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# Public Law: Insurance

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## INSURANCE OF THE PERSON

*Moore v. Prudential Insurance Co.*[1] concerned a claim under an accidental death and dismemberment policy which excluded loss caused by disease or bodily infirmity.[2] The plaintiff had developed osteomyelitis, a bone infection, following two previous fractures, which condition each time had become quiescent after lengthy convalescence. When the plaintiff suffered a third fracture, the treating physician decided to amputate because any attempt to save the plaintiff's leg would undoubtedly result in a flare up of osteomyelitis. The Louisiana supreme court allowed recovery of the policy benefits for loss of a leg, finding that a pre-existing latent or dormant condition does not prevent recovery where the accident is the "predominant, moving, proximate cause"[3] of the loss.[4] Similarly, *Martin v. American Benefit Life Insurance Co.*[5] involved a claim for disability benefits under a health and accident insurance policy which excluded loss "caused wholly or in part, directly or indirectly by any disease, defect or infirmity. . . ."[6] The plaintiff claimed disability from an automobile accident which resulted in aggravation of his pre-existing arthritic condition. The Louisiana supreme court again allowed recovery, finding that the pre-existing condition was dormant and would not have been disabling without the injury received in the accident. The court's "proximate cause" test appears to be directly contrary to the clear and unambiguous limitations of coverage in the policies.[7]

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1. 278 So. 2d 481 (La. 1973).

2. The policy covered "loss of life, sight or limb as a result, directly and independently of all other causes, of bodily injuries effected solely through external, violent and accidental means. . . ." In addition, the policy excluded any loss caused "directly or indirectly, by . . . disease or bodily . . . infirmity, or medical or surgical treatment thereof . . . or bacterial infection." *Id.* at 482.

3. *Id.* at 483.

4. Both the trial court and the court of appeal had denied recovery. *See* Moore v. Prudential Ins. Co., 263 So. 2d 456 (La. App. 1st Cir. 1972).

5. 294 So. 2d 200 (La. 1974).

6. The policy insured "against loss . . . resulting from bodily injuries effected solely, directly and independently of all other causes through EXTERNAL VIOLENT AND ACCIDENTAL MEANS, which . . . shall not be caused wholly or in part, directly or indirectly by any disease, defect or infirmity. . . ." In addition, the policy excluded disability "caused or contributed to directly or indirectly, wholly or partly: (1) By disease in any form . . . ." *Id.* at 201.

7. In *Jennings v. Louisiana & S. Life Ins. Co.*, 290 So. 2d 811 (La. 1974), the

The life insurance policy in *Suire v. Combined Insurance Co.*[8] required that suit be brought within four years and sixty days after death. The policy was discovered by the beneficiary eight years after the death of the insured. Although the Louisiana supreme court upheld the validity of a clause fixing a reasonable time in which to institute suit on a policy, the court accepted the general rule from other jurisdictions that failure to file suit because of ignorance of the policy does not defeat recovery where the failure to discover the policy was not due to the fault of the beneficiary.

### LIABILITY AND RELATED COVERAGE

Under prior revisions of comprehensive general liability policies, the courts had concluded that the policy in effect when the negligence occurs provides coverage even though the damage does not result until after the policy expires.[9] To avoid this interpretation, insurers redrafted the comprehensive general liability policy to provide coverage on an "occurrence" basis.[10] In *Oceanonics, Inc. v. Petroleum Distributing Co.*,[11] the Louisiana supreme court held that insurers had achieved their purpose, finding there was nothing contrary to public policy in excluding coverage for damage sustained after the expiration of the policy even though the delictual act was committed during the policy period.[12]

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Louisiana supreme court held that silicosis was an "injury" and not a "sickness," notwithstanding the fact that silicosis is classed as an "occupational disease" under the workmen's compensation laws. The policy provided more lucrative benefits for disability from injury.

8. 290 So. 2d 271 (La. 1974).

9. The leading case is *Kendrick v. Mason*, 234 La. 271, 99 So. 2d 108 (1958).

10. The applicable policy language is set forth in the court of appeal decision in *Oceanonics, Inc. v. Petroleum Distrib. Co.*, 280 So. 2d 874, 876 (La. App. 3d Cir. 1973):

> "In connection with the completed operations coverage, the policy also provides that:
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> > " 'The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an *occurrence*.'
>
> "The word 'Occurrence' is defined in the policy as meaning . . . 'an accident, including injurious exposure to conditions, which results, *during the policy period*, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.'
>
> "The policy also stipulates that, 'This insurance applies only to bodily injury or property damage *which occurs during the policy period* within the policy territory.' "

11. 292 So. 2d 190 (La. 1974).

12. A similar result was reached in *Mut v. Newark Ins. Co.*, 289 So. 2d 237 (La. App. 1st Cir. 1974). In another supreme court case dealing with the definition of

Many professional liability and errors and omissions policies are written on a "claims made" basis. These policies provide coverage for negligent acts occurring during the policy period provided the claim is also made against the insured during the policy period. In *Livingston Parish School Board v. Firemen's Fund American Insurance Co.*,[13] an engineer was covered under a professional liability policy during the time he was engaged in the construction of a building.[14] Three days after he allowed his policy to lapse, the building collapsed. In dismissing the engineer's claim against his insurer, the Louisiana supreme court held that the policy unambiguously limited coverage to acts discovered and reported during the policy term and that such coverage condition was not contrary to public policy.[15]

*Reichart v. Continental Insurance Co.*[16] presented the res nova issue whether the insurer's obligation to defend included the obligation to appeal a judgment adverse to the insured. Accepting the minority position among other states, the First Circuit Court of Appeal held that the insurer does have the obligation to appeal where a substantial interest of the insured reasonably may be served or protected by appeal. In *Reichart,* the court found there was a serious issue whether the award beyond the policy limits was excessive; therefore, the insurer was obligated to appeal.[17] This decision appears to be a fair interpretation of the policy language.[18]

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"occurrence," numerous plaintiffs sued for property damage caused during a canal construction project. The court refused to accept the insurer's contention that the entire project was one occurrence as defined in the policy which would have limited total recovery by all plaintiffs to the stated limits of liability for one occurrence. The court concluded that the damage sustained by each plaintiff was a separate occurrence. Lombard v. Sewer & Water Bd., 284 So. 2d 905 (La. 1973).

13. 282 So. 2d 478 (La. 1973).

14. The policy provided:

> "(a) During the Policy Period
>
> "The insurance afforded by this policy applies to errors, omissions or negligent acts which occur within the United States of America, its territories or possessions, or Canada during this policy period *if claim therefore is first made against the insured during this policy period.*" *Id.* at 480 n.2.

15. The insurance industry cites inflation as the justification for policies written on a "claims made" or "occurrence" basis. Such policies permit the payment of current claims out of current premiums which have been adjusted to reflect current awards and loss experience. Of course, these provisions also discourage an insured from allowing his coverage to lapse which generates more premium dollars.

16. 290 So. 2d 730 (La. App. 1st Cir.), *writ refused,* 294 So. 2d 545 (La. 1974).

17. *Id.* at 735. The court also awarded penalties and attorney's fees under LA. R.S. 22:658 (1950), *as amended by* La. Acts 1958, No. 125, holding that an insurer's failure to properly interpret its own policy, even if the issue is res nova, does not constitute a reasonable ground for refusal to pay.

18. The only policy language quoted by the court was: " '[T]he company shall

The courts have continued to broaden uninsured motorist coverage by striking down any policy provision standing in the way of stacking the statutory minimum coverage per vehicle. The most significant extension occurred in *Wilkinson v. Firemen's Fund Insurance Co.*,[19] in which the insured was allowed to stack the limit of liability for each vehicle under a single policy covering three vehicles.[20] *Rascoe v. Wilburn*[21] is the first case to involve the 1972 amendments to R.S. 22:1406 which introduced the concept of "underinsured" motorist coverage.[22] The case permits stacking of coverage under separate policies to aggregate uninsured motorist coverage in amounts in excess of the liability coverage of the negligent motorist. The opinion is not clear as to whether the insureds are entitled to recover the total uninsured motorist limits in addition to the liability coverage or whether their recovery is limited to the amount by which their uninsured motorist coverage exceeds the applicable liability coverage.[23] The 1972 amendment seems clearly to restrict recovery to the latter. However, where injuries justify such an award, the 1974 amendment of R.S. 22:1406 now appears to allow recovery of the total

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defend any suit alleging such bodily injury or property damages which are payable under the terms of the policy, even if any of the allegations of the suit are groundless, false or fraudulent.' " 290 So. 2d at 732.

Some policies contain additional language similar to the following: "But the company shall not be obligated . . . to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements." Such provision should negate any obligation to appeal when the insurer elects to satisfy the trial court judgment against it, thereby exhausting its limits of liability.

19. 298 So. 2d 915 (La. App. 3d Cir.), *writ refused*, 302 So. 2d 304 (La. 1974).

20. Prior decisions, including the Louisiana supreme court decisions in *Deane v. McGee*, 261 La. 686, 260 So. 2d 669 (1972), and *Graham v. American Cas. Co.*, 261 La. 85, 259 So. 2d 22 (1972), all involved the stacking of the limits of liability for two or more vehicles insured under *separate* policies.

Several cases nullified exclusions designed to prevent coverage when the insured was occupying another "owned" vehicle. Chateau v. Smith, 297 So. 2d 268 (La. App. 4th Cir. 1974); Thomas v. Nelson, 295 So. 2d 847 (La. App. 1st Cir. 1974); Rascoe v. Wilburn, 295 So. 2d 201 (La. App. 3d Cir. 1974); Roberie v. State Farm Mutual Auto. Ins. Co., 291 So. 2d 293 (La. App. 3d Cir. 1974). The *Chateau* and *Thomas* cases permitted insureds with automobile policies to recover for injuries sustained by riding uninsured motorcycles.

21. 295 So. 2d 201 (La. App. 3d Cir. 1974).

22. LA. R.S. 22:1406(D)(2)(b) (Supp. 1964), *as amended by* La. Acts 1972, No. 137: "For the purposes of this coverage the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the uninsured motorist coverage carried by an insured."

23. The trial court had granted the insurer's motion for summary judgment. The case was reversed and remanded.

uninsured motorist limits in addition to the liability coverage of the negligent motorist.[24]

R.S. 22:636 provides that written notice of cancellation "must be actually delivered or mailed to the insured." In *Broadway v. Allstar Insurance Corp.*,[25] the Louisiana supreme court held that this statute requires actual receipt of the notice of cancellation. Proof of deposit of the cancellation in the mail creates only a prima facie presumption of delivery which can be overcome by proof of non-delivery.[26]

The landmark Louisiana supreme court decision in *Canter v. Koehring Co.*,[27] firmly established the legal basis for a claim by one employee against a fellow employee of the same corporation arising out of the breach of a duty delegated to the fellow employee by the corporation. The financial reward in most such claims comes from the extension of coverage in the comprehensive general liability policy to include "executive officers" as additional insureds. In *Galloway v. Employers Mutual*,[28] a shop foreman who was in charge of the entire manufacturing operation of a small corporation was held to be an "executive officer" within the meaning of the insurance policy. There was a persuasive dissent on the issue of contributory negligence. The majority opinion on this issue will strain the credulity of most readers. The fact that the majority found it necessary to engage in such forced logic to make an award to a seriously injured workman is compelling evidence that tort law is not the proper vehicle for compensation of industrial accident victims. The legislature should enact a fair workmen's compensation system which provides adequate benefits for truly disabled employees as their exclusive remedy against both their employer and fellow employees.

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24. LA. R.S. 22:1406(D)(2) (Supp. 1964), *as amended by* La. Acts 1974, No. 154: "For the purposes of this coverage the term uninsured motor vehicle shall, subject to the terms and conditions of such coverage, also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of damages suffered by an insured and/or the passengers in the insured's vehicle at the time of an accident, as agreed to by the parties and their insurers or as determined by final adjudication."

25. 285 So. 2d 536 (La. 1973).

26. In this case the agent rather than the company had sent the notice of cancellation. After reviewing the agency contract, the court also concluded that the agent had no authority to cancel the policy and that its attempt to do so was ineffectual. Following *Broadway*, the court in *Automobile Club Ins. Co. v. Aaron*, 296 So. 2d 464 (La. App. 4th Cir. 1974), found that the insured had overcome the presumption with testimony that neither the insured nor the mortgage holder had received notice of cancellation.

27. 283 So. 2d 716 (La. 1973).

28. 286 So. 2d 676 (La. App. 4th Cir.), *writ refused*, 290 So. 2d 333 (La. 1974).