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State Farm Mutual Automobile Insurance Co. v. Azhar: **Protecting the New Victims of “Hit & Run” in Underinsured Motorist Coverage—Insurance Companies**

I. INTRODUCTION

A motorist, without warning, is suddenly involved in an automobile accident that results in serious bodily injury or property damage. Convinced the accident is entirely the other driver's fault, the motorist ascertains whether the other driver is insured. If the injured motorist is lucky, the other driver will have automobile liability insurance.¹ The motorist is confident the other driver's coverage will be inadequate to cover all of the damages. A settlement for the limits of the other driver's liability coverage occurs, which releases the other driver and his insurer. The injured motorist then seeks to recover the perceived excess damages from his insurance company through his underinsured motorist (UM) coverage.² The injured motorist's insurer evaluates the claim and offers money to the insured, the injured motorist, below an amount the insured feels is justified. The insured accepts the money, but is not obligated to release his insurance company. Confident a jury will agree with him and award more damages, the insured initiates suit against his UM insurer. A jury determines the insured sustained damages in an amount less than he had already received from the other driver's liability insurer. Therefore, the injured party's UM insurer does not owe additional damages to the insured, and the insured's suit is dismissed.

What happens to the money the injured party accepted from his UM insurer? The insurance company did not receive a release from liability for this amount. A jury determined the tortfeasor's insurance company adequately compensated the injured party, and that excess insurance, underinsured motorist coverage, was

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1. Automobile liability insurance coverage, with minimum requirements, became compulsory for all drivers in Louisiana in 1977. However, not all drivers comply with this requirement. "The state Department of Motor Vehicles estimated that at least 22 percent—or 648,029—Louisiana motorists were uninsured on Feb. 1, 1992." Mukul Verma, *Auto Insurance Prompts Bills: Legislators Concerned About Rising Cost, Decreasing Availability*, *Baton Rouge Morning Advocate*, March 29, 1992, at A10.

2. Prior to 1977, automobile liability insurance in Louisiana was not compulsory. Proof of financial responsibility was required only after the motorist had been involved in an accident. Many innocent accident victims, although insured against their own liability, were left uncompensated because the negligent motorist was uninsured and not financially responsible. Recognizing this serious gap in protection, the legislature, in 1962, required insurers to make uninsured motorist (UM) insurance protection available in certain minimal limits to persons purchasing automobile liability insurance. Through legislative and judicial expansion, UM coverage has become a very significant protection for insured Louisiana motorists and a fertile field for litigation.

W. Shelby McKenzie, *Louisiana Uninsured Motorist Coverage—After Twenty Years*, 43 *La. L. Rev.* 691, 691 (1983).

not needed to make the victim whole. Arguably, the UM insurer should be entitled to a return of the funds given to the insured before the trial. The money was an estimate, by the UM insurer, of the insured's damages that may exceed the amount the insured already received from the tortfeasor's insurer.

To answer this question regarding Louisiana law, the inquiry begins with the recent Louisiana Supreme Court decision, *State Farm Mutual Automobile Insurance Co. v. Azhar*.³ After an analysis of facts very similar to the example above, the *Azhar* court, in a 4-3 decision, held the insurance company was not entitled to a return of the tender. The supreme court decision implies that tenders have finality,⁴ respecting payments to the insured, only for the UM insurance company. However, the UM insurer does not have the same sense of finality, regarding liability, until a court so determines or the insured chooses not to pursue future litigation.

Chief Justice Calogero, in dissent, joined by Justices Kimball and Marcus, appeared to follow the majority of prior jurisprudence addressing this issue. His opinion was concise and clear.⁵ But, more importantly, Chief Justice Calogero's evaluation was tempered by fairness to both sides.

Instead of using the hypothetical above, a more complete understanding of the significance the *Azhar* decision will have on the Louisiana insurance industry should result from examining the actual facts of *Azhar*.

II. HISTORY OF AZHAR

On May 11, 1987, Dr. Azhar was involved in an automobile accident with Shannon Holmes.⁶ At the time of the accident, State Farm Mutual Automobile

3. 620 So. 2d 1158 (La. 1993).

4. This implication follows from the court's holding that the tender will not be returned absent some fraud or ill practices. Therefore, once an insurer makes the tender, the best case scenario for the insurer, if a trial results, is finding no additional liability to the insured.

5. What *McDill v. Utica Mut. Ins. Co.*, referred to as an unconditional tender is not a final or conclusive payment, but one without such condition as, say, requiring a release of limitation on the use of the funds. Nor is it an accord and satisfaction, compromise or settlement. And it does not effect a release of the claim when the insured accepts the tender. As the court of appeal decided in *United Services Auto Ass'n v. Dugas*, the tendered sum is not conclusively the insured's as the amount due for uninsured damages, until a judge or jury says it is.

Since the "unconditional tender" is only a good faith act acknowledging a UM insurer's contractual obligation to pay damages, when an insurer pays more than the underinsured damages, or what is required by contract, then an insurer has a right to recover from its insured for mistaken or excessive payments not due under the contract . . . since an insured can seek more money, even after the tender, fairness dictates that the law operate for a defendant as well as a plaintiff, and permit a defendant to seek restoration of reimbursement of an excessive payment.

State Farm Mut. Auto. Ins. Co. v. Azhar, 620 So. 2d 1158, 1160 (La. 1993) (Calogero, C.J., dissenting) (citations omitted).

6. Brief for Respondent at 1, State Farm Mut. Auto. Ins. Co. v. Azhar, 620 So. 2d 1158 (La.

Insurance Company (State Farm) was both Ms. Holmes' liability insurer and Dr. Azhar's underinsured motorist insurer.⁷ Dr. Azhar filed suit against Ms. Holmes and State Farm, as both Ms. Holmes' liability insurer and as Dr. Azhar's uninsured motorist carrier.⁸ Dr. Azhar released Ms. Holmes and State Farm, in its capacity as her liability insurer, from liability after State Farm paid its liability policy limits of \$25,000.⁹ On December 18, 1990, Dr. Azhar received \$35,000 from State Farm under the uninsured/underinsured motorist provisions of Azhar's policy with State Farm.¹⁰

Dr. Azhar continued to pursue the litigation against State Farm in hopes of receiving a larger payment under his policy. At trial, the jury awarded damages of only \$28,600, assigned 50% of the fault to Dr. Azhar, and, therefore, reduced his recovery to \$14,300.¹¹ Ultimately, the insurance payments to Dr. Azhar exceeded his assessed damages; thus, Azhar's suit against State Farm was dismissed.¹² These insurance payments to Dr. Azhar included \$25,000 from Ms. Holmes' insurer, \$35,000 from Dr. Azhar's uninsured/underinsured motorist insurer, and \$1,926 from the medical payments provision of State Farm's policy with Dr. Azhar.¹³ The sum of these credits, \$61,926, was over four times the amount to which the jury decided Dr. Azhar was entitled.

State Farm demanded from Dr. Azhar the return of the \$35,000 tender because the damages awarded to him by the jury did not exceed the limits of Ms. Holmes' \$25,000 liability policy.¹⁴ After Dr. Azhar refused to return the \$35,000 payment, State Farm filed suit to recover this amount. Its theory of recovery was that it had paid Dr. Azhar a "thing not due,"¹⁵ and that he had been unjustly enriched by receiving the \$35,000.¹⁶

The supreme court in *Azhar* held that an "unconditional tender" made by an insurer is not recoverable, absent some fraud or ill practices.¹⁷ The supreme court set forth several bases which lay the foundation for its decision. These underlying conclusions include: (1) "If the legislature had intended for the 'unconditional' payment under LSA-R.S. 22:658 to be subject to a 'condition,' [such as payment of a thing not due], it could easily have included such a

1993) (No. 93-CC-0556).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2.

12. *Id.*

13. *Id.*

14. *Id.*

15. La. Civ. Code arts. 2301-2313. See discussion *infra* part IV.E.

16. *State Farm Mut. Auto. Ins. Co. v. Azhar*, 620 So. 2d 1158 (La. 1993).

17. *Id.* at 1160. The trial court denied Dr. Azhar's exception of no cause of action, and the court of appeal denied a writ, citing *United Servs. Auto. Ass'n v. Dugas*, 593 So. 2d 918 (La. App. 4th Cir.), writ denied, 596 So. 2d 210 (1992). A supervisory writ was granted, 616 So. 2d 676 (La. 1993), to review the action of the court of appeal. *Azhar*, 620 So. 2d at 1158-59.

'condition' in the statute[;]"¹⁸ (2) the use of the word "unconditional," regarding a tender, absolutely bars any condition, regardless of its source, which will retroactively affect the tender; and (3) Louisiana Civil Code article 2308¹⁹ means "a conditional payment may be reclaimed . . . [but] an unconditional payment may not be reclaimed."²⁰ This note will analyze the underlying support of *Azhar* in an attempt to determine if the Louisiana Supreme Court reacted too harshly by rejecting State Farm's request.

This note will also address the issue of whether an insurer providing uninsured/underinsured motorist coverage is entitled to recover its unconditionally tendered payment from the insured if a court awards damages less than the amount tendered.²¹ While addressing this issue, this note suggests that despite the supreme court's conclusion in *Azhar*, the insurer should be able to recover the unconditional tender. To support this suggestion, this note will address the following specific issues: (1) the insured is not legally entitled to collect because the suspensive condition, existing in all underinsured motorist insurance contracts, is never fulfilled, preventing the insurer's obligation from coming into existence; (2) the unconditional tender made by State Farm is in fact a payment of a thing not due and subject to recovery; (3) the court misinterpreted Louisiana Civil Code article 2308, leading to an incorrect application regarding an agreement subject to a suspensive condition; (4) an unconditional tender does not become conditional because a legal mandate, beyond the control of the insurer, is imposed by law; and (5) policy considerations, which include the specific purpose of UM coverage, the insured's minimal risks in pursuing future litigation, and the future effect on the size of the insurer's tender, require the opposite result.

Section III of this note addresses the purpose of uninsured/underinsured motorist coverage in Louisiana. Section IV analyzes the applicable law in Louisiana. This analysis reviews Louisiana Revised Statutes 22:658 and 22:1406 along with the jurisprudential decisions that affect the interpretation of these statutes. Section V examines the policy considerations triggered in the insured and UM insurer relationship. Finally, section VI suggests a statutory solution to address the unconditional tender recovery, an area of the law that has been previously unprovided for by the legislature.

18. *Id.* at 1159 (citing *United Servs. Auto. Ass'n v. Dugas*, 593 So. 2d 918 (La. App. 4th Cir.) (Hufft, J. Pro Tem., dissenting), *writ denied*, 596 So. 2d 210 (1992)).

19. La. Civ. Code art. 2308 addresses payments under agreements (a contract in the instant case) that are subject to an uncertain suspensive condition (insured's damages exceeding the underinsured's liability coverage limits).

20. *Azhar*, 620 So. 2d at 1160.

21. Additionally, it should be recognized that the judicially determined damages were less than the tortfeasor's liability policy limits.

III. PURPOSE OF UNINSURED/UNDERINSURED MOTORIST COVERAGE

Uninsured (UM) and underinsured motorist (UIM) coverage is similar to, but is not, strictly speaking, a substitute liability policy obligating the UM/UIM insurance company to compensate the insured for the negligence or fault of an inadequately insured motorist.²² Though there are many similarities between UM/UIM insurance, underinsured motorist coverage developed independently, and much later, to fill the gaps between loss and compensation that resulted in early jurisprudence interpreting the extent and meaning of "uninsured motorist coverage."

Uninsured motorist insurance did not develop until the 1950's.²³ UM insurance became necessary due to the increased number of persons failing to acquire the necessary liability insurance. Insurance companies, although sympathetic to the victims of an uninsured motorist, generally opposed state-imposed programs and public Unsatisfied Judgment Funds. To avoid further "socialization of insurance" and government intervention, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau drafted an uninsured motorist endorsement to the family automobile policy.²⁴ The rapid adoption and public acceptance of uninsured motorist coverage in the insurance industry resulted in its implementation throughout the nation on a broad scale.²⁵

The purpose of UM insurance is to provide the insured with the same protection he would have had were the offending driver covered adequately with liability insurance.²⁶ UM insurance was designed to be secondary insurance, only necessary if sufficient liability insurance, the primary insurance, was unavailable. Therefore, UM insurance is designed to place the victim in the *same position as he would have been* had the tortfeasor been insured.²⁷ The required coverage is not to be extended, by judicial interpretation, beyond the statute's plain intent.²⁸ The plain intent of Louisiana Revised Statutes 22:1406(D), the basis for UM coverage, does not include double recovery or

22. This is not to say that uninsured motorist coverage is for the benefit or protection of the tortfeasor (uninsured motorist). The UM carrier's payment of the insured's damages does not release the tortfeasor from any liability. The insurer under this coverage merely stands in the shoes of the tortfeasor to compensate the victim for the amount the victim could have collected had the tortfeasor (uninsured motorist) carried liability insurance. See Rowland H. Long, *The Law of Liability Insurance* § 24.01 (1988).

23. Robert H. Joost, *Automobile Insurance and No-Fault Law* 2d § 1:10 (1992); Long, *supra* note 22, § 24.01.

24. Long, *supra* note 22, § 24.01.

25. *Id.*

26. *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 218 So. 2d 580 (1968); 8C John A. Appleman, *Insurance Law and Practice* § 5071.45 (1987); George J. Couch et al., *Couch Cyclopedic of Insurance Law* § 45:624 (2d ed. 1981); Long, *supra* note 22, § 24.01.

27. See *Block v. Reliance Ins. Co.*, 433 So. 2d 1040 (La. 1983); *Hoefly v. Government Employees Ins. Co.*, 418 So. 2d 575 (La. 1982).

28. *Smith v. State Farm Mut. Auto. Ins. Co.*, 328 So. 2d 679 (La. App. 3d Cir. 1976).

placing the insured in a better position than he would have been had the tortfeasor carried sufficient liability insurance. "Underinsured motorists coverage pays damages for bodily injury that the covered persons are legally entitled to recover from a motorist who has auto liability insurance, when the amount of that insurance is *not enough to pay* the full amount of the damages."²⁹

Uninsured/Underinsured motorist coverage was designed to compliment standard liability policies. It must be recognized that UM is closer to an accident or indemnity policy, as compared to simply another liability policy available to the innocent victim. One reason is because UM provides first-party benefits as opposed to a liability policy that pays third-party benefits.³⁰ Although Louisiana courts have found that insufficient liability insurance by a motorist constitutes "uninsured,"³¹ some jurisdictions determined otherwise.³² Thus, underinsured motorist coverage was usually created in those jurisdictions to fill some of the gaps created by this strict construction.³³

The Legislature designed underinsured motorist coverage to deal with situations where the insured was injured by a tortfeasor who, although carrying the statutory minimum in liability coverage, was insufficiently insured to compensate fully for all damages incurred. In a traditional sense, the above tortfeasor was not "uninsured" because some liability coverage was available to the victim. Underinsured motorist coverage filled the possible void in coverage by providing benefits equal to the difference between the tortfeasor's liability insurance limits and the victim's liability limits. The additional benefits were available only if the victim's limits were higher than the tortfeasor's, and then only to the extent necessary to fully compensate the victim.³⁴ "UIM insurance, like UM coverage, provides damages to an insured only if another person's fault was the proximate cause of the insured's injury, and *only if the damages of the insured/victim exceeded the liability limits of the defendant's [tortfeasor's] . . . liability policy.*"³⁵

The history and application of UIM and UM coverage should be considered within an analysis of *Azhar*. With an understanding of UIM and UM coverage,

29. Frederick G. Crane, *Insurance Principles and Practices* 86 (1980) (emphasis added).

30. Couch et al., *supra* note 26, § 45:624.

31. See Whitten v. Empire Fire & Marine Ins. Co., 353 So. 2d 1071 (La. App. 2d Cir. 1977).

32. Other jurisdictions have denied recovery under "uninsured" coverage. The distinction is based in the general definition of uninsured. These other jurisdictions determined if the tortfeasor had insurance, but it was insufficient, the tortfeasor was "underinsured" not "uninsured." After finding the tortfeasor was not uninsured, recovery of any damages above the tortfeasor's liability limits would be denied. See Payne v. Farm Bureau Mut. Ins. Co., 768 S.W.2d 543 (Ark. 1989); Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436 (Miss. 1989); Harwell v. Continental Ins. Co., 359 S.E.2d 172 (Ga. Ct. App. 1987).

33. This is not to imply that uninsured motorist coverage is a form of no-fault coverage. Recovery by the innocent victim is still conditioned upon a finding of tort liability on the part of the uninsured tortfeasor. See Long, *supra* note 22, § 24.01.

34. Joost, *supra* note 23, § 1:11.

35. *Id.* (emphasis added).

it is apparent that the essential function of underinsured motorist coverage supports State Farm's conclusion that its payment should be returned because Dr. Azhar received a payment of a thing not due.³⁶

IV. ANALYSIS OF APPLICABLE LOUISIANA LAW

A. Louisiana Statutes and Jurisprudence Establishing the Requirements of the Administration of Uninsured/Underinsured Motorist Coverage

In Louisiana, "[u]ninsured motorist coverage received its initial legislative endorsement in Act 187 of 1962, which amended Louisiana Revised Statutes 22:1406 to add subsection (D)."³⁷ Subsection (D) provided that Louisiana insurers could not issue an automobile liability insurance policy unless protection was provided for persons insured under the liability policy for bodily injury damages for which an owner or operator of an uninsured motor vehicle was legally responsible.³⁸ Louisiana Revised Statutes 22:1406(D) remains the basis for uninsured/underinsured motorist coverage.³⁹ The courts of Louisiana have consistently determined that the object of Louisiana Revised Statutes 22:1406(D) is to promote full recovery of damages to innocent victims by making uninsured motorist coverage available as primary protection when the tortfeasor is without coverage (uninsured) and, additionally, as excess coverage when the tort-feasor is inadequately insured (underinsured).⁴⁰

Another crucial statute in the analysis of a claim involving underinsured motorist insurance is Louisiana Revised Statutes 22:658,⁴¹ which establishes the

36. La. Civ. Code art. 2301 provides: "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it."

37. McKenzie, *supra* note 2, at 691.

38. *Id.* The amount of protection was established in the Motor Vehicle Safety Responsibility Law. See La. R.S. 32:851-1043 (1989 & Supp. 1994).

39. See La. R.S. 22:1406(D) (Supp. 1993).

40. Johnson v. Fireman's Fund Ins. Co., 425 So. 2d 224, 226 (La. 1982) ("The central purpose of . . . the uninsured motorist statute is the protection of the injured person."); Hoefly v. Government Employees Ins. Co., 418 So. 2d 575, 578 (La. 1982) ("The statute [La. R.S. 22:1406(D)] is to be liberally construed to carry out this objective."). See W. Shelby McKenzie & H. Alston Johnson, III, Insurance Law and Practice § 119, in 15 Louisiana Civil Law Treatise (1986). An uninsured motorist's insurer is responsible for the damages suffered by an insured which are in excess of the liability insurance of the negligent motorist and which have not been paid by the negligent motorist or by someone responsible for his fault or by someone solidarily liable with him.

41. La. R.S. 22:658 (Supp. 1994) provides:

A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:656 [life], R.S. 22:657 [health and accident], and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest.

.....

B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor . . . when such failure is found to be arbitrary,

thirty-day⁴² time frame for insurers to pay any amount due to the insured. This thirty-day period does not limit the investigation of genuine questions of fact to be resolved. The UM insurer may proceed as long as necessary to resolve legitimate concerns. However, once the UM insurer has sufficient reason to believe it will owe the insured some amount, it then has thirty days in which to make the necessary tender.⁴³

Louisiana Revised Statutes 22:658 was enacted prior to Louisiana Revised Statutes 22:1406(D). This time sequence created a legal concern of whether Louisiana Revised Statutes 22:658 was applicable to uninsured/underinsured motorist coverage. The Louisiana Supreme Court eliminated this uncertainty in *Hart v. Allstate Insurance Co.*⁴⁴

La. R.S. 22:658 provides that all insurers issuing "any type" of "contract" other than life insurance and health and accident insurance shall pay the amount of any claim due any insured. Uninsured motorist coverage is a contract whereby the insurer agrees to pay all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of "bodily injury" sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured or underinsured motor vehicle. Accordingly, La. R.S. 22:658 is applicable to an uninsured motorist claim.⁴⁵

The *Hart* court then proceeded to analyze the two statutes, Louisiana Revised Statutes 22:658 and 22:1406(D), *in pari materia* to determine the meaning of two vital clauses contained within them. The first clause, "legally entitled to recover," as contained in Louisiana Revised Statutes 22:1406(D), meant "simply that the plaintiff must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages."⁴⁶ The court then stated:

capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of ten percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, together with all reasonable attorney fees for the prosecution and collection of such loss, or in the event a partial payment or tender has been made, ten percent of the difference between the amount paid or tendered and the amount found to be due and all reasonable attorney fees for the prosecution and collection of such amount.

42. Prior to the 1989 amendment to La. R.S. 22:658, the period allowed for payment of claims was sixty days. The 1989 amendment became effective for all claims arising after midnight, December 31, 1989.

43. William D. Grimley, *The Unconditional Tender: McDill Revisited*, *Around the Bar*, Apr. 1990, at 6, 9.

44. 437 So. 2d 823 (La. 1983).

45. *Id.* at 827.

46. *Id.* at 828 (citing *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 218 So. 2d 580 (1969)).

Accordingly, to establish a "satisfactory proof of loss" [contained in Louisiana Revised Statutes 22:658] of an uninsured motorist claim, the insured must establish that the insurer receive sufficient facts which fully apprise the insurer that the owner or operator of the other vehicle involved in the accident was [1] uninsured or underinsured, [2] that he was at fault, [3] that such fault gave rise to damages and [4] establish the extent of those damages.⁴⁷

The second clause, "shall pay the amount of any claim due," has become equally important. Interestingly, the word "unconditional" is not contained in Louisiana Revised Statutes 22:658. Frequently, the unconditional tender becomes a central aspect of uninsured/underinsured claims. So, what is the statutory basis for the unconditional tender? The statutory language, "shall pay the amount of any claim due," found in Louisiana Revised Statutes 22:658, must be the basis for the unconditional tender.

The development of an unconditional tender requirement is credited by recent courts to *McDill v. Utica Mutual Insurance Co.*⁴⁸ The Louisiana Supreme Court, in *McDill*, expounded on the rule it established in *Hart*:

If the first three elements of the *Hart* test are satisfied and the insured has made a showing that the [UM] insurer will be liable for some general damages, the [UM] insurer must tender the reasonable amount which is due. This amount would be *unconditionally tendered* to the plaintiff not in settlement of the case, but to show their good faith in the matter and to comply with the duties imposed upon them under their contract of insurance with the insured. The amount that is due would be a figure over which reasonable minds could not differ.⁴⁹

This position is taken by the court because allowing the defendant-insurer to refuse tendering any amount because the *exact* amount of damages, the fourth element of *Hart* test, is not proven, renders the fourth element "meaningless as it places an impossible burden on the plaintiff prior to going to trial."⁵⁰ Thus, the unconditional tender was born . . . or was it?⁵¹

47. *Id.* at 828.

48. 475 So. 2d 1085 (La. 1985).

49. *Id.* at 1091-92 (emphasis added).

50. *Id.* at 1091.

51. Actually, no, it was not. Prior to the Louisiana Supreme Court's 1985 decision in *McDill*, Louisiana courts were already using the concept of an unconditional tender in the application of Louisiana Revised Statutes 22:658. *See, e.g.,* O'Brian v. Allstate Ins. Co., 420 So. 2d 1222 (La. App. 3d Cir. 1982); LeBlanc v. Underwriters at Lloyd's, London, 402 So. 2d 292 (La. App. 3d Cir. 1981); Nations v. Excess Ins. Co., 377 So. 2d 433 (La. App. 2d Cir. 1979); Riverland Oil Mill v. Underwriters for Lloyd's, New York, 368 So. 2d 156 (La. App. 2d Cir.), *writ denied*, 369 So. 2d 1365 (La. 1979); Fruge v. Hub City Iron Works, Inc., 131 So. 2d 593 (La. App. 3d Cir. 1961).

Three years before *McDill*, the third circuit stated: "The law is clear that where there is a reasonable dispute as to amount of loss, the insurer can avoid imposition of penalties and attorney's

Regardless of its origin, the "unconditional tender" and the recovery of an overpayment, resulting from an "unconditional tender," have created conflict within Louisiana's judicial system. To address the overpayment problem, an examination of the prior decisions is beneficial.

B. Prior Inconsistent Decisions

Prior to *Azhar*, Louisiana jurisprudence was split on the issue whether an insurer was entitled to recover the excess of an unconditional tender if the subsequent award of damages was less than the amount tendered.⁵² The issue also has been interpreted, under Louisiana law, by a federal court.⁵³ A brief analysis of these cases follows.

The first case addressing an underinsured motorist insurer's right of recovery, *Gallagher v. State Farm Insurance Co.*,⁵⁴ arose in federal court. The facts of *Gallagher*, regarding the status of the insurers, were very similar to *Azhar*.⁵⁵ Gallagher settled her claim against an underinsured motorist and State Farm for \$10,000, the limits of the liability policy.⁵⁶ Additionally, on July 24, 1990, State Farm sent Gallagher a \$6,500 check, specifically described as an unconditional tender.⁵⁷ As the litigation continued, State Farm removed the action to federal court to resolve Gallagher's claim against it as her underinsured motorist carrier.⁵⁸ Gallagher filed an amended petition⁵⁹ to which State Farm filed an answer and a counterclaim that sought reimbursement of the \$6,500 tender.⁶⁰ Judge Sear held in *Gallagher*: "While the amount the insurer must tender is that which cannot reasonably be disputed, the terms by which *McDill*

fees by unconditionally tendering part of the claim which is undisputed." *O'Brian*, 420 So. 2d at 1225. However, because *McDill* was the first Louisiana Supreme Court decision to adopt the "unconditional tender" language, citation to it, naturally, is more authoritative than citation to an appellate decision. This example is simply to demonstrate that the lower courts were familiar with the term, "unconditional tender," and had used it prior to *McDill*.

52. *Pitard v. Davis*, 599 So. 2d 398 (La. App. 5th Cir. 1992) (finding an insurer is not entitled to recovery of payment); *United Servs. Auto. Assoc. v. Dugas*, 593 So. 2d 918 (La. App. 4th Cir.), *writ denied*, 596 So. 2d 210 (1992) (finding an insurer is entitled to recovery of payment).

53. *Gallagher v. State Farm Ins. Co.*, 760 F. Supp. 562 (E.D. La. 1991) (finding an insurer may recover tendered amount exceeding damages).

54. 760 F. Supp. 562 (E.D. La. 1991).

55. In both accidents State Farm was the liability insurer of the underinsured motorist and was the underinsured motorist insurer of the injured party.

56. *Gallagher*, 760 F. Supp. at 563.

57. *Id.*

58. *Id.*

59. The amended petition also sought attorney's fees from State Farm by alleging State Farm's actions were arbitrary and capricious. While this is a vital aspect of the requirements of La. R.S. 22:658, this note does not attempt to address the issue of attorney's fees, except as it affects the insurer's motive for making an unconditional tender.

60. *Gallagher*, 760 F. Supp. at 563.

describes the tender it requires do not admit of the conclusion that the insurer is forbidden from arguing later that a tender it made was excessive or mistaken."⁶¹

The first Louisiana circuit case to specifically address the issue of the return of an unconditional tender was *United Services Automobile Ass'n v. Dugas*,⁶² which cited *Gallagher* approvingly.⁶³ In *Dugas*, the plaintiff, Dr. Dugas, and an underinsured motorist were involved in an automobile accident. United Services Automobile Association (USAA), as the insurer of Dr. Dugas, provided liability and underinsured motorist coverage. Dr. Dugas sued the underinsured motorist, her insurer, and his insurer, USAA, claiming the negligent third party was underinsured as to his damages.⁶⁴ The defendant's insurer paid its policy limits of \$20,000, and Dr. Dugas dismissed his suit against the defendant and her insurer.⁶⁵ The litigation against USAA continued on the issue of USAA's underinsured coverage of Dr. Dugas.⁶⁶ Before the trial actually commenced, pursuant to Louisiana Revised Statutes 22:658 and *McDill*, USAA unconditionally tendered \$110,000, which Dr. Dugas accepted.⁶⁷ The case then proceeded to a trial against USAA because the damages Dr. Dugas claimed exceeded the \$130,000 already received. However, the jury awarded damages of only \$60,000—\$70,000 less than the amount received by Dr. Dugas.⁶⁸ USAA filed suit to recover the \$70,000; the court of appeal ultimately ruled in its favor.⁶⁹

A significant piece of the puzzle, which is relied upon by subsequent courts,⁷⁰ also originated in this opinion. In dissent, Justice Pro Tempore Hufft

61. *Id.* at 564.

62. 593 So. 2d 918 (La. App. 4th Cir.), *writ denied*, 596 So. 2d 210 (1992).

63. *Id.* at 921.

64. *Id.* at 920.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Originally, in the district court, the insured filed exceptions of res judicata, estoppel by judgment, no cause of action, and motion for summary judgment. The insurer filed only a motion for summary judgment. The district court denied all exceptions and denied both motions for summary judgment. The insured filed application for supervisory writs. The court of appeal originally denied writs. However, the Louisiana Supreme Court granted certiorari, *United Servs. Auto. Ass'n v. Dugas*, 582 So. 2d 847 (La. 1991), and remanded to the court of appeal for briefing, argument, and opinion. On remand, the court of appeal held:

[T]he insurer can recover the overpayment because the contract is the law between the parties. The provision of that contract relating to underinsured motorist coverage requires the insurer to pay *only the uninsured portion* of the actual damages, and we interpret this to mean damages judicially determined, in this case by a jury, just as the liability provisions mean an insurer is liable to third parties only for judicially determined damages.

Dugas, 593 So. 2d at 920.

70. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Azhar*, 620 So. 2d 1158, 1158-59 (La. 1993); *Pitard v. Davis*, 599 So. 2d 398, 405 (La. App. 5th Cir. 1992).

opined: "[T]he majority decision place[d] a 'condition' on the 'unconditional' payment pursuant to LSA-R.S. 22:658."⁷¹

The final case in the trilogy addressing this issue prior to *Azhar* was *Pitard v. Davis*.⁷² Multiple parties⁷³ were involved in the litigation; however, the

71. In its entirety, the dissent stated:

I respectfully dissent. The majority decision places a "condition" on the "unconditional" payment pursuant to LSA-R.S. 22:658. The net effect of the decision is that a payment under LSA-R.S. 22:658 must now be held in escrow until the rendition of the final judgment to determine what, if any, portion of the payment is subject to a refund to the insurance company.

The payment under LSA-R.S. 22:658 was made for the sole purpose of avoiding the imposition of attorney's fees. This is what the insurance company received for its payment. Penalties and attorney's fees would not be imposed in this case because the payment was greater than the final judgment and if the final judgment had been \$200,000.00 the insurance company would have argued against the imposition of penalties and attorney's fees on the judgment in excess of its payment on the basis that its payment was not arbitrary, capricious or without probable cause.

If the legislature had intended for the "unconditional" payment under LSA-R.S. 22:658 to be subject to the "condition" set forth in the majority opinion, it could easily have included such a "condition" in the statute. It is submitted that such a provision was not inserted because it would have destroyed the very purpose for the enactment of the statute—to insure the timely payment by the insurance company of the portion of the claim which is due so the insured could immediately use the funds to alleviate the damages suffered.

Dugas, 593 So. 2d at 922 (Hufft, J. Pro Tem., dissenting).

Justice Pro Tempore Hufft implies that the legal mandate to return a payment that was determined "not due" is a condition imposed by the insurer upon the insured. As discussed *infra* at notes 87-92 and accompanying text, the Louisiana Civil Code articles mandating repayment should not be considered a condition, as used in an "unconditional" tender.

Additionally, Justice Pro Tempore Hufft declared, "The payment under LSA-R.S. 22:658 was made for the sole purpose of avoiding the imposition of penalties and attorney's fees. This is what the insurance company received for its payment." *Id.* Actually, it is only a payment of a thing *due* that avoids attorney's fees; if an amount is not *due*, attorney's fees cannot be imposed. For example: An insurer makes an unconditional tender of \$5,000 to an insured. If the insured then proceeds with an action against the insurer to have the damages judicially determined, and damages *due* are found to be \$5,000, no penalties or attorney's fees would be awarded because the insurer did not act arbitrarily or capriciously in tendering \$5,000. If the insurer had not made a tender, attorney's fees would be justified if the insurer had acted arbitrarily or capriciously. If the judicially determined damages *due* were \$0, regardless of whether any amount is tendered, no penalties or attorney's fees will be imposed because the insurer's actions can not be deemed arbitrary and capricious. In *Azhar*, because a jury determined no additional damages were *due*, no penalties or attorney's fees could be imposed. Thus, State Farm did not *pay for the purpose of avoiding attorney's fees*.

72. 599 So. 2d 398 (La. App. 5th Cir. 1992) (ruling on this issue just eighteen days after the writ was denied on the fourth circuit's opinion in *Dugas*).

73. These parties included: Andree Pitard (passenger in James Hailey's vehicle) against Joe Davis (driver of the vehicle that rear-ended the vehicle in which Pitard was a passenger), Harvey Melville d/b/a Red Top Seafood (Davis' employer), Trinity Universal Insurance Company (Melville's insurer), James W. Hailey (driver of the vehicle in which Pitard rode as a passenger), United States Fidelity & Guaranty Company (Hailey's liability and underinsured motorist carrier), and State Farm and Liberty Mutual Insurance Companies, two additional underinsured motorist carriers. *Id.* at 399-

pertinent parties were Pitard, Hailey, and United States Fidelity & Guaranty Company (hereinafter USF&G). The court dismissed Hailey, the host driver defendant, from the suit. USF&G, Hailey's underinsured motorist carrier, tendered \$50,000 of its \$250,000 underinsured motorist limit to Pitard.⁷⁴ Pitard also signed a written release of the other parties, excluding the two additional underinsured motorist insurers.⁷⁵ USF&G reconvened against Pitard seeking a refund of the \$50,000 tender.⁷⁶ The jury found Davis negligent and awarded damages of \$95,800 to Pitard.⁷⁷ The trial judge dismissed USF&G's reconventional demand and also awarded additional medical expenses, as stipulated by counsel, amounting to \$13,500. The total damages awarded were \$109,300.⁷⁸ Because the total damages did not exceed the \$140,000 Pitard had already received, \$90,000 from liability insurance and \$50,000 from USF&G, Pitard's suit was dismissed.⁷⁹ USF&G, relying on *Dugas*, argued that it was entitled to a refund of \$22,208.⁸⁰ The Louisiana Fifth Circuit Court of Appeal declined to follow the majority's analysis in *Dugas*.⁸¹ Instead, it adopted the reasoning of Justice Pro Tempore Hufft's dissent, holding the insurer was not entitled to reimbursement of the payment made to the insured.⁸²

These diverse opinions demonstrate the obvious difficulty Louisiana courts faced in analyzing the statutes and available jurisprudence. One such difficulty each court had to ultimately address was the unconditional tender. An examination of the analysis used by *Dugas*, *Gallagher*, and *Pitard* to define the unconditional tender may provide a more complete understanding of the term.

The holding of *McDill* is often repeated:⁸³ the failure of the insurer to pay an "amount [that] would be unconditionally tendered to the plaintiff not in settlement of the case, but to show their good faith in the matter and to comply with the duties imposed upon them under their contract of insurance with the

400.

74. *Id.* at 400.

75. *Id.*

76. *Id.*

77. \$50,000 for pain and suffering, \$45,800 for past lost wages, and \$0 for future lost wages.

Id.

78. *Id.*

79. *Id.*

80. "USF & G asserts its UM coverage did not take effect until Trinity's \$90,000.00 payment was exhausted; thus, under the judgment [of \$109,300 in damages] USF & G was liable only for \$19,300.00 with interest of \$8,492.00. USF & G argues its total liability was \$27,792.00. It paid \$50,000.00. It contends it is due a refund of \$22,208.00." *Id.* at 404.

81. *Id.* at 405.

82. *Id.* at 403.

83. *State Farm Mut. Auto. Ins. Co. v. Azhar*, 620 So. 2d 1158 (La. 1993); *United Servs. Auto. Ass'n v. Dugas*, 593 So. 2d 918 (La. App. 4th Cir.), *writ denied*, 596 So. 2d 210 (1992); *Pitard v. Davis*, 599 So. 2d 398 (La. App. 5th Cir. 1992); *Wambsgans v. Liberty Lloyds Ins. Co.*, 595 So. 2d 719 (La. App. 5th Cir. 1992). Support is also found in federal courts. *Gallagher v. State Farm Ins. Co.*, 760 F. Supp. 562 (E.D. La. 1991).

insured"⁸⁴ may be the basis for imposition of penalties and attorney's fees. The court in *Dugas* correctly identified the relationship of the unconditional tender and Louisiana Revised Statutes 22:658:

[T]he *McDill* requirement for an "unconditional tender" does not create an obligation separate from the insurance contract. On the contrary, *McDill* emphasizes the insurance contract, explaining that La.R.S. 22:658 is a mechanism for enforcing existing contractual obligations between insurer and insured. Further, *McDill* says that this unconditional tender merely shows the insurer's acknowledgement of "the duties imposed upon them under their contract of insurance with the insured." From this we conclude that neither La.R.S. 22:658 nor the jurisprudence contemplates that an unconditional tender is a separate obligation that displaces an insurer's contractual obligation.⁸⁵

The courts generally find an act by the insurer, such as requiring settlement of a claim⁸⁶ or a proof of loss admitting the tendered amount is the extent of damages,⁸⁷ is the cause of a tender being found unconditional. "Condition" is not defined in the Civil Code,⁸⁸ nor did the reporter choose to define the term in the comments of any article because "the word can be used in a variety of contexts and be vested, therefore, with many different meanings."⁸⁹ In *Azhar*, State Farm did not place any conditions on the tender, such as placing the amount in escrow or requiring acknowledgement of settlement. Dr. Azhar was free to use the tender as he saw fit. The "condition" requiring a return of the tender to the insurer, as Justice Pro Tempore Hufft labeled it in *Dugas*, is actually imposed by Civil Code articles 2301-2313. Justice Pro Tempore Hufft's analysis is bootstrapping. The articles should not be considered a condition. The intent of an unconditional tender and hence, a determination of what is unconditional, should only be evaluated by actions of the insurer.

In *Gallagher*, the court interpreted "unconditional" as follows: "The tender is unconditional because the plaintiff need not release his or her claims in return. Just as the insured is not precluded by acceptance of the tender from seeking more, the insurer may not be precluded from arguing that its tender was too

84. *McDill v. Utica Mut. Ins. Co.*, 475 So. 2d 1085, 1091-92 (La. 1985).

85. *Dugas*, 593 So. 2d at 921.

86. *Landry v. State Farm Ins. Co.*, 529 So. 2d 417, 426 (La. App. 1st Cir. 1988); *Jackson v. Security Indus. Ins. Co.*, 484 So. 2d 966, 969, (La. App. 3d Cir. 1986); *O'Brian v. Allstate Ins. Co.*, 420 So. 2d 1222, 1226 (La. App. 3d Cir. 1982); *Riverland Oil Mill, Inc. v. Underwriters for Lloyd's*, 368 So. 2d 156, 164 (La. App. 2d Cir. 1979); *Witherwax v. Zurich Ins. Co.*, 315 So. 2d 420, 426 (La. App. 3d Cir. 1975); *Spano v. Emmco Ins. Co.*, 239 So. 2d 434, 437 (La. App. 4th Cir.), *writ refused*, 241 So. 2d 530 (1970).

87. *Sibley v. Insured Lloyds*, 442 So. 2d 627, 632 (La. App. 1st Cir. 1983).

88. Alain A. Levasseur, *Louisiana Law of Obligations in General* 58 (1988).

89. *Id.*

generous.”⁹⁰ Judge Sear further stated in *Gallagher*, “[a] tender under *McDill* does not negate whatever right to recover an insurer may have against its insured for mistaken or excessive payments.”⁹¹ The court in *Dugas* also reasoned there was more to defining “unconditional” than to state that a condition is placed on an unconditional tender. “Unconditional,” the *Dugas* majority stated, “does not mean ‘final’ or ‘conclusive’ as if ending the litigation. It is not an accord and satisfaction, compromise or settlement.”⁹²

Finally, Justice Pro Tempore Hufft, in the *Dugas* dissent, bases the definition of unconditional on the ease with which the legislature could have included such a condition in the statute. This analysis begs the question of why, if the word “unconditional” is not found in Louisiana Revised Statutes 22:658, the legislature would suspect a qualifier of unconditional was necessary? As discussed earlier in this paper, the courts, not the legislature, have transformed “unconditional” into a term of art relating to the insurer’s duties to the insured.

D. Insured’s Right of Payment is Determined Under Its Contractual Agreement

Claims for uninsured motorist benefits are simply claims made under an insurance contract. Thus, contract law determines the rights and obligations of the parties.⁹³ To enforce the contract, the insured must demonstrate his legal entitlement to the alleged damages from the tortfeasor under tort law. State Farm’s insurance contract with Dr. Azhar defined its obligation to pay uninsured claims as follows: “We will pay damages for bodily injury the insured is *legally entitled to collect* from the owner or driver of an uninsured motor vehicle.”⁹⁴ By requiring the insured to be “legally entitled to collect,” State Farm clearly intended to insure only those uninsured motorist claims that were recoverable

90. *Gallagher v. State Farm Ins. Co.*, 760 F. Supp. 562, 564 (E.D. La. 1991).

91. *Id.* (citing, additionally, La. Civ. Code arts. 2301, 2302, and cases thereunder) (footnotes omitted).

92. *United Servs. Auto Ass’n v. Dugas*, 593 So. 2d 918, 921 (La. App. 4th Cir.), *writ denied*, 596 So. 2d 210 (1992) (citing *Johnson v. Protective Casualty Ins. Co.*, 572 So. 2d 355, 357 (La. App. 1st Cir. 1990)). The court further stated:

We believe unconditional means just that: an insurer cannot condition its tender. As an example, an insurer cannot place conditions on its tender by requiring a release, or by demanding that the funds be placed in escrow, or by limiting their use to payment of medical bills. The tender is unconditional in the sense the insured can use it as his own, but it is not conclusively his until a judge or jury says that it is his as the amount due for underinsured damages.

Id.

93. See *Hemel v. State Farm Mut. Auto. Ins. Co.*, 211 La. 95, 29 So. 2d 483 (1947); *Kellams v. Oliver*, 595 So. 2d 331 (La. App. 3d Cir.), *writ denied*, 596 So. 2d 556 (La. 1992).

94. Brief for Respondent at 3, *State Farm Mut. Auto. Ins. Co. v. Azhar*, 620 So. 2d 1158 (La. 1993) (93-CC-0556) (emphasis in original).

under theories of tort law.⁹⁵ The Louisiana Supreme Court's adoption of this concept is recognized in *Hart v. Allstate Insurance Co.*⁹⁶

Chief Justice Calogero, author of the dissent in *Azhar*, previously explained in *Niemann v. Travelers Insurance Co.*⁹⁷ why the determination of tort liability is so vital to UM disputes. The UM insurer has no obligation to pay damages that do not exceed the tortfeasor's liability limits.⁹⁸ Therefore, the obligation does not exist until the tortfeasor's liability limits are exceeded by damages. This reference to the "obligation" of the insurer also illuminates the importance of understanding, under civilian theory, how an insurer's obligation arises.

Professor Alain A. Levasseur⁹⁹ expounds on the analysis used to determine the kind of obligation, if any, created under the Louisiana Civil Code in his précis.¹⁰⁰ Professor Levasseur refers to the legal effects created by an insurance contract in the section concerning suspensive and resolutive conditions.¹⁰¹

95. Paul W. Pretzel, *Uninsured Motorists* § 17.2 (1972) ("That is, if the insured could not, under the law of torts, 'legally' recover from the uninsured motorist, the company is not liable under the UM portions of the policy."); Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 39.1 (2d ed. 1985) ("[T]he critical inquiry is whether the indemnification sought by a claimant is for damages which could have been recovered in a tort suit resulting from such an accident.").

96. 437 So. 2d 823, 828 (La. 1983). The supreme court approvingly cites *Breaux v. Government Employee Ins. Co.*, 369 So. 2d 1335, 1338 (La. 1979) ("A person insured under the uninsured motorist provision of a particular policy must establish that he is 'legally entitled to recover' damages from the owner or operator of an uninsured or underinsured motor vehicle in order to obtain coverage thereunder."), and *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 529, 218 So. 2d 580, 583 (1969) ("The words 'legally entitled to recover' mean simply that the plaintiff must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages.").

97. 368 So. 2d 1003 (La. 1979).

98. *Id.* at 1007 n.6. Footnote 6 provides:

The 1974 amendment of R.S. 22:1406 D in effect makes UM coverage "excess" coverage. The UM carrier has no obligation to pay that portion of plaintiff's damages within the underinsured tortfeasor's liability policy limits but only those damages which exceed the policy limits and which are within the UM policy limits; thus, uninsured motorist insurer's only right to reimbursement in event of payment is with respect to recovery of that part of insured's claim which exceeds the tortfeasor's liability policy limits, a sum as to which only the tortfeasor is exposed.

(citation omitted).

99. Professor of Law; Associate Director, Center of Civil Law Studies, Louisiana State University.

100. Levasseur, *supra* note 88.

101. An obligation is subjected to a suspensive condition when it *may not be enforced until the uncertain event occurs* (LSA-C.C. Art. 1767). Although this description of the effects of a suspensive condition states that the obligation *may not be enforced*, actually a suspensive condition has a much more drastic effect: it *suspends the existence* of the obligation between the parties until the uncertain event occurs and, therefore, suspends the enforcement of that same obligation. Although the bond of law has been formed, no obligation is yet in existence. Such is the case, for example, of an insurance contract on a home for protection against fire, flooding or other disasters. The insurance company will not be called upon to indemnify the home owner until the house has been damaged or destroyed. There is no obligation in existence for the insurance company although the

This same characterization applies to an underinsured motorist insurance contract. A suspensive condition¹⁰² exists, which is not fulfilled until an insured is "legally entitled to recover," and the insured's damages exceed the limits of the liability policy of the underinsured motorist/tortfeasor.

As long as the occurrence of the uncertain event has not taken place, and for whatever length of time its fulfillment is pending, the suspensive condition prevents the rights and obligations of the parties from coming into existence. Although a juridical act has been formed, as illustrated in [Louisiana Civil Code articles] 1771 and 1775, that juridical act is, to a large extent, without any effect. The parties must wait for their rights and obligations to be born, if and when the condition is fulfilled.¹⁰³

Professor Levasseur proceeds, using Louisiana Civil Code articles 2301-2313 as his source of authority, to state, "should the debtor-obligor ever perform before the fulfillment of the condition, he must be entitled to claim his performance back on the ground that he made a payment of a thing not due."¹⁰⁴ State Farm's payment was made before the jury determined Dr. Azhar's damages did not exceed the amount of liability coverage carried by Ms. Holmes.

E. Payment of a Thing Not Due

The ability of a party to recover the payment of a thing not due (*condictio indebiti*) is set forth in Louisiana Civil Code articles 2301-2313.¹⁰⁵ Therefore, because Louisiana Revised Statutes 22:658 does not expressly or implicitly deprive an insurer of the right to recover undue payments, and the Insurance Code fails to address this issue, the Civil Code should apply.¹⁰⁶ State Farm

insurance contract has been entered into.

Id. at 61 (third emphasis added).

102. "As a modality or component part of an obligation, a condition must be understood as an event which may or may not occur and to which is tied the existence or the extinction of a bond of law. Thus, a conditional obligation is one whose fate is indefinite." *Id.* at 58.

103. *Id.* at 75.

104. *Id.* at 76.

105. La. Civ. Code art. 2301 provides: "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it." La. Civ. Code art. 2302 provides: "He who has paid through mistake, believing himself a debtor, may reclaim what he has paid." La. Civ. Code art. 2304 provides: "A thing not due is that which is paid on the supposition of an obligation which did not exist, or from which a person has been released." La. Civ. Code art. 2308 provides: "It is considered that a thing has been paid, when not due, if the payment was made by virtue of an agreement, the effect of which is suspended by a condition, the event of which is uncertain." La. Civ. Code art. 2309 provides: "This principle must not be extended to things due on a day certain, nor to conditions which must certainly happen."

106. A general statute, such as a civil code article, applies when the specific statute (*sui generis*), Insurance Code, does not provide applicable law. This is a standard method of statutory interpretation.

paid the \$35,000 by mistake, believing, based on the facts before fault was judicially determined, that it was obligated to tender this amount to Dr. Azhar. After the jury determination of damages, the obligation, in fact, did not exist because damages did not exceed the tortfeasor's liability coverage. Thus, State Farm paid on an obligation that did not exist.¹⁰⁷ Article 2302 provides:

He who has paid through mistake, believing himself a debtor, may reclaim what he has paid.¹⁰⁸

Thus, it appears to directly address State Farm's situation. State Farm, believing it was a debtor, tendered an undisputed amount. Subsequently, the court should have determined this tender was not "due" from State Farm, and the tender should have been recovered. Louisiana jurisprudence has repeatedly recognized an insurer's right to recover an overpayment made to the insured.¹⁰⁹

In an analogous case not involving an insurance company, but still pertinent to the facts of *Azhar*, a doctor, believing he was at fault, agreed, prior to trial, to pay the city \$50 per month for damage he caused to a utility pole during an accident.¹¹⁰ During the trial, the city was held responsible for the accident, relieving the doctor of liability.¹¹¹ Consequently, the court determined the doctor was entitled to recover a \$50 payment that had already been made.¹¹² By analogy, this case stands for the proposition that State Farm has a cause of action under Article 2302 to recover the \$35,000 mistakenly paid. Otherwise, the case is no longer a valid statement of the law. An insurance company should be as entitled to the benefits of the Louisiana Civil Code as a private doctor.

Although, through *Azhar*, the supreme court implies that Article 2302 is not applicable, Article 2304 provides still another basis for recovery of the tender. Article 2304 provides:

107. This is implied from the nature of an obligation in an insurance contract. The obligation did not exist until the suspensive condition, damages exceeding tortfeasor's liability policy, was fulfilled. Since damages only totaled \$14,300.00, and the tortfeasor's liability limits were \$25,000.00, the obligation could not have come into existence. See *Niemann v. Travelers Ins. Co.*, 368 So. 2d 1003, 1007 n.6 (La. 1979).

108. La. Civ. Code art. 2302.

109. *Dear v. Blue Cross*, 511 So. 2d 73 (La. App. 3d Cir. 1987); *Mathews v. Louisiana Health Serv. & Ind. Co.*, 471 So. 2d 1199 (La. App. 3d Cir. 1985); *Shelter Ins. Co. v. Cruse*, 446 So. 2d 893 (La. App. 1st Cir. 1984); *DeVillier v. Highlands Ins. Co.*, 389 So. 2d 1133 (La. App. 3d Cir. 1980); *Aetna Casualty & Sur. Co. v. Melancon*, 348 So. 2d 717 (La. App. 1st Cir. 1977); *Great American Indem. Co. v. Dauzat*, 157 So. 2d 308 (La. App. 3d Cir. 1963); *Hardware Dealers Mut. Fire Ins. Co. v. Guzzardi*, 144 So. 2d 556 (La. App. 4th Cir. 1962); *Central Sur. & Ins. Corp. v. Corbello*, 74 So. 2d 341 (La. App. 1st Cir. 1954). Federal courts have also addressed this issue. Applying Louisiana law, they have held the insurer was entitled to recover. *Gallagher v. State Farm Ins. Co.*, 760 F. Supp. 562 (E.D. La. 1991); *Prudential Ins. Co. of Am. v. Harris*, 748 F. Supp. 445 (M.D. La. 1990).

110. *Tischler v. City of Alexandria*, 471 So. 2d 1099 (La. App. 3d Cir. 1985).

111. *Id.* at 1103.

112. *Id.*

A thing not due is that which is paid on the supposition of an obligation which did not exist, or from which a person has been released.¹¹³

By definition, a *McDill* unconditional tender is an insurer's good faith offer to pay¹¹⁴ in order to comply with the duties imposed upon it by its contract of insurance with the insured.¹¹⁵ If "duties" is interpreted to imply something is "due," then surely after the jury determination of damages and fault, State Farm stated a cause of action under Article 2304 for "recovery of the payment" which is *subsequently undue*.¹¹⁶

The *Azhar* court appeared willing to follow the mandates of Articles 2301 and 2302, until it addressed Article 2308. Article 2308 provides:

It is considered that a thing has been paid, when not due, if the payment was made by virtue of an agreement, the effect of which is suspended by a condition, the event of which is uncertain.¹¹⁷

The supreme court's interpretation of Article 2308 is unconventional. The court's interpretation was as follows: "Under [Civil Code article] 2308, a *conditional* payment, subject to an uncertain suspensive condition, is regarded as payment of a thing not due. Under that Article, a conditional payment may be reclaimed. The Article's converse implication is that an unconditional payment may not be reclaimed."¹¹⁸

The court's interpretation of Article 2308 is questionable. The phrase "the effect of which" refers to the effect of the *agreement* as being the suspensive condition, not the effect of the *payment*. "Modifiers should come, if possible, next to the word they modify."¹¹⁹ Following this basic rule of grammar, the court should have concluded that State Farm's payment, the unconditional tender, was

113. La. Civ. Code art. 2304.

114. *McDill v. Utica Mut. Ins. Co.*, 475 So. 2d 1085, 1092 n.5 (La. 1985).

115. *Id.* at 1092.

116. See Alain A. Levasseur, Louisiana Law of Unjust Enrichment in Quasi-Contracts 184-91 (1991). If determined that the tender is due, the obligation could then be characterized as being subject to a resolutive condition. The same result would be reached. Upon the occurrence of the resolutive condition, that being a finding that damages are less than the tortfeasor's liability coverage limits, the parties are to be returned to the *status quo ante*, their original position. Thus, the obligation is treated as if it never occurred. *Id.* The tendered amount would be returned to the insurer.

117. La. Civ. Code art. 2308.

118. *State Farm Mut. Auto. Ins. Co. v. Azhar*, 620 So. 2d 1158, 1160 (La. 1993) (emphasis added).

119. William Strunk, Jr. & E. B. White, *The Elements of Style* 30 (3d ed. 1979). Rule 20 provides:

The position of the words in a sentence is the principal means of showing their relationship. Confusion and ambiguity result when words are badly placed. The writer must, therefore, bring together the words and groups of words that are related in thought and keep apart those that are not so related.

Id. at 28.

made by virtue of an agreement, the UM insurance policy. The policy's effect was suspended on the condition Dr. Azhar's damages exceed the tortfeasor's \$25,000 liability coverage. The occurrence of this event was uncertain, at least until a court ruled on Dr. Azhar's damages and percentage of fault.

The caption, "Payment under agreement subject to uncertain suspensive condition," above Article 2308 also supports this interpretation of the intent of the article.¹²⁰ Article 2308 should not be applied to conditional or unconditional payments. The court apparently was trying to construct an interpretation tailored to support the desired result in this case.¹²¹

The proper interpretation of Article 2308 was available in our jurisprudence. Judge Culpepper's opinion in *Whitehall Oil Co. v. Boagni*¹²² provides a guide to interpreting Article 2308. The articles concerning payment of a thing not due¹²³ must be evaluated *in pari materia*. "The rationale of the articles is that, even without an express agreement to that effect, every payment presupposes a debt. Consequently, if a thing has been paid without it being due, it can be recovered."¹²⁴

Boagni analyzes "repetition," the French action to recover payment of a thing not due. Repetition could be exercised in three different situations: (1) when there was no obligation; (2) when the payment resulted from an obligation that has ceased to exist; and (3) where the obligation's cause was immoral or illicit.¹²⁵

120. This is not to say a heading is considered "law." The author intends only to point out that the heading is generally used to give the reader an overview of the statute's content. Following this assumption, the article's caption indicates that "subject to uncertain suspensive condition" modifies "agreement." If "Payment" was to be modified, "under agreement" would have been eliminated or offset with commas.

121. At the end of its opinion, the *Azhar* court appeared to be uncertain of its analysis, while maintaining certainty as to the desired outcome. The court determined that "State Farm's assessment of Azhar's claim was above that of the jury and represented a possible error in judgment. On the other hand, the jury may have erred. Regardless, State Farm evaluated the claim and made an unconditional payment to its insured, which cannot be recovered." *Azhar*, 620 So. 2d at 1160 (emphasis added).

The court recognizes State Farm's possible error. The court then appears to shift its focus from State Farm by stating the jury may have erred. The proverbial phrase "two wrongs do not make a right" immediately comes to mind. There is always a possibility of jury error. But a jury determination should be assumed correct, unless facts indicate otherwise. The court's use of "regardless" appears to indicate that in spite of confusion elsewhere, the court was certain as to the outcome desired.

122. 217 So. 2d 707 (La. App. 3d Cir.), *aff'd*, 255 La. 67, 229 So. 2d 702 (1969).

123. La. Civ. Code arts. 2301-2313.

124. *Boagni*, 217 So. 2d at 709 (footnote omitted).

125. Repetition always presupposes that what was paid was not due, but in order to determine precisely the conditions under which repetition can be exercised, it is necessary to distinguish between three different situations: (1) where there was no obligation whatever between the payer and the payee; (2) where the payment was made in view of an actual obligation which has since ceased to exist; and (3) where the obligation paid had an illicit or an immoral cause.

"Planiol takes the position that error by the payer is required in situation (1) listed above, but not in situations (2) and (3)."¹²⁶

The third circuit in *Boagni* noted Planiol's discussion concerning Code Napoleon article 1376, which is almost identical to Louisiana Civil Code article 2301.¹²⁷ Neither of these two articles further defines "of a thing not due," nor expressly provides for recovery of a payment made in error.¹²⁸ Louisiana Civil Code articles 2302 through 2309, which have no corresponding source articles in the Code Napoleon, serve the purpose of "expressly allow[ing] recovery where there is error on the part of the person making the payment and to further define 'a thing not due'."¹²⁹

Article 2304 provides:

A thing not due is that which is paid on the supposition of an obligation which did not exist, or from which a person has been released.¹³⁰

The article provides for two separate situations: first, when a person pays through error a debt which actually does not exist at the time of payment.¹³¹ Second, where the actual obligation exists at the time of payment, but the debt is later released.¹³² "Although Article 2304 does not expressly [state] that in this situation error on the part of the payer [the UM insurer] is not required, [the court believed] this [was] necessarily implied."¹³³ The court then stated, "[Louisiana Civil Code article] 2308 affords similar relief *where the condition*

Id. at 710 (citing 2 Marcel Planiol, *Treatise on the Civil Law*, pt. 1, § 837 (Louisiana State Law Institute trans., 12th ed. 1959)).

126. It is required that there be something not due: the plaintiff in repetition must prove that his debt was resolved or annulled, or that the future debt did not arise; but the condition of error is not required, and it cannot be exacted. There is an act other than payment, and that is the annulment, the resolution or failure of a condition, which renders necessary the reestablishment of things in the state they would have been in if the agreement had not been made [*status quo ante*].

Id. (citing Planiol, *supra* note 125, § 843, at 452) (emphasis added).

127. *Id.* at 710.

128. *Id.*

129. *Id.*

130. La. Civ. Code art. 2304.

131. As discussed earlier, the obligation to pay the insured may not have arisen until Dr. Azhar's damages exceeded Ms. Holmes' liability coverage limits. This is, in effect, very similar to the result that would have been reached under Article 2302.

132. This situation may apply if the statutory language of La. R.S. 22:658, to "pay the amount of any claim due," is interpreted as creating an obligation. The obligation could be subsequently released upon a jury finding of an overpayment of damages to the insured.

133. *Whitehall Oil Co. v. Boagni*, 217 So. 2d. 707, 710 (La. App. 3d Cir.), *aff'd*, 255 La. 67, 229 So. 2d 702 (1969).

For, if there is an actual legal obligation at the time of the payment, it cannot be made through mistake. As Planiol says, in Vol. 2, Part I, Sec. 843, . . . there is an act which takes the place of the payment through error, and that is the subsequent resolution or failure of the contract. Under our Code, this would be a resolutive condition.

Id.

is suspensive."¹³⁴ Therefore, Article 2308 was, arguably, included in the Civil Code to address the situation when a suspensive condition is not fulfilled and causes the failure of the contract/obligation.

Judge Culpepper's clear and thorough analysis guides one to the proper interpretation, and additional Louisiana courts have also found the same interpretation of Article 2308.¹³⁵

F. Tender is Not A Compromise

The unconditional tender is not a compromise.¹³⁶ The benefit of this legal theory is the *finality* it affords. In situations involving the unconditional tender, the insured is not prevented from seeking additional damages. In a vast majority of cases, the unconditional tender acts as a final adjustment of the case merely because the insured is satisfied with the amount of compensation he receives. The insurer cannot ask for a release pursuant to the tender, because as discussed earlier,¹³⁷ the tender would be conditional and expose the insurer to penalties and attorney's fees. The unilateral tender should not be treated as a compromise because the insured, by accepting the tender, does not concede the differences between the parties.¹³⁸ Pursuant to Louisiana Civil Code article 3071,¹³⁹ a compromise agreement needs no cause or consideration other than adjustment of differences and a desire to put at rest all possibility of future litigation.¹⁴⁰ Thus, the lack of the adjustment of differences from the insured's perspective reflects the lack of a compromise. In a settlement situation, both parties receive

134. *Id.* at 711 n.6 (emphasis added). See also Articles 2021, 2023, 2042, and 2045 on suspensive and resolutive conditions.

135. Succession of *Miller v. Manhattan Life Ins. Co.*, 110 La. 652, 658, 34 So. 723, 725 (1903) ("[T]he Code is express that what is due under a suspensive condition, dependent upon an uncertain event, is not due, and cannot form the consideration of a payment."); *Penny v. Spender Business College*, 85 So. 2d 365, 367 (La. App. 2d Cir. 1956) ("The condition which will suspend the effect of an agreement referred to in article 2308 is what is generally referred to as . . . a condition precedent . . .").

136. *McDill* stated it was not an accord and satisfaction either.

137. See *supra* note 92 and accompanying text.

138. *Rivett v. State Farm Fire & Casualty Co.*, 508 So. 2d 1356 (La. 1987).

139. A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to hope of gaining, balanced by the danger of losing.

This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

La. Civ. Code art. 3071.

140. *Dornier v. Live Oak Arabians, Inc.*, 602 So. 2d 743 (La. App. 1st Cir.), writ denied, 608 So. 2d 177 (1992).

the benefit or detriment of the bargain. The *McDill* tender, however, does not settle the litigation; it merely indicates good faith.

*Pattison v. Valley Forge Insurance Co.*¹⁴¹ provides another example of strategies used by courts to further avoid the *Azhar* situation. In *Pattison*, the insurer unconditionally tendered \$40,000 to the insured. The insured, seeking higher damages, continued the litigation against the insurance company. The jury determined that the \$40,000 tender was adequate to compensate the insured and awarded no additional damages, thus avoiding the issue of a payment of a thing not due. *Pattison* does not address the injustice imposed on an insurer if damages do not exceed the limits of the tortfeasor's liability coverage. But, it does not attempt to rub salt into the wounds of the insurer by acknowledging an overpayment was made and not allowing the proper codal remedy.

V. POLICY CONSIDERATIONS

A. *Uninsured/Underinsured Motorist Coverage was Created for a Specific Purpose*

The legislature created uninsured/underinsured motorist insurance coverage to provide to the innocent victim a source of restitution when damages suffered by the victim could not be recovered from the tortfeasor.¹⁴² The legislature wanted to protect the innocent victims from bearing the burden of irresponsible tortfeasors who either failed to carry liability insurance or carried an inadequate amount. However, uninsured/underinsured coverage was not designed to allow parties injured in accidents to recover monetary payments in excess of their actual damages. This is arguably implied in UM coverage being considered excess coverage.¹⁴³ Excess, by common definition, means an amount that surpasses. Therefore, UM coverage was to pick up where the tortfeasor's liability policy left off. There should not be an overlap that results in double recovery.

Uninsured/underinsured insurance is intended to "make up the difference" in coverage. A simple examination of the words used to identify the coverage illustrates this point. "Un," when used in adjectives or nouns, means "not."¹⁴⁴ "Under" is defined as "falling short of a standard or required degree."¹⁴⁵ Thus, uninsured is simply *not insured*; likewise, underinsured is *insurance that falls short of the required degree or amount needed*. Neither form of insurance should have been applicable in *Azhar* because the tortfeasor's liability insurance covered Dr. Azhar's judicially determined damages. It is inherently unfair to require an insurance company to pay claims, under an uninsured or underinsured

141. 599 So. 2d 873 (La. App. 4th Cir.), *writ denied*, 604 So. 2d 1001 (1992).

142. *See supra* notes 39-40 and accompanying text.

143. 8C John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 5071.35 (1981).

144. Webster's New Collegiate Dictionary (1977).

145. *Id.*

policy, in contravention of the actual policy language. Dr. Azhar's underinsured policy was only to be effective if he suffered damages that were not reimbursed by the tortfeasor or the tortfeasor's insurer. Dr. Azhar was fully compensated for all judicially determined damages; in fact, his settlement with Ms. Holmes' insurer resulted in Dr. Azhar receiving \$10,700 above his actual damages.

The *Azhar* court suggested the jury could have erred in determining the proper amount of damages to award Dr. Azhar.¹⁴⁶ The court uses the possible error to justify allowing Dr. Azhar to keep the tendered amount. The court would not be as willing to resort to the same rationale if the roles were reversed. If Dr. Azhar had received from State Farm an amount less than the damages a jury determined were owed him, it is unlikely the court would have stated "the jury could have erred"¹⁴⁷ and, thus, no modification of either party's status was required.

There is a potential for error in *any suit*. Is it not true that any judge or jury is susceptible to human error? But this slight possibility should not inure to the benefit of only uninsured motorist victims. If the courts are unwilling to account for jury error in all cases, no one should be allowed to receive the benefit of the judge's doubt of the jury's decision.

The courts should not treat an insurance company differently merely because it is larger and better able to absorb a loss. Both parties should receive what was bargained for in their contract. State Farm fulfilled the *McDill* requirement, a good faith effort to comply with the terms of the contract, by making its tender to Dr. Azhar. However, in Dr. Azhar's evaluation of the claim, he believed his contract of insurance with State Farm entitled him to a larger payment. State Farm's error in assessing the extent of Dr. Azhar's damages would have gone unnoticed were it not for Dr. Azhar's error in his assessment of the damages. Additionally, Dr. Azhar's error resulted in increased litigation costs for State Farm, and possibly for himself, depending on the arrangement with his counsel. Yet, State Farm was held responsible for both its own and Dr. Azhar's error.

The Legislature's intent when creating uninsured/underinsured motorist coverage in Louisiana was to allow full recovery for damages *suffered* by the innocent victim.¹⁴⁸ Dr. Azhar chose to have an impartial jury determine the extent of his damages, instead of accepting State Farm's assessment.¹⁴⁹ Dr. Azhar obviously believed he was contractually entitled to a larger payment. State Farm should likewise be able to rely on its contract. State Farm did not receive its contractual benefits from the results reached in *Azhar*.

146. State Farm Mut. Auto. Ins. Co. v. Azhar, 620 So. 2d 1158, 1160 (La. 1993).

147. *Id.*

148. See *supra* notes 39-40 and accompanying text.

149. Insurers may not look at the good faith tender as having no effect. The insurer may include a portion of anticipated legal costs in determining what an individual claim is worth. The insurer hopes the tender has the effect of ending litigation, though requiring this would make the tender unconditional. But, if the insured fails to accept the tender as an end to litigation, the insured should not be able to continue without risk.

B. *The Insured's Risk is Small in Further Litigation*

The supreme court's holding in *Azhar* puts the insured, who has received a *McDill* tender, in an enviable position. The insured has a non-refundable *minimum* payment which he may choose to keep and forego future litigation; or, he may pursue greater rewards through the judicial system by continuing litigation against the insurer, while risking only the difference of the insured's attorney's contingency fee, if anything at all. The insured who receives a tender before hiring an attorney risks nothing because the attorney will only collect on his contingency fee if an additional amount is awarded to the insured in subsequent litigation against the insurer.

The insured, having little to lose, is encouraged to pursue all potential actions against the insurer, which opens the floodgates of litigation. As Chief Justice Calogero correctly pointed out in his *Azhar* dissent, "since an insured can seek more money, even after the tender, fairness dictates that the law operate for a defendant as well as a plaintiff, and permit a defendant to seek restoration or reimbursement of an excessive payment."¹⁵⁰

Larger tenders to innocent victims might result from allowing an insurer to recover excessive payments. Insurers' assessments will include the value of no future litigation. If the insurer knows the insured risks having to return what a jury determines is in excess of the insured's actual damages, increased tenders, intending to end litigation, would be more common. Both parties, insureds and insurers, would benefit from allowing recovery of the excess tender.

Additionally, without the benefit of a full judicial hearing, insurers are unable to determine the true facts surrounding the accident. If excessive payments are recoverable, insurers are more likely to view alleged factual circumstances in favor of the injured insured, resulting in higher tenders.

Finally, it cannot be overemphasized that the insured controls whether to pursue future litigation. This note suggests that the insurer cannot seek a return of the tender until after the insured chooses to pursue litigation, and a court or jury determines actual damages. Risk is then equalized for both parties. Each will be expected to abide by the jury's determination, and adjust previous compensation, either way, to ensure the insured is *fairly* compensated.

C. *Insurance Companies Will Reduce Amount Tendered in the Future*

In *Dugas*, Justice Pro Tempore Hufft clearly articulated the purpose of Louisiana Revised Statutes 22:658—"to insure the timely payment by the insurance company of the portion of the claim which is due so the insured could immediately

150. *State Farm Mut. Auto. Ins. Co. v. Azhar*, 620 So. 2d 1158, 1160 (La. 1993) (Calogero, C.J., dissenting) (citing *United Servs. Auto. Ass'n v. Dugas*, 593 So. 2d 918, 921 (La. App. 4th Cir.), *writ denied*, 596 So. 2d 210 (1992)).

use the funds to alleviate the damages suffered."¹⁵¹ Not allowing recovery of an excessive *McDill* tender would frustrate that purpose. As Chief Justice Calogero pointed out, "The result of [*Azhar*] will be to discourage UM insurance carriers from making early, substantial tenders. The fear of making irrevocable, larger than necessary payments will bring this about."¹⁵² It thus appears, regardless of the theory adopted, the purpose of the statute may be adversely affected.

On the other hand, allowing insurers to recover an undue payment will encourage insurers to make fair estimates, which the insured is free to use as he determines. The *Azhar* decision encourages insurers to scrutinize more closely the insured's presentation of the facts. This higher scrutiny would not be necessary if the insurers could rely on their tender being returned upon a finding that the original alleged facts did not justify the amount the insurer was required to tender. The insured risks return of an excess tender only if he chooses to seek more damages and, subsequently, requests this amount be judicially determined. Equity requires, under the contract¹⁵³ between the insured and insurer,¹⁵⁴ that the insured receive no more than he contracted for if he chose continued litigation. Otherwise, the insured is simply gambling with someone else's money.

Forcing the insurers to scrutinize each tender¹⁵⁵ will again increase the number of litigants needing the assistance of the courts. Because tenders will be lower, the insured will be forced to turn to the courts more frequently to calculate the exact damages, which the insurer is unwilling, and usually unable, to determine.¹⁵⁶

VI. CONCLUSION

The unconditional tender requirement, developed in *McDill*, became a basis for an inherently unfair decision in *Azhar*. The holding in *Azhar* reflects a need for corrective action by the Legislature. The civilian theory in Louisiana clearly

151. *Dugas*, 593 So. 2d at 922-23 (Huff, J. Pro Tem., dissenting).

152. *Azhar*, 620 So. 2d at 1160 (Calogero, C.J., dissenting).

153. La. Civ. Code art. 2054 provides:

When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

154. La. Civ. Code art. 2055 provides: "Equity . . . is based on the principles that no one is allowed to take unfair advantage of another . . ."

155. Though the insurer should "scrutinize" any claim, the evaluation would likely result in fewer "bare minimum" tenders if the insurer was entitled to recover any excess amount, after a judicial determination, that resulted from an insured's pursuance of the litigation.

156. See *McKenzie & Johnson*, *supra* note 40, § 130, at 274.

Claims under UM coverage are first-party claims between an insured and his own insurer which apparently are governed by the penalty provisions of LSA-R.S. 22:658. However, these claims are unique because liability of the insurer is predicated upon the liability of a third party. Furthermore, fixing of the amount of the claim is difficult because of the uncertainty involved in measuring general damages for personal injuries.

recognizes legislation and custom as the only primary sources of law.¹⁵⁷ Jurisprudence, doctrine, conventional usages, and equity are persuasive or secondary sources of law.¹⁵⁸ Jurisprudential rules regarding unconditional tenders, and methods for incorporating these rules into the insurance code, created confusion, not solutions. The Louisiana Supreme Court in *Azhar* clearly defined the rights of an insurance company to recover its unconditional tender—there is no right of recovery absent fraud or ill practices. It seems ironic that uninsured/underinsured motorist coverage, which was suggested by the insurance industry to correct an injustice to injured insureds who responsibly obtained liability coverage, but were injured by an irresponsible party, is now being used to perpetuate an injustice against insurers who responsibly comply with the requirement of *McDill*. The *Azhar* court seems to have overlooked the original intent of uninsured/underinsured coverage, to place the innocent victim in the same position he would have been in had the tortfeasor carried adequate liability coverage. The judicial system should not, by bootstrapping jurisprudence, develop law unprovided by statute. The Legislature should now correct this wrong by providing statutorily for recoverability of the tender.

A suggested statutory remedy is the passage of Louisiana Revised Statutes 22:658(E) to provide:

If an insurer unconditionally tenders payment to the insured and subsequently the amount due under the policy is determined in an action between the insurer and the insured to be less than the amount tendered, the insurer shall be entitled to reimbursement from the insured of the amount by which the unconditional tender exceeded the amount judicially determined to be due under the policy.

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157. La. Civ. Code art. 1.

158. See A.N. Yiannopoulos, Louisiana Civil Law System §§ 31-32 (1977).

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