

# Death in the City: Gorman's Flawed Application of the Direct Action Statute to Insured Political Subdivisions

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# Death in the City: *Gorman*'s Flawed Application of the Direct Action Statute to Insured Political Subdivisions

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#### INTRODUCTION

The Opelousas police arrested Brian Armstrong on the evening of September 27, 2009, for “disturbing the peace due to intoxication” after he disrupted an Alcoholics Anonymous meeting.<sup>1</sup> By sunrise, he was dead.<sup>2</sup> No policeman stopped by Mr. Armstrong’s cell, which held three other inmates, between midnight and six o’clock.<sup>3</sup> During the time when the police left the cell unattended, two of the inmates attacked and killed Mr. Armstrong, while the other inmate yelled for a policeman to help.<sup>4</sup> No help arrived.<sup>5</sup>

Mr. Armstrong’s mother, Ms. Joyce Gorman, sued the city of Opelousas and the Opelousas Police Department<sup>6</sup> for their role in her son’s death.<sup>7</sup> In December 2010, Ms. Gorman asked the City to identify its liability insurer.<sup>8</sup> After failing to comply with discovery requests for seven months, the City finally named Lexington Insurance Company as its liability insurer.<sup>9</sup>

In September 2011, Ms. Gorman joined Lexington as a defendant in her lawsuit against the City.<sup>10</sup> Lexington moved for summary judgment, contending that the claims Ms. Gorman asserted were not covered under the City’s claims-made-and-reported policy, because the City had not provided Lexington with written notice of her claim until after the policy had expired.<sup>11</sup> The trial court granted Lexington’s motion for summary

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1. State v. King, 124 So. 3d 623, 625 (La. Ct. App. 3d 2013).

2. *Id.* at 626.

3. *Id.*

4. *Id.*

5. *Id.*

6. Both defendants are referred to as “the City” throughout this Note.

7. Gorman v. City of Opelousas, 148 So. 3d 888, 890 (La. 2014).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 890–91 (The policy stated as follows: “The wrongful act [for which the City is liable] shall take place on or after the retroactive date, but before the end of the policy period, and shall arise solely in your capacity as a law enforcement agency. A claim for a wrongful act shall be first made against the

judgment.<sup>12</sup> The court of appeal reversed, holding that “the contractual notice provision cannot be used to deprive Gorman of her vested rights under the direct action statute [sic].”<sup>13</sup>

The Louisiana Supreme Court, in a four-to-three opinion, reversed the court of appeal and reinstated the trial court’s grant of Lexington’s motion for summary judgment.<sup>14</sup> Like the circuit split that existed prior to *Gorman*,<sup>15</sup> the majority opinion and the dissent wildly diverged on basic application of the Direct Action Statute,<sup>16</sup> which permits an injured plaintiff to sue the tortfeasor’s insurer directly.<sup>17</sup> Ultimately, the Court deprived Ms. Gorman of her ability to recover against Lexington, because the City refused to provide Lexington with notice of Ms. Gorman’s claim.<sup>18</sup> Ms. Gorman was thus forced to settle her lawsuit against the City,<sup>19</sup> as no court could compel the City to pay her any damages that a court may have awarded her.<sup>20</sup>

The competing opinions in *Gorman* reveal the deep disagreement over the application of the Direct Action Statute within the Louisiana Supreme Court, among the lower courts, and between the state and federal courts. The majority and the dissent differed substantially on the resolution of the following three issues: (1) whether the Direct Action Statute grants a

Insured and reported to us in writing during the policy period . . . .”) (emphasis in original).

12. *Id.* at 891.

13. *Gorman v. City of Opelousas*, No. 12-1468, 2013 WL 1831075, at \*3 (La. Ct. App. 3d May 1, 2013), *rev’d*, 148 So. 3d 888 (La. 2014).

14. *Gorman*, 148 So. 3d at 898 (“The City’s failure to report Gorman’s claim to Lexington during the applicable policy period as required precludes coverage. Absent coverage, Gorman was not deprived of a right under the Direct Action Statute.”).

15. *See, e.g., Murray v. City of Bunkie*, 686 So. 2d 45, 50 (La. Ct. App. 3d 1996) (finding that the notice requirement in a claims-made-and-reported policy was unenforceable); *but see Reichert v. Bertucci*, 650 So. 2d 821, 823 (La. Ct. App. 4th 1995) (finding that the notice requirement in a claims-made-and-reported policy did not violate public policy).

16. *Gorman*, 148 So. 3d at 895–96 (citing *Hood v. Cotter*, 5 So. 3d 819, 829 (La. 2008)). The majority asserted that the Direct Action Statute confers “a procedural right of action,” allowing an injured third person to sue the tortfeasor’s insurer directly. *Id.* at 896. The dissent argued that the Direct Action Statute bestows on injured third persons a substantive cause of action against the tortfeasor’s insurer. *See id.* at 898 (Knoll, J., dissenting).

17. LA. REV. STAT. ANN. § 22:1269(B)(1) (2009).

18. *Gorman*, 148 So. 3d at 898.

19. Motion to Dismiss, *Gorman v. City of Opelousas*, No. 10-C-4849-D (La. Dist. Ct. Sept. 29, 2014).

20. LA. CONST. art. XII, § 10(C); LA. REV. STAT. ANN. § 13:5109(B)(2) (2012) (“Any judgment rendered in any suit filed against . . . a political subdivision . . . shall be exigible, payable, and paid only . . . out of funds appropriated for that purpose by the named political subdivision . . .”).

substantive right to an injured plaintiff;<sup>21</sup> (2) whether the distinction between occurrence policies and claims-made-and-reported policies is relevant to the outcome of the case;<sup>22</sup> and (3) whether the notice requirement in a claims-made-and-reported policy violates the public policy considerations underlying the Direct Action Statute.<sup>23</sup> The prior cases that applied the Direct Action Statute are not uniform in their answers, and unfortunately *Gorman*'s reasoning fails to adequately settle these issues.

Because *Gorman*'s reasoning is insufficient, this Comment will explain how the Court should have resolved these three contentious issues by analyzing how prior courts have applied the Direct Action Statute and the public policy considerations inherent in that law. Part I of this Comment will clarify the history behind Louisiana's Direct Action Statute and explain how the courts have historically interpreted that law. Part II will discuss the facts behind Ms. Gorman's lawsuit, the procedural history, and the Supreme Court's ultimate holding in *Gorman*. Part III will analyze the majority and dissenting opinions in *Gorman* and discuss what the correct outcome should have been in light of the relevant jurisprudence and public policy. Part IV will propose a legislative solution to rectify the injustice of the majority's overly broad holding. This proposed legislation will amend the Insurance Code to prohibit insurance companies from issuing claims-made-and-reported policies<sup>24</sup> to political subdivisions of the state, so that these political subdivisions cannot avoid liability by

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21. *Gorman*, 148 So. 3d at 895–96 (citing *Hood*, 5 So. 3d at 829). The majority contended that the Direct Action Statute does not confer any substantive rights on an injured third person. *Id.* The dissent argued that the Direct Action Statute gives an injured third person a substantive right against the insurer that vests at the time of injury. *Id.* at 900 (Knoll, J., dissenting).

22. *Id.* at 897. The majority believed that extending coverage under the Lexington policy to Ms. Gorman's claims would transform "the City's claims-made-and-reported policy into an occurrence policy." *Id.* at 897 (citing *Hood*, 5 So. 3d at 830). The dissent maintained that the result of this case should be the same under an occurrence policy or a claims-made-and-reported policy. *Id.* at 903 (Knoll, J., dissenting) (citing *Murray v. City of Bunkie*, 686 So. 2d 45, 50 (La. Ct. App. 3d 1996)). For an explanation of the distinctions between occurrence policies and claims-made-and-reported policies, see discussion *infra* Part III.B.2.

23. *Gorman*, 148 So. 3d at 898. The majority reasoned that the notice requirement "in a claims-made-and-reported policy [is] not per se impermissible as against public policy." *Id.* The dissent insisted that Lexington's "notice requirement derogates from the public policy behind our Direct Action statute [sic]." *Id.* at 901 (Knoll, J., dissenting).

24. "A [claims-made-and-reported] policy is triggered if: 1) the [insured's tortious act or omission] . . . took place after the applicable [retroactive] date; and 2) during the policy period, a) the victim made a claim against the insured; and b) the insured reported the claim to the insurer." Bob Works, *Excusing Nonoccurrence of Insurance Policy Conditions in Order to Avoid Disproportionate Forfeiture: Claims-Made Formats as a Test Case*, 5 CONN. INS. L.J. 505, 530 (1999).

failing to report claims. As long as the injury occurs during the policy period or the injured plaintiff files a claim during the policy period, victims will be assured that coverage exists for a political subdivision's negligent actions.<sup>25</sup>

## I. HISTORY OF THE DIRECT ACTION STATUTE

The cases interpreting the Direct Action Statute echo the Supreme Court's disagreement over the resolution of the three issues in *Gorman*.<sup>26</sup> The history of the Direct Action Statute places into perspective the divisions among the *Gorman* opinions. The public policy considerations that motivated the Direct Action Statute's passage and the evolution of the jurisprudential interpretation of the law help to determine how the *Gorman* Court should have answered the three issues presented.

### A. The Legislature Seeks to Protect the Public from Insolvent Tortfeasors

Prior to the creation of the Direct Action Statute, Louisiana courts regularly enforced insurance policies as written,<sup>27</sup> rather than endeavoring to interpret them in favor of injured third persons.<sup>28</sup> Taking advantage of this formalism, insurance companies drafted their policies in favorable terms and often inserted "no action" clauses into their policies.<sup>29</sup> Under these clauses, the insurance company would pay its insured only if the insured first paid the injured plaintiff the amount that the court awarded.<sup>30</sup>

Predictably, these policies harmed plaintiffs. If insolvent or bankrupt, the insured tortfeasor could not pay damages to the plaintiff.<sup>31</sup> Because the insured tortfeasor could not pay the plaintiff, the insurer owed no money to its insured under the policy.<sup>32</sup> Thus, an injured plaintiff could not collect

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25. See WILLIAM SHELBY MCKENZIE & H. ALSTON JOHNSON, III, INSURANCE LAW AND PRACTICE § 6:25, in 15 LOUISIANA CIVIL LAW TREATISE 593 (4th ed. 2012).

26. See, e.g., *Hood*, 5 So. 3d 819; *West v. Monroe Bakery, Inc.*, 46 So. 2d 122 (La. 1950); *Murray*, 686 So. 2d 45; see also discussion *infra* Part III.

27. See Alston Johnson, *The Louisiana Direct Action Statute*, 43 LA. L. REV. 1455, 1456 (1983). If a court found that an insured tortfeasor was liable to an individual, the tortfeasor's insurance company indemnified the tortfeasor for the amount that the tortfeasor had to pay the injured plaintiff. See *id.* at 1456–57.

28. See, e.g., *Provost v. Homes by Lawrence & Pauline, Inc.*, 103 So. 3d 1280, 1282 (La. Ct. App. 3d 2012); *Love v. Sirey*, 119 So. 3d 732, 736 (La. Ct. App. 5th 2013).

29. Johnson, *supra* note 27, at 1457.

30. *Id.*

31. *Id.*

32. *Id.* The courts, believing that "an insurance contract provided indemnification for loss by the insured rather than coverage of the liability of an insured to a third

his award from the defendant or the defendant's insurer, and was left without a remedy.<sup>33</sup>

The Louisiana legislature sought to fix this problem in 1918 when it passed Act 253, the first incarnation of the Direct Action Statute.<sup>34</sup> This Act required insurance policies to stipulate that the insurance company must pay an injured plaintiff the damages for which a court held its insured liable, regardless of whether the insured tortfeasor was insolvent or bankrupt.<sup>35</sup> The Act also granted injured plaintiffs the right to sue the tortfeasor's insurer directly under the policy's terms, but only if the tortfeasor was insolvent or bankrupt.<sup>36</sup> This right of direct action, although limited to situations where the tortfeasor was unable to pay the court-awarded damages, incorporated public policy considerations into the insurance contract itself.<sup>37</sup> Despite the revolutionary nature of this statute, no court had occasion to interpret the new law for 11 years.<sup>38</sup>

In 1929, the Orleans Court of Appeal<sup>39</sup> finally rendered an opinion interpreting the Direct Action Statute.<sup>40</sup> In *Edwards v. Fidelity & Casualty Co. of New York*,<sup>41</sup> the insurance company claimed it was not liable to the plaintiff, because the insured tortfeasor had neither notified the insurance company of the accident as required under the policy nor been judicially declared insolvent or bankrupt.<sup>42</sup> The court disagreed, holding that, although the insured's failure to notify his insurer of the accident deprived the insured of the right to be reimbursed, the plaintiff was not barred from suing the insurer to recover the judgment that the insured owed him.<sup>43</sup> In addition to interpreting Act 253 of 1918 as granting an injured plaintiff a substantive cause of action against the insurance company, the court noted

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person," treated these policies as indemnity policies rather than modern insurance policies. *Id.* at 1456.

33. *Id.* at 1457.

34. Act No. 253, 1918 La. Acts 461. Insurance companies that issued policies contrary to this law were forced to pay a fine, and failure to comply with the statute was considered a misdemeanor offense. *Id.* at 462. In the current version of the Direct Action Statute, the legislature has eliminated these penalties in favor of reading the statute into nonconforming policies. See LA. REV. STAT. ANN. § 22:1269 (2009).

35. Act No. 253, 1918 La. Acts 461, 461.

36. *Id.* at 461-62.

37. Johnson, *supra* note 27, at 1457.

38. *Id.* at 1458.

39. The Louisiana Fourth Circuit Court of Appeal is the successor court of the Orleans Court of Appeal. See *Williams v. Lemaire*, 655 So. 2d 765, 768 (La. Ct. App. 4th 1995).

40. See *Edwards v. Fid. & Cas. Co. of N.Y.*, 123 So. 162 (La. Ct. App. Orleans 1929).

41. *Id.*

42. *Id.* at 163.

43. *Id.*

that the Direct Action Statute controlled the interpretation of insurance policies with respect to injured third persons.<sup>44</sup> In passing the Direct Action Statute, the court believed the legislature intended for insured tortfeasors to be statutorily presumed insolvent or bankrupt if an injured third person was unable to execute a judgment against the insured.<sup>45</sup>

*B. Amendments and Jurisprudential Interpretations Further Public Policy Considerations*

In response to the Orleans Court of Appeal's decision in *Edwards*, the legislature amended Act 253 of 1918 the following year.<sup>46</sup> In Act 55 of 1930, the legislature essentially adopted the *Edwards* rationale that a judgment of insolvency or bankruptcy of the insured tortfeasor was not required for the injured plaintiff to sue the insurer,<sup>47</sup> because the original version of the statute—which required that the insured tortfeasor be either insolvent or bankrupt—was silent as to whether such a judgment was necessary.<sup>48</sup> The amended statute also granted injured plaintiffs the ability to sue the insurer directly without also having to sue the insured tortfeasor.<sup>49</sup>

Although the legislature appeared to reject the holding in *Edwards* that the statute created a substantive right,<sup>50</sup> not all courts agreed that the statute only granted a procedural right.<sup>51</sup> Courts did, however, uniformly protect

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44. *Id.*

45. *Id.* at 163–64.

46. Act No. 55, 1930 La. Acts 122; see Johnson, *supra* note 27, at 1459.

47. Act No. 55, 1930 La. Acts 122, 123 (“[A]ny judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured . . . .”); *Edwards*, 123 So. at 164 (“It is our opinion that . . . an unsatisfied execution, was intended to be . . . proof of the . . . [insured’s] insolvency or bankruptcy.”); Johnson, *supra* note 27, at 1460.

48. See Act No. 253, 1918 La. Acts 461; see also *Edwards*, 123 So. at 163–64.

49. Act No. 55, 1930 La. Acts 122, 123 (“Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy . . . and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido.”).

50. See *id.* The amended law’s statement that the plaintiff’s “right of direct action against the insurer” was “within the terms, and limits of the policy” indicated that the statute granted a procedural right, rather than a substantive one. *Id.*; see also *Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co.*, 138 So. 183, 188 (La. Ct. App. Orleans 1931).

51. See *West v. Monroe Bakery, Inc.*, 46 So. 2d 122, 123 (La. 1950) (“An analysis of our jurisprudence . . . discloses that with two exceptions Act 55 of 1930 has been treated consistently as conferring *substantive rights* on third parties . . . .”) (emphasis in original).

injured persons by interpreting the Direct Action Statute as overriding policy language that prohibited a suit against the insurer unless the injured person obtained a judicial declaration that the insured was insolvent.<sup>52</sup> According to the courts, public policy required that the statute, which superseded any contrary provisions in an insurance policy, be read into an insurance policy.<sup>53</sup>

In 1942, the Supreme Court announced an important jurisprudential interpretation of the public policy behind the Direct Action Statute.<sup>54</sup> In *Davies v. Consolidated Underwriters*,<sup>55</sup> the Court held that the insurer was “not deprived of any substantial right” by the injured plaintiff’s suit even though the insurer did not receive satisfactory notice from its insured.<sup>56</sup> The Court explained that the Direct Action Statute embodied the public policy that liability policies are intended to protect the public rather than the insured tortfeasor.<sup>57</sup>

This public policy consideration, which numerous cases have since reiterated,<sup>58</sup> illustrates how courts interpret insurance contracts differently than other contracts in Louisiana.<sup>59</sup> Under the Direct Action Statute, courts read public policy considerations into insurance contracts.<sup>60</sup> Whereas courts generally interpret most contracts in light of the parties’ common intent,<sup>61</sup> insurance contracts, which are issued “for the benefit of all injured persons . . . to whom the insured is liable,” are interpreted in favor of third parties.<sup>62</sup> Public policy, as embodied in the Direct Action Statute, further protects an injured plaintiff’s right of direct action by prohibiting insurance policies from limiting that right to less than a year after the date

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52. See *Rambin v. S. Sales Co.*, 145 So. 46, 50 (La. Ct. App. 2d 1932).

53. See *id.*; *Webb v. Zurich Ins. Co.*, 205 So. 2d 398, 408 (La. 1967).

54. *Davies v. Consol. Underwriters*, 6 So. 2d 351 (La. 1942).

55. *Id.*

56. *Id.* at 357.

57. *Id.* (“[Act No. 55 of 1930] expresses the public policy of this State that an insurance policy against liability is not issued primarily for the protection of the insured but for the protection of the public.”).

58. See, e.g., *Gorman v. City of Opelousas*, 148 So. 3d 888, 894 (La. 2014) (citing *West v. Monroe Bakery, Inc.*, 46 So. 2d 122, 129–30 (La. 1950)); *Holtzclaw v. Falco, Inc.*, 355 So. 2d 1279, 1281 (La. 1977) (quoting *Davies*, 6 So. 2d at 357). The legislature has codified *Davies*’ interpretation of Louisiana’s public policy into the Direct Action Statute. See LA. REV. STAT. ANN. § 22:1269(D) (2009) (“[A]ll liability policies within their terms and limits are executed for the benefit of all injured persons and their survivors or heirs to whom the insured is liable . . .”).

59. See MCKENZIE & JOHNSON, *supra* note 25, § 2:6, at 74–75.

60. See *id.*

61. LA. CIV. CODE art. 2045 (2015).

62. LA. REV. STAT. ANN. § 22:1269(D) (2009); see MCKENZIE & JOHNSON, *supra* note 25, § 2:6, at 74–75.

the plaintiff's cause of action arose.<sup>63</sup> Thus, the Direct Action Statute and public policy play a vital role in a court's interpretation of an insurance contract.

In 1948, the legislature compiled the existing statutes regarding insurance into an Insurance Code<sup>64</sup> and slightly tweaked the Direct Action Statute in an attempt to aid federal courts in determining how the Direct Action Statute affected out-of-state policies.<sup>65</sup> In 1950, the legislature reenacted the statute as Louisiana Revised Statutes section 22:655 and added the following sentence to the law: "This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana . . . provided the accident occurred within the State of Louisiana."<sup>66</sup> The legislature added this provision to provide further guidance to federal courts that were still uncertain how the Direct Action Statute impacted out-of-state insurance policies.<sup>67</sup> Seventeen years later, however, the Louisiana Supreme Court in *Webb v. Zurich Insurance Co.*<sup>68</sup> determined that as long as either "the policy was issued or delivered in Louisiana *or* if the accident or injury occurred in Louisiana,"<sup>69</sup> the injured plaintiff could invoke the Direct Action Statute to sue the tortfeasor's insurer.<sup>70</sup> Although the *Webb* Court's interpretation of the legislative intent is flawed under the plain language of the statute,<sup>71</sup> which states that the accident must occur in Louisiana for the plaintiff to sue the tortfeasor's insurer,<sup>72</sup> this jurisprudential reading of the Direct Action Statute

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63. See LA. REV. STAT. ANN. § 22:868(B) ("No insurance contract delivered or issued for delivery in this state . . . shall contain any condition, stipulation, or agreement limiting [the] right of action against the insurer . . . to a period of less than one year from the time when the cause of action accrues . . .").

64. Act No. 195, 1948 La. Acts 140, 141.

65. Johnson, *supra* note 27, at 1463–64. The Direct Action Statute, as it was codified in 1948, began by stating that "[n]o policy or contract of liability insurance shall be issued or delivered in this State," and the opening reference to the illegality of policies not in conformity with the statute was deleted. Act No. 195, 1948 La. Acts 140, 141.

66. Act No. 541, 1950 La. Acts 985, 986.

67. Johnson, *supra* note 27, at 1463–64.

68. 205 So. 2d 398 (La. 1967).

69. Johnson, *supra* note 27, at 1464 (citing *Webb*, 205 So. 2d 398).

70. *Webb*, 205 So. 2d at 406. The Supreme Court based its interpretation of the legislature's intent on a vetoed bill that would have removed the phrase "provided the accident or injury occurred within the State of Louisiana." *Id.* at 404–05.

71. See LA. REV. STAT. ANN. § 22:1269(B)(2) (2009); Johnson, *supra* note 27, at 1477 ("The most charitable thing that can be said of the [*Webb* Court's] opinion is that it announced what the writing justice believed the legislature 'must have meant' or 'could have enacted' as opposed to the meaning to be derived from the plain language of the enactment." (footnote omitted)).

72. LA. REV. STAT. ANN. § 22:1269(B)(2); Act No. 541, 1950 La. Acts 985, 986.

illustrates how the courts tended to read the statute broadly to extend statutory coverage to the claims of injured plaintiffs.<sup>73</sup>

Since *Webb*, the legislature has amended the statute several times, but only a few of these amendments are relevant to the analysis of the *Gorman* decision. In 1956, the legislature codified the public policy articulated in *Davies* that liability policies were intended to protect injured persons.<sup>74</sup> The 1988 revision modified the right of direct action by preventing the plaintiff from suing the insurer unless the plaintiff also sues the insured tortfeasor as a co-defendant.<sup>75</sup> The legislature, however, listed several exceptions to this general rule.<sup>76</sup> For example, if the insured tortfeasor is bankrupt or insolvent, the injured plaintiff can sue the tortfeasor's insurer without having to join the tortfeasor in the suit.<sup>77</sup> The most recent relevant modification of the Direct Action Statute came in 2008, when the law was reenacted without any substantive changes as Louisiana Revised Statutes section 22:1269 as part of a revision of the Insurance Code.<sup>78</sup> A few years after this revision, Mr. Armstrong's death due to the City's negligence gave the Supreme Court an opportunity to further the public policy behind the Direct Action Statute in *Gorman*.

## II. DEATH IN THE CITY: FACTS AND PROCEDURAL HISTORY OF *GORMAN V. CITY OF OPELOUSAS*

Shortly after the police arrested Mr. Armstrong for drunkenly disrupting an Alcoholics Anonymous meeting,<sup>79</sup> they placed him in what they referred to as the "drunk tank"—"an eight-foot by eight-foot cinderblock room" with a dense metal door and no functioning lights.<sup>80</sup> Mr. Armstrong was so intoxicated that the police had to carry him to the drunk tank,<sup>81</sup> and when three other men were placed in the cell with him, he was lying face down on the floor.<sup>82</sup> Six hours passed before the officer on duty checked on the inmates.<sup>83</sup> In the meantime, two of the inmates began savagely kicking Mr.

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73. See, e.g., *Versai Mgmt. Corp. v. Progressive Cas. Ins. Co.*, No. 11-2717, 2012 WL 1118669, at \*4 (E.D. La. Apr. 2, 2012) (citing *Webb*, 205 So. 2d at 406); *Spomer v. Aggressor Int'l, Inc.*, 807 So. 2d 267, 277-78 (La. Ct. App. 1st 2001).

74. Act No. 475, 1956 La. Acts 927, 928.

75. Act No. 934, 1988 La. Acts 2448, 2448-49.

76. *Id.* at 2449.

77. See LA. REV. STAT. ANN. § 22:1269(B)(1)(a)-(b).

78. See *id.* § 22:1269; Act No. 415, 2008 La. Acts 1846, 1846, 1889.

79. *State v. King*, 124 So. 3d 623, 625 (La. Ct. App. 3d 2013).

80. *Id.* at 625-26.

81. *Id.* at 625.

82. *Id.* at 626.

83. *Id.* The officer testified that he thought he would be able to hear if there were any "excessively loud" sounds emanating from Mr. Armstrong's cell, even though a hallway and a steel door stood between his desk and the cell. *Id.*

Armstrong, mutilating his head, neck, sides, and groin.<sup>84</sup> The fourth inmate in the cell repeatedly pounded the cell door and pleaded for someone to save Mr. Armstrong, but the officer on duty heard nothing.<sup>85</sup> By the time the officer checked on the inmates, Mr. Armstrong was dead.<sup>86</sup>

One day before the anniversary of her son's death, Ms. Gorman sued the City<sup>87</sup> under wrongful death and survival actions.<sup>88</sup> In December 2010, Ms. Gorman requested the name of the City's liability insurer.<sup>89</sup> The City failed to answer.<sup>90</sup> When the trial court granted Ms. Gorman's motion to compel an answer in June 2011,<sup>91</sup> the City ignored the court order.<sup>92</sup> Three days before a hearing on whether the court should sanction the City's attorneys for not complying with the court's order to compel an answer,<sup>93</sup> the City finally told Ms. Gorman that its insurer was Lexington Insurance Company.<sup>94</sup> Ms. Gorman then amended her petition and named Lexington as a defendant.<sup>95</sup> Unfortunately, the City's answer to Ms. Gorman's request arrived too late to save her claims against its insurer.<sup>96</sup>

Lexington, finally served with Ms. Gorman's petition on September 22, 2011,<sup>97</sup> moved for summary judgment against the City and Ms. Gorman.<sup>98</sup> Lexington argued that no coverage existed under the policy because the City did not notify it of Ms. Gorman's claim during the policy

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84. *Id.* at 626–27.

85. *Id.*

86. *Id.* at 626.

87. *Gorman v. City of Opelousas*, 148 So. 3d 888, 890 (La. 2014). Ms. Gorman also sued the two inmates who killed her son. *Id.* at 890 n.1.

88. *Id.* at 890. Ms. Gorman's wrongful death and survival actions would have prescribed had she waited another two days to file them. *See* LA. CIV. CODE arts. 2315.1(A), 2315.2(B) (2015).

89. *Gorman*, 148 So. 3d at 890.

90. *Id.*

91. *Id.*

92. Plaintiff's/Appellant's Original Brief at 3, *Gorman v. City of Opelousas*, No. 12-1468, 2013 WL 1831075 (La. Ct. App. 3d May 1, 2013).

93. *Id.*

94. *Gorman*, 148 So. 3d at 890.

95. *See* LA. REV. STAT. ANN. § 22:1269 (2009); *Gorman*, 148 So. 3d at 890. The Direct Action Statute gives injured plaintiffs the ability to directly sue the tortfeasor's insurer as a co-defendant of the tortfeasor. *See* *Anderson v. Ichinose*, 760 So. 2d 302, 307 (La. 1999) (“The Direct Action Statute affords a victim the right to sue the insurer directly when the liability policy covers a certain risk. The statute does not, however, extend the protection of the liability policy to risks that were not covered by the policy or were excluded thereby (at least in the absence of some mandatory coverage provisions in other statutes).”).

96. *See Gorman*, 148 So. 3d at 890–91.

97. *Id.*

98. *Id.*

period,<sup>99</sup> as required under the City's claims-made-and-reported policy.<sup>100</sup> Under a claims-made-and-reported policy, the insurance company is not liable for any damages caused by the insured, unless three conditions are met.<sup>101</sup> First, the negligent act for which the insured is liable must occur after a specified retroactive date.<sup>102</sup> Second, the injured party must file a claim against the insured during the policy period.<sup>103</sup> Finally, the insured must report the claim to the insurance company before the end of the policy period.<sup>104</sup> The claims-made-and-reported policy differs from an occurrence policy, which does not require the insured to provide the insurer with notice of the claim during the policy period, but rather only requires that the negligent act take place during the policy period.<sup>105</sup>

The distinction between these two types of policies played a role in the trial court's ruling on Lexington's motion for summary judgment.<sup>106</sup> The trial court determined that no coverage existed under Lexington's policy, reasoning that holding Lexington liable for Ms. Gorman's claim against the City would transform the claims-made-and-reported policy at issue into an occurrence policy.<sup>107</sup> In effect, ignoring the notice requirement in the City's policy would destroy "the bargained for exchange" between the parties to the contract.<sup>108</sup> Thus, the trial court deemed Ms. Gorman's

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99. *Id.*

100. *Id.* at 890, 900 (Lexington's policy stated that "COVERAGE IS LIMITED GENERALLY TO LIABILITY FOR CLAIMS FIRST MADE AGAINST YOU AND REPORTED IN WRITING TO US WHILE THE COVERAGE IS IN FORCE . . ."). The policy period at issue began on April 17, 2010, and extended to April 17, 2011. *Id.* at 891. The policy applied retroactively to any actions—dating back to April 17, 2005—for which the City's police department may have been liable, including Mr. Armstrong's death, which occurred in September 2009. *Id.* at 890–91.

101. Works, *supra* note 24, at 530.

102. *Id.*

103. *Id.*

104. *Id.*

105. MCKENZIE & JOHNSON, *supra* note 25, § 6:25, at 593.

106. *Gorman v. City of Opelousas*, 148 So. 3d 888, 891 (La. 2014).

107. *Gorman*, 148 So. 3d at 891; *see* *FDIC v. Caplan*, 838 F. Supp. 1125, 1131 n.11 (W.D. La. 1993) ("[U]nder [an occurrence] policy, liability is triggered when injury or damage occurs during the policy period." (citing *FDIC v. Barham*, 794 F. Supp. 187, 193 n.10 (W.D. La. 1991), *aff'd*, 995 F.2d 600 (5th Cir. 1993))).

108. *Gorman*, 148 So. 3d at 891; *see also* LA. CIV. CODE arts. 2045, 2046 (2015); *Peterson v. Schimek*, 729 So. 2d 1024, 1028 (La. 1999) ("The role of the judiciary in interpreting insurance contracts is to ascertain the common intent of the insured and insurer as reflected by the words in the policy. When the words of an insurance contract are clear and explicit and lead to no absurd consequences, courts must enforce the contract as written and may make no further interpretation in search of the parties' intent." (internal citations omitted)).

efforts to obtain the identity of the City's insurer prior to April 17, 2011, the date the policy period ended, irrelevant.<sup>109</sup>

Ms. Gorman appealed this decision to the Third Circuit.<sup>110</sup> The Third Circuit reversed and determined that coverage existed for Ms. Gorman's claim, reasoning that the insured's failure to satisfy the notice requirement did not deprive the plaintiff of the ability to sue the insurer.<sup>111</sup> The Third Circuit analogized this case to *Murray v. City of Bunkie*,<sup>112</sup> where the Third Circuit had previously found that an injured third person was covered under a claims-made-and-reported policy issued to the city of Bunkie.<sup>113</sup> In that case, the court held that the Direct Action Statute granted injured plaintiffs a substantive right "that could not be taken away because of the insured's failure to notify the insurer—a condition over which the plaintiff had no control."<sup>114</sup> Thus, the Third Circuit found that Ms. Gorman's inability to ascertain the identity of the City's insurer during the policy period did not deprive her of a substantive right.<sup>115</sup>

Lexington appealed to the Supreme Court, seeking to have the trial court's ruling reinstated.<sup>116</sup> The Court granted certiorari and addressed the following three issues: (1) whether the Direct Action Statute grants an injured plaintiff a substantive right against the tortfeasor's insurer; (2) whether a claims-made-and-reported-policy affects the injured plaintiff's claim against the tortfeasor's insurer differently than would an occurrence policy; and (3) whether the notice requirement in Lexington's policy to the City is enforceable against Ms. Gorman so as to preclude coverage for her claim.<sup>117</sup>

Ultimately, the Court divided four to three in its resolution of all three issues.<sup>118</sup> First, the majority, relying primarily on one recent case, held that the Direct Action Statute grants injured third persons only a procedural right of action to sue the tortfeasor's insurer.<sup>119</sup> Second, the majority found

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109. *Gorman*, 148 So. 3d at 891.

110. *Gorman v. City of Opelousas*, No. 12-1468, 2013 WL 1831075, at \*3 (La. Ct. App. 3d May 1, 2013), *rev'd*, 148 So. 3d 888 (La. 2014). The City also appealed the trial court's ruling, *id.* at \*1, \*3, but its arguments for why coverage existed are not relevant to the analysis of the Louisiana Supreme Court's decision.

111. *Id.*

112. 686 So. 2d 45 (La. Ct. App. 3d 1996).

113. *Gorman*, 2013 WL 1831075, at \*3 (citing *Murray*, 686 So. 2d 45).

114. *Id.* (quoting *Murray*, 686 So. 2d at 49).

115. *Id.*

116. *Gorman v. City of Opelousas*, 148 So. 3d 888, 892 (La. 2014).

117. *Id.* at 892, 895–98.

118. Justice Knoll's dissenting opinion was joined by Chief Justice Johnson and Justice Hughes. *Id.* at 903.

119. *Id.* at 895–96. The majority reasoned that the plaintiff's "substantive cause of action against the insured" did not extend to the insurance company. *Id.*; *see also infra* Part III.A.1.

that a claims-made-and-reported policy affects an injured third person's claim against the tortfeasor's insurer differently than an occurrence policy does.<sup>120</sup> Finally, the majority held that the notice requirement in this policy was enforceable because the Court had previously held that notice requirements in claims-made-and-reported policies did not violate the public policy underlying the Direct Action Statute.<sup>121</sup> Thus, Ms. Gorman could not recover any damages from Lexington.

In contrast, Justice Knoll's dissenting opinion came to the opposite conclusion on all three of the major issues in this case. First, Justice Knoll contended that the Direct Action Statute gives an injured third person a substantive right of action against the insurer that is bestowed at the time of injury.<sup>122</sup> Next, Justice Knoll argued that the case should be resolved the same way as it would under an occurrence policy, because the notice requirement in a claims-made-and-reported policy infringed upon the plaintiff's substantive right of direct action against the insurer.<sup>123</sup> Lastly, Justice Knoll determined that the trigger of Lexington's policy was unenforceable, as it violated the public policy considerations inherent in the Direct Action Statute.<sup>124</sup> Thus, the reasoning of the majority and dissenting opinions is irreconcilable.

### III. DISSECTING *GORMAN*'S UNDERSTANDING OF THE DIRECT ACTION STATUTE

Both the majority and the dissent relied on prior Supreme Court interpretations of the Direct Action Statute.<sup>125</sup> The two opinions, however, reached opposite conclusions on all three issues presented in the case. The reasoning of both opinions is insufficient, and neither opinion convincingly explains why the other's application of the Direct Action Statute is wrong. Applying public policy considerations and prior jurisprudential interpretations

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120. *Gorman*, 148 So. 3d at 897 (extending coverage under the Lexington policy to Ms. Gorman's claims would transform "the claims-made-and-reported policy into an occurrence policy"); *see also infra* Part III.B.1.

121. *Gorman*, 148 So. 3d at 895, 898 (citing *Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.*, 282 So. 2d 478, 482–83 (La. 1973)); *see also infra* Part III.C.1.

122. *Gorman*, 148 So. 3d at 900 (Knoll, J., dissenting) (citing *Edwards v. Fid. & Cas. Co. of N.Y.*, 123 So. 162, 163 (La. Ct. App. Orleans 1929); *West v. Monroe Bakery, Inc.*, 46 So. 2d 122, 123, 127 (La. 1950)); *see also infra* Part III.A.1.

123. *Gorman*, 148 So. 3d at 903 (Knoll, J., dissenting) (citing *Murray v. City of Bunkie*, 686 So. 2d 45, 50 (La. Ct. App. 3d 1996)); *see also infra* Part III.B.1.

124. *Gorman*, 148 So. 3d at 901 (Knoll, J., dissenting); *see also infra* Part III.C.1.

125. *Gorman*, 148 So. 3d at 897 (majority opinion) (citing *Hood v. Cotter*, 5 So. 3d at 830 (La. 2008)); *id.* at 900 (Knoll, J., dissenting) (citing *West*, 46 So. 2d at 123, 127).

of the Direct Action Statute to this case reveals how *Gorman*'s two factions understood—or misunderstood—the Direct Action Statute.

*A. Does the Direct Action Statute Grant a Procedural or Substantive Right?*

One fundamental issue on which the majority and dissent disagree is whether the Direct Action Statute grants a procedural or substantive right. This determination is significant because, if Ms. Gorman's right of direct action against Lexington was a procedural right, her ability to sue Lexington for her son's death would depend solely on whether the City had complied with the policy's notice requirement.<sup>126</sup> If the right was substantive, however, the notice requirement would be unenforceable because a plaintiff cannot be deprived of a vested substantive right.<sup>127</sup> Ultimately, the majority correctly recognized that the right was procedural, a view that comports with both the legislative intent behind the revision of the Direct Action Statute after *Edwards*<sup>128</sup> and the past 60 years of jurisprudence.<sup>129</sup>

*1. The Gorman Opinions Rely on Jurisprudence to Come to Different Conclusions*

Ms. Gorman's attorney argued before the Supreme Court that Ms. Gorman's substantive right to sue Lexington under the Direct Action Statute vested at the moment that her son was killed.<sup>130</sup> Relying heavily on its previous decision in *Hood v. Cotter*,<sup>131</sup> the *Gorman* majority determined that the Direct Action Statute merely bestows a procedural right of action on the plaintiff against the tortfeasor's insurer.<sup>132</sup> Thus, the plaintiff's substantive cause of action remains against the tortfeasor alone, and the plaintiff's right of action against the tortfeasor's insurer is not a vested right.<sup>133</sup> The majority declined to give a more in-depth analysis as to why the Direct Action Statute did not grant an injured third person a substantive

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126. *Id.* at 895–96 (majority opinion).

127. *Id.* at 894.

128. *Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co.*, 138 So. 183, 188 (La. Ct. App. Orleans 1931).

129. *See, e.g., Anderson v. Ichinose*, 760 So. 2d 302, 305 (La. 1999); *Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.*, 282 So. 2d 478, 481 (La. 1973); *Home Ins. Co. v. Highway Ins. Underwriters*, 62 So. 2d 828 (La. 1952).

130. *Gorman*, 148 So. 3d at 894.

131. 5 So. 3d 819 (La. 2008).

132. *Gorman*, 148 So. 3d at 895–96 (citing *Hood*, 5 So. 3d at 829).

133. *Id.* at 896–97 (citing *Hood*, 5 So. 3d at 829).

right and did not address the dissent's position.<sup>134</sup> The majority's refusal, however, to rebut the dissent's position through a more thorough analysis of the jurisprudence leaves the reader without answers as to where the discrepancy in the jurisprudence arose or which position is correct.

Writing for the dissent's three justices, Justice Knoll vigorously disagreed with the majority's statement that the Direct Action Statute merely granted a procedural right.<sup>135</sup> Referring to the majority's position as "legally erroneous," Justice Knoll maintained that the Direct Action Statute bestowed a substantive right on injured third persons.<sup>136</sup> Relying primarily on the holdings in *Edwards* and *West v. Monroe Bakery*,<sup>137</sup> Justice Knoll argued that at the moment Mr. Armstrong died, Ms. Gorman's "substantive cause of action against the insured vested."<sup>138</sup> Because the Direct Action Statute granted a substantive right to plaintiffs, according to Justice Knoll, the City's failure to comply with the notice requirement in the policy could not deprive Ms. Gorman of her right of action against Lexington.<sup>139</sup> The dissent, however, did not rely on a single Supreme Court case decided in the last 60 years,<sup>140</sup> which suggests that the majority's holding is in line with the Court's more recent interpretations of the Direct Action Statute.

## *2. The Supreme Court Has Interpreted the Direct Action Statute as Granting a Procedural Right for Over 60 Years*

No satisfactory answer exists in the Louisiana jurisprudence as to why the Supreme Court changed its opinion on the type of right the Direct Action Statute grants injured persons. Thankfully, the Mississippi Supreme Court, applying Louisiana law, has pointed out that the Louisiana Supreme Court case *Home Insurance Co. v. Highway Insurer Underwriters*<sup>141</sup> "effectively overruled" *West's* interpretation of the Direct Action Statute as bestowing a substantive right.<sup>142</sup>

Interestingly, neither Louisiana courts nor legal scholars have treated *Home Insurance* as a landmark case. No Louisiana court has ever treated *Home Insurance* as overruling *West's* interpretation of the Direct Action

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134. See generally *id.* at 892–98.

135. See *id.* at 900 (Knoll, J., dissenting).

136. *Id.*

137. 46 So. 2d 122 (La. 1950); see also *supra* note 51 and accompanying text.

138. *Gorman*, 148 So. 3d at 900 (Knoll, J., dissenting).

139. *Id.* at 903.

140. *Id.* at 900–03.

141. 62 So. 2d 828 (La. 1952).

142. *Ford v. State Farm Ins. Co.*, 625 So. 2d 792, 795 (Miss. 1993). Interestingly, Justice Moise authored the majority opinions in both *West* and *Home Insurance*. *West*, 46 So. 2d at 123; *Home Ins.*, 62 So. 2d at 829.

Statute. Indeed, the *Home Insurance* opinion never mentions *West*.<sup>143</sup> Whatever its reasons for not referring to *West*, the *Home Insurance* Court clearly repudiated the conclusion of the former decision, stating unequivocally that the Direct Action Statute “is purely remedial and does not affect any substantial rights under the contract of insurance,”<sup>144</sup> whereas *West* had viewed the statute “as conferring *substantive rights* on [plaintiffs] . . . which became vested at the moment of the accident in which they are injured.”<sup>145</sup>

Since *Home Insurance* was decided, the Supreme Court has consistently held that the Direct Action Statute is procedural in nature,<sup>146</sup> which appears to be in line with the legislative intent.<sup>147</sup> The legislature, by amending the Direct Action Statute after *Edwards*,<sup>148</sup> signified that the plaintiff’s right of direct action was intended to be a procedural right, rather than a substantive right.<sup>149</sup> The legislature’s amendment stated that the injured plaintiff “shall have a right of direct action against the insurer company within the terms, and limits of the policy.”<sup>150</sup> The legislature further stated that its intent for the plaintiff’s right to sue the insurer was to “be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured.”<sup>151</sup> This language, which exists in the present version of the

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143. See *Home Ins.*, 62 So. 2d 828.

144. *Id.* at 831 (quoting *Robbins v. Short*, 165 So. 512, 514 (La. Ct. App. 1st 1936)). The Court further noted that both Act 253 of 1918 and Act 55 of 1930 “treat of provided remedies and not of contractual obligations; they are not restrictions of rights of action but are remedial enlargements and remedies of procedure to better insure recovery for an injured person.” *Id.*

145. *West*, 46 So. 2d at 123.

146. See, e.g., *Cacamo v. Liberty Mut. Fire Ins. Co.*, 764 So. 2d 41, 43 (La. 2000); *Quinlan v. Liberty Bank & Trust Co.*, 575 So. 2d 336, 353 (La. 1991). Interestingly, Justice Hughes, who joined the *Gorman* dissent, authored an opinion in 2013 that held that the Direct Action Statute merely granted a procedural right of action to injured persons against the tortfeasor’s insurer. See *Soileau v. Smith True Value & Rental*, 144 So. 3d 771, 775–76 (La. 2013).

147. *Home Ins.*, 62 So. 2d at 831 (“The Legislature evidently felt that our courts should not be made to become circumlocution officers winding and unwinding red tape, but . . . gave an interpretation of the provisions of Act No. 55 of 1930, as amended, when it expressed its *intent* as to the limitation of the scope of operation on the remedial act.” (emphasis in original)).

148. See *supra* Part I.A–B.

149. *Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co.*, 138 So. 183, 188 (La. Ct. App. Orleans 1931) (“We feel that to give retrospective effect to the statute of 1930 would not have the effect of impairing the obligation of the insurance agreement . . . . Whether written before or after that statute was passed, [the insurance policy] is affected by it.”). Note that the judge who wrote *Edwards* also authored the *Rossville* opinion. Johnson, *supra* note 27, at 1461.

150. Act No. 55, 1930 La. Acts 122, 123.

151. *Id.*

Direct Action Statute,<sup>152</sup> clearly signifies that the statute grants a procedural right, as the language limits the plaintiff's right to sue the insurer to the rights that the tortfeasor has against his own insurer.<sup>153</sup> Although the Supreme Court struggled with this concept initially,<sup>154</sup> the Court has had a firm understanding of the legislative intent over the last 60 years.<sup>155</sup>

Despite the Louisiana Supreme Court's consistent interpretation of the Direct Action Statute over the past 60 years, confusion remains due to several Louisiana courts of appeal, as well as some federal courts, misinterpreting the law. Although many federal courts have interpreted the statute correctly,<sup>156</sup> others have cited *West* to interpret the law as granting substantive rights.<sup>157</sup> Recently, some courts of appeal have also ignored over 60 years of jurisprudence and relied on *West*, holding that the Direct Action Statute vests injured third persons with a substantive right.<sup>158</sup> *Gorman*'s holding, which abrogated these rulings, should quell the rumblings among the lower courts<sup>159</sup> and will hopefully convince the federal courts to interpret the Direct Action Statute as bestowing a procedural right.<sup>160</sup>

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152. LA. REV. STAT. ANN. § 22:1269(B)(1), 1269(C) (2009).

153. Johnson, *supra* note 27, at 1460–61 (“[T]he insurers apparently gained legislative sanction of the concept that this direct action was more a matter of procedure than of substance. The direct action was subject to all lawful conditions of the policy and the defenses which could be urged by the insurer to an action brought by the insured for indemnity. This could be seen as . . . an overruling of the holding in *Edwards*. . . . Indeed, there hardly could have been any other meaning to the amendment.”).

154. See *West v. Monroe Bakery, Inc.*, 46 So. 2d 122, 131 (La. 1950) (McCaleb, J., dissenting) (“[T]he majority fail to take in account that . . . [the 1930 amendment to the Direct Action Statute] specifically restricted [the plaintiff's] right and made it subject to all lawful conditions of the policy contract and to the defenses which could be urged by the insurer in a direct action brought by the insured.”).

155. See, e.g., *Hood v. Cotter*, 5 So. 3d 819, 827, 829 (La. 2008) (“[T]he Direct Action Statute does not extend any greater right to third party tort victims who were damaged by the insured. . . . The Direct Action Statute . . . grants a procedural right of action against an insurer where the plaintiff has a substantive cause of action against the insured.” (internal citations omitted)).

156. See, e.g., *Authenment v. Ingram Barge Co.*, 878 F. Supp. 2d 672, 681 (E.D. La. 2012).

157. See, e.g., *Auster Oil & Gas, Inc., v. Stream*, 891 F.2d 570, 577–78 (5th Cir. 1990) (citing *West*, 46 So. 2d at 123); *In re Combustion, Inc.*, 960 F. Supp. 1056, 1061 (W.D. La. 1997) (citing *West*, 46 So. 2d at 123).

158. See, e.g., *Williams v. Lemaire*, 655 So. 2d 765, 767–68 (La. Ct. App. 4th 1995) (citing *West*, 46 So. 2d at 122); *Murray v. City of Bunkie*, 686 So. 2d 45, 48–49 (La. Ct. App. 3d 1996) (citing *Williams*, 655 So. 2d at 767–68).

159. *Gorman v. City of Opelousas*, 148 So. 3d 888, 894–95, 898 (La. 2014).

160. Federal courts apply the Direct Action Statute under choice of law principles. *Combustion*, 960 F. Supp. at 1059 (“[T]he federal court applies the choice of law [rules] of the forum state [when exercising supplemental jurisdiction

*B. How Does the Direct Action Statute Affect Claims-Made-and-Reported Policies?*

The next issue on which the opinions differ is whether the Direct Action Statute affects claims-made-and-reported policies the same as occurrence policies. The resolution of this issue affects the Court's ability to enforce the notice requirement in claims-made-and-reported policies. If the statute treats these two types of policies differently, then the notice requirement in claims-made-and-reported policies is enforceable, but if the statute treats claims-made-and-reported policies the same as occurrence policies, the notice requirement is not enforceable.<sup>161</sup> The *Gorman* majority's determination that the two types of policies must be treated differently was correct because these policies have different triggering events that must occur before the insured receives coverage,<sup>162</sup> and ignoring this difference would disregard "the bargained-for exchange between the insurer and the insured."<sup>163</sup> Thus, the majority correctly found that the notice provision in the City's policy was enforceable.

*1. Gorman's View on the Relevance of the Distinctions Between Occurrence Policies and Claims-Made-and-Reported Policies in Light of the Direct Action Statute*

The *Gorman* majority felt that the distinctions between occurrence policies and claims-made-and-reported policies impacted the outcome of the case.<sup>164</sup> The Court distinguished *West*, which held that an insurer could not defeat coverage for the injured plaintiff's claim by asserting that it had not received notice of the accident,<sup>165</sup> by stating repeatedly that *West* dealt with an occurrence policy.<sup>166</sup> The Court noted that only two of the policy's

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over state law claims]. This Court will apply the Louisiana choice of law articles to determine the law or laws applicable to all claims filed under the Louisiana Direct Action Statute." (internal citations omitted)). The *Erie* doctrine is not implicated in such situations, and any use of the terms "substantive" or "procedural" in this Note do not implicate *Erie*. See *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945) ("'[S]ubstance' and 'procedure' are the same keywords to very different problems. . . . [T]he terms are in common use in connection with situations turning on such different considerations as . . . the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws." (internal citations omitted)).

161. See *infra* Part III.B.2.

162. MCKENZIE & JOHNSON, *supra* note 25, § 6:25, at 593; Works, *supra* note 24, at 530.

163. *Gorman*, 148 So. 3d at 896.

164. See *id.* at 894 n.10.

165. *West v. Monroe Bakery, Inc.*, 46 So. 2d 122 (La. 1950).

166. *Gorman*, 148 So. 3d at 894.

three requirements were met for the City to be insured for the claims Ms. Gorman was asserting.<sup>167</sup> The Court further reasoned that finding coverage for Ms. Gorman's claims under the policy would be impossible, as that finding would disrupt the common intent of the parties to the contract by treating their claims-made-and-reported policy as an occurrence policy.<sup>168</sup>

In contrast, Justice Knoll's dissent did not discuss the distinctions between occurrence policies and claims-made-and-reported policies because she believed that the distinctions were irrelevant; in her view, the Direct Action Statute bestowed a substantive right on plaintiffs that vested upon injury.<sup>169</sup> Justice Knoll appeared to suggest that the purpose of the Direct Action Statute—to provide injured third persons with a remedy against the tortfeasor's insurer<sup>170</sup>—should apply equally to both occurrence policies and claims-made-and-reported policies.<sup>171</sup> In contrast to Justice Knoll's dissent, the distinctions among the different types of insurance policies are important for determining whether coverage is triggered in a given case. The distinctions between occurrence policies and claims-made-and-reported policies, and why insurers prefer the latter to the former, help to explain the majority's reticence to treat the City's claims-made-and-reported policy the same as an occurrence policy.

## *2. Coverage Under Different Types of Policies is Triggered in Different Manners*

The primary distinguishing factor among liability policies is the event that triggers coverage.<sup>172</sup> Under an occurrence policy, coverage is

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167. *Id.* at 893.

168. *Id.* at 897.

169. *Id.* at 903 (Knoll, J., dissenting) (“I ‘see no meaningful distinction between the loss of rights suffered by an injured third party for failure to give notice under an occurrence policy and the loss of rights suffered by an insured third party for failure to give notice under a ‘claims made’ policy.’ In both instances, injured third parties become vested with rights under our Direct Action statute, and in both instances, the enforcement of the notice provisions would deprive injured third parties of their rights under the Direct Action statute when it was not within their power to give notice.” (quoting *Murray v. City of Bunkie*, 686 So. 2d 45, 50 (La. Ct. App. 3d 1996))).

170. *See* Act No. 253, 1918 La. Acts 461; *see also* Johnson, *supra* note 27, at 1457.

171. *Gorman*, 148 So. 3d at 903 (Knoll, J., dissenting) (quoting *Murray*, 686 So. 2d at 50).

172. *See* Works, *supra* note 24, at 514; *see also* David T. Grand, Jr., Comment, *Nailing Down Occurrence Triggers for Property Damage in the Wake of Redevelopment—Why a Distinction Should Be Made Between First and Third Party Policies*, 68 LA. L. REV. 605, 606 n.9 (2008) (“‘Trigger’ is a term used to describe what must happen, according to the terms of an insurance policy, for the

generally triggered if the injury takes place during the existence of the policy.<sup>173</sup> For example, if the City's policy was an occurrence policy, the City would have been covered against Ms. Gorman's claims so long as her son was killed during the policy period, regardless of when her suit was filed or when the insurer was notified. Occurrence policies were the only type of policies that existed when professional liability companies came into existence.<sup>174</sup> Insurance companies, however, could not adequately anticipate all of the claims that people would make after the policy period had ended from acts that occurred during the policy period, or the amount they would owe the claimant due to inflation.<sup>175</sup> For this reason, insurance companies often lost more money than they made on occurrence policies.<sup>176</sup>

Claims-made-and-reported policies developed in response to the disadvantages of occurrence policies.<sup>177</sup> Claims-made-and-reported policies are more attractive to insurers because they provide more certainty—the insurer is not liable for any claims made or reported after the policy's expiration date occurs.<sup>178</sup> Insureds also benefit under claims-made-and-reported policies by paying lower premiums and receiving coverage for acts that occurred after the policy's "retroactive date," which is a specified date, negotiated by the parties, that occurred before the policy period began.<sup>179</sup> Coverage under this type of policy is only triggered if three prerequisites occur: (1) the injury or negligent act happens subsequent to the policy's retroactive date, (2) the plaintiff files the claim against the insured before the policy expires, and (3) the insurer receives written notice of the claim from its insured before the policy expires.<sup>180</sup>

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potential of coverage to arise." (citing *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 913 P.2d 878, 880 n.2 (Cal. 1995)).

173. MCKENZIE & JOHNSON, *supra* note 25, § 6:25, at 593. For a brief discussion of how some now-obsolete occurrence policies were triggered by an event other than injury, see Works, *supra* note 24, at 515 n.12.

174. Gerald Kroll, Comment, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 UCLA L. REV. 925, 926 (1975).

175. *Id.* at 926 n.7.

176. *Id.* at 926.

177. James F. Hogg, *The Tale of a Tail*, 24 WM. MITCHELL L. REV. 515, 518 (1998). Note that Hogg's article focuses on claims-made policies. Because claims-made-and-reported policies are a species of claims-made policies, his article is relevant here.

178. Kroll, *supra* note 174, at 928; Works, *supra* note 24, at 530.

179. Kroll, *supra* note 174, at 929 (citing *Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.*, 282 So. 2d 478, 483 (La. 1973)); Works, *supra* note 24, at 525–26.

180. *Gorman v. City of Opelousas*, 148 So. 3d 888, 892 (La. 2014); Works, *supra* note 24, at 530.

### 3. The Coverage for Which the Parties Bargained Determines the Insurer's Obligation

Prior to *Gorman*, the courts of appeal were split on the issue of whether, under the Direct Action Statute, the distinctions between occurrence policies and claims-made-and-reported policies mattered in determining whether coverage existed for an injured third person's claims.<sup>181</sup> The Fourth Circuit in *Williams v. Lemaire*<sup>182</sup> and the Third Circuit in *Murray* treated a claims-made-and-reported policy the same as an occurrence policy.<sup>183</sup> But earlier decisions by both of these circuits,<sup>184</sup> as well as the Fifth Circuit,<sup>185</sup> have enforced the provisions of claims-made-and-reported policies differently than occurrence policies would be enforced in the same situations.<sup>186</sup> Although not mentioned by the *Gorman* Court, the Second Circuit has also determined that claims-made-and-reported policies are distinct from occurrence policies and, as such, should be treated differently.<sup>187</sup>

This circuit split, however, is not justifiable in light of the holdings of the Supreme Court and similar decisions of other state courts. The Supreme Court has routinely distinguished claims-made-and-reported policies from occurrence policies ever since the Court first addressed this issue in 1973.<sup>188</sup> One federal court, applying Louisiana's Direct Action Statute, explained that an insurer of an occurrence policy cannot preclude coverage due to lack of notice because the injury triggers that policy.<sup>189</sup>

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181. See LA. REV. STAT. ANN. § 22:1269 (2009); *Gorman*, 148 So. 3d at 894–95.

182. 655 So. 2d 765 (La. Ct. App. 4th 1995).

183. *Gorman*, 148 So. 3d at 895; *Murray v. City of Bunkie*, 686 So. 2d 45, 50 (La. Ct. App. 3d 1996); *Williams*, 655 So. 2d at 768.

184. See *Reichert v. Bertucci*, 650 So. 2d 821 (La. Ct. App. 4th 1995); see also *Case v. La. Med. Mut. Ins. Co.*, 624 So. 2d 1285 (La. Ct. App. 3d 1993).

185. See *Bank of La. v. Mmahat, Duffy, Opatowsky & Walker*, 608 So. 2d 218 (La. Ct. App. 5th 1992).

186. *Gorman*, 148 So. 3d at 895; *Reichert*, 650 So. 2d at 823; *Case*, 624 So. 2d at 1289; *Mmahat*, 608 So. 2d at 221.

187. See *Lodwick, L.L.C. v. Chevron U.S.A., Inc.*, 126 So. 3d 544 (La. Ct. App. 2d 2013).

188. See, e.g., *Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.*, 282 So. 2d 478, 481 (La. 1973) (“In [this claims-made-and-reported policy], the coverage is effective only if the negligent harm is discovered and reported within the policy term; this is to be contrasted with an ‘occurrence’ policy, where the coverage is effective if the negligent harm occurs within the policy period, regardless of the date of discovery.”); *Anderson v. Ichinose*, 760 So. 2d 302, 305 (La. 1999) (“The major distinction between the ‘occurrence’ policy and the [claims-made-and-reported] policy constitutes the difference between the peril insured.” (quoting Sol Kroll, *The Professional Liability Policy “Claims Made”*, 13 FORUM 842, 843 (1978))).

189. *FDIC v. Caplan*, 838 F. Supp. 1125, 1131 (W.D. La. 1993).

Thus, precluding coverage would interfere with the third party's direct action against the insurer.<sup>190</sup> In contrast, the court found that under a claims-made-and-reported policy the notice requirement "defines the insurer's obligation, and thus the [third] party's rights, under the law."<sup>191</sup> Most courts in other states have also noted the importance of the distinctions between the triggers in the two types of policies.<sup>192</sup>

Thus, the *Gorman* majority correctly concluded that distinguishing between claims-made-and-reported policies and occurrence policies is essential to the outcome of the case.<sup>193</sup> In an occurrence policy, the injured plaintiff can sue the tortfeasor's insurer as long as the injury occurred during the policy period; even if the plaintiff files the claim after the policy has expired, the insurance company is still liable.<sup>194</sup> On the other hand, claims-made-and-reported policies only provide coverage if the injury occurs after the policy's retroactive date, the plaintiff makes a claim against the tortfeasor during the policy period, and the tortfeasor notifies his insurer of the claim before the policy period expires.<sup>195</sup> The Supreme Court correctly noted that finding that the City was insured against Ms. Gorman's claims simply because her son died after the policy's retroactive date would transform the City's policy into an occurrence policy.<sup>196</sup> The dissent's refusal to distinguish the coverage triggers between occurrence policies and claims-made-and-reported policies suggests that the dissent may have simply been desperate to find coverage for Ms. Gorman.<sup>197</sup>

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190. *Id.*

191. *Id.*

192. *See, e.g.*, *Textron, Inc. v. Liberty Mut. Ins. Co.*, 639 A.2d 1358, 1364 (R.I. 1994) ("[I]n the case of a reporting requirement, which is typically found only in a claims-made-and-reported policy, the prescribed notification actually defines the scope of coverage provided by the policy, as the [notice] is the event that triggers coverage." (citations omitted)); *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 379–80 (Tex. 2009) ("Unlike occurrence policies . . . some claims-made policies (often called 'claims-made-and-reported' policies) have an additional requirement that the claim be reported to the insurer within the policy period or within a specific number of days thereafter" (footnote omitted) (citations omitted)).

193. *Gorman v. City of Opelousas*, 148 So. 3d 888, 894–95, 897 (La. 2014).

194. *See id.* at 894 (citing *West v. Monroe Bakery, Inc.*, 46 So. 2d 122, 126, 130 (La. 1950)); *Kroll, supra* note 174, at 925.

195. *Gorman*, 148 So. 3d at 892.

196. *Id.* at 897.

197. *See id.* at 903 (Knoll, J., dissenting).

*C. Does the Notice Requirement in the City's Policy Violate Public Policy?*

The last issue on which the majority and the dissent disagree is whether the notice requirement in the City's policy violates the public policy inherent in the Direct Action Statute. The determination of this issue affects Lexington's liability. If the Court found that the notice requirement violated public policy, the City would be insured against Ms. Gorman's claims, but if the notice requirement did not violate public policy, Ms. Gorman could not recover from Lexington because the City would not be covered. The majority concluded that Lexington's notice requirement did not violate public policy.<sup>198</sup> This finding, however, ignores the legislature's intent in passing the Direct Action Statute<sup>199</sup> and the similarities between political subdivisions and insolvent insureds.<sup>200</sup> Thus, the Court should have held that claims-made-and-reported policies' notice requirements violate public policy when those policies are issued to political subdivisions.

*1. Gorman Finds the City's Policy Is Permissible Under the Direct Action Statute*

The majority relied on the Court's prior decisions in *Hood* and *Anderson v. Ichinose*<sup>201</sup> to determine that enforcing the notice requirement in claims-made-and-reported policies does not per se violate public policy.<sup>202</sup> The Court found its prior analysis in *Hood* relevant although the plaintiff in *Hood* filed a claim after the policy period expired, whereas Ms. Gorman filed her claim during the existence of the City's policy.<sup>203</sup> After noting that in some situations courts might deem the notice provision of a claims-made-and-reported policy unenforceable,<sup>204</sup> the Court concluded that the City's policy was permissible under the Direct Action Statute.<sup>205</sup>

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198. *Id.* at 897 (majority opinion).

199. *See* MCKENZIE & JOHNSON, *supra* note 25, § 2:2, at 34.

200. *Gorman*, 148 So. 3d at 897 n.18; *id.* at 901 (Knoll, J., dissenting); *see also* discussion *infra* Part III.C.2–3.

201. 760 So. 2d 302 (La. 1999).

202. *Gorman*, 148 So. 3d at 896 (citing *Hood v. Cotter*, 5 So. 3d 819, 830 (La. 2008); *Anderson*, 760 So. 2d at 306).

203. *Id.* at 896–97 (citing *Hood*, 5 So. 3d at 825).

204. *Id.* at 895 n.12 (citing *Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.*, 282 So. 2d 478, 481 n.4 (La. 1973)). The *Livingston Parish School Board* Court explained that an insurer might violate public policy if that "insurer, once having accepted a premium and agreed to cover professional negligence during the policy year, then attempted to withdraw its implied condition of providing continuous coverage at reasonable rates thereafter for the risk so insured, when discovered." *Livingston Parish Sch. Bd.*, 282 So. 2d at 481 n.4.

205. *Gorman*, 148 So. 3d at 898.

The majority acknowledged that injured third persons usually do not have the ability to unearth the tortfeasor's insurer on their own, and thus are not able to fulfill the notice requirement in a claims-made-and-reported policy themselves.<sup>206</sup> Although this outcome may seem unfair, the majority reasoned that the insured tortfeasor has an incentive to give written notice of the claim to his or her insurer to avoid being wholly liable for the plaintiff's injury.<sup>207</sup> Based on this conclusion, the Court refused to extend coverage under the City's policy to Ms. Gorman's claims.<sup>208</sup> The majority admitted that the City's refusal to notify Lexington of Ms. Gorman's pending claim, which baffled the Court, adversely affected Ms. Gorman.<sup>209</sup> The Court ultimately determined, however, that penalizing Lexington for the City's noncompliance with the policy by requiring coverage in a situation Lexington did not bargain for would be unfair.<sup>210</sup>

The Court stated in a footnote that Ms. Gorman may not be able to collect any monetary award, even if a court determines that the City is liable, because the City, as a political subdivision, is not required to pay any judgment granted against it.<sup>211</sup> The majority believed that this reason was not sufficient to deem the policy's notice requirement unenforceable.<sup>212</sup> Justice Knoll, however, found the majority's reasoning blatantly unfair.<sup>213</sup> She argued that the notice requirement violates the public policy considerations inherent in the Direct Action Statute.<sup>214</sup> Based on the legislature's original intent in passing the statute—protecting injured third persons by requiring insurers to provide coverage for their insolvent or bankrupt insureds—the City was clearly entitled to coverage against Ms. Gorman's claims.<sup>215</sup> Justice Knoll analogized the City to an insolvent insured, as the City can simply refuse to pay any judgment granted against it,<sup>216</sup> and argued that the City should be insured against Ms. Gorman's

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206. *Id.* at 897.

207. *Id.*

208. *Id.* at 898.

209. *Id.* at 897.

210. *Id.*

211. *See* LA. CONST. art. XII, § 10(C); *see also* LA. REV. STAT. ANN. § 13:5109(B)(2) (2012); *Gorman*, 148 So. 3d at 897 n.19 (“Even though payment of a resulting judgment, if any, by the City is discretionary in that an appropriation would be required and the City's assets cannot be seized to satisfy a judgment, we are not free to modify the terms of the policy that were bargained for by the City and Lexington.” (citations omitted)). Ms. Gorman has since settled her claim against the City for an undisclosed amount. Motion to Dismiss, *supra* note 19.

212. *Gorman*, 148 So. 3d at 897 n.19.

213. *Id.* at 901 (Knoll, J., dissenting).

214. *Id.*

215. *Id.* (citing MCKENZIE & JOHNSON, *supra* note 25, § 2:2, at 34).

216. *See* LA. CONST. art. XII, § 10(C); *see also* LA. REV. STAT. ANN. § 13:5109(B)(2) (2012).

claims because she did everything in her power to preserve her right of direct action against Lexington.<sup>217</sup>

*2. Insured Political Subdivisions Are Analogous to Insolvent Insureds*

The majority correctly noted that courts have traditionally deemed notice requirements in claims-made-and-reported policies to not violate the public policy considerations inherent in the Direct Action Statute.<sup>218</sup> Prior decisions by the Supreme Court, however, have hinted that in some instances a court may not enforce a notice requirement if it violates public policy,<sup>219</sup> such as if a notice requirement limits a plaintiff's right of direct action to less than a year from the date when the plaintiff's cause of action against the insured tortfeasor arose.<sup>220</sup> Note that Ms. Gorman's right of direct action against Lexington was not restricted to less than a year, since the fact triggering her cause of action against the City—her son's death—arose on September 28, 2009, and the City's policy did not expire until April 17, 2011.<sup>221</sup> Thus, if one does not thoroughly analyze the public policy considerations inherent in the Direct Action Statute, the *Gorman* majority appears to be in line with the Supreme Court's prior decisions.<sup>222</sup>

Although much of Justice Knoll's dissent directly contradicts long-standing jurisprudence and basic insurance law, on this point the dissent makes a very compelling argument that the notice requirement in the

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217. *Gorman*, 148 So. 3d at 901 (Knoll, J., dissenting).

218. *See, e.g.*, *Hood v. Cotter*, 5 So. 3d 819, 830 (La. 2008); *Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.*, 282 So. 2d 478, 481 (La. 1973).

219. *See Anderson v. Ichinose*, 760 So. 2d 302, 306 n.5 (1999).

220. *See LA. REV. STAT. ANN.* § 22:868(B) (2009).

221. *Gorman*, 148 So. 3d at 893.

222. Most other states have also enforced notice provisions in claims-made-and-reported policies because these provisions do not violate their state's public policy. *See, e.g.*, *Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So. 2d 512, 514 (Fla. 1983); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 406 (N.J. 1985). In fact, the Supreme Court of Wisconsin, a state which has its own direct action statute, recently ruled that Wisconsin's notice-prejudice statutes, which specifically prohibit an insurer from relying on its insured's failure to give written notice of a claim unless the insurer was prejudiced, do not apply to claims-made-and-reported policies. *See WIS. STAT. ANN.* §§ 631.81, 632.24, 632.26 (West 2004); *Anderson v. Aul*, 862 N.W.2d 304, 308 (Wis. 2015) ("Upon considering the text of the notice-prejudice statutes, the historical context of claims-made-and-reported policies, the statutory history of the notice-prejudice statutes, the consequences of alternative interpretations of the notice-prejudice statutes, and the purpose of claims-made-and-reported policies, we conclude that Wisconsin's notice-prejudice statutes do not supersede the reporting requirement specific to claims-made-and-reported policies.").

City's insurance policy violates public policy.<sup>223</sup> The legislature, by giving injured persons a right of direct action against insurance companies, intended to provide injured third parties a remedy when insolvent tortfeasors injured them.<sup>224</sup> This insolvency provision still exists in the current version of the law, nearly one hundred years after its inception.<sup>225</sup>

The Court should have analogized the City, as a political subdivision,<sup>226</sup> to an insolvent insured, as Justice Knoll did, so that the City would have been insured against the claims Ms. Gorman asserted against it. The Louisiana Constitution provides that the legislature has the ability to determine how judgments against the state, state agencies, and political subdivisions are to be paid.<sup>227</sup> The legislature has decided that a plaintiff who wins a civil lawsuit against the state or a state agency can only receive that award if the legislature appropriates money for the sole purpose of satisfying that judgment.<sup>228</sup> Likewise, in judgments against a political subdivision, the plaintiff only receives awarded damages if the political subdivision appropriates funds specifically to pay that judgment.<sup>229</sup>

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223. *Gorman*, 148 So. 3d at 901 (Knoll, J., dissenting) (arguing that because the City does not have to pay Ms. Gorman any judgment rendered against it, the Court should have analogized the City to an insolvent insured and extended coverage under the policy to Ms. Gorman's claims).

224. See Act No. 253, 1918 La. Acts 461.

225. LA. REV. STAT. ANN. § 22:1269(A) (2009) ("No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy . . .").

226. The Constitution defines a political subdivision as "a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions." LA. CONST. art. VI, § 44(2). A municipality is defined as "an incorporated city, town, or village." *Id.* § 44(3).

227. *Id.* art. XII, § 10(C). Scholar W. Lee Hargrave argues that this constitutional provision was not intended to prevent plaintiffs from recovering judgments against the state or political subdivisions. W. Lee Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 LA. L. REV. 647, 655 (1983) ("[Louisiana Constitution article XII, section 10(C)] is not aimed at limiting the courts in a general manner in dealing with the state. Certainly, the attitude of the constitutional convention was to enlarge and protect individual rights, not to limit them. To interpret section 10(C) as some general prohibition against enforcement of judgments against the state would be inconsistent with that policy and would threaten the reach of judicial review, a review that was increased and strengthened during the convention."); *but see* Kenneth M. Murchison, *Local Government Law*, 38 LA. L. REV. 462, 475–476 n.76 (1978) ("[C]ertain statements in the constitutional convention debates on the section abolishing sovereign immunity indicate an intention to leave the judgment creditor at the mercy of the governmental body.").

228. LA. REV. STAT. ANN. § 13:5109(B)(2) (2012).

229. *Id.*

The legislature generally appropriates funds when a court rules in favor of a plaintiff in cases where the state or a state agency is a defendant,<sup>230</sup> whereas political subdivisions are not well known for paying judgments granted against them.<sup>231</sup> The Supreme Court has previously recognized that this creates “a right without a remedy” for plaintiffs with judgments against a political subdivision.<sup>232</sup> The Court, however, deems itself powerless to force a political subdivision to pay a judgment rendered against it.<sup>233</sup> In some instances, a political subdivision’s decision to not pay a judgment rendered against it may violate the United States Constitution,<sup>234</sup> but so far neither federal nor Louisiana courts have addressed this issue.

*3. Political Subdivisions Are More Likely to Mistakenly Fail to Report Claims to Their Insurers than Individuals or Corporations*

The *Gorman* majority based its reasoning that the notice provision in the City’s policy is enforceable on the grounds that the insured tortfeasor has an incentive to shift liability to the insurer by reporting any adverse claim to its insurer.<sup>235</sup> This is certainly true in most situations. In suits against an individual or corporation, the insured has an incentive to report any claim for which that insured is liable to its insurer. Solvent individuals and corporations have indicated, simply by purchasing insurance, that they do not wish for a court to hold them personally liable for any claims that an injured party may have against them. Further, the Direct Action Statute provides that an injured third person can sue the tortfeasor’s insurer

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230. Hargrave, *supra* note 227, at 656.

231. See P. RAYMOND LAMONICA & JERRY G. JONES, LEGISLATIVE LAW AND PROCEDURE § 9.2, in 20 LOUISIANA CIVIL LAW TREATISE 244, 342–43 (2d ed. 2014) (“Appropriation of funds by a political subdivision (as by the state) is generally a discretionary legislative act by the governing body, and a judgment creditor against a political subdivision usually has no legal recourse to compel appropriation or seize assets to pay the judgment.”); see also Hargrave, *supra* note 227, at 656 (“No legislation exists to force [political subdivisions] to pay their judgments . . . . In the absence of such legislation, there remains a serious problem with some local government units refusing to pay unpopular judgments.”).

232. *Newman Marchive P’ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1270 (La. 2008).

233. *Id.* (“[A]s the judicial branch, like all branches, derives its power from the constitution, we are bound to accept the limitations placed upon us by that document.”).

234. Lee Hargrave, *Louisiana Constitutional Law*, 39 LA. L. REV. 807, 819 (1979) (“If a city or a parish refused to pay when it had the funds to do so, the invasion of the individual interest would seem to be a substantial one, and the agency ought to be made to supply a rational basis for nonpayment; if none is forthcoming, it would appear that due process could be invoked.”).

235. *Gorman v. City of Opelousas*, 148 So. 3d 888, 897 (La. 2014).

directly without joining the tortfeasor as a defendant if the tortfeasor is insolvent.<sup>236</sup> Thus, an insolvent tortfeasor who has assented to a claims-made-and-reported policy and notifies his insurer of the suit is likely to be left out of the litigation altogether. Because of these incentives, insured persons who are sued will almost certainly comply with the policy's notice provision.

Political subdivisions have less of an incentive to report claims than individuals and corporations because they are not required to pay adverse judgments rendered against them.<sup>237</sup> Thus, political subdivisions are more likely than individuals and corporations to fail to notify the insurer due to oversight.<sup>238</sup> In *Murray v. City of Bunkie*,<sup>239</sup> the Bunkie City Clerk attempted to send written notice of the plaintiff's claim to the city's insurer.<sup>240</sup> Unfortunately, the city's insurance agent delivered the notice to the wrong insurance company.<sup>241</sup> That insurance company did not provide coverage for the claim and notified the city, which led the city to cancel that policy.<sup>242</sup> Several months later, the Bunkie City Clerk finally discovered that a different insurance company had issued a policy to the city that covered the plaintiff's claim.<sup>243</sup> Although the city attempted to notify that insurance company, the policy period had already expired.<sup>244</sup>

The City in *Gorman* also demonstrated this potential for nonfeasance by its failure to notify Lexington of Ms. Gorman's claim.<sup>245</sup> Ms. Gorman requested the name of the City's insurer during discovery about four months before the City's policy expired.<sup>246</sup> The City did not reply until

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236. LA. REV. STAT. ANN. § 22:1269(B)(2) (2009).

237. *Id.* § 13:5109(B)(2) (2012).

238. The possibility exists, however, that a political subdivision with a claims-made-and-reported policy—which typically offers cheaper premiums than other types of policies—could refuse to notify its insurer of an adverse claim to avoid paying higher premiums, and then simply refuse to pay any judgment awarded to the plaintiff. *See Gorman*, 148 So. 3d at 897 & n.18; *see also* Hargrave, *supra* note 227, at 656. The *Gorman* majority was concerned with this possibility, but ultimately found that the City did not have such motives. *Gorman*, 148 So. 3d at 897.

239. 686 So. 2d 45 (La. Ct. App. 3d 1996).

240. *Id.* at 47.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* Although the *Murray* court determined that the city of Bunkie was covered under the policy, *Gorman* abrogated this holding because *Murray* misinterpreted the Direct Action Statute as granting substantive rights to an injured plaintiff against the tortfeasor's insurer. *See Gorman v. City of Opelousas*, 148 So. 3d 888, 895, 898 (La. 2014).

245. *Gorman*, 148 So. 3d at 890.

246. *Id.* at 890–91.

Ms. Gorman threatened the City's attorneys with sanctions.<sup>247</sup> By then, the policy had expired.<sup>248</sup> The Supreme Court indicated that there was "no evidence of fraud or collusion" between the City and Lexington,<sup>249</sup> which implies that the likely reason for the City's failure to report the claim was mere oversight. Similarly, the political subdivision in *Murray* failed to report the claim to the proper insurer because its insurance agent neglected to notice that the political subdivision had entered a new policy with a different insurer.<sup>250</sup> A political subdivision's failure to comply with its policy's notice requirement out of neglect prejudices injured plaintiffs, who are left with "a right without a remedy"<sup>251</sup>—the policy provides no coverage because the insured did not satisfy the notice provision, and the political subdivision cannot be compelled to appropriate funds to pay the plaintiff a court-awarded judgment.

Analogizing the City to an insolvent insured is also consistent with the principles of interpretation from the Louisiana Civil Code. The majority's ultimate holding—that Ms. Gorman was not covered under the City's policy because the City did not notify Lexington of her claim—resulted from its rigid application of the Direct Action Statute to the case.<sup>252</sup> Unfortunately, this led to an absurd result: Ms. Gorman, who filed her claim before it prescribed and directed the City to tell her who its liability insurer was,<sup>253</sup> was unable to recover damages from Lexington due to the City's inaction.<sup>254</sup> The Louisiana Civil Code instructs the courts to not look to the legislature's intent in passing a law unless the law is ambiguous or enforcement of the law as written results in "absurd consequences."<sup>255</sup> Reasoning *a contrario*, the courts are to seek the legislative intent behind the law if the application of that law's plain language to a case would result in an absurd outcome.<sup>256</sup> The legislative intent behind the Direct Action Statute—to protect plaintiffs injured by insolvent insureds from having no

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247. Plaintiff's/Appellant's Original Brief, *supra* note 92, at 3.

248. *Gorman*, 148 So. 3d at 890.

249. *Id.* at 897.

250. *Murray*, 686 So. 2d at 47.

251. *Newman Marchive P'ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1270 (La. 2008).

252. *Gorman*, 148 So. 3d at 897–98.

253. *Id.* at 890.

254. *Id.*

255. LA. CIV. CODE art. 9 (2015).

256. Reasoning *a contrario* has been defined as follows: "When a text expressly states one thing it is deemed to deny the contrary . . . when one thing is included in a provision of law, it operates as an exclusion of things different from it." Jean Carbonnier, *Authorities in Civil Law: France*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 91, 114 (Joseph Dainow ed., 1974).

remedy—has been clear since its inception.<sup>257</sup> Thus, the Court should have adopted Justice Knoll’s reasoning and analogized the City to an insolvent insured to extend coverage to Ms. Gorman’s claims under the City’s policy by holding that notice requirements in claims-made-and-reported policies, when issued to political subdivisions, violate the public policy considerations inherent in the Direct Action Statute.<sup>258</sup>

This reasoning would not adversely affect the procedural nature of the Direct Action Statute but would still provide coverage for insured political subdivisions against plaintiffs like Ms. Gorman. Unfortunately, the Court simply ignored the overtly unjust result: the City’s negligence in refusing to notify Lexington of Ms. Gorman’s claim deprived her from recovering damages from Lexington for the City’s negligent actions that led to her son’s death.<sup>259</sup>

#### IV. LEGISLATIVE SOLUTION: AN AMENDMENT TO THE INSURANCE CODE

The public policy inherent in the Direct Action Statute indicates that liability policies are issued to safeguard the public, particularly from insolvent insureds.<sup>260</sup> A political subdivision acts as an insolvent insured if it chooses to not pay damages when a court renders judgment against it, as public property cannot be seized to satisfy a judgment under the Louisiana Constitution like private property can.<sup>261</sup> Further, most political subdivisions are required to obtain insurance.<sup>262</sup> Thus, public policy dictates that insured political subdivisions should not be treated as insured individuals or corporations.<sup>263</sup> *Gorman*’s broad holding ignores the

257. See Act No. 253, 1918 La. Acts 461; see also MCKENZIE & JOHNSON, *supra* note 25, § 2:2, at 34.

258. See *Gorman*, 148 So. 3d at 888, 901 (Knoll, J., dissenting).

259. See *id.* at 901.

260. See LA. REV. STAT. ANN. § 22:1269 (2009); see also *Gorman*, 148 So. 3d at 894.

261. LA. CONST. art XII, § 10(C); see also LA. REV. STAT. ANN. § 13:5109(B)(2) (2012); *Newman Marchive P’ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1271 (La. 2008) (“[Louisiana Revised Statutes section] 13:5109(B)(2) requires a specific appropriation of funds to pay a particular judgment before disbursement of those funds may be compelled . . . . Prior to such an appropriation, the funds remain ‘public funds,’ and any effort by the judiciary to direct their disbursement would constitute an unlawful seizure of public funds . . . .”).

262. LA. REV. STAT. ANN. § 33:3061 (2009) (“It is recognized that municipalities, parishes, and school boards of the state must insure themselves and their employees and officers from various monetary risks and exposures, and that it is necessary to accord municipalities, parishes, and school boards great latitude in contracting for such insurance . . . to allow such entities to secure such insurance at the lowest possible cost . . . .”).

263. See LA. REV. STAT. ANN. § 22:1269 (2009).

injustice that results when a political subdivision fails to comply with its claims-made-and-reported policy's notice requirement—the plaintiff's claims are not covered under the policy, and the plaintiff cannot execute any judgment a court may render against the political subdivision.

Although the Court should reverse itself in light of the correct application of the public policy considerations inherent in the law, a more clear and immediate remedy is for the legislature to amend the Insurance Code to prohibit the enforcement of notice provisions in claims-made-and-reported policies issued to political subdivisions against injured third persons. This amendment would uphold *Gorman*'s correct interpretations of the statute while instructing the courts in how to correctly apply the law to insured political subdivisions.<sup>264</sup> The proposed amendment would read as follows:

Any provision in a policy or contract of liability insurance issued or delivered to a political subdivision of this state that requires the insured to provide notice to the insurer for coverage to be triggered shall be deemed null and void.

This proposed amendment solves many potential problems with *Gorman*'s holding and reinforces both the legislative intent and the public policy considerations inherent in the Direct Action Statute. First, the amendment clarifies that notice requirements in claims-made-and-reported policies do not inherently violate public policy,<sup>265</sup> unless those policies are issued to political subdivisions.<sup>266</sup> Individuals and corporations have an incentive to report any claims made against them to their insurer to avoid

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264. The legislature can pass legislation to show courts how to correctly interpret a remedial law, but cannot legislatively overrule a court's interpretation of substantive legislation. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 819 (La. 1992). The Direct Action Statute is remedial legislation, so this amendment to the Insurance Code is constitutional. *See Gorman*, 148 So. 3d at 895–96.

265. *See Hood v. Cotter*, 5 So. 3d 819, 830 (La. 2008). Although some insured persons may be insolvent, and thus unable to pay a judgment rendered against them, such an insured still has an incentive to notify its insurer. The Direct Action Statute provides that when the insured is insolvent or bankrupt, the injured person can file a claim against the insurer without having to name the insured as a party. LA. REV. STAT. ANN. § 22:1269(B)(1)(a)–(b). Insolvent or bankrupt insureds have a strong incentive to avoid litigation by notifying the insurer of a pending claim.

266. Legislation preventing the state or state agencies from obtaining claims-made-and-reported policies is not necessary because the state tends to appropriate money to pay plaintiffs who win lawsuits against the state or state agencies. *See Hargrave, supra* note 227, at 656 (“[T]he state has an excellent record of appropriating funds to pay judgments rendered against it. The problems that have arisen in collecting money judgments involve payment of judgments by municipalities and parish governing authorities.”).

liability and to avail themselves of the coverage for which they paid.<sup>267</sup> A political subdivision, on the other hand, cannot be forced to pay damages and, as a result, has less of an incentive to report a claim to its insurer.<sup>268</sup> Because a political subdivision has less of an incentive to report a claim than an individual or corporation, this amendment prevents an insurer from relying on its policy's notice provision to deprive the injured plaintiff of a remedy.<sup>269</sup>

Second, this amendment furthers the public policy that liability policies are intended to protect injured third parties.<sup>270</sup> *Gorman* demonstrates that political subdivisions can refuse to notify their insurer of a pending claim while maintaining the option of not paying the injured claimant damages.<sup>271</sup> The only party adversely affected by this outcome is the injured third person, as neither the political subdivision nor its insurer is required to pay damages. Clearly, this result does not protect injured third parties. The proposed amendment remedies this troubling result by preventing insurers of political subdivisions from relying on the notice provision in a claims-made-and-reported policy to deny coverage to claims asserted by injured third parties. Further, this amendment relieves the political subdivision of having to do anything—other than pay its premiums<sup>272</sup>—for coverage to be triggered. The injured third person will trigger coverage when he is injured, if the policy is an occurrence policy, or when he files his claim against the insured during the policy period, if the policy is a claims-made policy, which is identical to a claims-made-and-reported policy except that notice to the insurer is not required.<sup>273</sup>

Finally, this amendment, which interprets remedial legislation that the *Gorman* Court misunderstood,<sup>274</sup> does no violence to the procedural nature

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267. See *Gorman*, 148 So. 3d at 897.

268. See LA. REV. STAT. ANN. § 13:5109(B)(2) (2012); see, e.g., *Gorman*, 148 So. 3d at 897; *Murray v. City of Bunkie*, 686 So. 2d 45, 47 (La. Ct. App. 3d 1996).

269. See, e.g., *Gorman*, 148 So. 3d at 897; *Murray*, 686 So. 2d at 47.

270. LA. REV. STAT. ANN. § 22:1269(D).

271. See *id.* § 13:5109(B)(2); see also *Gorman*, 148 So. 3d at 890, 897 n.19.

272. One side effect of this amendment is that insurance companies will likely charge political subdivisions higher premiums. In light of the public policy that liability policies are aimed at safeguarding members of the public, ensuring that injured third persons are covered outweighs the burden on political subdivisions to pay higher premiums. See LA. REV. STAT. ANN. § 22:1269(D).

273. See MCKENZIE & JOHNSON, *supra* note 25, § 6:25, at 593.

274. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 819 (La. 1992) (“The principle of separation of powers does not exclude the authority of the legislature to enact clearly interpretive laws, *clarifying* the meaning of previously enacted texts outside the context of litigation. Of course, it is a different matter when the legislature actually *amends* previously enacted legislation by laws designated as interpretive.” (quoting A.N. Yiannopoulos, *Validity of Patents Conveying Navigable Waterbottoms—Act 62 of 1912, Price, Carter, and All That*, 32 LA. L. REV. 1, 16 (1971))).

of the Direct Action Statute. The *Gorman* Court reasoned that the Direct Action Statute grants injured persons a procedural right.<sup>275</sup> The amendment, which does not contradict this holding, thus preserves over 60 years of jurisprudence that correctly interprets the Direct Action Statute as granting a procedural right of action to plaintiffs who have a cause of action against the insured tortfeasor.<sup>276</sup> Unfortunately, three members of the Court incorrectly interpreted the Direct Action Statute as bestowing substantive rights on third persons.<sup>277</sup> If just one justice in the majority had joined Justice Knoll's opinion, over 60 years of jurisprudence on the Direct Action Statute would have been overturned.<sup>278</sup> When the current makeup of the Court changes, a different majority in a similar case may rely on the dissent's reasoning and throw the interpretation of the Direct Action Statute into chaos, forcing the legislature to act. The proposed amendment solves this potential problem by providing future courts with guidance in interpreting the Direct Action Statute by preventing political subdivisions from obtaining claims-made-and-reported policies while preserving *Gorman*'s holding on the other issues of the case.

#### CONCLUSION

Although most of the *Gorman* opinion correctly interprets the Direct Action Statute, the majority does not provide sound reasoning for its views. The *Gorman* majority fails to acknowledge that the Court determined that the Direct Action Statute was remedial legislation over 60 years ago,<sup>279</sup> and that only a few isolated appellate courts<sup>280</sup> and federal courts<sup>281</sup> have departed from this view. But the majority correctly notes that it could not treat a claims-made-and-reported policy the same as an occurrence policy.<sup>282</sup> Unfortunately, the majority does not explain that a notice requirement in the former policy outlines the scope of the insurer's duty, whereas a notice requirement in the latter policy does not trigger

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275. See *Gorman*, 148 So. 3d at 896.

276. See, e.g., *Home Ins. Co. v. Highway Ins. Underwriters*, 62 So. 2d 828, 831 (La. 1952); *Cacamo v. Liberty Mut. Fire Ins. Co.*, 764 So. 2d 41, 43 (La. 2000)); see also *Johnson*, *supra* note 27, at 1460–61.

277. See *Gorman*, 148 So. 3d at 903 (Knoll, J., dissenting).

278. *Id.* at 900; see also *Home Ins.*, 62 So. 2d at 831.

279. See *Home Ins.*, 62 So. 2d at 831.

280. See *Williams v. Lemaire*, 655 So. 2d 765, 767–68 (La. Ct. App. 4th 1995) (citing *West v. Monroe Bakery, Inc.*, 46 So. 2d 122 (La. 1950)); see also *Murray v. City of Bunkie*, 686 So. 2d 45, 48–49 (La. Ct. App. 3d 1996) (citing *Williams*, 655 So. 2d at 767–68).

281. See, e.g., *Auster Oil & Gas, Inc., v. Stream*, 891 F.2d 570, 577–78 (5th Cir. 1990) (citing *West*, 46 So. 2d at 123); *In re Combustion, Inc.*, 960 F. Supp. 1056, 1061 (W.D. La. 1997) (quoting *West*, 46 So. 2d at 123).

282. *Gorman*, 148 So. 3d at 897.

coverage and thus disrupts the injured person's direct action against the insurer.<sup>283</sup>

The majority errs in holding that claims-made-and-reported policies issued to political subdivisions are not against public policy.<sup>284</sup> This finding leaves plaintiffs in Ms. Gorman's position "a right without a remedy"<sup>285</sup> while ignoring the risk that political subdivisions will not report claims to their insurers due to oversight.<sup>286</sup> Due to this potentially inequitable outcome, the legislature must act to protect the public by amending the Insurance Code to prohibit political subdivisions from obtaining claims-made-and-reported policies. This amendment would further the public policy considerations in the Direct Action Statute by ensuring that injured plaintiffs in Ms. Gorman's situation have not only a right, but also a remedy.

*Grant Tolbird\**

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283. *FDIC v. Caplan*, 838 F. Supp. 1125, 1131 (W.D. La. 1993).

284. *Gorman*, 148 So. 3d at 897–98.

285. *Newman Marchive P'ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1270 (La. 2008).

286. *Murray v. City of Bunkie*, 686 So. 2d 45, 47 (La. Ct. App. 3d 1996).

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