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Insurance

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INSURANCE

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LIFE INSURANCE

Decisions during this term on the subject of life insurance were, for the most part, unremarkable. There were the usual disagreements over applicable prescriptive periods,[1] and assertions of liability for failure to procure coverage or refusal to insure after the applicant believed that insurance would be issued.[2] But the decision in *In re Hamilton*,[3] concerning the rights of a beneficiary who causes the death of the insured, raises very important questions of policy and statutory interpretation which should be considered in more detail in this forum.

The insured and the beneficiary lived in a so-called "common-law spouse" relationship. On one particular evening, Mr. Hamilton was intoxicated, and a violent argument ensued. His "spouse" stabbed him several times, inflicting fatal wounds.

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1. Davis v. Security Indus. Ins. Co., 446 So. 2d 419 (La. App. 4th Cir. 1984) (The plaintiff brought suit on life insurance policy eighteen months after insured's death, despite a policy provision limiting such an action to one year and 60-day period after death; the court upheld the policy restriction on limitation of action, especially in light of plaintiff's having had possession of policy and not having offered any excuse for his untimely demand.); Lord v. Metropolitan Life Ins. Co., 434 So. 2d 1179 (La. App. 1st Cir. 1983) (The *cestui que vie* mysteriously disappeared; the last date for coverage under group policy was April 28, 1969 and suit was filed on April 23, 1980; the court held that the 10-year prescriptive period of the Civil Code was applicable.).

2. Beam v. Intercontinental Life Ins. Co., 447 So. 2d 12 (La. App. 2d Cir. 1984) (reasonable diligence on the part of an agent, and no reliance on the part of an insured who did not cooperate in obtaining medical examination; no policy issued); Davis & Landry, Inc. v. Guaranty Income Life Ins. Co., 442 So. 2d 621 (La. App. 1st Cir. 1983) (No unreasonable delay in processing application; the premium receipt language did not provide coverage because of conditions requiring risk approval before coverage attached.); Kieffer v. Southern United Life Ins. Co., 437 So. 2d 919 (La. App. 2d Cir.), cert. denied, 442 So. 2d 456 (La. 1983) (A credit life request was involved; the bank issued the certificate with notice of the right to decline coverage within 31 days; within the stated term, the insurer declined coverage; the cancellation was held to be effective.).

3. 446 So. 2d 463 (La. App. 4th Cir.), cert. denied, 448 So. 2d 105 (La. 1984) (Calogero, Dennis & Lemmon, JJ., specially concurring in writ denial with the comment that "the statute in question prohibits recovery by a beneficiary adjudged guilty of an intentional *act* which results in his criminal responsibility for the insured's death.").

His assailant pleaded guilty to a charge of manslaughter under Louisiana Revised Statutes 14:31.[4] A dispute arose over the distribution of the proceeds of a life insurance policy on his life. His legal spouse and children claimed those proceeds for the estate as against the claims of the assailant, contending that under Louisiana Revised Statutes 22:613(D) she would not be entitled to her rights as beneficiary under the policy because she was "criminally responsible" for the death of the insured.[5] Noting some ambiguity in the statute,[6] the court nonetheless held that the plea to manslaughter resulted in a holding of criminal responsibility for the death of the insured. Thus, it reversed the summary judgment in favor of the assailant and granted that of the legal spouse and children.

Every jurisdiction must face the question of a potential bar to recovery of the policy proceeds by the beneficiary due to his own conduct. These cases almost always involve the homicide of the insured at the hands of the beneficiary, and Louisiana has its share of such cases. The primary issues in most cases are a factual determination of whether the killing may have been justifiable, even in a criminal sense, and whether the presence or absence of a criminal conviction will be conclusive in a civil proceeding involving the insurance proceeds.

For most of its judicial history, Louisiana has resolved such problems without the assistance of a statute. In one of the earliest cases reported, a concubine had shot her paramour in what was established to be self-defense (though she shot him in the back.)[7] The insurer provoked a concursus proceeding to decide a dispute over the proceeds of a life insurance policy between the beneficiary (the concubine) and the administrator of the estate of the insured decedent. The trial court had agreed with the administrator's argument that even though self-defense might be shown, public policy would require that she not be entitled to the proceeds of the policy. The appellate court disagreed, holding that if the killing was in self-defense, it was the exercise of a "natural

4. Apparently, the plea was to a charge under the criminal code, La. R.S. 14:31(2)(a) (1974): "Manslaughter is . . . (2) A homicide committed, without any intent to cause death or great bodily harm. . . . (a) When the offender is engaged in the perpetration or attempted perpetration. . . of any intentional misdemeanor directly affecting the person . . . ."

5. See La. Insurance Code: La. R.S. 22:613(D) [hereinafter cited as La. Ins. Code]:

> No beneficiary, assignee, or other payee under any personal insurance contract shall receive from the insurer any benefits thereunder accruing upon the death . . . of the individual insured when said beneficiary . . . is held by a final judgment of a court of competent jurisdiction to be criminally responsible for the death . . . of the individual insured . . . .

6. For other aspects of the decision centering on these issues, see Johnson, Developments in the Law, 1983-84—Legislative Procedure and Interpretation, 45 La. L. Rev. 341, 342 (1984).

7. National Life & Acc. Ins. Co. v. Turner, 174 So. 646 (La. App. Orl. 1937).

right" of the beneficiary. Thus, she could not be denied the proceeds on the alleged basis that she would profit from her own "wrongdoing."

Some dissent from this view may be found in *Hollander v. Good Citizens Mutual Benefit Association.*[8] A wife (the beneficiary of the policy) had killed her husband (the insured) under circumstances in which self-defense was a clear possibility. The policy contained a provision denying coverage if the insured's death was the result of a "violation of law." The court held that under either version of the facts, the wife could not recover under the policy. If the beneficiary had not acted in self-defense, then the homicide was clearly in violation of law. Furthermore, even if she had acted in self-defense, the insured's conduct directed at her was in violation of law.[9] Thus, the court reversed the lower court's award of the policy proceeds to the attorney to whom they had been assigned by the wife—an incidental point of which the court took no formal notice. The court distinguished the case discussed in the preceding paragraph on the ground that the opinion did not reflect that the policy contained a "violation of law" clause requiring denial of benefits. Curiously, *Hollander* has never been cited for its interpretation of the "violation of law" provision in this factual context.

Whatever comfort insurers might have gotten from *Hollander* probably was destroyed by the decision of the supreme court in *American National Life Insurance Co. v. Shaddinger.*[10] Again, the combatants were the spouses, and the beneficiary claimed to have killed the insured in self-defense. Citing numerous cases from other jurisdictions, the court announced the rule that a beneficiary named in a life insurance policy is not entitled to the proceeds of the insurance if he or she "feloniously kills the insured." But it also noted that the intentional killing by the beneficiary of the person insured, if committed in lawful self-defense, will not prevent the beneficiary from claiming the proceeds of the insurance on his life. Nothing in the opinion suggested that a "violation of law" clause was at issue, so *Hollander* was not even mentioned,

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8. 193 So. 903 (La. App. Orl. 1940). Cf. Davis v. Unity Life Ins. Co., 43 So. 2d 67 (La. App. Orl. 1949) (A reversal of the judgment for the beneficiary and remanded for the taking of additional evidence on the circumstances of death; the insurer was urging the defense of no coverage when death results from intentional act of person other than insured—presumably whether felonious or not.).

9. The two Louisiana cases cited by the court in support of its reasoning did not involve a homicide by the beneficiary in alleged self-defense. One was a denial of benefits on the ground that the insured was intoxicated when killed in a traffic accident he probably caused, and the other was a denial because the insured was participating in an illegal card game when shot by another participant. Geddes & Moss Undertaking & Embalming Co. v. First Nat'l Life Ins. Co., 167 So. 881 (La. App. Orl. 1936) (The plaintiff was a funeral home which had been assigned the policy proceeds by a beneficiary); Landry v. Independent Nat'l Life Ins. Co., 135 So. 110 (La. App. Orl. 1931) (The plaintiff was the actual beneficiary.).

10. 205 La. 11, 16 So. 2d 889 (1944).

much less overruled. In effect, the court permitted the beneficiary to recover under circumstances which established an assault with a deadly weapon by the insured on the beneficiary. Under these circumstances, one could argue that *Shaddinger* did not deny the possibility that if the policy had contained a "violation of law" provision, the court could have concluded that the insured's conduct was such a violation and could have denied recovery regardless of whether the beneficiary acted in self-defense or not.

If there were any "violation of law" provisions in the policies at issue, subsequent Louisiana decisions do not mention them. Louisiana courts' resolution of the issue usually is limited to permitting recovery for the beneficiary if the facts justify a finding of self-defense[11] and denying recovery if they do not justify such a finding.[12]

In appropriate cases, our courts have had to deal with requested extensions of the basic propositions discussed above. It has been held that when the beneficiary/widow and the insured decedent spouse lived together in a community of acquets and gains, the felonious killing of the insured by the beneficiary not only dissolves the community, but causes the forfeit of any potential interest in the policy proceeds which the beneficiary/widow might have had.[13] A guilty plea by the beneficiary to a criminal charge of felonious killing was held admissible in a civil proceeding involving disposition of the policy proceeds, but is not conclusive as a matter of law.[14] If it can be shown that the beneficiary has fradulently procured the insurance without the insured's consent as a part of a scheme to kill the spouse for the insurance proceeds, the policy is null, even with respect to the estate of the insured and his heirs at law.[15]

In 1979, very possibly as a result of a celebrated case in which a beneficiary spouse had poisoned her husband and later sought recovery

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11. See, e.g., Provident Life & Acc. Ins. Co. v. Carter, 345 So. 2d 1245 (La. App. 1st Cir. 1977).

12. See, e.g., Southern Life & Health Ins. Co. v. Mack, 17 So. 2d 370 (La. App. Orl. 1944), (The testimony of a blind "witness" to the killing was accepted over that of the beneficiary in order to hold that the killing was not in self-defense; the proceeds were awarded to the estate of the insured and to the heirs at law.).

13. Succession of Butler, 147 So. 2d 684 (La. App. 4th Cir. 1962) (Beneficiary charged with murder and pled to manslaughter; assignee of her purported interest in proceeds had no right to them.).

14. Smith v. Southern Nat'l Life Ins. Co., 134 So. 2d 337 (La. App. 4th Cir. 1961). See Note, Insurance—Felonious Killing of Insured by Beneficiary, 36 Tul. L. Rev. 579 (1962). *Hamilton* might suggest a change in this position.

15. Flood v. Fidelity & Guar. Life Ins. Co., 394 So. 2d 1311 (La. App. 1st Cir.) (The wife had earlier been convicted of poisoning her husband and a criminal conviction reflected economic motives for doing so involving an insurance policy on his life; the court held that the policy had been obtained on a fraudulent basis and denied recovery to the "estate" of the murdered spouse, which recovery would probably have inured to the benefit of the only child of the marriage.), cert. denied, 399 So. 2d 608 (1981).

on the policy she had obtained as a part of her scheme,[16] the legislature provided a statutory basis for the disqualification of a beneficiary. The statute prohibits the receipt of any proceeds of a life insurance policy by a "beneficiary, assignee or other payee" when such a person "is held by a final judgment of a court of competent jurisdiction to be criminally responsible" for the death of the insured. The prohibition extends neither to payment of funeral expenses for the insured under an assignment, nor to payment under a facility of payment clause (unless to the disqualified person).[17]

The codification, while aimed at an entirely laudatory objective, is not wholly satisfactory. In the first place, its standard for disqualification is not completely consistent with the standards for disqualification of an intestate heir or of a legatee (as they read as of this writing). A person is unworthy of succeeding as an intestate heir if he has been "convicted of having killed, or attempted to kill, the deceased," as well as upon other grounds not pertinent here.[18] A legatee may not receive his legacy if he has "unlawfully taken the life of the testator"; in such a case, the legacy is deemed to be revoked as a result of his conduct.[19] A simple example will demonstrate the inconsistencies among these various standards. Assume that W and H are a childless couple. Each has

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16. The *Flood* case cited in the immediately preceding footnote.

17. See La. Ins. Code § 613(D) which states:

> No beneficiary, assignee, or other payee under any personal insurance contract shall receive from the insurer any benefits thereunder accruing upon the death, disablement, or injury of the individual insured when said beneficiary, assignee, or other payee who is held by a final judgment of a court of competent jurisdiction to be criminally responsible for the death, disablement or injury of the individual insured. Where such a disqualification exists, the policy proceeds shall be payable to the secondary or contingent beneficiary, unless similarly disqualified, or, if no secondary or contingent beneficiary exists, to the estate of the insured. Provided, that nothing contained herein shall prohibit payment pursuant to an assignment of the policy proceeds where such payment defrays the cost and expenses of the insured's funeral or expense incurred in connection with medical treatment of the insured. Provided, also, that nothing contained herein shall prohibit payment of insurance proceeds pursuant to a facility of payment clause, so long as such payment is not made to a beneficiary, assignee or other payee disqualified by this Section.

18. See La. Civ. Code art. 966 ("Persons unworthy of inheriting, and, as such, deprived of the successions to which they are called, are the following: (1) Those who are convicted of having killed, or attempted to kill, the deceased; and in this respect they will not be the less unworthy, though they may have been pardoned after their conviction. (2) Those who have brought against the deceased some accusation found calumnious, which tended to subject the deceased to an infamous or capital punishment. (3) Those who, being apprised of the murder of the deceased, have not taken measures to bring the murderer to justice.").

19. La. Civ. Code art. 1691(6) ("However, in all cases, a legacy or disposition shall be deemed revoked in the event that the legatee has unlawfully taken the life of the testator, and said legacy or disposition shall be deemed not written.").

a sibling. Each has a testament naming the other as universal legatee. There is a life insurance policy on the life of husband naming wife as beneficiary. Assume that W shoots H (not in self-defense) and then commits suicide. W will never be "convicted" of having killed H under the intestate heir provision for the simple reason that a criminal prosecution abates upon the death of the accused. But since the standard for revocation of a legacy is not limited to a conviction, it could arguably be established in a civil proceeding that she had "unlawfully" taken her husband's life. But if the contingent beneficiary is the "estate" of H, might she not receive the right to his share of the community as his intestate heir, which would then pass to her sibling upon her death? Additionally, with respect to the proceeds of the policy, can it not also be said that no court of competent jurisdiction could ever hold her "criminally responsible" for her husband's death, due to her own death? And if that is true, does not the wife then have a right to the policy proceeds, a right which will subsequently belong to her sibling at her death?

These interpretations lead to a disturbing result. All of the community property (W's half and H's half) and the insurance proceeds ultimately belong to W's sibling rather than H's sibling, even though W's sibling's rights must of necessity derive completely from the rights of W, who murdered her husband.[20]

The foregoing problems can be resolved by amending the statutes governing the question of disqualification of intestate successors, testate successors, and policy beneficiaries so that the same standard will apply to all three. This assumes, of course, that the policy decision is made that all such successors should be treated alike—there appears to be no reason why they should not.

Any proposed amendment must deal with the additional problems posed by the language of Louisiana Revised Statutes 22:613(D) as it presently reads. That statute provides that a beneficiary is disqualified if, by final judgment of a court of competent jurisdiction, he is held to be "criminally responsible" for the death of the insured. Is this meant to be the equivalent of a criminal conviction, and if so, why did the legislature not say so specifically? Could this mean that a court exercising civil jurisdiction could conclude that the beneficiary "would have been criminally responsible" if he had been tried in a criminal proceeding and disqualify him on that basis? If so, should it use the criminal standard of proof beyond a reasonable doubt to do so?

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20. See Succession of Medica, 163 So. 2d 425 (La. App. 2d Cir.) (The husband killed his wife and then committed suicide; the court refused to hold him an unworthy heir because the statute called for a "conviction" because of the killing of his wife; due to his death, he was never convicted of the crime.), cert. denied, 246 La. 379, 164 So. 2d 362 (1964).

A person may be "criminally responsible" for a death though not guilty of "intentional" homicide—if convicted of manslaughter, for example. This would be broader than the prior jurisprudential rule of "intentional and felonious" killing. The *Hamilton* decision seemingly indicates that this broader ruling may prevail.

In addition, the term "criminally responsible" is imprecise, a problem that the court in *Hamilton* encountered. A person who dies before the completion of a criminal proceeding will never be convicted of the crime, though he might be considered "criminally responsible" by some. A person acquitted of a crime by reason of insanity is not convicted but might also be considered by some to be "criminally responsible."[21] The assailant in *Hamilton* was "criminally responsible" for an assault, but should she be considered "criminally responsible" for the death if convicted under the portion of the Criminal Code dealing with non-intentional homicide? The court in *Hamilton* thought she should:

> When Joann Hamilton pled guilty to manslaughter she admitted criminal responsibility for Mr. Hamilton's death, notwithstanding her contention that she did not intend to kill him. There is no doubt that Joann Hamilton's intentional assault on Mr. Hamilton contributed to his death. The statute does not require more than a finding by a court of competent jurisdiction that the beneficiary was criminally responsible for the death of the insured.[22]

One must also consider whether the statute is intended to be exclusive. Whatever "criminally responsible" may be intended to mean, is this the only basis upon which a person may be disqualified. The jurisprudence prior to the statute did not appear to be based upon criminal conviction, through the court usually spoke of "felonious and intentional" killing. The statute does not provide that its standard is the *only* basis upon which disqualification may be based, but rather that disqualification occurs *if* its tenets are satisfied. The court did not have to face that question in *Hamilton*, since it held that the statutory requirement was fulfilled.

These are not idle academic questions. In *California-Western States Life Insurance v. Sanford*,[23] the court dealt with a number of them. An estranged husband had killed his wife, but was acquitted of the criminal charge on the basis of insanity. The insurer commenced an interpleader action to resolve the dispute between the husband/beneficiary and the children who would inherit the proceeds (if payable to the estate

21. See California-Western States Life Ins. Co. v. Sanford, 515 F. Supp. 524 (E.D. La. 1981).

22. 446 So. 2d at 465.

23. 515 F. Supp. 524 (E.D. La. 1981).

as a secondary beneficiary). The husband sought a summary judgment on the basis that Louisiana Revised Statutes 22:613(D) was the exclusive ground for disqualification and that since he had been acquitted of the crime, he could not be disqualified as beneficiary. The court denied the motion on several grounds. First, the court reasoned that the absence of the word "conviction" from the statute suggested that a Civil court could find "criminal responsibility" sufficient to deny recovery under the policy. Second, the court concluded that the statute must be interpreted as an extension of the jurisprudential principles evolved by the Louisiana courts rather than as an abrogation of them. Thus, the statute's intent was to make a criminal conviction conclusive as to disqualification and thereby to relieve the opposing party of proving disqualification. But it was not meant to require a conviction as a prerequisite to disqualification, since that previously had not been the law. The court therefore held that the children were entitled to litigate the issue of their father's sanity in a civil proceeding, and inferentially held that they would be entitled to the proceeds of the policy as heirs if they proved he was sufficiently sane to satisfy traditional Louisiana jurisprudential principles.

Legislative clarification of Louisiana Revised Statutes 22:613(D) and the Civil Code articles on disqualification of heirs and legatees is needed. Such amendments should be much more specific than the present provisions. If it is sufficient to disqualify a successor that he had been involved[24] in the "intentional and unjustifiable" killing of the person in question (regardless of the presence or absence of a criminal conviction) that should be clearly stated. Such a statement, while not only much clearer in its expression of the ground upon which disqualification is based, would also eliminate all of the problems emanating from the various reasons for which a criminal conviction might not be obtained (excluded evidence, death of accused, insanity, and others). The amendments should also make clear whether other non-intentional, but nonetheless "criminal" acts might suffice for disqualification: negligent homicide, vehicular homicide, and other conduct of a reckless, though not intentional, nature.

Due to the different nature of the criminal trial process, disqualification of civil successors such as beneficiaries and heirs should not be tied to that process. Rather, one should identify the type of conduct which should bar a civil successor and then require it to be proved in a civil proceeding. There is nothing wrong with making conviction of a crime involving intentional homicide an automatic disqualification.

24. This word would be broad enough to include the "contract killing" of one spouse by the other, for example, even though the conspirator spouse was not actually the killer.

However, it should remain open to claimants to establish disqualification on specific statutory grounds other than a criminal conviction, such as upon satisfactory proof of involvement in an intentional and unjustifiable homicide.

UNINSURED MOTORIST COVERAGE

Mandatory Coverage

Louisiana Revised Statutes 22:1406(D)(1)(a) provides that no "automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle" shall be issued unless uninsured motorist (UM) coverage is provided therein with the same limits as the bodily injury liability coverage (unless the insured rejects such coverage or select lower limits).[25] In *Southern American Insurance Co. v. Dobson*,[26] the plaintiff was driving a truck owned by Dobson Pulpwood Company when he was severely injured through the negligence of an underinsured motorist. Plaintiff claimed UM coverage under three policies issued to Dobson Pulpwood. Aetna issued an automobile liability policy specifically covering the truck, which provided both liability and UM coverage with $100,000 limits. Southern American issued a commercial umbrella liability insurance policy which provided liability coverage up to a limit of $1,000,000 in excess of the limits of underlying liability policies including the Aetna automobile liability policy. In addition, Dobson Pulpwood obtained a commercial excess umbrella liability

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25. La. Ins. Code § 1406(D)(1)(a):

> 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 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; provided, however that the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject in writing the coverage or selects lower limits. Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer. 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.

26. 441 So. 2d 1185 (La. 1983).

policy from Northeastern with coverage in the amount of $2,000,000 in excess of the Southern and other underlying policies. Although the Southern and Northeastern policies provided excess automobile liability insurance, neither policy expressly afforded uninsured motorist protection, nor had either company obtained a written waiver of UM coverage from the named insured. Both Southern and Northeastern filed suits for declaratory judgments that their policies did not provide UM coverage. The trial court entered judgment against the insurers. The third circuit court of appeal reversed, holding that Louisiana Revised Statutes 22:1406(D)(1)(a) required UM coverage only under an automobile liability policy and that umbrella policies were not automobile liability policies within the meaning of the UM statute.[27] On original hearing with three dissents, the Louisiana Supreme Court affirmed. On rehearing, again with three dissents, the supreme court reversed the decision of the court of appeal, holding that Louisiana Revised Statutes 22:1406(D)(1)(a) mandates UM coverage, not just under an automobile liability policy, but under any policy providing automobile liability insurance.[28] The majority found such result dictated by the plain language of the statute and the public policy considerations behind it.

Prior to Act 438 of 1977, the UM statute did not specify the form or procedure required for effective rejection or selection of lower limits.[29] This amendment required a document signed by the named insured or his legal representative but did not require that the document be physically attached to the insurance policy. In *A.I.U. Insurance Co. v. Roberts*,[30] the Louisiana Supreme Court, in refusing to enforce an oral selection of lower limits, held that a waiver of the mandatory coverage prior to the September 9, 1977 (the effective date of the amendment) was not enforceable unless in writing and attached to the policy pursuant to the requirements of Louisiana Revised Statutes 22:628. The *Roberts* decision left unanswered the question of whether an unattached written rejection or selection of lower limits executed prior to the effective date of the 1977 amendment would be enforceable with respect to a renewal policy issued after the 1977 amendment. This amendment eliminated the requirement that such document be attached to the policy. *Sentilles v. State Farm Mutual Auto Insurance Co.*[31] held that a 1976 unattached

27. Southern Am. Ins. Co. v. Dobson, 415 So. 2d 641 (La. App. 3rd Cir. 1982) and Northeastern Fire Ins. Co. v. Dobson, 415 So. 2d 644 (La. App. 3d Cir. 1982), rev'd sub nom. Southern Am. Ins. Co. v. Dobson, 441 So. 2d 1185 (La. 1983).

28. Justice Blanche authored the original opinion and was joined by Justices Calogero, Dennis, and Marcus. Chief Justice Dixon wrote the opinion on rehearing in which he was joined by Justices Dennis, Lemmon, and Watson.

29. Act 438 of 1977 is incorporated in La. Ins. Code § 1406(D)(1)(a), quoted in note 25 supra.

30. 404 So. 2d 948 (La. 1981).

31. 443 So. 2d 723 (La. App. 4th Cir. 1983), cert. denied, 445 So. 2d 437 (La. 1984).

written selection of lower limits was not enforceable with respect to a renewal policy issued after the 1977 amendment.[32] The amendment did not resurrect a waiver which was invalid when made.

Stacking

Act 623 of 1977, known as the "anti-stacking" provision, amended Louisiana Revised Statutes 22:1406(D)(1)(c) to prohibit stacking of multiple UM coverages available to the same insured, except under express limited circumstances. Many policies issued prior to the effective date of Act 623 of 1977 contained "other insurance" clauses which, if enforceable, would prevent stacking. Prior to the amendment, such clauses were unenforceable under the jurisprudential interpretation of the UM statute.[33] The first, second, and third circuits held that the "other insurance" clauses in pre-amendment policies were effective for post-amendment accidents because the anti-stacking amendment removed the judicial barrier to enforceability.[34] In *Block v. Reliance Insurance Co.*[35], the Louisiana Supreme Court overturned this line of decisions, holding that insurance policy contracts entered into prior to the amendment included the mandatory provisions of the statute then in effect which authorized stacking. Application of the anti-stacking provision to pre-amendment policies would be a legislative impairment of contract, prohibited by Article 1, Section 23 of the Louisiana Constitution of 1974. The plaintiff in *Block* was permitted to stack the coverages for twelve vehicles under a fleet policy.[36]

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32. See also Stroud v. Liberty Mut. Ins., 429 So. 2d 492 (La. App. 3d Cir.), cert. denied, 437 So. 2d 1147 (La. 1983). Other recent cases involving rejection of UM coverage or selection of lower limits include: Aramburo v. Travelers Ins. Co., 426 So. 2d 260 (La. App. 4th Cir.), cert. denied, 433 So. 2d 161 (La. 1983), phraseology altered, 438 So. 2d 274 (La. App. 4th Cir.) (holding that application which gave choices only of 5/10 limits or rejection of coverage was not an effective selection of 5/10 limits), cert. denied, 443 So. 2d 1110 (La. 1983); Chiasson v. Whitney, 427 So.2d 470 (La. App. 5th Cir. 1983), cert. denied, 433 So. 2d 180 (La. 1983) (holding that selection of lower limits signed by agent was not effective); Smith v. Royal Globe Ins. Co., 424 So. 2d 1277 (La. App. 3d Cir. 1982) (holding that written rejection of UM coverage as to all persons except certain named individuals and their spouses was effective).

33. See Barbin v. United States Fid. & Guar. Co., 315 So. 2d 754 (La. 1975); Deane v. McGee, 261 La. 686, 260 So. 2d 669 (1972); Graham v. American Cas. Co., 261 La. 85, 259 So. 2d 22 (1972). But cf. Seaton v. Kelley, 339 So. 2d 731 (La. 1976).

34. Block 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), rev'd sub nom Block v. Reliance Ins. Co., 433 So. 2d 1040 (La. 1983); Hebert v. Breaux, 398 So. 2d 1299 (La. App. 3d Cir.), cert. denied, 401 So. 2d 986 (La. 1981). As noted above, writs were granted in both *Block* and *Faria*, the cases were consolidated, and both decisions were reversed.

35. 433 So. 2d 1040 (La. 1983).

36. Jurisprudence under cases which arose prior to the 1977 amendment is conflicting concerning stacking of multiple coverages under a fleet policy. Briley v. Falati, 367 So. 2d 1227 (La. App. 4th Cir.), cert. denied, 369 So. 2d 1379 (La. 1979), held that a person

The exception contained in the anti-stacking provision permits a person injured "while occupying an automobile not owned by said injured party" to recover 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 finality of the selection of the one excess policy was the issue before the Louisiana Supreme Court in *Taylor v. Tanner*.[37] The deceased was the occupant of a non-owned car which was struck by an underinsured motorist. Plaintiffs accepted the liability limits of the negligent motorist and the UM limits from the insurers of the host driver and the deceased's auto, reserving rights against the UM insurer of the deceased's employer. The employer's insurer moved for summary judgment on the ground that the plaintiffs could not stack an additional policy. The trial court granted the motion, and the court of appeal affirmed the dismissal.[38] The supreme court reversed, holding that acceptance of the deceased's excess UM coverage was conditional and did not bar recovery under the employer's coverage so long as there was no ultimate recovery of excess UM coverage beyond that provided by any one policy. The selection of an excess policy was not irrevocable, and the insured may later opt for another policy. When a subsequent selection was made, the court did not decide whether the funds paid under the original policy should be refunded, whether such payment should be credited against the liability of the subsequent selectee, or whether the responsibility should be prorated between the two insurers according to their policy limits.[39]

Justice Lemmon, concurring in the denial of rehearing in *Southern American Insurance Co. v. Dobson*, makes it clear that the *Dobson* decision did not resolve the complex stacking issue presented by the facts of that case. Under the court's decision, the plaintiff had UM

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insured only as an occupant of a vehicle was not entitled to stack separate UM coverages on sixty-six vehicles insured under the same policy. In Holmes v. Reliance Ins. Co., 359 So. 2d 1102 (La. App. 3d Cir.), cert. denied, 362 So. 2d 1120 (La. 1978), the court permitted stacking under a garage liability policy insuring 160 vehicles. The Louisiana Supreme Court did not resolve the issue in *Block*. It held that the plaintiff in *Block* was entitled to stack multiple coverages under a fleet policy because he was expressly named as an additional insured under an endorsement.

37. 442 So. 2d 435 (La. 1983).

38. 422 So. 2d 1338 (La. App. 3d Cir. 1982).

39. Justice Dennis concurred, taking exception to any implication in the majority opinion that the proceeds of multiple policies might be prorated. He agreed that an insured might conditionally opt for one UM coverage and later elect to refund those proceeds in favor of a larger coverage. He was of the opinion that the provisions of La. Ins. Code § 1406(D)(1)(c) expressly prohibited recovery from more than one policy. However, it would seem that proration could be justified under the statutory language if it were read to limit the amount of recovery by the insured rather than the source of funds. Where several insurers provide excess coverage, proration appears to be an equitable method to allocate the ultimate responsibility.

coverage under a primary policy and two layers of excess coverage. The concurring opinion of Justice Lemmon indicates that *Dobson* does not resolve the issue whether the anti-stacking provision[40] prohibits the insured from recovery under both excess policies. The primary motivation behind the anti-stacking provision was to overturn the jurisprudence which authorized the stacking of multiple coverages issued on multiple vehicles, whether such multiple vehicles were insured under the same or separate policies. The legislature probably was not contemplating a situation in which the insured purchases several layers of primary and excess UM coverage for the same vehicle. Since the UM statute specifically authorizes an insured to increase his coverage to any amount,[41] there does not appear to be any reason to prohibit the insured from purchasing such additional coverage under multiple policies. To reach that result, however, the courts will have a difficult time dealing with the express language of the anti-stacking provision.[42]

Residents

The Louisiana Supreme Court in *Bearden v. Rucker*[43] considered the issue whether a judicially separated spouse continued to be a resident of her husband's household. The wife, who was awarded custody of

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40. La. Ins. Code § 1406(D)(1)(c) (1978):

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

(Emphasis added).

41. La. Ins. Code § 1406(D)(1)(b) (1978) ("Any insurer delivering or issuing an automobile liability insurance policy referred to herein shall also permit the insured, at his written request, to increase the coverage applicable to uninsured motor vehicles provided for herein to any amount.").

42. See emphasized language in La. Ins. Code § 1406(D)(1)(c) set forth in note 40 supra.

43. 437 So. 2d 1116 (La. 1983).

her youngest son, lived in an apartment with her son and with the wife's mother. All three were injured through the negligence of an uninsured motorist while occupying an automobile owned by an unrelated party. The issue for the court's determination was whether UM coverage was afforded under a policy standing in the husband's name on an automobile being used exclusively by the wife belonging to the former community. Since the policy was in the husband's name, his wife would not fall within the definition of the named insured unless she were a resident of his household.[44] Likewise, the son and mother would have UM coverage only if they were residents of the named insured's household.[45]

The majority opinion suggested that residency is not solely dependent upon living under the same roof, but rather the emphasis is upon membership in a group and intention. The court pointed out that the wife testified that she still considered reconciliation a possibility, that there had been no division of the community property which continued in joint ownership, and that the wife retained keys to the family home which she visited several times a week and where she maintained belongings and was free to come and go as she pleased. Without explaining the significance of this factor, the court also pointed out on several occasions that the insurance agent had knowledge of the wife's possession of one of the cars when the policy was renewed after the separation. Upon consideration of these factors, the majority reversed the holdings of the two lower courts and found that the wife was a resident of her husband's household.

The majority further concluded that the son and mother were also insured under the policy. Since the wife fell within the definition of the named insured as a spouse who was a resident of the same household, the son and mother were found to be covered as relatives because they were residents of the named insured's household. The court did not discuss the anomalous fact that its decision granted the wife membership in two separate households—one with her husband and the other with her son and mother. The decision is not inequitable from the standpoint that the wife is afforded the same protection she would have received if the policy on the vehicle partially owned and used exclusively by her were written in her name or in the joint names of the former spouses. Perhaps, rather than straining the definition of "resident," the policy should have been reformed in light of the agent's full knowledge of the circumstances.

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44. The policy provided coverage for "the named insured and any relative" with no requirement that they be occupying an insured automobile. The policy defined a "named insured" as "the individual named in Item 1 of the declarations and also includes his spouse, if a resident of the same household."

45. "Relative" was defined as "a relative of the named insured who is a resident of the same household." *Bearden*, 437 So. 2d at 1120.

Penalties

Any doubt whether the penalty provisions of Louisiana Revised Statutes 22:658 are applicable to UM claims was dispelled by the Louisiana Supreme Court decision in *Hart v. Allstate Insurance Co.*[46] In order to comply with the requirement of Louisiana Revised Statutes 22:658 that the insured submit a "satisfactory proof of loss," the court suggested that it was incumbent upon the UM insured to submit evidence to the insurer establishing (1) that the owner or operator of the other vehicle involved in the accident was uninsured or underinsured, (2) that he was at fault, (3) that such fault gave rise to damages, and (4) the extent of such damages.[47]

AUTOMOBILE LIABILITY COVERAGE

Compulsory Insurance Law/Omnibus Coverage

On July 1, 1978, the Compulsory Motor Vehicle Liability Security Law became effective.[48] With certain minor exceptions, this act requires that every motor vehicle registered in this state be covered by a motor vehicle liability policy as defined by Louisiana Revised Statutes 32:900 or by other specified security. The owner is required to certify that the vehicle is insured or other security is posted when he applies for vehicle registration or an inspection tag. The applicant can be required to show evidence of such insurance or security.

To avoid paying excess premiums, the named insured in *Fields v. Western Preferred Casualty Co.*[49] accepted an endorsement to his automobile liability policy which excluded coverage for a specifically named employee. Unfortunately, the excluded employee was involved in an accident operating a company vehicle on his last day of work. Louisiana Revised Statutes 32:900 requires that a motor vehicle liability policy insure the person named in the policy and any other person using the motor vehicle with the permission of the named insured. The court held that the exclusion of a specific driver was in violation of the requirement of the compulsory insurance law, thus requiring that the policy be

46. 437 So. 2d 823 (La. 1983). For a discussion of the prior jurisprudence, see McKenzie, Louisiana Uninsured Motorist Coverage—After Twenty Years, 43 La. L. Rev. 691, 730 (1983).

47. 437 So. 2d at 828. No penalties were imposed in *Hart*. Two recent cases have awarded penalties plus $5,000 attorney's fees: Cloney v. Smith, 441 So. 2d 342 (La. App. 5th Cir.), cert. denied, 444 So. 2d 608 (La. 1984) (The court concluded that the insurer's denial of the claim was based upon a "cursory investigation."); Savoy v. Chapmann, 441 So. 2d 21 (La. App. 3d Cir. 1983) (The UM insurer refused to pay its insured for accident in which liability insurer had denied coverage on the grounds that the tortfeasor's actions were intentional.).

48. 1977 La. Acts, No. 115, § 1, adding La. R.S. 32:861-865.

49. 437 So. 2d 344 (La. App. 2d Cir.), cert. denied, 440 So. 2d 528, 754 (La. 1983).

reformed but "only to the extent to make the policy comply with law."[50] The insurer was responsible only for the minimum limits mandated by law. The Louisiana Supreme Court denied writs.

Louisiana Revised Statutes 32:900(J) specifically provides that the "requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements." Since the owner is not compelled to purchase all of the coverage required by Louisiana Revised Statutes 32:900 under one policy, the *Fields* decision does not appear to be a proper application of the statutes unless the insurer expressly certifies that its policy complies with Louisiana Revised Statutes 32:900.[51]

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50. Id. at 347.

51. For cases which have upheld the exclusion of specified drivers by name or classification, see Smith v. Western Preferred Cas. Co., 424 So. 2d 375 (La. App. 2d Cir. 1982) (collision coverage), cert. denied, 427 So. 2d 1212 (La. 1983); Hudson v. Thompson, 422 So. 2d 640 (La. App. 3d Cir. 1982) (no discussion of La. R.S. 32:900); Jack v. Adriatic Ins. Co., 420 So. 2d 1292 (La. App. 3d Cir. 1982) (The policy contained an exclusion for "[l]oss to the automobile which occurs while it is being operated by any person who does not possess a valid driver's license at the time of the loss." Damages caused by the unlicensed wife of the insured were not covered.); Wallace v. Boyte Enter. Inc., 385 So.2d 916 (La. App. 2d Cir. 1980) (exclusion of coverage for everyone except the named insured if the vehicle is leased to others); Lusk v. Aetna Cas. & Sur. Co., 295 So. 2d 238 (La. App. 3d Cir. 1974) (The court enforced the "Student Risk" endorsement which provided that the policy did not apply "to any person as an insured who is enrolled as a student at any school, college, or other educational or vocational institution, except the named insured or a member of his or her family."); Hennigan v. Savelle, 294 So. 2d 910 (La. App. 2d Cir. 1974) ("Student Risk" endorsement); Maggio v. Manchester Ins. Co., 292 So. 2d 255 (La. App. 4th Cir. 1974) (The court upheld the validity of an endorsement to an automobile policy which restricted coverage to the named insured or members of his immediate family, finding there was no coverage for a person who was using the automobile with permission and who was not related to the named insured.); Hurst v. Hardware Mut. Cas. Co., 234 So. 2d 802 (La. App. 1st Cir.), cert. denied, 256 La. 618, 237 So. 2d 398 (1970). In Pecoraro v. Galvin, 243 So. 2d 307 (La. App. 4th Cir. 1971), the court found that the vicarious liability of a father for his student son was covered under a policy issued to another son which contained a "Student Risk" endorsement because the father, as a resident of the household, was also covered under the policy and not excluded by the "Student Risk" endorsement. For the applicability of La. R.S. 32:900 to other policy provisions, see Gotreaux v. Travelers Ins. Co., 299 So. 2d 466 (La. App. 3d Cir.), cert. denied, 302 So. 2d 309 (La. 1974); Crocket v. Collins, 308 So. 2d 391 (La. App. 1st Cir. 1975).