Louisiana Law Review

Volume 46 | Number 3
Developments in the Law, 1984-1985: A Symposium
January 1986

Insurance Law

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INSURANCE LAW

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UNINSURED MOTORIST COVERAGE

Out-of-State Policies

In *Snider v. Murray*,[1] the Louisiana Supreme Court resolved a conflict among the circuits concerning the applicability of the Louisiana Uninsured Motorist (UM) Statute[2] to insurance policies issued and delivered in other states. In a number of decisions, the second circuit had applied the more liberal coverage derived from interpretation of the Louisiana UM statute to out-of-state policies when the accident occurred in Louisiana, utilizing choice-of-law principles to balance the interest of the states.[3]

The supreme court in *Snider*, however, rejected the second circuit's approach and adopted the reasoning used by the first,[4] third[5] and fourth[6] circuits. The deceased was insured under a UM policy issued and delivered in Texas when he was domiciled in and his vehicle principally garaged in Texas. Subsequently, he moved to Louisiana where he was domiciled at the time of his fatal Louisiana accident. The tortfeasor's liability coverage was $10,000, and the deceased's UM coverage was

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1. 461 So. 2d 1051 (La. 1985).

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

3. Bloodworth v. Carroll, 455 So. 2d 1197 (La. App. 2d Cir. 1984), rev'd, 463 So. 2d 1313 (La. 1985); Wilson v. State Farm Ins. Co., 448 So. 2d 1379 (La. App. 2d Cir. 1984); Jones v. American Fire-Indem. Ins. Co., 442 So. 2d 772 (La. App. 2d Cir. 1983); Sutton v. Langley, 330 So. 2d 321 (La. App. 2d Cir.), cert. denied, 332 So. 2d 805 (La. 1976). Federal Courts, applying Louisiana law, also followed this line of reasoning. Stickney v. Smith, 693 F.2d 563 (5th Cir. 1982); Bell v. State Farm Mut. Auto. Ins. Co., 680 F.2d 435 (5th Cir. 1982), cert. denied, 459 U.S. 1088, 103 S. Ct. 572 (1982); Fenasci v. Travelers Ins. Co., 642 F.2d 986 (5th Cir. 1981) (dicta); Brawner v. Kaufman, 496 F. Supp. 961 (E.D. La. 1980).

4. Ricardo v. America Indem. Co., 201 So. 2d 145 (La. App. 1st Cir. 1967).

5. Richard v. Beacon Nat'l Ins. Co., 442 So. 2d 875 (La. App. 3d Cir. 1983).

6. Abel v. White, 430 So. 2d 202 (La. App. 4th Cir. 1983); Powell v. Warner, 398 So. 2d 22 (La. App. 4th Cir. 1981).

$10,000. Under Texas law and the provisions of the policy, the UM coverage was available only for the amount by which the UM limits exceeded the liability limits, which in this case was zero. The Louisiana statute, on the other hand, permits recovery under UM coverage for the full amount of damages in excess of the liability coverage up to the UM limits.[7] The second circuit applied the Louisiana statute to permit recovery of the $10,000 UM limits. The supreme court, with two dissents, reversed, concluding that even if the Louisiana statute were applicable under choice-of-law principles the Louisiana UM statute expressly identifies the insurance policies to which it applies. The Louisiana statute governs only a policy "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state."[8] Therefore, since the Texas policy under consideration did not meet the statutory criteria, the Louisiana statute was not applicable.[9]

Unrestricted Releases

The supreme court has recognized that the UM insured could compromise his claim against the tortfeasor without losing his right to pursue his UM claim[10] and that the tortfeasor and the uninsured motorist carrier are solidary obligors.[11] With this jurisprudential background, a number of unfortunate cases arose in which the UM insured executed a release in favor of the tortfeasor without expressly reserving his rights against the UM insurer. Louisiana Civil Code article 2203 formerly provided that the release of one debtor released all solidary obligors unless the rights against the remaining debtors were expressly reserved. Relying on this Civil Code provision, UM insurers were successful in a number of lower court decisions in obtaining the dismissal of suits brought by UM insureds who had executed unrestricted releases. Having granted writs in five such cases, the supreme court in *Corona v. State Farm Insurance Co.*,[12] held that an express reservation of rights was unnecessary, finding that the statutory rights of the insured under the UM statute were in

7. La. R.S. 22:1406(D)(2)(b) (1978).

8. La. R.S. 22:1406(D)(1)(a) (1978).

9. On the issue of where an automobile is principally garaged, see Decatur v. United States Fidelity & Guar. Co., 464 So. 2d 854 (La. App. 5th Cir. 1985) (Louisiana statute not applicable to auto temporarily in this state at the time of policy renewal).

10. Niemann v. Travelers Ins. Co., 368 So. 2d 1003 (La. 1979). Cf. Pace v. Cage, 419 So. 2d 443 (La. 1982). For further discussion, see McKenzie, Louisiana Uninsured Motorist Coverage—After 20 Years, 43 La. L. Rev. 691, 723 (1983).

11. Hoefly v. Government Employees Ins. Co., 418 So. 2d 575 (La. 1982). Cf. Fertitta v. Allstate Ins. Co., 462 So. 2d 159 (La. 1985); Johnson v. Fireman's Fund Ins. Co., 425 So. 2d 224 (La. 1983).

12. 458 So. 2d 1275 (La. 1984).

conflict with article 2203. While this strained statutory interpretation may be subject to criticism, the issue has been rendered moot by the revision of the obligation articles of the Civil Code, effective January 1, 1985, which repealed civil code article 2203. Revised article 1803 rejects the express reservation requirement.

Credit For Payments

A number of recent decisions have grappled with issues involving what credit is due the UM insurer or the liability insurer for payments made or due by the other. *Fertitta v. Allstate Insurance Co.*[13] is a significant decision by the Louisiana Supreme Court on the issue of whether the plaintiff's judgment against the tortfeasor should be reduced by the amount of the plaintiff's pretrial settlement with the UM insurer, when the insurer waived subrogation as a condition of the settlement. Seeking recovery for injuries sustained in an auto accident, the plaintiff sued the negligent motorist and her liability insurer, Allstate, plus the plaintiff's UM insurer, State Farm. Subsequently, the negligent motorist filed a third-party demand against Allstate for the amount of any judgment in excess of its $10,000 policy limits, contending that Allstate had acted neither fairly nor in good faith in settlement negotiations.

Immediately prior to the commencement of trial, plaintiff settled with State Farm for $32,000 of its $50,000 policy limit. Plaintiff expressly reserved "all rights" to proceed against other persons and to "recover the full amount of any judgment or settlement without any reimbursement or payment to State Farm . . . ."[14] The trial court awarded plaintiff damages in the amount of $48,701.11 and refused to credit the State Farm settlement against this liability. The trial court further awarded judgment against Allstate on the third-party demand for the liability in excess of its policy limits. Allstate appealed, contending that it was entitled to credit for the State Farm payment. The court of appeal affirmed, finding that Allstate was liable for the full judgment against its insured because of its improper handling of the claim. It further concluded that Allstate was not entitled to credit for the State Farm payment on the basis that there was no solidarity between Allstate and State Farm, the latter being liable only after Allstate's obligations were fully satisfied.

With two concurring opinions and two dissents, the supreme court reversed. Allstate's liability *to the plaintiff*, the court held, was not extended by its improper claims handling. The plaintiff was entitled to recover from Allstate only its liability policy limits; the judgment for

13. 462 So. 2d 159 (La. 1985).
14. Id. at 161 n.1.

the excess was on the third-party demand in favor of Allstate's insured, the tortfeasor. The court further noted that a solidary obligation existed between the tortfeasor and the UM insurer, State Farm, for the amount of the claim in excess of the liability limits. Therefore, payment by one solidary obligor (State Farm) would be credited against the solidary obligation to reduce the indebtedness of the other solidary obligor (the tortfeasor). The court recognized that there may be rights between solidary obligors for reimbursement but held that State Farm's waiver of its rights inured to the other debtor, not the creditor. It also rejected the argument that the collateral source rule precluded credit of UM benefits against the tortfeasor's obligation, distinguishing the UM insurer's solidary obligation created by the UM statute from collateral sources such as hospitalization insurance.[15]

Fertitta dealt with the issue of whether the tortfeasor was entitled to credit for a payment made by the UM insurer. The converse question, of whether the UM insurer is entitled to credit for payments made by tortfeasors and their liability insurers, also leads to troublesome issues. Questions involving claims against a single tortfeasor and multiple tortfeasors should be considered separately. In the simple case, the plaintiff with UM coverage is injured by the negligence of one tortfeasor with inadequate liability insurance. Regardless of the amount of the settlement between the plaintiff and the tortfeasor's liability insurer, the UM insurer should be entitled to credit for the policy limits of the liability insurance;

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15. It is not clear from the *Fertitta* decision what, if anything, could have been done to deny the tortfeasor (and his liability insurer) the benefit of the settlement of the UM claim. Although the UM insured may prevent subrogation of the UM insurer by settlement with and release of the tortfeasor, see cases cited in supra note 10, the jurisprudence is clear that the UM insurer is entitled to subrogate against a tortfeasor who has not been released. Bond v. Commercial Union Assurance Co., 407 So. 2d 401 (La. 1981). If it had not waived its subrogation in the *Fertitta* case, State Farm could have sought reimbursement from (would have had the right to pursue its subrogation claim against) the tortfeasor upon whom the ultimate burden of responsibility should be placed. Since the court held that a waiver inured to the benefit of the tortfeasor, perhaps the parties could have achieved the intended result with an assignment by State Farm of the subrogation right back to the plaintiff. Such a result would appear to be consistent with the revisions of Civil Code articles 1804 and 1892, effective January 1, 1985, which provide in part as follows:

Article 1804. Liability of solidary obligors between themselves. "If the circumstances giving rise to the solidary obligation concern only one of the obligors, that obligor is liable for the whole to the other obligors who are then considered only as his sureties."

Article 1892. Remission granted to sureties. "If the obligee grants a remission of debt to a surety in return for an advantage, that advantage will be imputed to the debt, unless the surety and the obligee agree otherwise."

Such assignment of the subrogation claim back to the UM insured as a condition of the settlement would not be subject to attack as a sale of litigious rights under Louisiana Civil Code article 2652, since such assignment clearly falls within the exception specified in article 2654.

UM coverage is applicable only to the extent that the negligent motorist is "uninsured and underinsured."[16] Although the UM insurer is solidarily liable with the tortfeasor, the UM insurer is not entitled to credit for the virile share of such solidary obligor.[17] An exception, however, should be recognized to this general rule when the full policy limits are not available to the UM insured because there are multiple claimants. Under such circumstances, the UM insurer should be entitled to credit only for the liability coverage reasonably available to the insured, which may be the balance remaining after settlement of other claims or a proportionate share of the policy limits or some other amount, depending upon the status of other claims.[18]

What is the responsibility of the UM insurer when there are joint tortfeasors? Is the UM insurer's responsibility determined as though it were the liability insurer of each tortfeasor or is its responsibility solely to provide backup protection to the insured against the contingency that there will not be adequate liability insurance from any source available to the insured? Is the UM insurer responsible only for the amount of damages in excess of all available liability insurance or is the UM insurer liable for the virile share of each tortfeasor in excess of that tortfeasor's liability insurance coverage?

These complex issues have not been resolved, but recent cases suggest a solution which appears inconsistent with the rationale behind UM coverage. In the most recent decision, *Farnsworth v. Lumbermen's Mutual Casualty Co.*,[19] the plaintiff was injured by joint tortfeasors, one with adequate liability insurance for the entire award and one without liability insurance. The trial court rendered judgment only against the liability insurer and not the plaintiff's UM insurer. The third circuit, acknowledging earlier decisions which held that the UM insurer was not liable if there was adequate liability insurance from any source to compensate the injured insured,[20] detected a "shift in judicial reasoning" since earlier decisions were based upon the recognition of a solidary obligation between the uninsured tortfeasor and the UM insurer. The court concluded that the current jurisprudence places the UM insurer

16. See La. R.S. 22:1406(D)(1)(a) and (2)(b) (1978).

17. Jordan v. Sweaney, 467 So. 2d 569 (La. App. 1st Cir.), cert. denied, 469 So. 2d 985 (La. 1985).

18. Cf. Breaux v. Government Employees Ins. Co., 369 So. 2d 1335 (La. 1979), as an example of a case in which the full liability policy limits were not available to the plaintiffs.

19. 442 So. 2d 1340 (La. App. 3d Cir. 1983), cert. denied, 445 So. 2d 452 (La. 1984).

20. Gautreaux v. Pierre, 254 So. 2d 476 (La. App. 3d Cir. 1971); Strother v. State Farm Mut. Auto. Ins. Co., 238 So. 2d 774 (La. App. 1st Cir. 1970); Fouquier v. Travelers Ins. Co., 204 So. 2d 400 (La. App. 1st Cir. 1967). Cf. Youngs v. Champagne, 348 So. 2d 126 (La. App. 4th Cir.), cert. denied, 350 So. 2d 1209 (La. 1977).

in the same shoes as though it were the liability insurer of the uninsured motorist, and the judgment was amended to hold the liability insurer and the UM insurer solidarily liable. Although the opinion was not specific, the court apparently intended for the two insurers to be obligated to pay the judgment equally. The supreme court denied plaintiff's application for writs, and apparently, the UM insurer did not apply for writs.[21]

The *Farnsworth* decision creates a strange anomaly in which the insurance purchased by or for the victim to protect against uninsured and underinsured motorists is used to reduce the obligations of an adequately insured tortfeasor. The UM statute requires insurance only for the "protection" of insureds who are injured by uninsured or underinsured motorists. To mandate such "protection" when adequate liability insurance is available from any source is unnecessary and incongruent with the public policy represented by the UM statute. The court should recognize that UM insurance is available only to compensate victims who are *unprotected* by liability insurance. The obligation of the UM insurer always should be secondary to liability insurance. In *Farnsworth*, since the liability insurance of one tortfeasor was adequate, the suit against the UM insurer should have been dismissed without prejudice. Likewise, in both settlements with and judgments against joint tortfeasors, the UM insurer should be liable only for the amount by which the insured's damages exceed the sum of liability insurance available to all tortfeasors.

Other Decisions

Uninsured motorist coverage has been the leading cause of insurance litigation for a number of years. As such, there was a bevy of decisions on other issues during the past year. Even though a qualified self-insured

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21. 445 So. 2d 452 (La. 1984). The same issue was presented in a different format in Hebert v. Ordoyne, 388 So. 2d 407 (La. App. 1st Cir. 1980). The plaintiffs' decedents (UM insureds of Royal Globe) were fatally injured in an accident allegedly caused by the joint negligence of Ordoyne (insured by Farm Bureau) and Champs's driver (insured by Cavalier and Interstate). Before trial, plaintiffs settled with Champs, Cavalier and Interstate for a total sum of $500,000. At trial, a jury verdict was rendered in the total amount of $575,000, finding Ordoyne and Champs's driver joint tortfeasors. Farm Bureau's liability policy limits were $20,000. Royal Globe claimed credit for the $500,000 paid on behalf of Champs, in addition to the Farm Bureau liability limits. The court held, however, that Royal Globe was entitled to credit only for one-half of the judgment, applying the joint tortfeasor solidary obligation principles announced in Harvey v. Travelers Ins. Co., 163 So. 2d 915 (La. App. 3d Cir. 1964). The standard reduction clause in Royal Globe's policy for sums received by the insured from other sources was held to be ineffective. Thus, Royal Globe was held liable for one-half of the judgment, less credit for Farm Bureau's liability limits. When the insureds received full dollar-for-dollar compensation for the entire extent of their damages, it is difficult to comprehend why the credit provisions of the reduction clause offend the UM statute.

company is responsible for the accident, the insured may recover under UM coverage.[22] Injuries resulting from discharge of firearms in a vehicle[23] or during an altercation following an automobile accident[24] did not arise out of use of the vehicle, a prerequisite for coverage under automobile liability and uninsured motorist coverage. Applying the criteria established by the supreme court in *Hart v. Allstate Insurance Co.*,[25] a number of decisions have awarded penalties and attorney's fees against the UM insurer under Louisiana Revised Statutes (La. R.S.) 22:658.[26] Several cases involved a determination of whether UM coverage was mandated under the terms of certain automobile liability insurance policies.[27]

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22. Bryant v. Gulf States Utils. Co., 460 So. 2d 709 (La. App. 3d Cir. 1984).

23. Topole v. Eidson, 464 So. 2d 406 (La. App. 1st Cir. 1985).

24. Dupuy v. Gonday, 450 So. 2d 1014 (La. App. 1st Cir. 1984).

25. 437 So. 2d 823 (La. 1983).

26. Cloney v. Smith, 441 So. 2d 342 (La. App. 5th Cir. 1983), cert. denied, 444 So. 2d 608 (La. 1984) (court concluded that the insurer's denial of a claim was based upon a "cursory investigation;" $5,000 awarded as attorney's fees); Savoy v. Chapmann, 441 So. 2d 21 (La. App. 3d Cir. 1983) (UM insurer refused to pay its insured for accident in which liability insurer had denied coverage on the ground that the tortfeasor's actions were intentional; $5,000 awarded as attorney's fees); Darbonne v. Safeco Ins. Co. of America, 452 So. 2d 801 (La. App. 3d Cir. 1984) (no reasonable basis for refusing to tender UM payment within sixty days; $5,000 attorney's fees increased by $500 on appeal); Rogers v. Ambassador Ins. Co., 452 So. 2d 261 (La. App. 5th Cir.), cert. denied, 457 So. 2d 14 (La. 1984) (although insurer's defense raised issue which was *res nova*, the insurer's misinterpretation of the UM statute was not a legal justification for nonpayment); Nelson v. Allstate Ins. Co., 464 So. 2d 1015 (La. App. 1st Cir. 1985) (insurer cannot enforce policy provision requiring payment of liability limits before payment of UM claim nor could insurer justify failure to pay the undisputed claim on the ground that the insured was demanding additional limits which he was not entitled to stack). But see McDill v. Utica Mut. Ins., 465 So. 2d 19 (La. App. 1st Cir. 1984), cert. granted, 467 So. 2d 1123 (La. 1985) (court of appeal reversed an award of $40,000 attorney's fees, finding that the plaintiff at no time prior to trial submitted satisfactory proof of loss to the insurer).

27. Ashline v. Simon, 466 So. 2d 622 (La. App. 5th Cir.), cert. denied, 472 So. 2d 28 (La. 1985) (auto rental agreement provided that lessor, a certified self-insured, provides liability coverage for customer in accordance with standard provisions of Basic Auto Liability Insurance Policy and that customer rejects UM coverage; court held that provision of liability coverage by lessor required UM protection and that mandatory rejection was unenforceable); Capone v. King, 467 So. 2d 574 (La. App. 5th Cir.), cert. denied, 468 So. 2d 1203, 1205 (La. 1985) (selection of lower limits with respect to UM coverage for owned automobiles did not constitute an implicit waiver of UM coverage for non-owned automobiles; decision does not adequately explain why UM coverage was mandatory for plaintiff); Antill v. Bankers & Shippers Ins. Co., 466 So. 2d 555 (La. App. 5th Cir.), cert. granted, 468 So. 2d 567 (La. 1985) (court of appeal concluded that "bobtail" policy, which excluded liability coverage while the vehicle was being used for certain purposes, was not required to provide UM coverage while the vehicle was being used for an excluded purpose).

Capone v. King[28] is the first decision to apply the "anti-stacking" provision[29] when the automobile occupied by the plaintiff was covered by both primary and excess liability insurance. The owner of the automobile was using the vehicle in the course of her employment. The court found that UM coverage was provided by the owner's policy and by the non-owned automobile liability coverage of the employer's automobile liability and umbrella liability policies. For purposes of the anti-stacking provision, the court classified all three policies as the "primary coverage" on the automobile and made no effort to deal with the specific statutory language, which is difficult to reconcile with the court's decision.[30]

LIABILITY INSURANCE

Automobile Exclusion

The personal liability coverage in a homeowners policy usually contains an express coverage exclusion for automobiles "owned or operated by, or rented or loaned to any insured." Under unusual circumstances in which the child was not an insured, it was held that a homeowners policy provided coverage for a parent's liability arising out of a minor child's negligent operation of an automobile.[31]

Business Pursuits Exclusion

The supreme court held that liability resulting from the fall of a large tree from rental property onto the neighbor's house was not excluded as a business pursuit under the provisions of a homeowners policy because maintenance of the tree fell within the exception contained in the exclusion for activities "ordinarily incident to non-business pursuits."[32]

Intentional Injury Exclusion

In 1984, the Louisiana Supreme Court established the ground rules for application of the intentional injury exclusion found in most liability

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28. 467 So. 2d 574 (La. App. 5th Cir.), cert. denied, 468 So. 2d 1203, 1205 (La. 1985).

29. La. R.S. 22:1406(D)(1)(c) (1978).

30. For further discussion of this issue, see Johnson & McKenzie, Developments in the Law, 1983-1984—Insurance, 45 La. L. Rev. 325, 336 (1985).

31. Pizzo v. Graves, 453 So. 2d 592 (La. App. 5th Cir.), cert. denied, 457 So. 2d 1181 (La. 1984). The court found that the child was no longer a resident of the parent's household, and therefore he did not fall within the policy definition of an insured. Ryder Truck Rental, Inc. v. Pinelli, 466 So. 2d 731 (La. App. 4th Cir. 1985), is an example of the usual situation in which the minor is a resident of his father's household. The court correctly held that the homeowner's policy excluded coverage for the vicarious liability of a father for the negligent operation of an automobile by his minor son.

32. Blue Ridge Ins. Co. v. Newman, 453 So. 2d 554 (La. 1984).

policies by requiring proof that the insured either consciously desired the physical result of his act or knew the result was substantially certain to follow.[33] Firing a pistol in the general direction of the plaintiff from less than ten feet[34] and giving the plaintiff's ankle a 180 degree twist[35] both were held to be within the exclusion as conduct from which the result was substantially certain to follow.[36]

Obligation to Defend

A number of cases during the past year have dealt with the insurer's obligation to defend its insured under a liability policy. Several cases have applied the rule announced by the supreme court in *American Home Assurance Co. v. Czarniecki*,[37] that the insurer has the obligation to defend the insured unless the allegations of the petition unambiguously exclude coverage.[38] Where the insured is named as a third-party defendant, the obligation to defend may be derived from the allegations of the third-party demand rather than the original petition.[39] The obligation

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33. Pique v. Saia, 450 So. 2d 654 (La. 1984).

34. Fleming v. Aetna Casualty & Sur. Co., 461 So. 2d 614 (La. App. 1st Cir. 1984), cert. denied, 464 So. 2d 302 (La. 1985).

35. Walpole v. Weathersby, 465 So. 2d 950 (La. App. 2d Cir. 1985).

36. Cf. Bloodworth v. Carroll, 455 So. 2d 1197 (La. App. 2d Cir. 1984), rev'd on other grounds, 463 So. 2d 1313 (La. 1985). After an exchange of obscenities and vulgar gestures, the insured backed his auto in the direction of his ex-wife for the purpose of frightening her. While executing this maneuver, the insured managed to injure three other persons, one seriously who was pinned between the insured's auto and an auto on which the wife had leaped for safety. The court found that only the emotional injury to the wife was intentional. While his conduct toward the others was extreme recklessness, the court concluded, there was no substantial certainty that injuries would occur. This conclusion seems questionable. The ex-wife and the others were standing in a group. The court does not explain adequately how the insured could have intentionally frightened his wife without inflicting the same injury on the others. He must have known that his actions would inflict emotional distress on all members of the group. Where some injury is intended, the fact that more severe injury than expected results should not change the intentional character of the injuries.

37. 255 La. 251, 230 So. 2d 253 (1969).

38. Louisiana Farm Bureau Mut. Ins. Co. v. Knotts, 466 So. 2d 502 (La. App. 3d Cir. 1985) (under policy excluding "any business pursuits or business property (other than farms)," the court held that the petition alleging injury from natural gas supplied to a cotton gin did not exclude the possibility that there was coverage for the loss as a farming operation excepted from the exclusion); CBM Eng'rs, Inc. v. Transcontinental Ins. Co., 460 So. 2d 745 (La. App. 3d Cir. 1984) (broad allegations of the petition did not exclude the possibility that the insured could be found liable for actions which were outside the scope of the professional services exclusion of a comprehensive general liability policy); Moreau v. Moran, 465 So. 2d 202 (La. App. 3d Cir. 1985) (insurer was not obligated to defend because alleged action clearly fell within the exclusion for completed operations and product hazard).

39. Mason v. Stauffer Chemical Co., 461 So. 2d 589 (La. App. 1st Cir. 1984).

to defend may be determined during the pendency of the original action in a separate suit for a declaratory judgment filed by either the insured[40] or insurer.[41] A trial court's interlocutory determination of coverage adverse to the insurer may be reviewed prior to final judgment upon the insurer's application for writs to the court of appeal.[42]

Prior jurisprudence has recognized that the obligation to defend includes an obligation to appeal an adverse judgment against the insured when there is a reasonable basis for appeal.[43] *Bowen v. Government Employees Insurance Co.*,[44] recognized that the insurer does not have the duty to post a suspensive appeal bond for the amount of any judgment in excess of its liability policy limits. When an excess judgment has been rendered against the insured, the insurer's duty is to act in good faith to assist the insured in making his own arrangements for a suspensive appeal bond and to keep the insured informed of significant developments.

FIRE COVERAGE, HEALTH AND ACCIDENT POLICIES

Legislative Developments

In a relatively quiet legislative year, there were a few enactments of import concerning fire coverage and health and accident policies. The most significant of the enactments was Act 249, amending La. R.S. 22:213 and 22:215, undoubtedly an attempt to overrule *Cataldie v. Louisiana Health Service & Indemnity Co.*[45] As discussed later, the *Cataldie* decision, decided during the past term, imposed substantial responsibilities on an insurer with respect to cancellation of health and accident coverage when there are pending claims. The decision was to a great extent based upon statutory language requiring that any cancellation be "without prejudice" to a claim originating prior to the cancellation date.[46] Act 249 altered that general statement in the standard provisions so that the cancellation would be without prejudice to "any claim for benefits accrued or expenses incurred for services rendered prior to cancellation."[47] It also added the final statement that upon

40. CBM Eng'rs, Inc. v. Transcontinental Ins. Co., 360 So. 2d 745 (La. App. 3d Cir. 1984) (obligation was established by partial summary judgment in declaratory action).

41. Louisiana Farm Bureau Mut. Ins. Co. v. Knotts, 466 So. 2d 502 (La. App. 3d Cir. 1985).

42. Moreau v. Moran, 465 So. 2d 202 (La. App. 3d Cir. 1985).

43. Reichert v. Continental Ins. Co., 290 So. 2d 730 (La. App. 1st Cir.), cert. denied, 294 So. 2d 545 (La. 1974).

44. 451 So. 2d 1196 (La. App. 5th Cir. 1984).

45. 456 So. 2d 1373 (La. 1984).

46. La. R.S. 22:213(B)(7) (1959).

47. 1985 La. Acts No. 249.

cancellation, the insurer would not be liable for "any claim for benefits accrued, or for expenses incurred for services rendered, subsequent to the cancellation date,"[48] unless the policy provided otherwise.

Other enactments concerning the health and accident field specify that, once declined, optional coverage for mental disorders need not be re-offered to the insured on renewal dates, though the insured may request such coverage on an anniversary date;[49] and with respect to pre-admission evaluations, provide for limited damages for "unreasonable" delay in certifying the eligibility of an insured for such an evaluation.[50]

There were also two relatively minor enactments concerning fire coverage. Act 506 provides that a material misrepresentation made by an insured subsequent to a fire loss, as to the value of the contents of the insured premises, will not void coverage "unless a court of competent jurisdiction" should determine otherwise.[51] Given the final proviso, the enactment may not actually make much difference, since the court appears to retain the authority to make such a misrepresentation an event which will void coverage. Act 938 increases to twenty days the notice which a fire insurer must give prior to cancellation of a policy, altering the standard fire provisions to that extent.[52]

Jurisprudence

One decision in this field stands out clearly during this term—*Cataldie v. Louisiana Health Services & Indemnity Co.*[53] Some very brief background on the subject of cancellation is necessary before turning to the facts in *Cataldie*.

Cancellation of a policy carries with it significantly different consequences from termination or cessation for reasons such as termination of employment under a group policy with the employer. In the first place, cancellation is regulated by statute. Prior to amendment by Act 249 of 1985, the standard provisions required by statute included a cancellation clause in these terms, or terms more favorable to the policyholder:

> The insurer may cancel this policy at any time by written notice delivered to the insured, or mailed to his last address . . . and shall refund the pro rata unearned portion of any premium paid. Such cancellation shall be without prejudice to

48. Id.
49. 1985 La. Acts No. 213, amending La. R.S. 22:669(A) (Supp. 1985).
50. 1985 La. Acts No. 429, adding La. R.S. 22:657(D) (Supp. 1986).
51. 1985 La. Acts No. 506.
52. 1985 La. Acts No. 938.
53. 456 So. 2d 1373 (La. 1984).

> any claim originating prior thereto. The insured may likewise cancel this policy on the above terms.[54]

The retention of a cancellation option by the insurer must be prominently displayed on the first page of the policy.[55] The insurer may offer and contract for "non-cancellable" insurance which may be kept in force by timely payment of premiums. Such policies are also closely regulated by statute.[56] Thus, the entire area of cancellation is not one in which the ordinary principles of contract law hold complete sway, but rather one, like so many other areas of insurance law, in which the public interest in the contract is so great that the legislator in effect becomes a party to the contract as well.

Certainly the insurer is entitled to cancel any policy if the premiums are not timely paid, but evidence of non-payment must be clear lest it be accused of having used the excuse of non-payment when the cancellation was really for some other unacceptable reason.[57] But even a cancellation for non-payment of premiums requires adequate notice to the insured so that he will be in a position to decide for himself what course of action to take in light of the impending cancellation.[58] This seems to be a more difficult problem in group policies than in individual coverage.[59]

The cancellation rights of an insurer were radically affected by the decision in *Cataldie*. The defendant, Blue Cross, had issued an individual

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54. La. R.S. 22:213(B)(7) (1959). By reference, group health policies are subject to the same requirement. La. R.S. 22:215(C) (1959).

55. La. R.S. 22:212(8) (1959).

56. La. R.S. 22:214 (Supp. 1985), which permits use of the terms "non-cancellable" or "non-cancellable and guaranteed renewable" only when the insured may continue the policy in force by timely payment of premiums until at least age fifty, or, if issued after age forty-four, for at least five years from its issuance; and provides that the term "guaranteed renewable" may be used under similar restrictions, except that the insurer may make premium rate changes by classes of insureds. Such policies are incontestable after three years and must contain a ten-day grace period for premium payments. An insurer which issues such policies must also offer, at additional cost, non-cancellable status up to age sixty-five. La. R.S. 22:214.1 (Supp. 1985).

57. Modisette v. American Integrity Ins. Co., 297 So. 2d 498 (La. App. 2d Cir. 1974) (insurer's evidence that it had not received premium payments completely controverted by insured's strong testimony and evidence to the contrary; insurer's case not helped by its refusal to renew after the cancellation, on basis of "health history" of insured).

58. Tabb v. Louisiana Health Serv. & Indem. Co., 361 So. 2d 862 (La. 1978), overruled on other grounds in Rudloff v. Louisiana Health Serv. & Indem. Co., 385 So. 2d 767 (La. 1979).

59. Greer v. Continental Cas. Co., 347 So. 2d 70 (La. App. 2d Cir. 1977) (group policy under which individual employee would have been entitled to $300.00 more per month had been cancelled and replaced by a successor policy, but employee might never have received notice of the cancellation; summary judgment for insurer on the issue reversed).

medical policy with family coverage to the claimant with fairly typical provisions and premium ($250,000.00 ceiling on major medical expenses, $100.00 deductible and quarterly premium of some $245.00).[60] More than two years after the issuance of the policy, the insured's young daughter was diagnosed as having brain cancer, of which she died about eighteen months later. During the treatment, substantial expenses were incurred and some of these were paid by Blue Cross. But also during the treatment, Blue Cross began to increase radically the premium and to decrease equally radically the coverage.[61] Ultimately, the changes were so great that the insured had no alternative but to cancel the policy himself and enter into one that covered only the very ill child and no other family member. After notice of cancellation, the insured filed a declaratory judgment action seeking reinstatement of the family coverage on the terms existing prior to the most recent increase in rates and decrease in coverage. The trial court granted the request, but the court of appeal amended the judgment so as to reinstate only the prior coverage for the daughter.[62]

The supreme court first held that the insurer's actions "caused" the cancellation of the policy, for which it must bear "legal responsibility." Thus it treated the case as one of cancellation by the insurer rather than the insured. Citing the standard policy provision on cancellation required by statute, it observed that the Blue Cross policy provision was less favorable to the insured and had to be treated as amended by the statute.[63] Finally, it held that the reduced coverage would be prejudicial to the claim for the daughter's expenses which arose prior to the cancellation. Thus it affirmed the position of the appellate court requiring reinstatement with respect to the daughter under the prior, more favorable conditions. The *Cataldie* rationale was also extended during this term to a group policy, under which the result might have even greater consequences.[64]

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60. Over the term of the policy and prior to the diagnosis of brain cancer, there had been minor changes in the coverage and premium. The premium went up by $10.00 per quarter at one point. At another point, the ceiling was raised to $300,000.00, and the deductible was decreased to $50.00. That produced an increase in the premium of about $75.00.

61. The major medical coverage ceiling dropped to $20,000.00, subject to a maximum of $10,000.00 in any one year. The deductible increased to $5,000.00. The premium doubled.

62. Cataldie v. Louisiana Health Serv. & Indem. Co., 433 So. 2d 367 (La. App. 3d Cir. 1984).

63. The Blue Cross provision with respect to expenses being incurred upon termination called for up to $100.00 in reimbursement or for a forty-five-day period, whichever occurred first.

64. Cabibi v. Louisiana Health Serv. & Indem. Co., 465 So. 2d 56 (La. App. 4th Cir. 1985). The dependent child in *Cataldie* died very shortly after the cancellation

The *Cataldie* decision is a prominent example of the supposed maxim that hard cases make bad law. The court reached what it felt to be an equitable result on the very difficult facts before it. But the rationale will have far-reaching consequences. It interjects the judiciary, to a limited extent, into the morass of premium calculations and coverage extensions. It suggests, although this must have already been clear from the statutes, that cancellation is not wholly a unilateral decision by the insurer.

The decision almost certainly was responsible for the changes wrought by Act 249 of 1985, but even those amendments will probably not be the final statement on the subject.

PROPERTY INSURANCE

At the very beginning of this term, the supreme court decided *Audubon Insurance Co. v. Farr*,[65] and by that decision gave some new dimensions to the relationship between a property insurer and its insured.

The home of a Ms. Paul was damaged by the negligence of a driver named Farr, insured by Allstate. After securing two estimates of the damage to her home, Ms. Paul contacted her property damage insurer, Audubon. It paid her $4,412.00, based on its estimate of damage of $4,512.00 less the $100.00 deductible. She gave Audubon an appropriate subrogation receipt for the payment, and Audubon's check to the order of Ms. Paul was paid on August 18, 1978.

Unknown to Audubon, Ms. Paul had apparently also been negotiating with Allstate as Farr's insurer. Three days after the Audubon check was paid, Allstate's check to Ms. Paul's order for $4,000.00 was paid. The check had a notation "in payment of property damage of 6-1-78" (the approximate date of the damage done by Farr). However, Ms. Paul signed no release document other than endorsement of the check.

Thus, Ms. Paul had collected some $8,412.000, which was well in excess of the actual damage caused. For its part, Audubon believed that it had been subrogated to Ms. Paul's rights against Farr and Allstate as of August 18, 1978. Thus, Audubon brought a suit against Farr and Allstate, asserting its rights as the subrogated property insurer to collect the sum it had paid to Ms. Paul. Farr and Allstate brought a third-party demand against Ms. Paul for the sum that Allstate had paid her.

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controversy. The claimant in *Cabibi* suffered from diabetes and would no doubt incur substantial expenses on a long-term basis. The court ordered that the cancellation be effective with respect to everything except the claimant's diabetes-caused expenses, and reserved to the parties the right to seek supplemental relief if an agreement could not be reached on the future premiums to be paid.

65. 453 So. 2d 232 (La. 1984).

The trial court granted judgment to Audubon for its $4,412.00 against Farr and Allstate, and in turn granted judgment on the third-party demand for $4,000.00 against Ms. Paul. The appellate court affirmed,[66] reasoning that Ms. Paul had subrogated Audubon to her rights prior to the payment by Allstate, and thus could not release Allstate from the assertion of those rights by Audubon, even if she had received $4,000.00 to do so.

The supreme court granted a writ, and reached the heart of the matter early in its opinion:

> [A]s between the two insurance companies, which is going to have the burden of trying to recoup from Paul that portion which represents a double recovery by her? Although Allstate's insured was the tortfeasor, the problem was caused by Audubon's insured, who breached the subrogation agreement with Audubon, thereby enriching herself to the detriment of her insurer.[67]

The court held that the compromise between Ms. Paul and Allstate was an effective settlement of their dispute, not subject to collateral attack by Audubon. Then it held that Ms. Paul *had* subrogated Audubon to her rights to that release, but thereafter breached the terms of the subrogation agreement which required her not to settle with or release anyone responsible for her loss without Audubon's consent. Thus, the court held that Audubon's remedy was against its own insured rather than against Farr and Allstate.

In a concurrence, Justice Dixon pointed out that article 2644 of the Louisiana Civil Code mandated the same result as that reached by the majority, since Allstate had not been notified of the transfer Ms. Paul's rights to Audubon by subrogation upon Audubon's payment to her.[68] Absent such notice, Allstate's payment to Ms. Paul discharged its obligation, and it could not be made to pay twice.

The rationale of *Audubon Insurance* may have surprised some insurers, who might confidently have expected that once subrogated rights were acquired by payment to an insured, neither the insured nor any

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66. Audubon Ins. Co. v. Farr, 443 So. 2d 733 (La. App. 4th Cir. 1983).

67. 453 So. 2d at 234.

68. La. Civ. Code art. 2644: "If, previous to notice having been given of the transfer to the debtor, either by the transferor or by the transferee, the debtor should have made payment to the transferor, the debtor is discharged of the debt." Since this article concerns assignment of rights and the 1985 revision of the Civil Code articles on obligations equates assignment and conventional subrogation, there is no reason to expect that Justice Dixon's view will not continue to prevail under the revised Civil Code articles.

other party could affect those rights without the consent of the insurer.[69] But the rationale was promptly followed in another case presenting almost identical facts.[70]

It thus appears that the insurer which pays its own insured for property damage and is subrogated to the insured's rights must give notice to the alleged tortfeasor, if any and if known, or his insurer, that the payment has been made and the subrogation taken. If it does not, it may find that its insured's own conduct will defeat any rights against the tortfeasor and his liability insurer. This will cause additional administrative difficulties for the property insurer, particularly when its investigation had not progressed far enough to permit it to know who might be responsible for the damage. It would appear that even if it is uncertain about the final outcome of its investigation, it should put all potential wrongdoers and their insurers on notice of its payment to its own insured.

The court in *Audubon Insurance* no doubt was trying to make the best of a bad situation and was attempting to do equity between the two insurers before the court when neither was responsible for the problem created by Ms. Paul's duplicity. But the result may have a chilling effect on settlements between an insurer and its own insured. If an insurer has not yet ascertained who might be responsible for the loss, can it in good faith pay its own insured (who will no doubt be pressing for payment) and take subrogated rights? Given the decision in *Audubon Insurance*, it takes a substantial risk in doing so that it will find that those rights have vanished into thin air if the insured finds out the identity of the tortfeasor before the insurer does. Given that risk, the property insurer may simply refuse to pay its own insured until it has information sufficient to permit it to give notice of payment to the appropriate persons. Such refusal and the attendant delay is not necessarily in the best interest of the insured under the property policy.

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69. See Southern Farm Bureau Cas. Co. v. Sonnier, 396 So. 2d 996 (La. App. 3d Cir. 1981) and the same case in the supreme court at 406 So. 2d 178 (La. 1981), as well as the discussion in Johnson, Developments in the Law, 1980-1981—Obligations, 42 La. L. Rev. 388, 400-02 (1982).

70. Great Falls Ins. Co. v. Jordan, 454 So. 2d 301 (La. App. 4th Cir. 1984) (insured accepted payment from own insurer under collision coverage and granted subrogation; later, insured settled with tortfeasor's insurer; neither insurer knew about the other; the court held that absent notice to the tortfeasor's insurer, its payment to the insured discharged its obligation, and it was not liable to the subrogated collision carrier). Cases in other jurisdictions have divided on these issues. More than a few jurisdictions have permitted an insurer in Audubon's place to sue an insurer such as Allstate, at least where there has been notice to the wrongdoer's insurer prior to the payment and subrogation. See Home Ins. Co. v. Hertz Corp., 71 Ill. 2d 210, 375 N.E.2d 115 (1978).