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Insurance

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UNINSURED MOTORIST COVERAGE

Arising Out Of Use

In *Kessler v. Amica Mutual Insurance Co.*,[1] the plaintiff, a Tulane law student, honked at a car that ran a stop sign and almost struck the plaintiff's vehicle. The driver of the other car, who was never identified, fired a shot through the back window of the plaintiff's auto, striking the plaintiff in the head. The plaintiff sought recovery under his uninsured motorist coverage, which included the customary protection for "hit and run" vehicles. Noting that there were also other elements of coverage that the plaintiff was required to meet,[2] the court focused on the requirement that the injury must arise out of the use of the uninsured motor vehicle.

In an earlier decision,[3] the court had suggested a two-step analysis for determining whether damages arise out of use of a vehicle. First, the court should identify the duty that the tortfeasor breached in causing the plaintiff's injury. Then, the court must determine whether that duty arises out of use of the automobile or exists independently of such use.

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1. 573 So. 2d 476 (La. 1991).

2. The court pointed out that the plaintiff also must prove that his damages were caused by accident and that the vehicle met the policy requirements for a "hit and run" vehicle. For a recent case discussing the "accident" issue, see Sanford v. Reeves, 554 So. 2d 1328 (La. App. 1st Cir. 1989) ("whether an injury is accidental must be determined from the victim's standpoint where a policy of uninsured motorist coverage is concerned."). But see Hartman v. Trinity Universal of Kansas, 551 So. 2d 797 (La. App. 3d Cir. 1989), writ denied, 556 So. 2d 1264 (1990) (plaintiff's auto policy provided coverage for medical expenses "caused by accident" while occupying a motor vehicle; in denying coverage for medical expenses resulting from an assault by robbers as the insured was entering her car, the court found that there was no accident without considering whether this incident was an "accident" from the victim's viewpoint). With respect to the policy requirements for a "hit and run" vehicle, see the discussion in the text, infra, concerning the 1991 legislation affecting those policy requirements.

3. Carter v. City Parish Gov't, 423 So. 2d 1080 (La. 1982).

The first step is usually satisfied by a duty-risk analysis to determine the legal cause of the injury. In this case, the court observed that there were breaches of two distinct duties that needed to be analyzed separately. First, the tortfeasor ran a stop sign. The court concluded that this breach of duty was not the legal cause of the injury because the risk of a gunshot wound was not within the scope of the duty to stop at a stop sign.

The gunshot was the cause-in-fact of the injury. The court observed that the duty to refrain from shooting at other persons or vehicles is a general duty imposed on all individuals, not just automobile drivers. Since this duty existed independently of the use of the automobile, and the breach did not require use of the automobile, the court concluded that the breach of duty did not arise out of use of the automobile. The court noted that "while using" was the only possible interpretation of "arising out of use" under which coverage could be found. This interpretation was rejected as beyond the contemplation of the parties and inconsistent with a common sense interpretation.[4]

Hit and Run Vehicles

Most policies providing UM coverage define an uninsured motor vehicle to include a "hit and run" vehicle provided there is physical contact between the unidentified vehicle and the insured or his vehicle. The requirement of physical contact has been consistently upheld with only reasonable extensions for multi-vehicle accidents and objects falling directly from vehicles.[5] In 1991, the uninsured motorist statute[6] was amended to eliminate the physical contact requirement under certain circumstances. The "phantom vehicle" amendment permits recovery without physical contact if the insured can prove, "by an independent and disinterested witness, that the injury was the result of the actions of the driver of another vehicle whose identity is unknown . . . ."[7] It

4. Other recent cases involving similar "use" issues include Slade v. Altex Ready-Mix Concrete Corp., 579 So. 2d 1102 (La. App. 2d Cir. 1991) (murder by robber who parked his vehicle on the side of the road, pretending that it was disabled, did not arise out of use of the parked vehicle) and Byrne v. State Farm Ins. Co., 572 So. 2d 728 (La. App. 4th Cir. 1990) (after her auto was bumped from the rear, the plaintiff was mugged when she got out of her car to investigate for damage; the court held that her injuries did not arise out of use of the "hit and run" vehicle). For a more complete review of the jurisprudence on the "use" issue, see W. McKenzie & A. Johnson, Louisiana Insurance Law and Practice §§ 65-75, in 15 Louisiana Civil Law Treatise (1986 and Supp. 1991).

5. See W. McKenzie & A. Johnson, Louisiana Insurance Law and Practice § 111, in 15 Louisiana Civil Law Treatise (1986 and Supp. 1991) for a review of this jurisprudence.

6. La. R.S. 22:1406(D) (1978).

7. La. R.S. 22:1406(D)(1)(f) as added by 1991 La. Acts No. 806.

will be interesting to observe the jurisprudential development of the meaning of "an independent and disinterested witness." Since there are other states with similar "phantom vehicle" provisions, reference to their decisions may be enlightening.[8]

Self-Insurance

By Act 626 of 1991, the UM statute was amended to provide that anyone possessing a certificate of self-insurance under the Louisiana Motor Vehicle Safety Responsibility Law[9] would be an "insurer" within the meaning of the UM coverage provided under the statute.[10] Since the statute makes little use of the term "insurer," the intended effect of the amendment is not entirely certain. It probably was intended to legislatively overrule the decision in *Jones v. Henry*[11] that a vehicle owned by a qualified self-insured was still an uninsured motor vehicle within the meaning of the UM statute.

Whether the amendment will be held to have a broader effect remains to be seen. It will be suggested that the amendment also should be held to impose a duty on qualified self-insurers, as "insurers," to provide uninsured motorist coverage. Such a duty did not exist prior to the amendment except for car rental agencies who agreed by contract to provide insurance.[12] If such were the intent, however, the amendment should and probably would have set forth that duty expressly, defining to whom that duty is owed, the limits of liability required and whether and by what procedure the protection may be waived or lower limits

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8. See Comment, Uninsured Motorist Coverage for Hit-and-Run Vehicles: The Requirement of Physical Contact, 49 La. L. Rev. 955 (1989). This student comment by Ronald Whitney recommended that Louisiana adopt a similar "phantom vehicle" provision, pointing out the statutory provisions in other states that had adopted such an approach.

9. La. R.S. 32:851-1043 (1989).

10. 1991 La. Acts No. 626 added La. R.S. 22:1406(D)(3) (Supp. 1991).

11. 542 So. 2d 507 (La. 1989).

12. In Jones v. Henry, 542 So. 2d 507, 510 (La. 1989), the court observed:

> R.S. 22:1406(D) and R.S. 32:861, when read together, lead to no other conclusion except that there must be a policy of insurance in effect in order to trigger the requirement of UM coverage. See Jordan v. Honea, 407 So. 2d 503 (La. App. 1st Cir. 1981), writ denied, 409 So. 2d 654 [sic] (La. 1982). Those who chose to satisfy the LMVSR law through self-insurance certificates, automobile liability bonds, or securities placed on deposit thus do not have to provide UM coverage.

Id at 510 n.4. On the other hand, self-insured car rental agencies who agree to provide insurance on their customers have been held to be subject to the mandatory requirement that UM coverage be provided with automobile liability insurance. Jones v. King, 549 So. 2d 350 (La. App. 5th Cir.), writ denied, 552 So. 2d 401 (1989); Pollard v. Champion Ins. Co., 532 So. 2d 838 (La. App. 4th Cir.), writ denied, 533 So. 2d 374 (1988); Tapia v. Ham, 480 So. 2d 855 (La. App. 2d Cir. 1985), writ denied, 484 So. 2d 138 (1986); Ashline v. Simon, 466 So. 2d 622 (La. App. 5th Cir.), writ denied, 472 So. 2d 28 (1985). Cf. Hearty v. Harris, 574 So. 2d 1234, 1240 (La. 1991).

selected. Neither the amendment nor the statute in general answers any of these questions in the context of self-insurance.

LIABILITY INSURANCE

Vehicle Self-Insurance

A sharply divided court in *Hearty v. Harris*[13] held that a self-insured rental car agency was not required to provide omnibus liability protection for persons using the vehicle with the express or implied permission of the renter.[14] The rental agency had complied with the Louisiana Motor Vehicle Safety Responsibility Law[15] by obtaining a certificate of self-insurance in accordance with the terms of Louisiana Revised Statutes 32:1042.[16] The majority held that neither this statute nor public policy required the self-insured to provide "omnibus" coverage.[17] The court also rejected the contention that the "insurance" provided under the rental contract required such coverage.[18]

The same day, the court found that another qualified self-insured company, while not required by statute to provide omnibus coverage, had agreed under the special circumstances in that case to be financially responsible for any damages caused by the operators of the school buses it furnished to a nonprofit corporation.[19]

When Excess Insurance Drops Down

Insureds often purchase additional liability insurance protection under either excess policies for particular kinds of coverage or umbrella

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13. 574 So. 2d 1234 (La. 1991) (one concurring opinion and three dissents).

14. In its rental contract, Budget Rent-A-Car agreed to provide liability coverage only to the renter and a named additional driver. The contract prohibited use by any other person and expressly excluded insurance coverage for unauthorized persons.

15. La. R.S. 32:851-1043 (Supp. 1991).

16. Obtaining such a certificate of self-insurance is one of the four ways in which vehicle owners can comply with the Louisiana Motor Vehicle Safety Responsibility Law. See La. R.S. 32:861A (1989).

17. While omnibus coverage is required in other methods of complying with the Safety Responsibility Law, such protection is not specified for self-insurance. The concurring opinion particularly noted that La. R.S. 32:1041 exempts rental agencies from any requirement to furnish proof of financial responsibility except for judgments rendered against them "as owners." The plurality opinion also rejected the argument that La. R.S. 22:655 (the Direct Action Statute) mandates omnibus coverage in all liability policies written in Louisiana. See also Jones v. Mid-South Ins. Co., 358 F.2d 887 (5th Cir. 1966).

18. The majority noted that omnibus coverage is mandated only for a "motor vehicle liability policy" as defined in La. R.S. 32:900 and certified as proof of financial responsibility under La. R.S. 32:898 or 32:899. There is no general requirement that automobile liability coverage provide omnibus protection.

19. Aisole v. Dean, 574 So. 2d 1248 (La. 1991).

policies which afford protection over multiple kinds of primary coverage. Such policies generally specify the "underlying policies" that the insured is required to purchase. If the insured purchases the required underlying liability insurance policy but this primary insurer becomes insolvent, then the issue becomes whether the excess insurer is liable only for the amount of the claim above the specified underlying limit of liability or whether its coverage "drops down" to replace the coverage of the insolvent primary carrier. This issue is determined by the language of the excess policy.

In *Kelly v. Weil*,[20] the Supreme Court of Louisiana recognized that most excess policies may be sorted into one of three categories for resolution of the "drop down" issue. In the first type, the excess coverage is dependent upon the "collectability" or "recoverability" of the primary limits and therefore clearly drops down.[21] In the second type, the excess coverage is described as in excess of the limits of the scheduled underlying policies for liability "covered" by such policies. This type clearly does not drop down upon insolvency of the underlying insurer.[22] The third type, which was involved in *Kelly*, defines the insured's retained limit as the greater of the total of the "applicable limits of the . . . underlying policies listed in . . . [the policy], and the applicable limits of any other insurance collectible by the insured."[23] Accepting the majority view nationwide, the court held that this type of policy does not drop down. From analysis of the policy, the court concluded that it was clear that "collectible" referred only to the other policies and not to the scheduled policies.[24]

DIRECT ACTION STATUTE

In last year's Faculty Symposium, the decision in *Quinlan v. Liberty Bank and Trust Co.* was discussed in some detail.[25] The decision as

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20. 563 So. 2d 221 (La. 1990). A companion case, Robichaux v. Randolph, 563 So. 2d 226 (La. 1990), reached a similar conclusion with respect to comparable provisions of another excess policy.

21. The court cited McGuire v. Davis Truck Servs., Inc., 518 So. 2d 1171 (La. App. 5th Cir.), writ denied, 526 So. 2d 791 (1988), as an illustration.

22. The court cited Radar v. Duke Transp., Inc., 492 So. 2d 532 (La. App. 3d Cir. 1986), as an illustration. A subsequent case finding a policy to be in the second *Kelly* category is Lumar Marine, Inc. v. Insurance Co. of N. Am., 910 F.2d 1267 (5th Cir. 1990). See also, Bernard Lumber Co. v. Louisiana Ins. Guar. Ass'n, 563 So. 2d 261 (La. App. 1st Cir.), writ denied, 566 So. 2d 981 (1990) (a pre-*Kelly* decision, but policy found similar to *Radar* policy).

23. *Kelly*, 563 So. 2d at 222.

24. A subsequent case classifying a policy in the third *Kelly* category is McWright v. Modern Iron Works, Inc., 567 So. 2d 707 (La. App. 2d Cir.), writ denied, 571 So. 2d 651 (1990).

25. McKenzie & Johnson, Insurance, Developments in the Law, 1989-1990, 51 La.

reported granted a direct action against the insurer which had issued an indemnity policy, as contrasted with a liability policy. There were two vigorous dissents, which were dissected in last year's article.

Following the publication of that article, a rehearing was granted. Though the result did not change, and though there were still two dissents and a separate concurring opinion, the majority opinion on rehearing slightly adjusted the rationale for reaching the conclusion that the policy in question would permit a direct action to be brought against the insurer.[26]

The policy in question was called a "directors and officers liability policy" issued to cover bank officers, but despite its name, it contained a number of provisions which appeared inconsistent with the usual liability policy. There was no clear obligation to defend, and the cost of defense was considered a part of the liability limits rather than an expense beyond the stated policy limits. The majority opinion on original hearing rather summarily concluded that because its "caption" so indicated, the policy must be considered a liability policy subject to the Direct Action Statute.[27] The dissenters, on the other hand, believed that the substance of the policy rather than the form should govern, and found the policy's substance to establish an indemnity obligation rather than a liability obligation.

On rehearing, the majority held that the Direct Action Statute "applies to any insurance against the liability of the insured for the personal injury or corporeal property damage to a tort victim, regardless of whether the policy is framed in liability or indemnity terms."[28] However, since the plaintiffs in the case at hand were not seeking either personal injury or corporeal property damage (but rather were seeking economic damage), that principle could not be used to resolve the dispute and indeed might be considered *dictum*.

But the majority also held that with respect to "any other type of tortious loss or damage," the Direct Action Statute affords a person a right of direct action "unless the insurance policy unambiguously expresses the parties' intent that it is a contract of indemnity against loss rather than a policy of insurance against liability."[29] Finding that plaintiffs were seeking "any other type of tortious loss or damage" and determining that the policy was ambiguous on the point, the majority on rehearing concluded on the basis of this second principle that the

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L. Rev. 249, 254-56 (1990), discussing Quinlan v. Liberty Bank & Trust Co., 558 So. 2d 221 (La. 1990).

26. Quinlan v. Liberty Bank & Trust Co., 575 So. 2d 336 (La. 1991).

27. La. R.S. 22:655 (Supp. 1991).

28. *Quinlan*, 575 So. 2d at 347.

29. Id.

policy must be considered one protecting against liability and that therefore a direct action was appropriate.

The analysis in the majority opinion of the background of the Direct Action Statute and the public policy which it supposedly expresses is thorough and quite defensible. It may well have been intended to broaden the scope of application of the Direct Action Statute, or at least to confirm the application which had been given to it over the years.[30] But the holding may also permit insurers who issue indemnity policies to escape direct actions, if they wish to do so, by careful wording of their policies. In theory, such an insurer could, in a policy insuring only against economic loss, specifically provide that the policy is one of indemnity and include a "no action" clause for good measure.

The court's opinion on rehearing in *Quinlan* presumably does not affect the validity of its earlier decisions[31] holding that, in most instances,

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30. The prior jurisprudence is mixed, but permits the conclusion that the reach of the Direct Action Statute is coterminous with recovery in "tort." How *Quinlan* might affect these kinds of cases is a matter of conjecture and considerable importance. See Oliver v. Natchitoches Air Center, Inc., 506 So. 2d 558 (La. App. 3d Cir.), writ denied, 507 So. 2d 220 (1987). (Direct Action Statute does not give tort victim a right of action against an agent for negligent cancellation of a policy of insurance issued to his client, the tortfeasor); Guillory v. Gulf South Beverages, Inc., 506 So. 2d 181 (La. App. 5th Cir. 1987) (Direct Action Statute does not give victim right to sue insurer for penalties and attorney's fees for alleged arbitrary refusal to pay claim); LeBouef v. Colony Ins. Co., 486 So. 2d 760 (La. App. 1st Cir. 1986) (no direct action for tort victim against insurance agent for negligent failure to procure proper coverage for his client, the tortfeasor); Campbell v. Continental-Emsco Co., 445 So. 2d 70 (La. App. 2d Cir.), writ denied, 446 So. 2d 1223 (1984) (direct action denied against errors and omissions insurer of agency which allegedly failed to procure proper general liability coverage); Champion v. Panel Era Mfg. Co., 410 So. 2d 1230 (La. App. 3d Cir.), writ denied, 414 So. 2d 389 (1982) (direct action permitted in products liability claim combining redhibition theory with tort); Davis v. Poelman, 319 So. 2d 351 (La. 1975) (direct action permitted against liability insurer of depositary, even though court seemed to base depositary's responsibility on a non-tort basis); Ralston Purina Co. v. Cone, 304 So. 2d 735 (La. App. 2d Cir. 1974), appeal after remand, 344 So. 2d 95 (La. App. 2d Cir. 1977) (direct action permitted in favor of purchaser against errors and omissions insurer of clerk of court); Gray & Co., Inc. v. Ranger Ins. Co., 292 So. 2d 829 (La. App. 1st Cir. 1974) (direct action permitted in favor of property owner against errors and omissions carrier of agency supposed to procure coverage for property); Vessel v. St. Paul Fire & Marine Ins. Co., 276 So. 2d 874 (La. App. 1st Cir. 1973) (direct action against legal malpractice insurer); Lacour v. Merchants Trust & Savings Bank, 153 So. 2d 599 (La. App. 4th Cir.), writ denied, 244 La. 1004, 156 So. 2d 56 (1963) (direct action denied in case involving blanket bond issued to bank, when dispute was between bank and its depositor over misplaced deposit); Tyler v. Walt, 184 La. 659, 167 So. 182 (1936) (direct action denied to bank depositor against bank's "blanket bond" surety).

31. Arrow Trucking Co. v. Continental Ins. Co., 465 So. 2d 691 (La. 1985) (insured with liability coverage in insolvent insurer may not recover from re-insurer of that carrier the sum which the insured paid to an injured accident victim); Fontenot v. Marquette Casualty Co., 258 La. 671, 247 So. 2d 572 (1971) (no direct action permitted unless re-

there is no direct action against a re-insurer, i.e., no right to "cut through" the policy issued by the ceding insurer to the re-insurer.

LIFE INSURANCE

In *Lemoine v. Security Industrial Insurance Co.*,[32] the insured had died by his own hand in November, 1984. About three years before his death, he had purchased a life insurance policy issued by the defendant with a face amount of $150,000.00. The premiums were calculated on an annual basis per $1,000.00 of coverage, with adjustments upon the anniversary date of the policy. The insured had the option to pay annually or more frequently, and he chose to pay monthly premiums by automatic bank draft.

All premiums were timely paid except for the months of August and October of 1984. The bank draft for the August payment was returned NSF. It was redeposited several days later, but in the meantime the September draft had been received by the insurer and was credited to the August payment. No other payments were made, so effectively the 31-day grace period for continuation of the policy in the event of non-payment of premiums began on September 21, 1984 and ended on October 22, 1984. Thus in the insurer's view, the death in November, 1984 came after the policy was no longer in force.

The insured's spouse argued that under Louisiana Revised Statutes 22:177, there could be no lapse in the coverage for non-payment of premiums within one year of the failure to pay, unless the written notice requirement of the statute had been met or unless the policy was issued on the basis of monthly or monthly premiums or for a term of less than one year. The insurer contended that the policy was "issued" on the basis of the monthly payments that the insured chose to make. The court properly disagreed, holding that the policy was an annual policy with an option in the insured to pay more frequently if he wished to do so. Finding that the statute applied, and finding that the insurer had not proven that its notice requirements had been followed, the court held that the policy was still in force at the time of the insured's death.

HEALTH AND ACCIDENT INSURANCE

Preemption Under ERISA

The Supreme Court of Louisiana has resolved, for the moment at least, the issue of whether the Employment Retirement Income Security

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insurer agreed to assume and carry out directly with the policyholder any of the policy obligations of the ceding insurer).

32. 569 So. 2d 1092 (La. App. 3d Cir. 1990), writ denied, 573 So. 2d 1120 (1991).

Act of 1974 (ERISA)[33] pre-empts Louisiana Revised Statutes 22:657, the statute which provides for penalties and mandatory attorney's fees for the arbitrary refusal to pay benefits under a health and accident insurance policy which qualifies as an "employee benefit plan" under ERISA. As the student of this area of the law knows, ERISA supersedes all state statutes insofar as they "relate to any employee benefit plan."[34] However, in recognition of the McCarran-Ferguson Act, and its permission for states to regulate the business of insurance,[35] ERISA "saves" from this preemption any state statute which "regulates insurance."[36] This "savings" clause is, however, itself limited by another provision in ERISA which provides that an employee benefit plan shall not be "deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts . . . ."[37]

The issue to be resolved in *Cramer v. Association Life Insurance Co.*[38] was whether the Louisiana provision permitting an award of penalties and attorney's fees could survive this labyrinth of federal statutory circumlocution and stand as authority for an award to an employee for the alleged arbitrary failure of an insurer under a plan purchased by the claimant's employer to pay a claim. The court easily concluded that the state statute related to the plan initially fell within the preemption clause. However, the court then determined that the state statute does not "regulate insurance" as the term is understood in the context of the McCarran-Ferguson Act.[39] In particular, the statute does not directly involve the spreading of a policyholder's risk, but rather is aimed at the process of paying claims. Finding a conflict with the civil enforcement mechanism of ERISA as well, the court concluded that Louisiana Revised Statutes 22:657 was not "saved" from the preemption clause simply because it had something to do with insurance. The opinion serves notice, one would presume, that a Louisiana statute "regulating" insurance will have to do so in the manner envisioned by the various interpretations of the McCarran-Ferguson Act before it will fall within the "savings" clause of ERISA.

The court's reasoning led it to grant the defendant insurer's motion for summary judgment with respect to penalties and mandatory attor-

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33. 29 U.S.C.A. § 1001, et seq. (West 1985 and West Supp. 1991).

34. 29 U.S.C. § 1144(a) (1988). This is the so-called preemption clause.

35. 15 U.S.C. § 1012 et seq. (1988).

36. 29 U.S.C. § 1144(b)(2)(A) (1988). This is the so-called "savings" clause.

37. 29 U.S.C. § 1144(b)(2)(B) (1988). This is the so-called "deemer" clause, presumably intended to keep a state from simply passing statutes to regulate "employee benefit plans" themselves, folding that into the state's power to regulate insurance generally, and thus evading any application of ERISA at all to such a plan.

38. 569 So. 2d 533 (La. 1990).

39. See the discussion at 569 So. 2d at 537-39.

ney's fees, and to rule that no jury trial could be permitted, since ERISA prohibits a jury trial on an action to recover benefits or to clarify or enforce rights under an employee benefit plan.

Disability Determination

The development of the law relative to determinations of disability is a relatively clear one, pitting the rather conservative language of a policy or a statute on the one hand against the rather permissive interpretation of the concept by our courts on the other.[40] A decision during this term offered a glimmer of hope to insurers that there might be a return to a somewhat more rational interpretation of the concept of disability, but the final outcome dashes any serious prospect of a change in judicial approach.

In *Phillippe v. Commercial Insurance Co.*,[41] the insured was a dentist who had lost his right thumb in an accident in February, 1976.[42] The disability policy which he had purchased essentially guaranteed ten years of payments of $500.00 per week if he was "wholly and continuously" disabled from performing "every duty pertaining to his occupation." It also offered the possibility of similar payments for the rest of his life at the end of that ten-year period if he was "wholly and continuously disabled by reason of such injury from performing the duties of any gainful occupation for which he is reasonably fitted."

The appellate court's opinion in the case consists entirely of a *per curiam* adoption of the trial judge's extensive reasons for judgment. The trial judge agreed with the insurer that it was entitled to a "two-tiered" analysis of the disability question. The first analysis, not seriously in contest, concerned whether the claimant was disabled during the first ten-year period from performing his duties as a dentist. The second analysis, which was in serious dispute, was whether at the end of that ten-year period, he was disabled from performing the duties of "any gainful occupation." The insurer was thus permitted to offer evidence on the latter point, and thus was undoubtedly optimistic that it might

40. This development is chronicled in W. McKenzie & A. Johnson, Louisiana Insurance Law and Practice § 290, at 549-55, in 15 Louisiana Civil Law Treatise, (1986 and Supp. 1991).

41. 574 So. 2d 374 (La. App. 1st Cir. 1990).

42. The opinion does not reflect, if the court knew it, that the injury happened in a hunting accident and that Dr. Phillippe sued the gun manufacturer alleging that the injury was due to a defect in the shotgun which the manufacturer had made. In that suit, Dr. Phillippe ultimately collected a judgment of some $900,000.00, plus attorney's fees. Phillippe v. Browning Arms Co., 395 So. 2d 310 (La. 1980). A good portion of the judgment was based on his loss of future income; neither the original opinion nor the opinion on rehearing in the case mention the disability policy which is at issue in the case discussed in this forum.

be able to escape a determination of disability on the more expansive footing normally favored by Louisiana courts.

It was not to be. Though the trial judge entertained the evidence, he was not convinced that even a highly educated and highly skilled individual such as the claimant had been shown to be capable of performing the duties of "any gainful occupation." Essentially, the court concluded that the claimant did not have a duty to retrain himself for another occupation, and that if he were not already trained for it when he was injured, then he did not have the skill, training, and experience for "any gainful occupation" other than dentistry.[43]

Benefits Upon Cancellation

Much has been written in this forum about the rights of an insured upon cancellation of a health and accident policy, or upon non-renewal or other termination. The legislature has written on the subject as well.[44]

The decision in *Waldrip v. Connecticut National Life Insurance Co.*[45] does not add an enormous amount to the discussion, but does continue the trend of predictably lenient treatment of such matters in favor of the insured. The claimant had group health coverage through his law firm beginning in January, 1987. The coverage was in effect when he developed liver problems which led to a successful liver transplant in March, 1988. In late June, 1988, the policy was "cancelled" effective September 1, 1988 because the coverage was no longer profitable. The insurer agreed, however, to "pay all valid claims incurred" prior to the cancellation date.[46] Claims submitted prior to termination were not in dispute.

But as to claims submitted after September 1, 1988, the issue turned upon the statutory language which required the insurer to pay those claims if they were considered "benefits accrued" under the statute which governs such cancellations. The policy did not define the term, and neither does the statute. Not surprisingly, the court held that "benefits accrued" means "services related to the condition of which the insurer was aware before it cancelled the policy."[47] In this factual context, that clearly covered the expenses of this liver ailment.

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43. 574 So. 2d at 379-380.

44. La. R.S. 22:215(A)(1)(d) provides in pertinent part that "modification, amendment, or cancellation shall be without prejudice to any claim for benefits accrued, or for expenses incurred for services rendered, prior to such modification, amendment or cancellation. Benefits and expenses incurred shall be as defined and limited by the terms of the policy."

45. 573 So. 2d 1172 (La. App. 5th Cir. 1991).

46. Id. at 1174.

47. Id.

SUBROGATION

The decision in *Boyer v. Trinity Universal Insurance Co.*[48] sorts out a very complicated factual situation which nonetheless involves a very mundane situation. Boyer had purchased an expensive imported automobile from Randolph, who had bought it from Cop, who had bought it from Sunbelt Auto Imports. One day, Boyer noticed the vehicle was missing from its parking place and reported it as stolen. He also filed a claim with his automobile insurer under the theft provision of his policy.

Several weeks later, Boyer received a package from Germany containing certain of his personal belongings which had been in the vehicle. There was also a letter from a German car dealership which informed Boyer that Sunbelt, the importer of the vehicle, had never paid for it, and accordingly that the car had been "repossessed." The vehicle was described by the court as a "gray market" car.

Predictably, litigation ensued, commenced by Boyer against his own insurer. Third-party demands along the chain of title were likewise filed. Boyer also amended his original petition to include claims against his two immediate predecessors in title, asserting warranty rights. Boyer won in the trial court against his insurer, but all other claims were dismissed, including his claim against the predecessors in title. The trial court considered the unauthorized repossession of the car a theft, and held that the insurance policy covered that eventuality.

The dismissal of all other claims became final because no one appealed, though Trinity appealed the judgment against it. Subsequently, Boyer and Trinity settled their differences, and the release document authorized Trinity to substitute itself in Boyer's place to pursue any claims that he might have, including those against his predecessors in title. A formal subrogation agreement was also signed several weeks later. In its appeal, Trinity asserted those rights which it believed that it had against those predecessors in title.

Though the supreme court ultimately determined that there were a number of interesting issues which it did not have to reach,[49] it resolved the dispute in favor of the predecessors in title. The court held that no subrogation in favor of Trinity occurred until—at the very earliest—its payment to its insured. At that time, its insured had no rights against his predecessors in title because the judgment dismissing his claim against them had not been timely appealed and was final. In other words, the reason why Trinity could not proceed was the simplest of all reasons in the subrogation context: the subrogor had no rights to convey to the subrogee.

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48. 576 So. 2d 444 (La. 1991).

49. Id. at 446 n.3.

While the result seems harsh, it is accurate to say that subrogation occurs with payment, and not before. It behooves a payor who believes that he will become a subrogee entitled to assert certain rights to verify that the rights in question are still in existence at the time he thinks the subrogation will occur.