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Uninsured Motorist Coverage in Louisiana

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in which, as a matter of complete speculation, a landowner disposes of his mineral interest to a person who has no intention of developing the property and retains an economic interest running for the life of the property in addition to the cash received upon execution of the contract. In such a situation, both parties really intend a sale, and both realize that there is no present prospect of development. It would seem unfair and totally unrealistic under these circumstances to cause the entire proceeds to be taxed as ordinary income subject to depletion merely because the transferor retains an economic interest running for the life of the property; the transaction should be taxed as what it clearly is, a sale. Therefore, it is respectfully suggested that when the federal courts are, in the future, presented with the problem of whether a particular transaction is a sale or a lease, the realities of the situation should govern the outcome rather than the unbending economic interest test. This is nothing more than an application of the maxim that substance rather than form should control federal tax consequences.

Chris A. Verret

UNINSURED MOTORIST COVERAGE IN LOUISIANA

By Act 187 of 1962, the Louisiana Insurance Code was amended to require that all automobile liability insurance policies delivered or issued for delivery in Louisiana contain an uninsured motorist provision.¹ Under such provision, the insured, when injured by an uninsured motorist, can recover from his own insurer damages for bodily injury, sickness, disease, or death to the same extent that he would be legally entitled to recover from the uninsured motorist. However, certain policies are not required to have uninsured motorist coverage. As provided in the statute, the insured may validly reject such coverage.² Further, the statute does not apply to policies issued

1. LA. R.S. 22:1406D (Supp. 1962). Although there should be little difference in wording from policy to policy, there is such a possibility, especially if out of state cases or treatises are examined. Because the uninsured motorist provision is a contract, the wording generally governs and a difference in wording may have great impact. Therefore, care should be exercised in studying the wording of each policy.

2. *Id.* D(1) reads in part: "[P]rovided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage." *Soileau v. Hartford Accident & Indem. Co.*, 182 So.2d 76 (La. App. 3d Cir. 1966). As this is the only case in

before its effective date,³ or delivered or issued for delivery outside of Louisiana,⁴ or issued by a surplus line insurer.⁵

This Comment is designed to examine the jurisprudential interpretations of the uninsured motorist provision in this state. In this regard there are two points which should be kept in mind. First, the purpose of this statute is to afford a person injured by a negligent uninsured motorist the protection to which he would be entitled if he were injured in an accident caused by an automobile covered by a standard liability insurance policy.⁶ Second, all insurance policies are contracts; therefore, the wording of the policy should govern the result, unless the provision is prohibited by statute or public policy.⁷

Initial Requirements for Recovery

There are several requirements which must be met before an injured party can recover under the uninsured motorist provision. The initial requirement is that the provisions of the policy

Louisiana treating rejection of coverage, apparently there is no problem of attempts by insurers to defeat the purpose of the statute through the use of rejections.

3. *Liberty Mut. Ins. Co. v. Rambin*, 185 So.2d 851 (La. App. 2d Cir. 1966); *Pierce v. Hartford Accident & Indem. Co.*, 184 So.2d 241 (La. App. 1st Cir. 1966).

4. *Ricardo v. American Indem. Co.*, 201 So.2d 145 (La. App. 1st Cir. 1967). Here the policy was issued in Texas while the plaintiff was a domiciliary of Texas, so the Louisiana statute did not apply. Of course, if a policy issued outside of Louisiana does contain uninsured motorist coverage, whether voluntarily or by compulsory statute, the Louisiana courts will not hesitate to give effect to the clause. *Morgan v. State Farm Mut. Auto. Ins. Co.*, 195 So.2d 648 (La. App. 3d Cir. 1967); *Liberty Mut. Ins. Co. v. Rambin*, 185 So.2d 851 (La. App. 2d Cir. 1966).

5. *Barrett v. State Farm Mut. Auto. Ins. Co.*, 226 So.2d 74 (La. App. 3d Cir. 1969). This case was cited with approval in *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Insurance*, 31 LA. L. REV. 288, 290 (1971).

6. "The purpose of the statute making uninsured motorist coverage compulsory, it has been said, is to give the same protection to a person injured by an uninsured motorist as he would have if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy." 12 COUCH ON INSURANCE 2d § 45:623 at 570 (1964), cited in *Rolling v. Miller*, 233 So.2d 723, 727 (La. App. 4th Cir. 1970).

7. LA. R.S. 22:620A (1950) provides in part: "Any insurer may insert in its policies any provisions or conditions required by its plan of insurance or method of operation which are not prohibited by the provisions of this Code." *LaBove v. American Employers Ins. Co.*, 189 So.2d 315, 318 (La. App. 3d Cir. 1966): "Our jurisprudence is settled that where the language of a policy is clear and unambiguous it constitutes the contract between the parties, which must be enforced as written. Also, in the absence of any statutory prohibition, the defendant insurer may impose whatever conditions it pleases upon its obligations under the policy."

actually extend coverage to the person injured.⁸ Basically, protection is afforded to three groups: first, the named insured and any relative who is a member of the same household;⁹ second, any other person "occupying" the insured vehicle; and third, any person entitled to recover for injuries sustained by a member of the first two groups.¹⁰ While the members of the first group are covered at all times,¹¹ the members of the second group must be "occupying" the insured vehicle to be covered.¹²

8. *Barrett v. State Farm Mut. Auto. Ins. Co.*, 236 So.2d 900 (La. App. 3d Cir. 1970); *Manuel v. American Employers Ins. Co.*, 228 So.2d 321 (La. App. 3d Cir. 1969); *Fidelity Gen. Ins. Co. v. Ripley*, 228 So.2d 238 (La. App. 3d Cir. 1969); *Rushing v. Allstate Ins. Co.*, 216 So.2d 875 (La. App. 1st Cir. 1968); *Buswell v. Biles*, 205 So.2d 165 (La. App. 2d Cir. 1968); *Spencer v. Traders & Gen. Ins. Co.*, 171 So.2d 723 (La. App. 3d Cir. 1965).

9. *Manuel v. American Employers Ins. Co.*, 228 So.2d 321 (La. App. 3d Cir. 1969); *Fidelity Gen. Ins. Co. v. Ripley*, 228 So.2d 238 (La. App. 3d Cir. 1969). In *Ripley*, despite the fact that the mother and father were separated; that the son lived with the mother most of the time; and that the father had removed the son's name from the list of drivers on the policy, the court found the son to be a resident of the father's household. Thus, it would seem the courts are inclined to a liberal construction of household residency.

10. The standard coverage clause provides: "Each of the following is an insured under this insurance to the extent set forth below:

"(a) the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either;

"(b) any other person while occupying an insured highway vehicle; and

"(c) any person with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above." N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES* 288 (Supp. 1967).

11. See *Manuel v. American Employers Ins. Co.*, 228 So.2d 321 (La. App. 3d Cir. 1969) (son of the named insured was a passenger in a car hit by an uninsured motorist); *Fidelity Gen. Ins. Co. v. Ripley*, 228 So.2d 238 (La. App. 3d Cir. 1969) (son of the named insured was a passenger in a car which was wrecked by an uninsured motorist driver). Both courts allowed recovery under the uninsured motorist provisions.

However, the coverage usually does not extend to a vehicle which is owned by the insured, but not insured under the policy. See, e.g., *Barrett v. State Farm Mut. Auto. Ins. Co.*, 236 So.2d 900 (La. App. 3d Cir. 1970); *Rushing v. Allstate Ins. Co.*, 216 So.2d 875, 876 (La. App. 1st Cir. 1968), in which the policy provided: "This policy does not apply . . . to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured. . . ."; *Spencer v. Traders & Gen. Ins. Co.*, 171 So.2d 723 (La. App. 3d Cir. 1965).

12. The standard uninsured motorist provision defines this requirement as follows: "[O]ccupying" means in or upon or entering into or alighting from . . ." N. RISJORD & J. AUSTIN, *AUTOMOBILE INSURANCE CASES* 290 (Supp. 1967). For an application of this test, see *Box v. Doe*, 221 So.2d 663 (La. App. 4th Cir. 1969). There, a couple was struck by a hit-and-run automobile while the boy was unlocking the car door and the girl was waiting for the door to be opened. The court found that the boy was occupying the car, as defined in the policy, but the girl was not. While the interpretation was for the purpose of deciding whether the coverage was excess or concurrent, rather than whether any coverage was extended, the decision shows the court's willingness to draw a fine line of distinction. Thus, two people who were standing close to each other were found to fit into different categories.

A second requirement for recovery is that the party must prove he is legally entitled to recover from the uninsured motorist.¹³ Since this issue involves all the elements of an ordinary negligence action, it can be said that if the insured would be unable to obtain a judgment against the uninsured motorist, he cannot recover from his own insurer.¹⁴ Thus, negligence, contributory negligence, last clear chance, and other such doctrines are considered in making this legal determination.¹⁵ However, the insured does not have to actually obtain a judgment against the uninsured motorist, nor must he make the uninsured motorist a party to the suit against the insurer.¹⁶

In addition to proving coverage and the legal right to recover from the uninsured motorist, the burden is on the insured to prove by a preponderance of the evidence that the offending automobile was uninsured.¹⁷ Under the usual policy definition of uninsured automobiles,¹⁸ there are three situations in which the uninsured motorist provision applies: (1) where there is no applicable bodily injury liability insurance policy; (2) where there is an applicable insurance policy but the company writing the policy has denied coverage; or (3) where the offending vehicle is a hit-and-run automobile.¹⁹ The statute further provides

While this result accords with the proverbial saying that the line has to be drawn somewhere, it seems extremely unfair to make such a tenuous distinction.

13. *Botsay v. Campanella*, 224 So.2d 107 (La. App. 4th Cir. 1969); *Box v. Doe*, 221 So.2d 666 (La. App. 4th Cir. 1969); *Rogers v. State Farm Mut. Auto. Ins. Co.*, 217 So.2d 690 (La. App. 3d Cir. 1969); *McCrorry v. Allstate Ins. Co.*, 194 So.2d 759 (La. App. 1st Cir. 1967); *Hernandez v. State Farm Mut. Auto. Ins. Co.*, 192 So.2d 679 (La. App. 3d Cir. 1966). It is important to note that the insured need only be *legally entitled* to recover; he does not have to obtain an actual judgment against the uninsured motorist.

14. "It is therefore clear that before the insured can recover from his insurer under the uninsured motorist clause he must first be legally entitled to recover from the uninsured motorist." *McCrorry v. Allstate Ins. Co.*, 194 So.2d 759, 762 (La. App. 1st Cir. 1967).

15. See note 13 *supra*.

16. *Lawrence v. Continental Ins. Co.*, 199 So.2d 398 (La. App. 3d Cir. 1967).

17. *Bullock v. Perry*, 238 So.2d 796 (La. App. 1st Cir. 1970); *Dalton v. Allstate Ins. Co.*, 234 So.2d 455 (La. App. 1st Cir. 1970); *Manuel v. American Employers Ins. Co.*, 212 So.2d 527 (La. App. 3d Cir. 1968); *Vitrano v. State Farm Mut. Auto. Ins. Co.*, 198 So.2d 922 (La. App. 4th Cir. 1967).

18. A recent case has held that the term "uninsured automobile" includes a motorcycle. *Thibodeaux v. St. Paul Mercury Ins. Co.*, 242 So.2d 112 (La. App. 3d Cir. 1970).

19. The standard provision states: "[U]ninsured highway vehicle' means: (a) a highway vehicle with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law of the state in which the insured highway vehicle is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such vehicle or with respect to which there is a

that the vehicle is considered uninsured when the liability insurer providing coverage on that vehicle becomes insolvent.²⁰ As previously stated, the burden is on the insured to prove that the automobile was uninsured.²¹ Where the question is one of the coverage afforded an offending vehicle under an existing policy, the inquiry is whether or not the particular provisions of that policy have been satisfied.²² Proof that there is no policy in existence is another matter. The courts had initially placed an extremely heavy burden of proof on the insured, virtually requiring the alleged uninsured motorist to testify to the fact that he had no insurance.²³ However, the statute was amended in 1970 to add an evidentiary provision.²⁴ Basically, the amendment provides that prima facie proof that neither the owner nor operator had insurance coverage on the vehicle may be obtained through the introduction of (1) affidavits of the owner and operator of the alleged uninsured vehicle that there was no automobile liability insurance policy covering the vehicle and (2) the introduction of an affidavit of an official of the Casualty and Surety Division that neither the owner nor operator had an automobile liability insurance policy. The burden of proving the existence and coverage of a policy then shifts to the insurer. This amendment provides a simple method of proving that there is no insurance policy applicable without allowing the insured an unfair advantage over the insurer.

Hit-and-Run Coverage

The statutory provisions do not specifically deal with a hit-and-run vehicle, but the definition of "uninsured automobile"

bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder or "(b) a hit-and-run automobile . . ." N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES* 290 (Supp. 1967).

20. LA. R.S. 22:1406D(2), (3) (Supp. 1962); *Alleman v. Employers Liability Assurance Corp.*, 253 So.2d 688 (La. App. 3d Cir. 1971).

21. Such a burden is on the insured in all suits on insurance policies. "[T]he burden in an action on an insurance contract is on the plaintiff to establish every fact in issue which is essential to his cause of action, and that his claim is within the policy coverage." *Macaluso v. Watson*, 188 So.2d 178, 179 (La. App. 4th Cir. 1966).

22. *Guidry v. Rhodes*, 238 So.2d 248 (La. App. 3d Cir. 1970); *Buswell v. Biles*, 205 So.2d 165 (La. App. 2d Cir. 1968); *Hartzog v. Eubanks*, 200 So.2d 303 (La. App. 1st Cir. 1967).

23. *Bullock v. Perry*, 238 So.2d 796 (La. App. 1st Cir. 1970); *Dalton v. Allstate Ins. Co.*, 234 So.2d 455 (La. App. 1st Cir. 1970); *Vitrano v. State Farm Mut. Auto. Ins. Co.*, 198 So.2d 922 (La. App. 4th Cir. 1967).

24. LA. R.S. 22:1406D(6) (Supp. 1970), added by La. Acts 1970, No. 345, § 1; *Jordan v. Great American Ins. Co.*, 248 So.2d 363 (La. App. 4th Cir. 1971).

commonly used in automobile liability policies does include a hit-and-run automobile.²⁵ By including in the definition of an uninsured automobile a hit-and-run vehicle, the imposition on the claimant of a well nigh impossible burden of proof, where neither the owner nor operator is identified, is obviated. However, it has been held that this easing of the burden goes beyond the statute and is therefore to be strictly construed.²⁶

The hit-and-run provisions do not apply unless there is physical contact with the insured or an automobile he is occupying and the identity of neither the owner nor the operator of the offending vehicle can be ascertained.²⁷ In addition, the insured must report the accident within 24 hours,²⁸ file an oath with the insurer within 30 days, and allow the insurer to inspect his automobile.²⁹ The courts have required that physical contact be proven on the basis that the hit-and-run provision clearly and unambiguously requires such proof, notwithstanding the argument that the purpose of the requirement is to prevent false claims and, therefore, the requirements of proof should not be applied when the claim is clearly valid.³⁰ As long as the courts

25. See note 19 *supra*.

26. See *Collins v. New Orleans Public Serv., Inc.*, 234 So.2d 270, 273 (La. App. 4th Cir. 1970), in which it was held: "The hit-and-run provisions do go beyond the statute in that under the latter alone the insured in every instance bears the burden of proving the uninsured automobile was in fact uninsured, while the policy provisions dispense with the necessity of such proof by the insured . . ."

27. The standard provision states: "[H]it-and-run vehicle' means a highway vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with a vehicle which the insured is occupying at the time of the accident, provided:

"(a) there cannot be ascertained the identity of either the operator or owner of such highway vehicle;

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

"(c) at the company's request, the insured or his legal representative makes available for inspection the vehicle which the insured was occupying at the time of the accident . . ." N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES* 289 (Supp. 1967).

28. Apparently the report to the police within 24 hours is sufficient, and the insured does not have to conduct an investigation of his own. *Box v. Doe*, 221 So.2d 666 (La. App. 4th Cir. 1969).

29. See note 27 *supra*.

30. *Collins v. New Orleans Public Serv., Inc.*, 234 So.2d 270 (La. App. 4th Cir. 1970); *Roloff v. Liberty Mut. Ins. Co.*, 191 So.2d 901 (La. App. 4th Cir. 1966).

view the coverage as being beyond that required by the statute, they will presumably uphold the requirement of physical contact.

A recent case has held that the hit-and-run provisions do not apply if the owner is identified, regardless of the fact that the operator remains unidentified.³¹ There the insured was hit by a car whose driver fled after the wreck. Papers in the car identified the owner, but it was found that the owner's policy did not provide coverage because the operator was driving without the owner's permission. Despite this fact, and the fact that the operator was never identified, the court construed the policy provisions literally and refused to allow the insured to recover under his uninsured motorist provisions.

The two limitations of the uninsured motorist provision which seem clearly inconsistent with the purpose of this coverage are the requirement of physical contact and the requirement that the identity of neither the owner nor the operator be ascertained. If the circumstances in a given case fail to meet either of these requirements, the insured will be left with no compensation for his injuries. However, since the easing of the burden under the hit-and-run coverage goes beyond the statute, either the policy provisions will have to be voluntarily modified to provide coverage in such cases or the statute will have to be amended to require such coverage. Either method would provide needed relief to an injured person who has no recourse against any insurer other than his own.

Prescription

The question of the prescriptive period applicable to the claim of an insured under the uninsured motorist clause initially occasioned a division of opinion as to whether the action was to be considered *ex contractu* or *ex delicto*. However, the Louisiana Supreme Court, in the companion cases of *Booth v. Fireman's Fund Insurance Co.*³² and *Thomas v. Employers Mutual Fire Insurance Co.*,³³ settled the issue by deciding that the action is *ex contractu* and, therefore, prescribes in 10 years.³⁴ The contrary view was undoubtedly based on the belief that since the chain

31. *Frazier v. Jackson*, 231 So.2d 629 (La. App. 4th Cir. 1970).

32. 253 La. 521, 218 So.2d 580 (1968).

33. 253 La. 531, 218 So.2d 584 (1968).

34. The prescriptive period for contracts is 10 years as provided by La. CIV. CODE art. 3544.

of events leading to the suit was initiated by a delict, the prescriptive period applicable to actions in tort should apply.³⁵ However, the uninsured motorist provisions do not provide insurance for the uninsured motorist, but rather protect the innocent insured from being left with no means of compensation for his injuries.

The problem of whether the period should run from the date of the accident or from the date on which the insured first learns of the lack of insurance protection has not been decided. Nevertheless, in view of the fact that a 10-year prescriptive period is applicable, using the date of the accident should afford ample protection to the claimant.

A difficulty arises from the fact that suits by the insured against his insurer prescribe in 10 years, while tort suits against the uninsured motorist prescribe in one year.³⁶ Thus, if an insured does not sue his own insurer within one year after the accident, the insurer's subrogation suit against the uninsured motorist might be barred by the one-year prescriptive period applicable to torts. If so, an insurer would be deprived of its opportunity to recover against the person ultimately responsible.³⁷ As yet, the problem has not been presented in any reported Louisiana case. Perhaps the best solution to this problem would be to hold that prescription does not commence against the insurer until the insurer has a valid cause of action. The valid cause of action would only accrue when the insurer has been forced to pay the insured and is, thereby, subrogated to the insured's rights against the uninsured motorist. Such a solution seems quite fair and has been utilized in Louisiana in other areas of the law.³⁸

Who Pays?—Insurer v. Uninsured Motorist

In the automobile accident field there are a multitude of possible parties and resulting relationships. One of the relation-

35. *Id.* art. 3536 provides a one-year prescriptive period for tort actions.

36. The uninsured motorist would be liable *ex delicto* under *id.* art. 2315, and thus the one-year prescriptive period would control.

37. LA. R.S. 22:1406D(4) (Supp. 1962) allows the insurer to recover what it has paid the insured from the proceeds of a settlement or through judgment against the uninsured motorist.

38. See *Minyard v. Curtis Products, Inc.*, 251 La. 624, 205 So.2d 422 (1967), discussed in *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Obligations*, 29 LA. L. REV. 200 (1969). The theory of *contra non valentem* might also be applicable in this situation. Under this doctrine prescription does not run against certain persons who are unable to bring an action. *Reynolds v. Batson*, 11 La. Ann. 729 (1856).

ships which gives rise to many problems is that of the insurer-uninsured motorist. Obviously, the insurer and the uninsured motorist are not joint tortfeasors, as the insurer's obligation arises *ex contractu*, while the uninsured motorist's obligation arises *ex delicto*. The Louisiana Civil Code provides that *in solido* obligations are not to be presumed, but arise only through express agreement of the parties or by operation of law.³⁹ The insurer and the uninsured motorist have not expressly agreed to be bound *in solido*, nor are they liable *in solido* as joint tortfeasors. Finally, since the uninsured motorist statute does not impose solidary liability, no law operates to bind them.⁴⁰ Thus, there appears to be no basis for liability *in solido*, notwithstanding that the claimant might have a cause of action against both the insurer and the uninsured motorist to recover for his injuries. It is submitted that the liability should be described as *in solidum* or an imperfect solidarity. This principle has been discussed in an earlier issue of this *Review* and is therefore not presented here.⁴¹

If both the insurer and the uninsured motorist are sued successfully, it seems that judgment should be rendered for the insured against both his insurer and the uninsured motorist to the extent of the liability incumbent upon each of them. The insurer should then be granted its statutory right to the proceeds of the judgment rendered against the uninsured motorist, but only to the extent it has paid the insured.⁴² When a judgment against an uninsured motorist exceeds the insurer's policy limits,⁴³ the question arises as to whether the insured has his whole

39. LA. CIV. CODE art. 2093: "An obligation *in solido* is not presumed; it must be expressly stipulated.

"This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law."

40. Joint tortfeasors would be bound *in solido* under *id.* art. 2324, which provides: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person for the damage caused by such act."

41. See *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Insurance*, 28 LA. L. REV. 372 (1968) for the explanation of this theory. The dissent in *Gautreaux v. Pierre*, 254 So.2d 476, 479 (La. App. 3d Cir. 1971) also discussed this theory.

42. See LA. R.S. 22:1406D(4) (Supp. 1962).

43. *E.g.*, where the policy limit is \$5,000 and the judgment is for \$15,000. The issue posed is whether the proceeds from the judgment should go first toward satisfying the \$10,000 remaining of the insured's claim, or first toward reimbursing the insurer, with the remainder going to the insured. Obviously, the only instance in which this controversy will arise is where the uninsured motorist does not have sufficient assets to satisfy the entire judgment, yet can contribute some amount.

claim satisfied first or whether the insurer first receives what it has paid, with the insured receiving the remainder. This issue remains unanswered. It would seem most desirable to allow an insured to fully recover before an insurer could collect. In addition to the desire to see the victim made as nearly whole as possible, there is the fact that the insurer has received adequate premiums to provide protection against uninsured motorists and hence, should not be allowed any preference over the insured.

Who Pays—Insurer v. Insurer Where Both Provide Uninsured Motorist Coverage

The relationships become more complicated when there are two or more insurers involved, each providing uninsured motorist coverage. Under the standard "other insurance" clause,⁴⁴ designed to take care of such situations, the initial determination is whether the insurer provides excess or primary insurance coverage. The insurer provides only excess insurance when the insured is occupying a vehicle which is not owned by the named insured, but which is covered by a similar policy providing primary coverage. In all other situations the insurer provides primary coverage.

If the insurer provides only excess insurance, the insurer is liable only for the amount by which its policy limit exceeds the policy limit of the insurer which has provided primary coverage.⁴⁵ Thus if the excess insurer's policy limit is \$10,000 and the primary insurer's limit is \$5,000, the excess insurer will be liable only for the excess \$5,000. However, when the two policies have the same limits, the courts hold that there is no

44. "E. Other Insurance.

"With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance. Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance." N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES* 292 (Supp. 1967).

45. *Id.*

excess and, hence, the excess insurer is liable for nothing.⁴⁶ However, an earlier case reached a slightly different result in a similar fact situation.⁴⁷ In that case the insured sustained injuries far exceeding the \$3,000 he recovered from the uninsured motorist insurer of the car in which he was a passenger. Since that insurer and the insured's own uninsured motorist insurer had the same policy limits (\$5,000), a strict construction of the excess insurance clause would have precluded any coverage. However, upon suing his own uninsured motorist insurer, the insured received an additional \$2,000 (giving him a total recovery of \$5,000—his policy limit). While the case does not strictly apply the other insurance clause, the result reached certainly seems desirable.

Usually, when two insurers provide primary insurance, each is bound for a pro rata amount.⁴⁸ Thus, each would be liable for that proportion of the damages which its policy limit bears to the sum of limits of all policies providing protection. Thus if there were two insurers each providing a \$5,000 limit, each would be liable for one-half of the damages. However, the courts have upheld that portion of the other insurance clause which provides that damages would not be deemed to exceed the higher of the limits of the applicable policies. This means that in a case such as the example above the damages would be deemed not to exceed \$5,000. Hence, each insurer would be liable for a maximum of only \$2,500 regardless of whether the actual damages exceeded the \$5,000 total.⁴⁹ Because each insurer contracted separately to provide the stated coverage, they would be bound severally rather than *in solido*.⁵⁰

In a recent case, a difficulty arose when the insured sued

46. *Broussard v. Whitaker*, 238 So.2d 228 (La. App. 3d Cir. 1970); *Long v. United States Fire Ins. Co.*, 236 So.2d 521 (La. App. 4th Cir. 1970); *Jackson v. State Farm Mut. Auto Ins. Co.*, 235 So.2d 621 (La. App. 2d Cir. 1970); *Rolling v. Miller*, 223 So.2d 723 (La. App. 4th Cir. 1970); *Lott v. Southern Farm Bureau Cas. Ins. Co.*, 223 So.2d 492 (La. App. 1st Cir. 1969).

47. *LeBlanc v. Allstate Ins. Co.*, 194 So.2d 791 (La. App. 3d Cir. 1967); Note, 28 LA. L. REV. 130 (1967).

48. See note 44 *supra*.

49. *Deane v. McGee*, 253 So.2d 655 (La. App. 1st Cir. 1971); *Bailes v. Southern Farm Bureau Cas. Ins. Co.*, 252 So.2d 123 (La. App. 3d Cir.), *writs granted*, 253 So.2d 791 (La. 1971); *Graham v. American Cas. Co.*, 244 So.2d 372 (La. App. 1st Cir.), *writs granted*, 257 La. 982, 244 So.2d 856 (1971). The supreme court opinion in the *Graham* case will be of great importance.

50. *Fremin v. Collins*, 194 So.2d 470 (La. App. 4th Cir. 1967); *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Insurance*, 28 LA. L. REV. 372, 374 (1968).

only one of his two uninsured motorist insurers, although both provided primary coverage.⁵¹ The court held that the party sued could not bring the other insurer into the suit through a third party demand. Under that decision the insurer sued is placed in the difficult position of being unable to make the other insurer a party to the suit, in order to give effect to the usual pro rata provisions. It is submitted that the insurer could use the policy provisions to have the insured include the other insurer as a co-defendant.⁵² However, should this theory not succeed, it is suggested that the statute should be amended.⁵³

Recovery for Damages Caused by Joint Tortfeasors—One Insured, One Uninsured

Another problem arises when the insured is injured by two negligent motorists, one of whom is insured and one of whom is not. Simply stated, the question is whether the presence of the insured motorist relieves the necessity for recovery against the uninsured motorist carrier. The court, in *Fouquier v. Travelers Insurance Co.*,⁵⁴ held that the presence of the negligent insured motorist removed the necessity for applying the uninsured motorist provisions because the statute was designed to protect the insured where his *only* recourse is against an uninsured motorist. However, it should be noted that the court stressed that the negligent motorist's insurance was sufficient to cover

51. *Fremin v. Collins*, 194 So.2d 470 (La. App. 4th Cir. 1967).

52. An insurer should be able to use the clause requiring the assistance and cooperation of the insured to force the insured to make the other insurer a defendant. Admittedly the clause is directed mainly to the uninsured motorist rather than an insurer, but the result would be desirable. The standard assistance and cooperation clause provides: "After notice of claim under this insurance, the company may require the insured to take such action as may be necessary or appropriate to preserve his right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; and in any action against the company, the company may require the insured to join such person or organization as a party defendant." N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES* 291 (Supp. 1967). As a practical matter, an insured should always desire to have all his insurers as defendants. The plaintiff in the *Fremin* case reflected this by amending his petition to include the other insurer.

53. *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Insurance*, 28 LA. L. REV. 372, 374 (1968).

54. 204 So.2d 400 (La. App. 1st Cir. 1967). This case was cited as authority for this point in both *Gautreaux v. Pierre*, 254 So.2d 476 (La. App. 3d Cir. 1971) and *Strother v. State Farm Mut. Auto. Ins. Co.*, 238 So.2d 774 (La. App. 1st Cir. 1970). In both cases the insured tortfeasor's policy was sufficient to cover the damages.

the judgment.⁵⁵ Thus, if the insured's judgment far exceeds the policy limits of the negligent motorist's insurance, the court might very well hold the uninsured motorist insurer liable in order to maximize the insured's recovery. Therefore, although the case reflects a proper solution, the result would probably have been different had the insured's damages exceeded the policy limits of the insured joint tortfeasor.

Limitations on the Uninsured Motorist Provision

As mentioned previously,⁵⁶ insurance policies govern the relationship between the insured and insurer unless there are superseding statutory or public policy prohibitions.⁵⁷ Beyond such limitations, insurers are free to insert conditions or limits on their liability. In view of the social purpose of the statute and the absence of arm's length negotiating in the area of insurance, it would seem logical that the courts would be especially watchful over clauses which impose limits or conditions on the insured's coverage. Accordingly, the courts have struck down several clauses to prevent defeat of the purpose of the uninsured motorist statute. One provision which the courts have found repugnant to the statute's purpose is the clause providing for compulsory arbitration. This provision has been declared invalid⁵⁸ on the ground that it deprives the Louisiana courts of jurisdiction of an action against the insurer.⁵⁹ An amendment to the statute now prohibits such compulsory arbitration clauses.⁶⁰ However, it should be noted that arbitration at the option of the insured is still valid.⁶¹ Further, it has been held that an insured who demands arbitration under a voluntary provision cannot later sue the insurer on the policy.⁶² So, while the insured can-

55. "We are of the opinion that when an uninsured motorist is solidarily liable with an insured motorist, and the insurance in effect is valid, enforceable and sufficient to cover the judgment realized by the plaintiff, there is no necessity for bringing into play the provisions of the uninsured motorist provisions in the policy." (Emphasis added.) *Fouquier v. Travelers Ins. Co.*, 204 So.2d 400, 403 (La. App. 1st Cir. 1967).

56. See note 7 *supra*.

57. LA. CIV. CODE art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them. They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith."

58. *Spillman v. United States Fidelity & Guar. Co.*, 179 So.2d 454 (La. App. 3d Cir. 1965); *Macaluso v. Watson*, 171 So.2d 755 (La. App. 4th Cir. 1965).

59. See LA. R.S. 22:629A(2) (1950).

60. LA. R.S. 22:1406D(5) (Supp. 1964).

61. *Id.*

62. *Bergeron v. Gassen*, 185 So.2d 106 (La. App. 4th Cir. 1966).

not be forced to arbitrate, once he decides to arbitrate he is bound by that decision.

Various clauses have also been held invalid because of the manner in which they were applied. The clause requiring assistance and cooperation of the insured has been held invalid to the extent that it requires the claimant to join the uninsured motorist as a party.⁶³ While the court recognized the desirability of the requirement, it was held invalid because it denied "the Louisiana insured the benefit of a practical remedy in Louisiana courts. . . ."⁶⁴ Also, the courts have invalidated a clause which excluded coverage if the offending vehicle was owned by a municipality,⁶⁵ reasoning that the phrase "any motor vehicle" in the statute would not allow such an exclusion.⁶⁶

Three other clauses have fared better with the courts. First, it has been held that coverage is forfeited where the insured has violated the policy provisions against making a settlement without written consent of the insurer.⁶⁷ Since the insurer has the statutory right to recover from the uninsured motorist,⁶⁸ a policy provision prohibiting the insured from diminishing this right is perfectly valid. Furthermore, where the insured has refused to furnish medical reports or sign authorizations for obtaining these, as required by the policy, the courts have refused recovery.⁶⁹ Finally, it has been held that a policy may validly prohibit a collision insurer from recovering from the uninsured motorist insurer the sum it has paid under its collision coverage.⁷⁰ The holding is sound both because the uninsured motorist coverage is intended to protect the insured, not another insurer, and because coverage extends only to bodily injury, not to property damage.

Several clauses in the coverage allow the insured to deduct certain disbursements from the amount which it must pay. At

63. *Lawrence v. Continental Ins. Co.*, 199 So.2d 398 (La. App. 3d Cir. 1967).

64. *Id.* at 399.

65. *Powell v. Allstate Ins. Co.*, 233 So.2d 38 (La. App. 2d Cir. 1970).

66. La. R.S. 22:1406D(1) (Supp. 1962).

67. *Griffin v. Aetna Cas. & Sur. Co.*, 189 So.2d 324 (La. App. 3d Cir. 1966); *LaBove v. American Employers Ins. Co.*, 189 So.2d 315 (La. App. 3d Cir. 1966).

68. La. R.S. 22:1406D(4) (Supp. 1962).

69. *LeBlanc v. Davis*, 254 La. 439, 223 So.2d 862 (1969); *Martin v. Starke*, 208 So.2d 723 (La. App. 3d Cir. 1968); *Pappas v. Aetna Cas. & Sur. Co.*, 191 So.2d 658 (La. App. 2d Cir. 1966).

70. *Phillips v. Garden*, 211 So.2d 735 (La. App. 2d Cir. 1968).

present a conflict exists among the courts as to whether the insurer should be allowed to deduct payments made under the medical payments coverage of the policy, with some courts allowing the deduction⁷¹ and other courts refusing it.⁷² Apparently, the purpose of the clause is to prevent a double recovery of medical expenses by the insured. Therefore, it appears that the deduction should be allowed only where damages are less than the policy limit, because here there is a danger of double recovery. On the other hand, where the damages exceed the policy limit, there is no danger of a double recovery; hence, the deduction should not be allowed.

In a recent case,⁷³ the Second Circuit overruled its prior decision⁷⁴ which had allowed the insurer to deduct payments the insured had received under the workmen's compensation act. The court reasoned that the deduction violated the statutory requirement that the policy provide minimum coverage. Were the deduction allowed, the insured would receive less than the minimum coverage and the insurer would benefit unjustly from the insured's receipt of workmen's compensation payments.

Conclusion

The uninsured motorist coverage affords desirable protection to the person injured by an uninsured motorist. However, added protection, perhaps in the form of a statutory amendment, is needed to better protect the victims of a hit-and-run vehicle. Nevertheless, it appears that the statute and the individual policies have been interpreted fairly to protect both the insured and the insurer.

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71. *Bailes v. Southern Farm Bureau Cas. Ins. Co.*, 252 So.2d 123 (La. App. 3d Cir.), *writs granted*, 253 So.2d 791 (La. 1971); *Connelley v. Southern Farm Bureau Cas. Co.*, 219 So.2d 206 (La. App. 1st Cir. 1969); *Morgan v. State Farm Mut. Auto Ins. Co.*, 195 So.2d 648 (La. App. 3d Cir. 1967).

72. *Bunch v. Frezier*, 239 So.2d 680 (La. App. 1st Cir. 1970); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 237 So.2d 690 (La. App. 4th Cir. 1970).

73. *Williams v. Buckelew*, 246 So.2d 58 (La. App. 2d Cir. 1971).

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