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DEVELOPMENTS IN THE LAW, 1985-1986—PART II

INSURANCE LAW

W. Shelby McKenzie and
*H. Alston Johnson**

UNINSURED MOTORISTS COVERAGE

Penalties

In *McDill v. Utica Mutual Insurance Co.*,[1] the supreme court emphasized the responsibility of the insurer under uninsured motorists (UM) coverage for timely payment of the undisputed amount of any claim. Previously, in *Hart v. Allstate Insurance Co.*,[2] the court recognized that payment of a claim under UM coverage was governed by the penalty provisions of Louisiana Revised Statutes (La.R.S.) 22:658, which requires insurers to pay claims within sixty days of receipt of satisfactory proof of loss.[3] The insured submits a satisfactory proof of loss, the *Hart* decision further suggested, if the insured submits evidence to the insurer establishing (1) that the owner or operator of the other vehicle involved in the accident was uninsured or underinsured, (2) that he was at fault, (3) that such fault gave rise to damages, and (4) the extent of those damages.[4]

In *McDill*, the court made the factual determination that there was no reasonable issue of fact as to the first three elements of a satisfactory proof of loss. With respect to the fourth element, there was a dispute concerning the amount of damages, but the insured clearly was entitled to some recovery under the UM policy. Under these circumstances, the court held, the insurer must tender unconditionally a reasonable pay-

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1. 475 So. 2d 1085 (La. 1985).

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

3. If a failure to pay timely is found to be "arbitrary, capricious, or without probable cause," the insurer is liable for a penalty of an additional twelve per cent (12%), plus reasonable attorney's fees. La. R.S. 22:658 (B) (Supp. 1986).

4. 437 So. 2d at 828.

ment.[5] The failure to tender the undisputed amount subjected the insurer in *McDill* to penalties and attorney's fees.[6]

Workers' Compensation

In the 1982 decision of *Johnson v. Fireman's Fund Insurance Co.*,[7] the supreme court recognized that the UM insurer, like the tortfeasor, is a third party under the Louisiana Workers' Compensation Law against whom the employer and his compensation carrier may assert their statutory right to reimbursement for benefits paid the injured worker.[8] *Johnson* was decided on the UM insurer's exception of no cause of action. Therefore, the insurance policy was not before the court. *Williams v. Thonn*[9] is the first decision specifically to consider the validity of the common provision found in UM policies which expressly excludes reimbursement of workers' compensation benefits. The court held that the exclusion was not valid because its effect would reduce the UM coverage below the limits of liability mandated by statute.[10]

Named Insured

In *Baesler v. State Farm Mutual Automobile Insurance Co.*,[11] the named insured was injured while operating a company car assigned to

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5. The court indicated that the insurer must tender an amount which is "a figure over which reasonable minds could not differ." 475 So. 2d at 1091-92.

6. Without discussion, the supreme court reinstated the trial court award of a twelve per cent penalty on the total amount, along with $40,000 in attorney's fees, which apparently was fixed to correspond with the plaintiff's contingent fee contract with his attorney.

7. 425 So. 2d 224 (La. 1982).

8. The *Johnson* decision did recognize one exception to the workers' compensation insurer's subrogation right against the UM insurer. The compensation insurer cannot recover out of UM coverage paid for by the employee, the court concluding that such recovery would result in an indirect imposition of the cost of compensation upon the employee which is prohibited by statute. 425 So. 2d at 228-29. For further discussion, see S. McKenzie & A. Johnson, Insurance Law and Practice § 118, in 15 Louisiana Civil Law Treatise (1986).

9. 487 So. 2d 619 (La. App. 4th Cir. 1986).

10. UM coverage is mandated under the provisions of La. R.S. 22:1406 (D) (1978 & Supp. 1986). In dicta, the *Williams* decision also observed that policy language providing credit against or a reduction of the limits of liability for amounts received by the insured as workers' compensation benefits was not enforceable. A number of decisions have reached this conclusion. Landry v. State Farm Mut. Auto. Ins. Co., 320 So. 2d 254 (La. App. 3d Cir. 1975); Monnier v. Lawrence, 467 So. 2d 35 (La. App. 4th Cir.), cert. denied, 472 So. 2d 37 (La. 1985); Gagnard v. Thibodeaux, 336 So. 2d 1069 (La. App. 4th Cir. 1976); Williams v. Buckelew, 246 So. 2d 58 (La. App. 2d Cir. 1970). However, the workers' compensation insurer is entitled to credit against future compensation liability for amounts paid to the injured employee under the employer's UM coverage. Thomas v. Hanover Ins. Co., 477 So. 2d 1171 (La. App. 1st Cir. 1985), aff'd, 488 So. 2d 181 (La. 1986).

11. 481 So. 2d 131 (La. 1986).

him by his employer. The UM insurer of his personal auto denied coverage on the ground that the policy definition of "insured automobile" excluded the vehicle "furnished for the regular use of the named insured." Reversing a summary judgment in favor of the insurer, the supreme court correctly held that the definition of insured automobile was not relevant to coverage since there is no requirement that the named insured be occupying the insured automobile at the time of the accident. UM policies generally provide coverage for the named insured and relatives (as defined in the policy) without any requirement that they be occupying any particular vehicle or any vehicle at all. While unnecessary to the decision, the court also observed that it would be "difficult to agree" that the car was furnished for the employee's regular use,[12] or that an alleged exclusion for said circumstances would be enforceable against the mandate of the UM statute.[13]

Other UM Litigation

Mandatory coverage and waiver continue to be a fertile field for litigation. The requirements of form and for execution of the waiver, and to what extent, if any, the court may look behind the signed waiver to ascertain whether the insured made an informed choice, are undergoing jurisprudential development.[14] The UM statute has been applied to au-

12. The court referenced Nevels v. Hendrix, 367 So. 2d 33 (La. App. 4th Cir. 1978), which places a restrictive interpretation on exclusions for vehicles "furnished for the regular use" of an insured. For further discussion of *Nevels*, see S. McKenzie & A. Johnson, Insurance Law and Practice § 63, in 15 Louisiana Civil Law Treatise (1986).

13. UM policy provisions purporting to exclude coverage for a named insured or relative while occupying a particular vehicle generally have been struck down as contrary to the mandatory provisions of La. R.S. 22:1406 (D) (1978 & Supp. 1986). For a discussion of these decisions, see S. McKenzie & A. Johnson, Insurance Law and Practice § 118, at 245-46, in 15 Louisiana Civil Law Treatise (1986).

14. In Cheadle v. Francois, 470 So. 2d 255 (La. App. 4th Cir. 1985), the court reversed a summary judgment in favor of the insurer, finding that the validity of the selection of lower limits involved disputed facts. The selection contained the signature "Mr. and Mrs. Willie A. Francois." The court held that this signature required proof of who actually signed the selection. A concurring opinion also suggested that the form was not effective because it provided only for selection of the minimum limits.

In Rawson v. Jennings, 487 So. 2d 777 (La. App. 3d Cir. 1986), the husband signed a written rejection of UM coverage when he initially purchased automobile liability insurance. When the policy was renewed, the agent apparently added UM coverage with minimal limits in an application signed by the wife. The court ruled that the insured was entitled to UM limits equal to the liability limits, finding that the initial rejection was vitiated by the subsequent change order instituting coverage. The subsequent selection of lower limits was held ineffective, however, because the insured was not informed of the statutory mandate of coverage equal to his bodily injury liability limits or the right to select lower limits.

tomobile lease agreements as well as liability policies.[15] In addition, the questionable extension of the concept of solidarity to require a UM insurer to share the award of damages with the liability insurer of an adequately insured joint tortfeasor has continued.[16]

AUTOMOBILE LIABILITY INSURANCE

Permission

Automobile liability insurance coverage is often dependent upon whether the operator had the permission to use the vehicle required under the terms of the automobile policy. In *Francois v. Ybarzabal*,[17] the supreme court correctly recognized that a policy requiring "permission" imposes a different standard from a policy requiring only "a reasonable belief" that the operator had permission to use the vehicle. When the policy requires "permission," then coverage exists only when the operator has the express or implied permission of the insured. The operator's subjective "reasonable belief" will not suffice.[18]

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15. In Tapia v. Ham, 480 So. 2d 855 (La. App. 2d Cir. 1985), cert. denied, 484 So. 2d 138 (La. 1986), the plaintiffs rented a car from Wray Ford, Inc., a franchise dealership of Ford Motor Company. There was a Rent-A-Car System agreement between Ford and Wray under which Ford agreed to provide automobile liability insurance to protect Ford, Wray and "any person . . . renting or driving the vehicle." The rental agreement between Wray and the plaintiff specified that liability insurance with 100/300 limits was provided "in accordance with the standard provisions of an automobile liability insurance policy." Relying on Ashline v. Simon, 466 So. 2d 622 (La. App. 5th Cir.), cert. denied, 472 So. 2d 28 (La. 1985), the court concluded that both Wray and Ford had agreed to provide automobile liability insurance and therefore the mandatory UM coverage was applicable.

16. Perrilloux v. Bowser, 483 So. 2d 1135 (La. App. 5th Cir. 1986) continued the trend commenced by Farnsworth v. Lumbermen's Mut. Cas. Co., 442 So. 2d 1340 (La. App. 3d Cir. 1983), cert. denied, 445 So. 2d 452 (La. 1984), of imposing a portion of the personal injury tab on the UM insurer even though the accident was caused jointly by the negligence of an adequately insured joint tortfeasor. In *Perrilloux*, the plaintiff was injured as a result of the joint negligence of an Illinois Central Gulf Railroad employee (40%) and Bowser (60%). Bowser was an uninsured motorist. The trial court cast the railroad's insurer with the full amount of the judgment. Relying on *Farnsworth*, the appellate court recast 40% to the railroad's insurer and 60% to the UM insurer of the plaintiff. This judicially created anomaly which requires the injured plaintiff to pay a portion of his liability award out of his own insurance coverage is criticized in McKenzie & Johnson, Developments in the Law, 1984-85—Insurance, 46 La. L. Rev. 475, 479-80 (1986). See also, S. McKenzie & A. Johnson, Insurance Law and Practice § 134, at 279-80, in 15 Louisiana Civil Law Treatise (1986).

17. 483 So. 2d 602 (La. 1986).

18. The *Francois* case arose out of an accident caused by an unlicensed minor who was operating an automobile insured by Sentry and whose father owned an automobile insured by State Farm under a policy providing coverage for operation of non-owned automobiles. The Sentry policy provided coverage to anyone using the automobile with

The standard of permission is dependent upon the policy language. The Family Automobile Policy, which is the policy subject to scrutiny in most of the current "permission" cases, provided different standards for owned and non-owned automobiles. For the owned automobile, there was no "permission" requirement for the named insured and relatives (as defined in the policy), but other persons (often referred to as "omnibus insureds") were covered only when their use of the owned auto was with the permission of the named insured. On the other hand, that policy form provided coverage to the named insured and relatives for their liability arising out of the use of non-owned automobiles, if their use was with the permission, or with a reasonable belief that they had the permission, of the owner.[19] These standards were carried forth in many of the simplified versions of the Family Automobile Policy, although some companies relaxed the standard for owned automobiles by requiring only a reasonable belief.

The Personal Auto Policy, which was drafted by the Insurance Services Office to replace the Family Automobile Policy and which is now widely used in Louisiana, has removed any permission requirement from the definition of insured and instead has inserted an exclusion which states that the policy does not provide liability coverage to any person "using a vehicle without a reasonable belief that the person is entitled to do so." That change has several important effects. First, permission is no longer an element of coverage. Therefore, the burden is shifted to the insurer to prove the applicability of its exclusion, i.e.,

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the named insured's permission. State Farm's policy required that the minor operate the non-owned car with a reasonable belief that he had the permission of the owner. The supreme court held that the jury was improperly instructed that there would be coverage under the Sentry policy if the minor had a "reasonable belief." The supreme court found that the Sentry policy required the express or implied permission of the insured. It dismissed the claim against Sentry upon the factual determination that the minor did not have such express or implied permission.

The case involved an interesting collateral issue. Since it had found both policies applicable and the Sentry policy to provide the primary coverage, the trial court had awarded judgment against Sentry for its policy limits of $25,000.00 and had awarded the remainder of the $1,880.57 in damages against State Farm's policy limits of 25/50. Because the plaintiff had not appealed the judgment against State Farm, a majority of the Louisiana Supreme Court held that it could not increase the award against State Farm even though the judgment against Sentry as the primary insurer had been reversed.

19. The court in *Francois* made the following observation: "Louisiana has two jurisprudential standards for permission, depending on whether coverage of car or driver is involved, i.e., coverage which follows the car versus coverage which follows the driver." 483 So. 2d at 604. This statement is absolutely correct in the context of the two policies under consideration by the court in *Francois*. The court's observation, however, should not be used out of context. Actually, the standard for permission should depend entirely upon policy language, not upon whether coverage of the car or the driver is involved.

the absence of the requisite permission.[20] In addition, the more relaxed "reasonable belief" standard is applicable to all covered vehicles. On the other hand, while the Family Automobile Policy did not require that a "relative" have permission to operate the owned automobile, apparently the Personal Auto Policy requires at least a reasonable belief on the part of all operators. The Business Auto Policy, the current policy form used for automobile liability insurance for most commercial enterprises, still retains permission as an element of coverage under its omnibus clause. As with any insurance issue, it is extremely important to study carefully the language of the particular policy in question.

Exclusion of Insured

Clarke v. Progressive American Insurance Co.[21] held invalid an exclusion of coverage for bodily injury to an insured contained in a surplus line automobile liability policy. Testimony established that admitted insurers were not permitted to use such an exclusion. The court determined, as a matter of public policy and by implication from the compulsory insurance law,[22] that the exclusion was contrary to express and implied statutory policy. It distinguished cases holding enforceable a similar exclusion contained in the personal liability coverage of some homeowners' policies.

Judicial Interest

Most automobile liability policies, as well as other liability policies, agree to pay judicial interest on the amount of the judgment from date of entry of the judgment until payment of the policy limits. *Dobson v. Aetna Casualty and Surety Co.*,[23] emphasizes the consequences to the insurer of failure to make a prompt tender of policy limits after judgment. A judgment in excess of $600,000 was rendered against the insured with automobile liability limits of $5,000. The liability insurer was cast for approximately $30,000 in judicial interest resulting from its six month delay in paying its policy limits into the registry of the court after the trial court judgment was rendered.[24]

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20. The insurer has the burden of proving the applicability of a coverage exclusion. See, e.g., Nettles v. Evans, 303 So. 2d 306 (La. App. 1st Cir. 1974).

21. 469 So. 2d 319 (La. App. 2d Cir. 1985).

22. La. R.S. 32:861-865 (Supp. 1986).

23. 484 So. 2d 976 (La. App. 3d Cir. 1986).

24. For further discussion of judicial interest see, S. McKenzie & A. Johnson, Insurance Law and Practice § 233, at 436-41, in 15 Louisiana Civil Law Treatise (1986).

PROPERTY INSURANCE

Acceptance of Legal Subrogation Concept

In *Aetna Insurance Co. v. Naquin*,[25] the supreme court resolved the conflict among the appellate circuits and firmly adopted the proposition that legal subrogation of an insurer upon payment to its insured should be the rule rather than the exception. Many of the arguments advanced in an earlier discussion in this forum[26] were specifically approved.

The defendant Naquin had been hired to make certain roof repairs to an apartment building owned by Aetna's insured. The job was not completed in a timely fashion, and a number of tenants suffered water damage as a result. The building itself was also damaged to some extent. Naquin assured the building owner that he would take care of the damages to the building itself, but refused responsibility for damages incurred by the individual tenants.

The owner (Aetna's insured) then contacted Aetna about the tenants' claims. Aetna paid $7,200 worth of these claims and sued Naquin to recover that amount. The trial court awarded Aetna a judgment for the amount claimed, and the fifth circuit court of appeal affirmed.[27] In doing so, it joined the first and second circuits in recognizing legal subrogation under these circumstances.

Naquin argued in the supreme court that since no evidence of a conventional subrogation agreement was introduced into evidence, Aetna had to rely upon the principle of legal subrogation; and that legal subrogation could not occur because Aetna and Naquin were not "solidary obligors" to the tenants. The supreme court properly observed that in the case usually cited for that proposition, the statement was merely dicta.[28] Moreover, the requirement in the Civil Code is simply that the payor owe the debt "with others or for others" and have "recourse against those others as a result of the payment."[29] This requirement certainly seems to fit the situation in *Naquin*.

Aetna owed the tenants reimbursement under the insurance contract which it had issued to the owner, and Naquin owed the tenants reimbursement because of his negligence in carrying out the repairs. The tenants are entitled to only one reimbursement for their loss; and if it comes from the insurance contract, there would appear to be no reason why the insurer who paid the loss should not be entitled to cast it over

25. 488 So. 2d 1950 (La. 1986).

26. Johnson, The Work of the Louisiana Appellate Courts for the 1977-78 Term—Obligations, 39 La. L. Rev. 675 (1979).

27. Aetna Ins. Co. v. Naquin, 478 So. 2d 1352 (La. App. 5th Cir. 1985).

28. Associated Mortgage Corp. v. Eanes, 254 La. 705, 226 So. 2d 502 (1969).

29. La. Civ. Code art. 1829. The former article from which this article was derived varied in language slightly, but not in substance.

onto the wrongdoer. If the law is otherwise, the loss will rest with the insured and in the premiums charged for that type of insurance, when it should properly rest with the wrongdoer. The law should seek to assign the loss to the wrongdoer unless there is good reason to reach a contrary result.

The acceptance of this principle by the supreme court foreshadows the application of the concept in a number of related factual situations, not all of which will be so easily resolved. If, for example, an automobile victim is injured by the negligence of a defendant and is reimbursed for $50,000.00 in medical expenses under a personal health and accident policy, we can rest assured that the defendant will continue to be denied any reduction in the amount awarded in a tort action due to the existence of a "collateral source" of reimbursement in that policy. But we may see the development of a principle that the victim is also not entitled to a recovery of those amounts expended by his health and accident carrier—but the carrier is, by virtue of legal subrogation. The decision in *Naquin* should produce some interesting and challenging questions in the future.

HEALTH AND ACCIDENT INSURANCE

Interaction Between Health Policy and Workers' Compensation

The decision on rehearing in *Pinell v. Patterson Services, Inc.*[30] and the closeness of the vote in the supreme court on both hearings amply demonstrates the difficulties presented by the interaction between a group health and accident policy based on employment and the workers' compensation remedies available to an injured worker.

Pan American Life had issued a group health and accident policy to Patterson Services for the benefit of Patterson's employees. It contained a rather standard general limitation clause which would have denied any coverage under the policy on account of injuries for which the employee "has or had a right to compensation" under any workers' compensation statute. In the case at hand, Pinell was injured during the course of his employment and was paid benefits under a federal compensation statute. At the same time, he instituted a tort action against other defendants, seeking recovery for his injuries.

The Pan American policy also contained a coordination clause which provided in essence that if the workers' compensation remedy of the injured worker yielded a recovery of less than $200.00 per week, he would be entitled to an amount under the policy sufficient to bring him to that level. The aggregate amount available under the policy, however, was subject to a specific maximum of $7,800.00.

30. 491 So. 2d 637 (La. 1986).

As it turned out, the compensation remedy brought Pinell more than $200.00 per week, and thus no benefits were paid under the Pan American policy. In due course, Pinell settled his tort action for a relatively substantial sum; the compensation benefits paid to Pinell were completely reimbursed out of the tort settlement, and there was a credit for future compensation up to the amount of the tort judgment.

Once the settlement was effected, Pinell claimed a right to the benefits under the Pan American policy. He contended that since the benefits had been reimbursed out of his tort settlement, all the compensation had been "negated."

The trial court agreed with Pinell, ordering payment of the maximum benefits under the health and accident policy. The appellate court reversed.[31] On original hearing, the supreme court reversed yet again, siding with Pinell's position.[32] But on rehearing, the supreme court took the view of the appellate court, denying any rights under the policy.[33]

The court properly reasoned that the right of Pinell to recover compensation benefits was not in the least affected by the fact that he had a tort remedy against a third person. The only result of negligence by a third person was that Pinell had a remedy beyond compensation. In addition, his employer had a right to reimbursement of the compensation paid, a right which would not exist if there were no negligence or other fault in a third person outside the employment enterprise. Though correct on these points and in its result, the court seemed to ignore that Pinell *had* received compensation benefits. The reimbursement which occurred served only to place the employer in the same position it occupied prior to the injury. Pinell had received his entire "tort recovery" for his injury—part in compensation and the remainder in tort.

That the employer is entitled to reimbursement of the compensation benefits paid is of no concern to a plaintiff such as Pinell. He receives the same amount that he would have received if there were no compensation statute. The tortfeasor pays the same amount he would have paid absent a compensation statute; he simply pays a part of it to the employer rather than to the employee. There is no reason to require payment under a health and accident policy written to be supplementary to compensation remedies when, in fact, the employee has received the full benefit of those compensation remedies. Any other decision would unnecessarily increase the cost of such health and accident policies by a factor based upon payment to employees beyond their statutory entitlement.

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31. Pinell v. Patterson Services, Inc., 468 So. 2d 762 (La. App. 1st Cir. 1985).
32. Pinell v. Patterson Services, Inc., 481 So. 2d 594 (La. 1986).
33. *Pinell*, 491 So. 2d at 640.