability coverage with which UM coverage is paired under LA. R.S. 22:1406(D).

126. The following provisions from insurance policies (see note 43, *supra*) are examples of reduction clauses:

Any amount payable under the [UM coverage] because of bodily injuries sustained in an accident by a person who is an insured under this coverage shall be reduced by (1) all sums paid on account of such bodily injury by or on behalf of [i] the owner or operator of the uninsured highway vehicle and [ii] any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under [the liability coverage of this policy], and (2) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability law or any similar law.

Any payment made under this coverage to or for any insured shall be applied in reduction of the amount of damages which he may be entitled to recover from any person insured under [the liability coverage of this policy].

The company shall not be obligated to pay under this coverage that part of the damages which the insured may be entitled to recover from the owner or operator of the uninsured highway vehicle which represents expenses for medical services paid or payable under [the medical payments coverage of this policy].

127. 270 So. 2d 637 (La. App. 2d Cir. 1972); see also *Hebert v. Ordoyne*, 388 So. 2d 407 (La. App. 1st Cir. 1980).

128. LA. R.S. 22:1406(D)(2)(b). If the insured had UM limits of \$10,000 and bodily injury damages of \$15,000 and if the negligent motorist had liability limits of \$5,000, it would be contrary to the concept of "underinsured motorist" protection to credit the \$5,000 liability coverage against the \$10,000 UM limits. Under his UM coverage,

A distinction must be made between that credit against UM limits provided for in the unenforceable reduction clause and the credit for sums received from other sources to which the UM insurer is entitled. The UM insurer is responsible only for the bodily injury damages of an insured which are in excess of the liability insurance of the negligent motorist and which have not been paid by the negligent motorist or someone responsible for his fault or someone solidarily liable with him.

The credit provision for workers' compensation payments also has been held to be unenforceable. Overruling an earlier decision,¹²⁹ the second circuit held, in *Williams v. Buckelew*¹³⁰ that credit for workers' compensation benefits received by the insured would have the effect of reducing UM protection below the limits required by statute. Therefore, the reduction clause was unenforceable. In *Williams*, however, the court specifically stated that there was no question of double recovery because the amount of the plaintiff's damages substantially exceeded the sum of his UM policy limits and the workers' compensation benefits paid. A subsequent decision from another circuit refused to apply the credit provision, even under circumstances in which the insured recovered the same medical expenses both as workers' compensation benefits and under UM coverage.¹³¹

The credit for medical expenses is enforceable only insofar as it prevents recovery of the same medical expenses under both UM coverage and medical payments coverage. If the limits of UM coverage are inadequate to compensate the insured for his other damages, the insurer cannot credit payments made under medical coverage against the liability limits of the UM coverage.¹³²

With respect to payments under the same policy, reduction clauses usually provide that any sum paid under liability coverage shall be credited against the UM limits and any sum paid under the UM coverage shall be credited against the liability limits. To the extent that the reduction of either limit would prevent the insured from receiving the full benefit of his UM coverage, courts likely will find

the insured is entitled to recover the amount of his damages in excess of the liability coverage.

129. *Allen v. United States Fid. & Guar. Co.*, 188 So. 2d 741 (La. App. 2d Cir. 1966), writ refused, 249 La. 743, 190 So. 2d 909 (1966).

130. 246 So. 2d 58 (La. App. 2d Cir. 1970).

131. *Landry v. State Farm Auto. Ins. Co.*, 320 So. 2d 254 (La. App. 3d Cir. 1975); see also *Gagnard v. Thibodeaux*, 336 So. 2d 1069 (La. App. 4th Cir. 1976). This reduction clause is discussed in Johnson, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Workers' Compensation*, 40 LA. L. REV. 742 (1980).

132. See cases cited in notes 99-100, *supra*. See text at notes 98-104, *supra* (Bodily Injury Damages).

such clauses inconsistent with the mandatory coverage of the UM statute. For example, in circumstances such as existed in *Casson v. Dairyland Insurance Co.*,¹³³ in which the insured maintained both a liability and a UM claim under the same policy, the reduction clauses are probably unenforceable.¹³⁴

STACKING OF MULTIPLE COVERAGES

In 1972, the supreme court, in *Graham v. American Casualty Co.*¹³⁵ and *Deane v. McGee*,¹³⁶ overruled numerous decisions from all four courts of appeal in order to permit "stacking" of the coverages under uninsured motorist policies. Policies often contained "other insurance" clauses which were designed to limit recovery to the highest limits available under any one policy.¹³⁷ In *Graham* and *Deane*, the supreme court found that such clauses were inconsistent with the UM statute's requirement that each liability policy contain UM coverage in a specified minimum amount.

In *Graham*, the plaintiff was a guest passenger in an automobile which collided with an uninsured motorist. There was no UM coverage on the vehicle in which she was riding. However, the plaintiff owned a vehicle and her father, with whom she was residing, owned two vehicles, each insured under separate Southern Farm policies with \$5,000 UM limits. Under the "other insurance" provisions of each policy, the plaintiff's recovery would have been limited to a total of \$5,000, prorated among the three policies. The supreme court found the "other insurance" provisions in conflict with the coverage man-

133. 400 So. 2d 713 (La. App. 3d Cir. 1981).

134. The court in *Casson* awarded the full amount of both the liability and the UM coverages without discussion of whether the policy contained such reduction clauses or their enforceability. For further discussion of *Casson*, see text at notes 80-82, *supra*.

135. 261 La. 85, 259 So. 2d 22 (1972).

136. 261 La. 686, 260 So. 2d 269 (1972). See Note, *Uninsured Motorist Insurance—Stacking Comes to Louisiana*, 33 LA. L. REV. 145 (1972).

137. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only to the amount by which the limit of liability for this coverage exceeds the applicable limit of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

See note 43, *supra*.

dated by statute and permitted the plaintiff to recover the \$5,000 policy limit of each policy.

In *Deane*, the plaintiff was a guest passenger in an automobile covered by two UM policies, each with a limit of \$5,000. The plaintiff also owned an automobile in Florida with \$10,000 UM limits. Under the "other insurance" provisions of the plaintiff's policy, his coverage would be excess and available only if the primary policies did not provide the Florida statutory minimum of \$10,000. Again, the supreme court held that the "other insurance" clause was ineffective, and the plaintiff was permitted to recover the policy limits under all three applicable policies.

The courts of appeal quickly extended the rationale of *Graham* and *Deane* to strike down other policy provisions restricting recovery under UM policies. In *Crenwelge v. State Farm Mutual Automobile Insurance Co.*,¹³⁸ the plaintiff was injured through the negligence of an uninsured motorist while driving one of two cars he owned. The cars were insured under separate State Farm policies. Each policy contained an express exclusion of coverage for an insured who was injured while occupying another automobile owned by the named insured. Thus, if effective, the exclusion would preclude recovery under the policy on the vehicle which was not involved in the accident. However, construing *Graham* and *Deane* as requiring that each policy provide the statutory minimum coverage, the court of appeal held that the plaintiff could recover under both policies.¹³⁹ Likewise, the court of appeal, in *Smith v. Trinity Universal Insurance Co.*,¹⁴⁰ found a reduction clause invalid. The policy provision gave credit against the UM limits for the amount of any recovery from other persons. The court held that the reduction clause was not enforceable because such credit would reduce the UM coverage below the statutory minimum limit.¹⁴¹

Graham and *Deane* permitted the stacking of coverages under separate policies. In *Barbin v. United States Fidelity & Guaranty Co.*,¹⁴² the supreme court applied the same reasoning to coverage for multiple vehicles insured under one policy. Barbin, as driver, and his wife

138. 277 So. 2d 155 (La. App. 3d Cir. 1973).

139. For further discussion, see text at notes 112-125, *supra* (Exclusions).

140. 270 So. 2d 637 (La. App. 2d Cir. 1972).

141. For further discussion, see text at notes 126-134, *supra* (Reduction Clauses).

142. 315 So. 2d 754 (La. 1975). Following *Barbin*, stacking was permitted even under fleet policies insuring many vehicles. *Holmes v. Reliance Ins. Co.*, 359 So. 2d 1102 (La. App. 3d Cir.), *writ denied*, 362 So. 2d 1120 (La. 1978) (160 vehicles). *But see* *Briley v. Falati*, 367 So. 2d 1227 (La. App. 4th Cir.), *writ denied*, 369 So. 2d 1379 (La. 1979), which held that a person insured only as an occupant of one of the vehicles covered under a fleet policy could not stack, thus limiting the stacking right to the named insured.

and two other couples, as passengers, were occupying one of two automobiles insured under a single policy. The court permitted the stacking of coverages for both automobiles not only for Barbin and his wife (as named insureds) but also for the passengers, who were insured only "while occupying an insured automobile." Straining the policy language, the court pointed out that an *insured automobile* was defined as "an automobile described in the policy" and concluded that passengers were entitled to stack the limits for both vehicles while occupying either insured vehicle. In *Seaton v. Kelley*,¹⁴³ however, the supreme court reached the limit of its expansive approach to stacking. *Seaton* was factually similar to *Barbin*, with the exception that multiple vehicles were insured under separate policies issued by the same insurer. The court held that a passenger (who was not a named insured or a relative) was entitled to recover only under the policy on the vehicle which he was occupying at the time of the accident; the passenger was not an insured under the separate policies on other vehicles owned by the same named insured. Thus, after *Barbin* and *Seaton*, for persons insured only as occupants, stacking was dependent upon whether the insurer chose to insure multiple vehicles under a single policy or under separate policies.

The prostacking decisions arose in an era when the mandated UM coverage limits were the minimal \$5,000/\$10,000 limits. Amendments to the statute in 1972, 1974, and 1977 greatly expanded the insured's right to acquire UM protection.¹⁴⁴ With this increased access to UM coverage, the legislature was persuaded to adopt Act 623 of 1977, which is known as the "anti-stacking" provision. The Act amends 22:1406(D)(1)(c) to prohibit stacking of multiple UM coverages available to the same insured, except under limited circumstances. Recovery under more than one policy is prohibited, except when the insured is injured "while occupying an automobile not owned by said injured party." Then, the statutory exception permits the injured party to recover under the UM coverage on the vehicle in which he is riding (as primary coverage) and also under one other UM policy available to him (as excess coverage).

The anti-stacking provision was first construed by the supreme court in *Courville v. State Farm Mutual Automobile Insurance Co.*¹⁴⁵ Courville, Sr. owned two vehicles—a 1964 pick-up and a 1968 Olds—each insured under separate State Farm policies. His son, Courville, Jr., while driving the 1964 pick-up, was seriously injured by the negligence of an uninsured motorist. Courville, Jr., sought to stack

143. 339 So. 2d 731 (La. 1976); see also *Schmidt v. Estate of Chronon*, 376 So. 2d 579 (La. App. 4th Cir. 1979).

144. See text at notes 8-11, 14-16, 28-30 & 34-35, *supra*.

145. 393 So. 2d 703 (La. 1981).

the UM coverages under both State Farm policies. Although clearly entitled to the full limits of the policy on the 1964 pick-up, Courville, Jr. could recover under the policy on the 1968 Olds only if he was within the exception of the anti-stacking provision. Technically, since the truck was owned by his father, Courville, Jr. was within the statutory exception for one injured "while occupying an automobile *not owned* by said injured party."

The third circuit,¹⁴⁶ however, refused to apply the exception literally, finding that the exception must be read in *pari materia* with the entire anti-stacking provision. The purpose of the provision was to override legislatively the jurisprudence which permitted stacking of multiple coverages, whether under the same policies or multiple policies available to the same insured. The main theme of the provision is that a person can recover under only one UM policy. Generally, the UM policy of the vehicle involved in the accident will afford the only applicable coverage. However, if an injured person were always relegated to that coverage alone, he would be at the mercy of the foresight of everyone with whom he rode. Therefore, the obvious intent of the exception contained in the Act was to afford an insured, when riding with others, the protection of his own UM coverage, in addition to whatever coverage was available on the vehicle in which he was riding.

If Courville, Sr. were the injured party, then under the anti-stacking provision, he could recover only under one policy because as owner he would not be within the statutory exception. The third circuit concluded that it would be a "legal absurdity" to permit another person to stack the two policies when the insured owner could not. Instead, it construed the exception to be inapplicable to any other coverage provided by the owner of the occupied vehicle; thus nonowner occupants could not stack coverage purchased for other vehicles by the owner of the occupied vehicle. This interpretation placed the owner and the occupant in the same position with respect to such other coverage.

The supreme court reversed, holding that the language of the exception was clear and unambiguous and that under Civil Code article 13, courts were not free to disregard the letter of the law in pursuit of its spirit. Therefore, Courville, Jr. was permitted to recover the full limits of both State Farm policies. The supreme court suggested that legislation was necessary if the Act did not express its true intent.

Courville involved two vehicles insured under separate policies. The first circuit has extended the supreme court's interpretation of

146. 386 So. 2d 176 (La. App. 3d Cir. 1980).

the anti-stacking exception in *Courville* to a single policy covering multiple vehicles. In *Bonner v. Robinson*,¹⁴⁷ the plaintiff, a major child residing with his parents, was injured while driving one of three cars owned by his mother and insured under a single policy. The plaintiff was permitted to recover the UM limits applicable to the vehicle he was driving, plus the limits applicable to one additional vehicle. The court held that the statute did not distinguish between separate vehicles insured under separate policies and multiple vehicles insured under the same policy.

In *Nall v. State Farm Mutual Automobile Insurance Co.*,¹⁴⁸ the supreme court made clear the conditions which must exist in order to apply the anti-stacking exception. The plaintiff, insured under two separate State Farm policies, was injured while a guest passenger in an automobile insured by GEICO. The accident was caused solely by the negligence of the plaintiff's host driver. The UM coverage on the host vehicle was not applicable,¹⁴⁹ and the plaintiff sought recovery under both of his own State Farm policies. The supreme court held that three conditions must be present in order for the anti-stacking exception to apply: (1) the injured party must have been occupying an automobile not owned by him; (2) there must be UM coverage on the occupied vehicle, which coverage is primary; and (3) there must be at least one other UM coverage available to the injured party who has not been fully compensated for his damages. Since the second condition was not present (there was no UM coverage available on the host vehicle), the 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.

When the plaintiff is injured while occupying an insured automobile, must he accept the coverage on that vehicle or may he select another, more favorable policy? A conflict in the jurisprudence leaves this issue unresolved. In *Branch v. O'Brien*,¹⁵⁰ the plaintiff owned four vehicles, each insured under separate State Farm policies. Three of the policies, including the policy on the vehicle in which the plaintiff was riding when she was injured by an uninsured motorist, had UM limits of \$10,000. The other policy, however, had UM limits of \$100,000. Each of these policies expressly excluded coverage for the insured while occupying any other vehicle owned by the insured.

147. 415 So. 2d 527 (La. App. 1st Cir. 1982).

148. 406 So. 2d 216 (La. 1981).

149. See text at notes 78-82, *supra*.

150. 396 So. 2d 1372 (La. App. 2d Cir.), *writ denied*, 400 So. 2d 905 (La. 1981).

The second circuit applied the anti-stacking provision to limit the insured to recovery under one policy. However, the court further held that she was not restricted to the policy on the vehicle in which she was riding. Citing the jurisprudence prior to the anti-stacking provision, the court found that the exclusion of coverage while occupying other owned vehicles was contrary to the mandatory requirement of UM coverage and that nothing in the anti-stacking provision affected this requirement. Therefore, although the plaintiff was limited to one policy, she was free to choose the policy most advantageous to her.

However, the first circuit disagreed in *Breaux v. Louisiana Farm Bureau Mutual Insurance Co.*¹⁵¹ The plaintiff owned two vehicles, a motorcycle insured by Home Indemnity Company with UM limits of \$10,000 and an automobile insured by Farm Bureau with UM coverage of \$50,000. The plaintiff, while riding the motorcycle, was injured through the negligence of an uninsured motorist. The court held that the anti-stacking provision was applicable, even though the UM policies were issued by different companies. Since he was limited to one policy, the plaintiff contended that he was entitled to select the more favorable Farm Bureau policy. Although the court agreed that the exclusion for other owned autos was unenforceable, the *Breaux* court expressly disagreed with the *Branch* conclusion and found that the intent of the anti-stacking provision was for the policy on the *accident* vehicle to be the applicable coverage. Therefore, the plaintiff was limited to the coverage on the motorcycle. The *Breaux* decision is in accord with the apparent, but not express, intent of the anti-stacking provision. The only express reference to such "primary" coverage is in the exception for occupancy of a nonowned automobile. The supreme court has denied writ applications in both *Branch* and *Breaux*.

The applicability of the anti-stacking provision to policies issued or renewed prior to the provision's effective date is an interesting issue. All prior amendments to the UM statute had expanded the mandatory coverage, and courts uniformly held that such amendments were applicable only to policies issued or renewed after the effective date of the amendment.¹⁵² However, policies issued prior to the effective date of the anti-stacking amendment normally contained "other insurance" clauses which, if enforceable, would prevent stacking. Prior to the amendment, these "other insurance" clauses could not be enforced because of the judicial conclusion that they were in conflict with the mandatory coverage provisions of the UM statute. The first,

151. 413 So. 2d 988 (La. App. 1st Cir.), writ denied, 420 So. 2d 453 (La. 1982).

152. E.g., *O'Banion v. Allstate Ins. Co.*, 347 So. 2d 878 (La. App. 3d Cir. 1977); *Lindsey v. Aetna Cas. & Sur. Co.*, 324 So. 2d 842 (La. App. 2d Cir. 1975); *Lorio v. Safeco Ins. Co.*, 316 So. 2d 744 (La. App. 1st Cir. 1975).

second, and third circuits have held that the "other insurance" clauses in preamendment policies are effective for post-amendment accidents because the anti-stacking amendment removes the jurisprudential barrier to enforceability.¹⁵³ They found no problem with impairment of contract because the policies contained the "other insurance" clauses.

SUBROGATION AND THE RIGHT TO SETTLE

Insurance policies generally provide that the company is subrogated to the extent of any payment under UM coverage to the insured's rights of recovery against any person. Further, the insured is obligated to do whatever is necessary to secure such rights and not to do anything to prejudice such rights.¹⁵⁴ In addition, policies generally contain an express exclusion of coverage for any insured who settles without the written consent of the company with anyone legally liable for his bodily injury. Prior to *Niemann v. Travelers Insurance Co.*,¹⁵⁵ the courts enforced the subrogation and consent-to-settle policy provisions.¹⁵⁶ In *Niemann*, however, a sharply divided Louisiana Supreme Court severely restricted the rights of the insurer to seek reimbursement of amounts paid under UM coverage. The insured had settled with the liability insurer of the negligent motorist for an amount nearly equal to the limits of his liability coverage. The insured expressly released both the negligent motorist and his liability insurer without seeking the consent of his own UM insurer. When the insured, claiming that he had not been fully compensated for his

153. *Blöck v. Reliance Ins. Co.*, 417 So. 2d 29 (La. App. 1st Cir. 1982); *Faria v. Smoak*, 416 So. 2d 132 (La. App. 2d Cir. 1982); *Hebert v. Breaux*, 398 So. 2d 1299 (La. App. 3d Cir.), writ denied, 401 So. 2d 986 (La. 1981). However, the policy language is not effective for preamendment accidents. *Manuel v. American Indem. Co.*, 368 So. 2d 1200 (La. App. 3d Cir. 1979); *Cutrer v. Brumfield*, 372 So. 2d 648 (La. App. 1st Cir. 1979).

154. In lieu of or in addition to a subrogation clause, some policies contain a trust agreement in which the insured agrees to pursue recovery against a third party at the request and expense of the insurer and to hold any recovery in trust for the insurer. The trust agreement was designed to protect against the possibility that a common law prohibition against assignment of personal injury claims would be applied against a subrogation claim.

155. 368 So. 2d 1003 (La. 1979) (three justices dissented).

156. *E.g.*, *Gauthreaux v. Travelers Ins. Co.*, 348 So. 2d 737 (La. App. 1st Cir. 1977); *Lorio v. Safeco Ins. Co.*, 308 So. 2d 377 (La. App. 1st Cir. 1975) (withdrawn from the Reporter at the request of the court). *But see* *Whitten v. Empire Fire & Marine Ins. Co.*, 353 So. 2d 1071 (La. App. 2d Cir. 1977); *LaBove v. American Employers Ins. Co.*, 189 So. 2d 315 (La. App. 3d Cir. 1966). Restrictions on the rights of the insurer under the subrogation and consent-to-settle provisions had been imposed prior to *Niemann* in *Hebert v. Green*, 311 So. 2d 223 (La. 1975), which held that the insurer could not prevent settlement with a joint tortfeasor of the uninsured motorist (with respect to an accident which occurred before legislation extending the UM protection to include underinsured motorists).

damages, made demand upon his UM insurer, it defended on the ground that the insured had breached the subrogation and consent-to-settle provisions of the policy. Reversing the lower courts, the supreme court held that these provisions were not enforceable because the insurer was vested only with a limited right of reimbursement under the provisions of 22:1406(D)(4)¹⁵⁷ and had no right to control the insured's settlement with the negligent motorist or his liability insurer. In justifying this extremely narrow reading of the statute, the majority pointed to the insured's dilemma in UM situations. The liability insurer of the negligent motorist will generally require the injured party to release both it and its insured before the liability insurer will voluntarily settle for its policy limits. On the other hand, the injured insured's UM carrier will, in many cases, refuse consent to such settlement in order to preserve its subrogation claim against the negligent motorist. Thus, if the subrogation and consent-to-settle provisions were enforceable, the UM insurer, for its own self interest, could retard compensation of the accident victim.

In *Bond v. Commercial Assurance Co.*,¹⁵⁸ the supreme court partially resurrected the subrogation rights of the insurer. After suit was filed against the UM carrier, it filed a third party demand for indemnity against the negligent underinsured motorist. Relying on *Niemann*, the court of appeal dismissed the third party demand. On rehearing, the supreme court reversed, holding that upon payment, an insurer, pursuant to a subrogation agreement contained in its policy, becomes conventionally subrogated to its insured's right against the tortfeasor. The holding in *Niemann* was restricted 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."¹⁵⁹ This conclusion was justified by the court on the ground that such an exclusion would conflict with the aim of the UM 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

157. LA. R.S. 22:1406(D)(4) provides:

In the event of payment to any person under the coverage required by this Section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

158. 407 So. 2d 401 (La. 1981).

159. *Id.* at 411.

motorist, but that subrogation right is subject to impairment by an insured who enters into a "reasonable settlement" with the tortfeasor and his liability insurer. The precariousness of the subrogation right was emphasized by the decision in *Pace v. Cage*.¹⁶⁰ The insured filed suit against the negligent motorist, the insurer, and his own UM carrier. The UM carrier filed a third party demand against the negligent motorist. After the insured settled with the original defendants, the UM carrier refused to dismiss its third party demand. Upon the stipulation that the insured had completely discharged the tortfeasor prior to any payment by the UM carrier, the supreme court held that the UM carrier no longer had a cause of action against the tortfeasor. One judge dissented, suggesting that the court had not come to grips with whether 22:1406(D)(4) grants an independent right of recovery to the UM insurer against the tortfeasor.

If the UM carrier settles with its insured first, may the insured subsequently settle with and release the tortfeasor and his liability insurer, or are the subrogation rights of the UM carrier then vested by virtue of the prior settlement? This issue does not appear to be resolved by the prior jurisprudence. Since public policy considerations in this area seem to prevail over ordinary notions about subrogation rights, the resolution of this remaining issue must await further weighing of those considerations by the supreme court.

Recent decisions 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.¹⁶¹ The jurisprudence also permits the tortfeasor to assert inability to pay in mitigation of a subrogation claim, but such an assertion by the tortfeasor cannot be utilized by the insurer to reduce its payments under UM coverage.¹⁶²

OTHER MATTERS

Jurisdiction and Conflicts of Law

Plaintiff, a California resident, was injured in Louisiana while a guest passenger in a vehicle owned and operated by a Louisiana resident. Plaintiff owned an auto in California insured by Western Pioneer, a company which was not authorized to do and did no insurance

160. 419 So. 2d 443 (La. 1982).

161. *Suhor v. Gusse*, 414 So. 2d 1217 (La. 1982); *Bond v. Commercial Union Assur. Co.*, 407 So. 2d 401 (La. 1981); *Southern Farm Bur. Cas. Ins. Co. v. Sonnier*, 406 So. 2d 178 (La. 1981).

162. *Bond v. Commercial Union Assur. Co.*, 407 So. 2d 401 (La. 1981), *on remand*, 415 So. 2d 572 (La. App. 3d Cir. 1982) (\$50,483.41 subrogation claim mitigated to \$5,000).

business in Louisiana. In *Hall v. Scott*,¹⁶³ which the supreme court has agreed to review, the first circuit followed the third circuit decision in *Jones v. MFA Mutual Insurance Co.*,¹⁶⁴ and held that Louisiana courts have no jurisdiction over foreign insurers on contractual claims for UM benefits. Neither the Long-Arm Statute¹⁶⁵ nor the Non-Resident Motorist Act¹⁶⁶ provided jurisdiction over the foreign insurer. Furthermore, the mere foreseeability that its insured would travel to Louisiana and become involved in an accident was not a sufficient "minimum contact" for jurisdiction.¹⁶⁷ When jurisdiction is not contested, there appears to be a conflict in the circuits as to whether Louisiana law or the law of the state in which the policy was issued is applicable. In *Sutton v. Langley*,¹⁶⁸ the second circuit applied Louisiana law to interpret a Texas policy issued to a Texas resident who was injured in a Louisiana accident. The court refused to apply the Texas guest passenger statute and permitted stacking of multiple coverages, which was not allowed under Texas law. The second circuit held that it was not bound to apply the law of the state of the contract where, on balance, Louisiana had a greater interest in the action.¹⁶⁹

In *Powell v. Warner*,¹⁷⁰ however, the fourth circuit held that Mississippi residents injured in a Louisiana accident were not entitled to recover underinsured motorist benefits under the UM coverage of their Mississippi policies. Mississippi law did not require and the policies did not provide underinsured motorist protection.¹⁷¹ Despite

163. 416 So. 2d 223 (La. App. 1st Cir. 1982), writ granted, 420 So. 2d 978 (La. 1982).

164. 398 So. 2d 10 (La. App. 3d Cir.), writ refused, 399 So. 2d 586 (La. 1981).

165. LA. R.S. 13:3201 (Supp. 1964 & 1977). This statute enumerates certain circumstances in which Louisiana courts will have personal jurisdiction, none of which would support a claim under uninsured motorist coverage on a policy issued and delivered outside of Louisiana.

166. LA. R.S. 13:3474 (1950 & Supp. 1954 & 1956). By operating a motor vehicle in Louisiana, a nonresident and his insurer are deemed to have submitted to the jurisdiction of this state and to have appointed the secretary of state as their agent for service of process. By its terms, this statute appears to be applicable only to liability claims against the nonresident and his insurer.

167. The court relied on the decision of the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

168. 330 So. 2d 321 (La. App. 2d Cir.), writ denied, 332 So. 2d 805 (La. 1976).

169. The second circuit relied on the balance-of-interests test adopted by the Louisiana Supreme Court in *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973), in which the court rejected the premise that the law of the place of the tort should always be applied. The second circuit suggested that the same rationale applied to contract law.

170. 398 So. 2d 22 (La. App. 4th Cir. 1981).

171. The court distinguished *Sutton* on the ground that the motorist was uninsured in *Sutton*, whereas the plaintiffs in *Powell* had recovered a portion of their damages from liability insurance. However, there was an insured cotortfeasor in *Sutton*. In any event, the distinction should not make any difference. The refusal in *Sutton* to apply

the fourth circuit's attempt to distinguish *Sutton*, the two decisions appear to be in conflict.

By its express language, the UM statute is applicable only to insurance policies on motor vehicles "registered or principally garaged in this state."¹⁷² Unless the Louisiana statute mandates coverage for the vehicle insured under the policy, it would seem preferable for the law of the state in which the policy was issued to determine what coverage was available under that policy.

Notice

Insurance policies generally require the insured to give prompt notice of an accident.¹⁷³ However, the general rule¹⁷⁴ that the insurer cannot escape liability for late notice absent actual prejudice is applicable to UM claims. The cases indicate an extreme reluctance to find actual prejudice.¹⁷⁵

Cooperation

UM policies generally provide that the insured must cooperate with the company by furnishing medical reports and submitting to medical examinations at the request of the company. These provisions are enforceable. Failure to comply is a breach of contract which entitles the insurer to a dismissal of the action brought by the insured.¹⁷⁶

the Texas Guest Passenger Statute can be justified on the ground that the law of the place where the accident occurred should determine whether the uninsured motorist is legally liable to the UM insured. However, the stacking requirement in *Sutton* cannot be rationalized with *Powell*. Both stacking and underinsured motorist coverage were available only under the mandatory provisions of the Louisiana UM statute.

172. LA. R.S. 22:1406(D)(1)(a). Cf. *Ricardo v. American Indem. Co.*, 201 So. 2d 145 (La. App. 1st Cir. 1967).

173. The phrases "as soon as practicable" or "as soon as possible" are included in the policies.

174. See *Miller v. Marcantel*, 221 So. 2d 557 (La. App. 3d Cir. 1969).

175. In *Barnes v. Lumberman's Mut. Cas. Co.*, 308 So. 2d 326 (La. App. 1st Cir. 1975), first notice was given almost three years after the accident. The court found that there was no factual showing of prejudice and rejected the contention of legal prejudice due to prescription of any subrogation claim against the tortfeasor. The court refused to presume that the negligent party would plead prescription. In *Davis v. Allstate Ins. Co.*, 272 So. 2d 458 (La. App. 2d Cir. 1973), suit almost one year after the accident was the insurer's first notice. Delay was excused because of the insured's belief that the negligent motorist had insurance. The court emphasized that the insurer did not claim any fraudulent intent on the part of the insured and had not shown any specific prejudice. Although the proof of prejudice was insufficient to avoid liability in *Hawthorne v. Southeastern Fid. Ins. Co.*, 387 So. 2d 26 (La. App. 3d Cir. 1980), the issue was held to be a reasonable basis to deny liability, and the insurer was not cast for penalties.

176. *LeBlanc v. Davis*, 213 So. 2d 185 (La. App. 3d Cir. 1968); *Martin v. Starke*,

However, the dismissal must be without prejudice. The insured is entitled to refile his action after compliance with the policy requirements.¹⁷⁷

Burden of Proof

The burden is on the plaintiff in an action on an insurance policy to prove every fact essential to establish that his claim is within the policy coverage.¹⁷⁸ One essential element of a UM claim is proof that the negligent motorist was uninsured or underinsured. Failure to establish lack of insurance is usually fatal to the claim,¹⁷⁹ although occasionally the appellate courts mercifully remand for additional proof.¹⁸⁰

This burden of proof is greatly alleviated by the provisions for prima facie evidence in 22:1406(D)(6), which, when utilized, shift the burden of proof to the insurer.

A tortfeasor's statement, allegedly made at the accident scene, to the effect he was uninsured has been found insufficient to prove uninsured status,¹⁸¹ but testimony by the motorist in court to that effect has been held to be adequate.¹⁸² Once the existence of a policy providing UM coverage is established, it is incumbent upon the insurer to establish the coverage limits.¹⁸³

Prescription

The supreme court, in *Booth v. Fireman's Fund Insurance Co.*,¹⁸⁴ held that a claim under UM coverage is an action in contract which

208 So. 2d 723 (La. App. 3d Cir. 1968); *Pappas v. Aetna Cas. & Sur. Co.*, 191 So. 2d 658 (La. App. 2d Cir. 1966).

177. *LeBlanc v. Travelers Indem. Co.*, 263 So. 2d 337 (La. 1972). This case was a sequel to *LeBlanc v. Davis*, 213 So. 2d 185 (La. 1968), filed after the insured supplied the requested medical information. The court held that the insured was entitled to maintain the action despite the contention of the insurer that it had been irrevocably prejudiced by the deliberate violation of the policy.

178. *Macaluso v. Watson*, 188 So. 2d 178 (La. App. 4th Cir. 1966); see also *Vitrano v. State Farm Mut. Auto. Ins. Co.*, 198 So. 2d 922 (La. App. 4th Cir. 1967); *Roloff v. Liberty Mut. Ins. Co.*, 191 So. 2d 901 (La. App. 4th Cir. 1966).

179. *Beck v. Allstate Ins. Co.*, 359 So. 2d 1327 (La. App. 4th Cir. 1978); *Talazac v. Phoenix of Hartford Ins. Co.*, 259 So. 2d 636 (La. App. 4th Cir. 1972); *Jordan v. Great Am. Ins. Co.*, 248 So. 2d 363 (La. App. 4th Cir. 1971); *Dalton v. Allstate Ins. Co.*, 234 So. 2d 455 (La. App. 1st Cir. 1970); *Macaluso v. Watson*, 188 So. 2d 178 (La. App. 4th Cir. 1966).

180. *Bullock v. Commercial Union Ins. Co.*, 397 So. 2d 13 (La. App. 3d Cir. 1981).

181. *Manuel v. American Employers Ins. Co.*, 212 So. 2d 527 (La. App. 3d Cir. 1968).

182. *Launey v. Thomas*, 379 So. 2d 27 (La. App. 3d Cir. 1980).

183. *Williams v. Bernard*, 413 So. 2d 198 (La. App. 4th Cir. 1982); see *Gianakis v. Mayen*, 301 So. 2d 413 (La. App. 4th Cir. 1974).

184. 253 La. 521, 218 So. 2d 580 (1968).

prescribes in ten years.¹⁸⁵ The court rejected the contention that the tort prescription of one year¹⁸⁶ should be applicable because of the requirement that the uninsured motorist be "legally liable to the insured."¹⁸⁷

Act 444 of 1977, which added Louisiana Revised Statutes 9:5629, effective July 1, 1978, established a two-year prescriptive period for claims under UM coverage, which prescription commences to run on the date of the accident.¹⁸⁸ In *Reichenphader v. Allstate Insurance Co.*,¹⁸⁹ the supreme court held that 9:5629 was applicable to existing claims. The plaintiff was injured on September 13, 1975, and filed suit on February 27, 1980. Finding the period between promulgation (August 8, 1977) and the effective date (July 1, 1978) to be reasonable as to notice and opportunity to file suit, the court held that the plaintiff's claim had prescribed on the effective date of Act 444 of 1977.

Suit against the tortfeasor interrupts prescription against the UM insurer. In *Hoefly v. Government Employees Insurance Co.*,¹⁹⁰ the supreme court determined that the uninsured or underinsured motorist and the UM carrier were solidary obligors, making applicable the rule that suit against one debtor in solido interrupts prescription against all.¹⁹¹

Even though the two-year prescription is applicable to UM claims, an action by the insurer against the negligent motorist seeking reimbursement for a claim paid under UM coverage has been held to be purely delictual and subject to the prescription of one year.¹⁹² Also, timely suit on a collision subrogation claim has been held not to in-

185. See LA. CIV. CODE art. 3544.

186. LA. CIV. CODE art. 3536.

187. The court suggested *legal liability* meant only "fault" and the tortfeasor's "personal" right to claim extinguishment of the tort obligation through a prescription did not inure to the benefit of the insurer. 253 La. at 529, 218 So. 2d at 583.

188. LA. R.S. 9:5629 (Supp. 1977): "Actions for recovery of damages sustained in motor vehicle accidents brought pursuant to uninsured motorist provisions in motor vehicle insurance policies are prescribed by two years reckoning from the date of the accident in which the damage was sustained."

189. 418 So. 2d 648 (La. 1982).

190. 418 So. 2d 575 (La. 1982); see also *Matthews v. Insurance Co. of N. Am.*, 418 So. 2d 582 (La. 1982) (decided on the same date as *Hoefly*). For a discussion of the doctrine of "proportionate prescription" applied by the *Matthews* trial court, see Note, *Proportionate Prescription—An Alternative for Applying Changes in Liberative Prescriptive Periods*, 43 LA. L. REV. 777 (1983).

191. LA. CIV. CODE art. 2097. Cf. *Youngs v. Champagne*, 348 So. 2d 126 (La. App. 4th Cir. 1977) (the court held that a liability insurer of an alleged cotortfeasor may not assert a third party demand for contribution against the UM insurer of the plaintiff).

192. *United States Fire Ins. Co. v. Larson*, 317 So. 2d 217 (La. App. 4th Cir. 1975); *Travelers Ins. Co. v. Veal*, 280 So. 2d 285 (La. App. 3d Cir. 1973).

interrupt prescription on a claim by the same insurer for reimbursement of a UM claim paid after one year.¹⁹³

Penalties

Claims under UM coverage are first-party claims between an insured and his own insurer which apparently are governed by the penalty provisions of 22:658.¹⁹⁴ However, these claims are unique because liability of the insurer is predicated upon the liability of a third party. Furthermore, fixing the amount of the claim is difficult because of the uncertainty involved in measuring general damages for personal injuries. Most courts have refused to award penalties and attorney's fees for failure to pay uninsured motorist claims, either on the ground that the insurer has no obligation to pay until the legal liability of the alleged uninsured motorist is established¹⁹⁵ or on the ground that the insurer had reasonable cause to contest the claim.¹⁹⁶ Penalties were awarded in *Soniat v. State Farm Mutual Automobile Insurance Co.*,¹⁹⁷ under unusual circumstances; the insurer conceded liability for the policy limits of its UM coverage, but it refused to pay those limits unless and until the insured released a liability claim against the driver of the insured vehicle. Because of the unique nature of a UM claim, the penalty provision should be applied, if at all, only in situations where the insurer has clearly engaged in outrageous conduct to gain an economic advantage unrelated to the good faith negotiation of the UM claim. Otherwise, the insurer should enjoy the same rights as the tortfeasor to contest liability and damages.

Legal Interest

In *Hebert v. Ordoyne*,¹⁹⁸ the first circuit concluded that legal interest on a judgment awarding UM benefits runs from the date of judicial demand. The court relied on Louisiana Revised Statutes 13:4203, which sets that commencement date for interest on "all

193. *Liberty Mut. Ins. Co. v. Brawner*, 353 So. 2d 487 (La. App. 3d Cir. 1977). The insurer sought to assert the UM subrogation claim by amendment of the original petition.

194. This provision requires insurers to pay the amount of any claim within sixty days. If a failure to pay timely is found to be "arbitrary, capricious and without probable cause," the insurer is liable for a penalty of an additional twelve percent, plus reasonable attorney's fees.

195. *E.g.*, *Schoelen v. Fidelity & Cas. Co.*, 318 So. 2d 90 (La. App. 3d Cir. 1975); *Bubrig v. Phoenix of Hartford Ins. Co.*, 306 So. 2d 60 (La. App. 4th Cir. 1974).

196. *E.g.*, *Hawthorne v. Southeastern Fid. Ins. Co.*, 387 So. 2d 26 (La. App. 3d Cir. 1980); *McGrew v. State Farm Mut. Auto. Ins. Co.*, 385 So. 2d 1276 (La. App. 3d Cir. 1980).

197. 340 So. 2d 1097 (La. App. 4th Cir. 1976).

198. 388 So. 2d 407 (La. App. 1st Cir. 1980).

judgments, sounding in damages, 'ex delicto.'"¹⁹⁹ The third circuit disagreed in *Guidroz v. Tauzin*,²⁰⁰ holding that interest was due only from the date of judgment. That court reasoned that a UM claim was a suit in contract²⁰¹ upon which interest was recoverable from the time the debt became due.²⁰² *Guidroz* further held that the debt under UM coverage does not become due until there is a legal determination of the liability of the uninsured motorist and the extent of the insured's damages. Therefore, the third circuit awarded interest only from the date of judgment. This conflict in the circuits remains.

Multiple Claimants and Inadequate UM Limits

*Manieri v. Horace Mann Mutual Insurance Co.*²⁰³ involved the issue of whether a UM insurer, faced with multiple claims in excess of its policy limits, was required to prorate the coverage among its insureds. The policy had \$10,000 limits and covered bodily injury sustained in an automobile accident by three insureds. Two of the insureds were killed, and the plaintiff was injured. The insurer settled with the survivors of the deceased victims for \$4,250 each and offered the remaining \$1,500 to the plaintiff. The plaintiff contended that he was entitled to a larger share of the policy limits. The fourth circuit correctly questioned the applicability of decisions holding that a *liability* insurer has no duty to prorate the policy's limits among all victims.²⁰⁴ The court expressed grave concern as to whether the UM insurer should be able to favor one insured over another through settlement. However, the court found in favor of the insurer on the ground that

199. The court also relied on *O'Donnell v. Fidelity Gen. Ins. Co.*, 344 So. 2d 91 (La. App. 2d Cir. 1977), which contains a thorough review of the jurisprudence concerning the recovery of interest under *liability* insurance policies. The third circuit, in *Guidroz v. Tauzin*, 413 So. 2d 682 (La. App. 3d Cir. 1982), questioned the applicability of *O'Donnell* to a UM claim.

200. 413 So. 2d 682 (La. App. 3d Cir. 1982).

201. The court derived this classification from *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 218 So. 2d 580 (1968). See text at notes 184-193, *supra* (Prescription).

202. See LA. CIV. CODE art. 1938.

203. 350 So. 2d 1247 (La. App. 4th Cir. 1977).

204. In *Richard v. Southern Farm Bureau Cas. Ins. Co.*, 254 La. 429, 223 So. 2d 858 (1969) (and *Holtzclaw v. Falco Inc.*, 355 So. 2d 1279 (La. 1978) (on rehearing)), the supreme court held that the insurer may enter into reasonable and good faith settlements to be credited against its policy limits, even though such settlements diminish or exhaust the insurance available to other claimants. Noting that the policy expressly gives the insurer the right to settle, the court further recognized the jurisprudential development of a duty on the part of the liability insurer to utilize the settlement right in good faith and with reasonable care and skill for the protection of the interests of both the insured and the insurer. The court correctly concluded that this duty to protect its insured through settlement could not be reconciled with an additional duty to avoid preference among claimants.

the settlements in fact achieved substantial proration of the policy limits.

In *Palombo v. Broussard*,²⁰⁵ the third circuit applied the liability standard that an insurer acting in good faith may make reasonable settlements with some insureds even if this has the effect of reducing or exhausting coverage to the prejudice of other claimants.²⁰⁶ However, the court refused to give credit upon finding that the insurer had acted in bad faith.²⁰⁷

All insureds should share proportionately when uninsured motorist limits are inadequate to fully compensate all insureds. However, such claims seldom can be computed with mathematical precision since they involve the difficult determination of damages for personal injury and wrongful death. In addition, coverage is based upon the legal liability of a third party, which may well be a contested issue as to one or more insureds and may involve comparative negligence computations. Perhaps, without deciding the issue, *Manieri* offers the best solution by its suggestion that the insurer has a duty to consider the interest of all of its insureds, but the insurer has the discretion to make a reasonable distribution of the proceeds in an effort to achieve substantial proration. Since the issues of coverage, liability, and damages can be disputed and complicated, the insurer must be given wide discretion to determine each insured's fair share in order to encourage voluntary resolution of multiple claims.

Res Judicata

The recent Louisiana Supreme Court decision in *Doyle v. State Farm (Mutual) Insurance Co.*²⁰⁸ opens a wide door for relitigation of

205. 370 So. 2d 216 (La. App. 3d Cir. 1979).

206. See note 204, *supra*.

207. Mr. and Mrs. Palombo were passengers in a Buick automobile owned and operated by Mr. Lachaussee, whose wife was also a passenger. The Lachaussees owned two automobiles, each insured under separate State Farm policies with \$25,000 to \$50,000 UM limits. Under *Seaton v. Kelly*, 339 So. 2d 731 (La. 1976), and prior to the anti-stacking provision, the Lachaussees could stack the coverages under the two policies but the Palombos could not. Although the Palombos were more seriously injured, the court found that the insurer had deliberately insisted on settlement with the Lachaussees first for the purpose of decreasing the amount of coverage available to the Palombos. In addition, the insurer had misled the Lachaussees as to the coverage available to them. The insurer settled with the Lachaussees for \$35,000 and contended it only had \$15,000 remaining for the Palombos. The court refused to give credit for the "bad faith" settlement with the Lachaussees. Although the award is not clearly itemized in the opinion, it appears that the Palombos may have been awarded an amount in excess of the insurer's policy limits on the Buick. At most, the court should have prorated the Buick limits, as the primary coverage, among the four claimants.

208. 414 So. 2d 763 (La. 1982).

the extent of damages. The plaintiff was injured in an accident allegedly caused by the joint fault of the operator and the manufacturer of the other vehicle. He instituted suit in federal court against the manufacturer, which in turn filed a third party demand against the operator and her liability insurer. The plaintiff then filed suit in state court against the manufacturer, the operator, her liability insurer, and the plaintiff's own UM carrier. The state court suit was stayed pending the outcome of the federal litigation.

The plaintiff released the adverse driver and her liability insurer upon payment of the policy limits of \$10,000. The claim against the manufacturer was then tried on the merits in federal court, and a judgment was rendered in favor of the plaintiff in the amount of \$90,000. The judgment was satisfied, and no appeal was taken.

The plaintiff then renewed the state court action against the UM carrier. A motion for summary judgment in favor of the UM carrier was granted by the trial court and affirmed by the court of appeal.²⁰⁹ With two dissents, the supreme court reversed, holding that judicial estoppel does not apply in Louisiana and the requisite elements of res judicata did not exist. Thus, there was no bar to the plaintiff's relitigation of the extent of his damages with the UM carrier. A dissenting justice suggested that the court should have the equitable power to determine in a particular case that an already adjudicated issue should not be relitigated.²¹⁰

Under different facts, the third circuit refused to permit relitigation of the extent of damages. In *Holley v. Royal Globe Insurance Co.*,²¹¹ the plaintiffs brought suit against the driver of the other vehicle and his liability insurer. The driver's liability policy had limits of \$100,000. After trial, judgment was rendered in favor of the plaintiffs for the total sum of \$99,917.16. The judgment was satisfied. The plaintiffs then filed a second suit against their own UM insurer. The court affirmed the dismissal of the second suit. Although the court recognized that neither res judicata nor judicial estoppel was applicable, the court held that the tortfeasor was not an underinsured motorist

209. *Doyle v. State Farm Ins. Co.*, 406 So. 2d 261 (La. App. 3d Cir. 1981).

210. The majority indicated that the UM carrier could not be joined in the federal court suit without defeating diversity jurisdiction under the provisions of 28 U.S.C. § 1332(c) (1976). However, this section provides only that a liability insurer sued in a direct action is deemed to be a citizen of the state of its insured. Therefore, § 1332(c) apparently would not preclude a UM claim if diversity of citizenship otherwise existed. State Farm happened to be the insurer of both the adverse vehicle and the plaintiff's automobile. The release of the liability claim included the reservation of the right to proceed against State Farm in its capacity as the UM carrier. The extent to which this factor influenced the court is not apparent from the majority opinion.

211. 407 So. 2d 32 (La. App. 3d Cir. 1982).

because the liability policy limits had not been exhausted. Whether *Holley* survives *Doyle* is an unanswered question. However, relitigation of the extent of damages is an inefficient process, and the issue needs to be rethought either judicially or legislatively.²¹²

CONCLUSION

In its first twenty years, uninsured motorist coverage in Louisiana has developed dramatically. Some unresolved issues remain. For the most part, however, this extremely important protection for motorists has reached an equilibrium, legislatively and judicially, where the vast majority of claims can be adjusted with certainty as to the rights and responsibilities of the parties. Nevertheless there will always be a substantial amount of litigation of UM claims. This is assured because of the issues of liability and quantum of damages necessarily involved in such claims, as well as the remaining coverage issues. However, those involved in the handling of UM claims can look back with nostalgic fascination at the first twenty years of UM coverage in Louisiana, during which this unique insurance concept grew rapidly from infancy to maturity.

212. The roles on the relitigation issue can be reversed. If the insured first pursues his claim against the uninsured or underinsured motorist and obtains a judgment which the UM insurer believes is excessive, the UM insurer certainly will contend that it is not bound by the determination of damages in the suit in which it was not given the opportunity to participate. Notions of due process and specific policy language protect the insurer in this situation. Unlike the reverse situation, however, the insurer would not be responsible for such piecemeal litigation. On the other hand, the insured should be encouraged to litigate all of his liability and UM claims in the same action.