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neither waiver nor estoppel. Likewise, neither waiver nor estoppel is available to an insured in bad faith.

Robert A. Hawthorne, Jr.

Distribution of a Limited Insurance Fund to Multiple Claimants

The problem of how to distribute a fund, insufficient to satisfy all claims, is encountered in various areas of the law, such as in bankruptcy and in the administration of insolvent successions. In these instances, the courts with the aid of legislation have developed rather well-settled methods of distribution. However, procedures for distributing limited insurance funds among multiple claimants are not so clearcut, and except in rare instances where there is legislation on the matter¹ the insurer distributes the fund subject to certain obligations to the insured. The purpose of this Comment is to examine the problems involved where there are multiple claims to limited insurance funds, to review current methods of distribution, and to discuss suggested alternative procedures. This discussion contemplates an insurance fund to be distributed according to the terms of the Standard Automobile Liability Policy,² although much of the discussion is pertinent to other types of casualty insurance policies.

The Settlement Process

Single claims to the insurance fund. Most of the leading cases which consider the legal relations between insurer, insured,

1. A New York statute makes provision for allocating proceeds of insurance policies held by certain carriers of passengers for hire. N.Y. VEHICLE AND TRAFFIC LAW § 17(1). This provision states that the policy must require payment of specified limits "to be apportioned ratably among the judgment creditors according to the amount of their respective judgments." It has been held that the proper form of remedy under this statute, when several persons have been killed or injured as the result of a single accident and the wrongdoer is insolvent, is an inequitable proceeding by a judgment creditor suing in his own behalf and in behalf of others similarly situated, to administer the proceeds of the policy as a fund created by statute for ratable protection. *Bleimeyer v. Public Serv. Mut. Cas. Ins. Corp.*, 250 N.Y. 264, 165 N.E. 286 (1929).

2. STANDARD AUTOMOBILE LIABILITY POLICY, NATIONAL BUREAU OF CASUALTY UNDERWRITERS AND MUTUAL INSURANCE RATING BUREAU, BASIC AUTOMOBILE AND PHYSICAL DAMAGE FORM (1955). See Faude, *The 1955 Revisions of the Standard Automobile Policy: Coverage: Insuring Agreements and Exclusions*, in *Section of Insurance Law, 1955 AMERICAN BAR ASSOCIATION PROCEEDINGS* 48 (1956).

and claimant in the settlement situation, have arisen out of single claims to the insurance fund. However, there is no indication from the jurisprudence that these legal relations are altered by the presence of more than one claimant, although as borne out in subsequent discussion, the obligations of the insurer become more complex where multiple claims are involved.

As a general rule, claims against tortfeasors holding liability insurance are settled without litigation.³ To this end, most policies contain a clause allowing the insurer to negotiate settlements as he deems expedient.⁴ Although typical policy language would indicate that the insurer has a *privilege* to settle as it sees fit, the courts have implied a *duty*, requiring the carrier to make or accept reasonable settlement offers within the policy limitations.⁵ The duty to settle is recognized in most jurisdictions, but there is disagreement as to what constitutes a breach of that duty. The majority view is that the duty to settle is breached when the insurer intentionally disregards the interests of the insured, such as when he refuses to settle knowing that there is a less than equal chance that a verdict would make the insured liable in excess of the policy limits.⁶ In a minority of jurisdictions, the duty to settle is breached merely when the insurer is negligent in handling a claim,⁷ such as when he fails

3. "It is a matter of common knowledge that the great majority of claims arising under these policies are settled. The percentage of litigated cases is small. Settlement is the rule and contest the exception." *Douglas v. United States Fidelity and Guaranty Co.*, 81 N.H. 371, 378, 127 Atl. 708, 712 (1924) (dictum).

4. See APPLEMAN, *AUTOMOBILE LIABILITY INSURANCE* 84 (1938).

5. *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 87 N.E.2d 347 (1949); *G. A. Stowers Furniture Co. v. American Idemnity Co.*, 15 S.W.2d 544 (Tex. Com. App. 1929).

6. *Attleboro Manufacturing Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 Fed. 573 (1st Cir. 1917); *National Mutual Cas. Co. v. Britt*, 203 Okla. 175, 200 P.2d 407 (1948). See also *Roberts v. American Fire & Cas. Co.*, 89 F. Supp. 827 (M.D. Tenn. 1960), *aff'd*, 186 F.2d 921 (6th Cir. 1951) (disregarding or limiting settlement offers because of claimant's race, creed, or color); *Ballard v. Citizens Casualty Co.*, 196 F.2d 96 (7th Cir. 1952) (demonstrating unwillingness to effect a settlement and showing lack of diligence in investigating a claim); *Royal Transit v. Central Surety & Insurance Corp.*, 168 F.2d 345 (7th Cir. 1948), *cert. denied*, 335 U.S. 845 (1948) (disregarding suggestions of a field adjuster and local trial counsel and taking arbitrary, capricious, reckless, and indifferent action towards the insured's interest); *Southern Fire and Casualty Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952) (advising the insured to transfer his property to avoid liens).

7. *Douglas v. United States Fidelity and Guaranty Co.*, 81 N.H. 371, 373, 127 Atl. 708, 710 (1924): "Exclusive authority to act does not necessarily mean the right to act arbitrarily. . . . So far as the obligation to use care is concerned . . . that obligation is ordinarily imposed by law upon all who undertake a service. . . . The result . . . of [an obligation to defend] . . . is not to leave the promisor free to act as though he had made no promise. The insurer has a duty to the insured at least equal to that which he owes himself. To prefer himself to the insured in refusing a settlement in a negligent manner is a breach of his duty as an agent

to investigate a suit pending against his insured or when he fails to investigate a claimant's injuries.⁸ As a remedy, the insurer is ordinarily required to pay the full amount of any judgment rendered against the policyholder as a result of the company's breach of the duty to settle, even if that amount exceeds the policy maximum.⁹

With full knowledge of the consequences of breaching the duty to settle, the insurer is usually eager to reach a settlement agreement with each party asserting a valid and reasonable claim within the policy limits. However, refusal to settle because of justifiable doubt as to the validity or reasonableness of a given claim does not constitute breach of the duty to settle. Where such doubt exists (and in the absence of a direct action statute) the insurer may refuse to pay until the claimant has obtained judgment against the insured. This privilege exists under the "no action" clause of the Standard Policy which provides, in part:

"No action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

However, the "no action" clause is forbidden in policies issued in Louisiana and is statutorily abrogated in insurance contracts issued or delivered outside the state, provided that the injury in question takes place and the case is tried in Louisiana.¹⁰ Under the Louisiana Direct Action Statute,¹¹ the injured party may

for settlement." See *G. A. Stowers v. American Idemnity Co.*, 15 S.W.2d 544 (Tex. Com. App. 1929); *APPLEMAN, AUTOMOBILE LIABILITY INSURANCE* 89 (1938). Appleman has stoutly contested the ability of a jury to decide whether or not an insurer has handled a claim in a negligent manner. Appleman, *Duty of Liability Insurer to Compromise Litigation*, 26 Ky. L.J.100, 109 (1938). However, the courts seem to allow some latitude for the uncertainties involved. *American Casualty Co. v. Howard*, 187 F.2d 322, 328 (4th Cir. 1951): "Lawyers representing liability insurers of motor users are not required to be prophets who can accurately foretell the results of litigation in personal injury cases arising out of automobile accidents nor does a mere mistake of judgment by these lawyers impose liability on the insurers beyond the policy limits of coverage."

8. *Roberts v. American Fire & Cas. Co.*, 89 F. Supp. 827 (M.D. Tenn. 1950), *aff'd per curiam*, 186 F.2d 921 (6th Cir. 1951).

9. *Ibid.*

10. A recent decision of the United States Supreme Court upheld the constitutionality of that portion of the statute which legislatively abrogates "no action" clauses in policies issued or delivered out of state, provided the accident occurs in Louisiana. *Watson v. Employer's Liability Assur. Corp.*, 348 U.S. 66 (1955), *rehearing denied*, 348 U.S. 921 (1955).

11. LA. R.S. 22:655 (1950), as amended and re-enacted, La. Acts 1958, No.

proceed directly against the tortfeasor's insurer without first obtaining judgment against the insured.¹²

Settlement of Multiple Claims

If only two claims are involved, the interests of the claimants and the insured do not ordinarily conflict since the maximum per-person coverage is usually one-half the insurer's maximum liability — thus the most either claimant could recover under a \$5,000/10,000 policy would be \$5,000. However, where there are three or more claimants and their aggregate demands exceed the policy maximum, a claimant's interest may conflict both with the interests of the insured and with those of his co-claimants. Suppose that *A*, *B*, and *C* are injured in a traffic mishap due to the insured's negligence. The insured holds a Standard Automobile Liability Policy under which the insurer can be required to pay up to \$5,000 to each person injured but its total liability per accident cannot exceed \$10,000. *A* offers to settle for \$4,000; *B* and *C* offer to settle for \$5,000 each. Upon investigation, the company determines that if these claims were pursued to judgments, it is likely that *A* would recover \$7,500; *B*, \$12,500; and *C*, \$15,000. The convenient solution would be to negotiate a comprehensive settlement with all three, bringing their combined demands within the policy maximum. However, if this cannot be accomplished, the insurer must refuse to settle with at least one of them. In the single claims cases, the courts apparently recognize that part of the insurer's duty to settle is to minimize the insured's liability in excess of the policy,¹³ and it would seem that the same would hold true in the settlement of multiple claims. Thus although all three claims are reasonable, it is arguable that the insurer would be required to settle with *B* and *C*, whose judgments would likely be the largest, forcing *A*, who offered to settle for less than either, to obtain judgment against the policyholder after the proceeds have been exhausted. Since this position may be most undesirable from *A*'s point of view,

125. For an excellent discussion of the Louisiana Direct Action Statute, see Comment, 22 LOUISIANA LAW REVIEW 243 (1961).

12. In a direct action, the plaintiff must prove that the insured would have been liable, if sued, and that if liable the insurer would have been obligated to pay. In its defense, the insurer may urge any defense the insured could have used had the action been brought against the latter, except those which are considered "personal" to the insured. See Comment, 22 LOUISIANA LAW REVIEW 243 (1961).

13. *Ballard v. Citizens Cas. Co.*, 196 F.2d 96 (7th Cir. 1952) (applying Illinois law); *Dumas v. Hartford Acc. & Indemnity Co.*, 94 N.H. 484, 56 A.2d 57 (1947); *G. A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Com. App. 1929).

especially if the insured is insolvent, he may search about for ways to protect what he considers to be his rightful share of the policy proceeds.

Protecting a Claimant's Interest

In earlier cases, the view prevailed that the claimant had no enforceable interest in the insurance fund.¹⁴ The liability policy was construed strictly as a contract of indemnification between the insurer and insured, and until the policyholder had actually paid a judgment against him, no liability would arise under the contract.¹⁵ Thus, where the insured was insolvent or otherwise unable to pay, a claimant with judgment against the insured was disabled from collecting the policy proceeds. This result is now considered contrary to public policy and most states require that liability policies carry a clause to the effect that insolvency or bankruptcy of the insured shall not bar an action directly against the carrier.¹⁶ Except in jurisdictions having direct action statutes, this right of action is restricted by the "no action" clause to claimants who either have obtained judgment against the insured or who have entered into a binding settlement agreement.

In the relatively few cases in point, the courts have preserved the insurer's freedom to distribute the fund as he deems expedient so long as the distribution is consonant with the best interests of the insured.¹⁷ In instances where the carrier refuses to settle until judgment is secured against the insured, the courts have held that the proceeds are to be distributed on a "first come, first served" basis, to the diligent claimants with the earliest judgments.¹⁸ This system of distribution is perhaps satisfactory both to the company and to the policyholder, but it may have objectionable features from the claimant's viewpoint. Though a claimant asserts a valid and reasonable claim, a carrier

14. *Fidelity & Cas. Co. v. Martin*, 163 Ky. 12, 173 S.W. 307 (1915); *RICHARDS, INSURANCE* 901-02, § 503 (4th ed. 1932); *VANCE, INSURANCE* 999-1000, § 196 (3d ed. 1951).

15. 8 *APPLEMAN, INSURANCE LAW AND PRACTICE* § 485 (1941).

16. *LA. R.S.* 22:655 (1950), as amended and re-enacted, *La. Acts* 1958, No. 125. See Comment, 9 *ORE. L. REV.* 57 (1930); Notes, 46 *HARV. L. REV.* 1325 (1933), 15 *IOWA L. REV.* 73 (1930).

17. *Bartlett v. Travelers Ins. Co.*, 117 Conn. 147, 167 Atl. 180 (1933), 43 *YALE L.J.* 136 (1934); *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957); *Bruyette v. Sandini*, 291 Mass. 373, 197 N.E. 29 (1935), 49 *HARV. L. REV.* 658 (1936); *Turk v. Goldberg*, 91 N.J. Eq. 283, 109 Atl. 732 (Ch. 1920).

18. *Burchfield v. Bevans*, 242 F.2d 239 (10th Cir. 1957) (applying Oklahoma law); *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957); *Bruyette v. Sandini*, 291 Mass. 373, 197 N.E. 29 (1935), 49 *HARV. L. REV.* 658 (1936).

may refuse to settle with him in order to use the proceeds in settling with other claimants who would likely obtain higher judgments against the insured. Or, the proceeds may be exhausted in payment to claimants who have rushed their claims to judgment. In order to protect their interests in the insurance proceeds, claimants have sought to assert rights in the fund in addition to those granted under the insolvency and "no action" clauses.

It has been argued, generally, that each claimant should have a right in the insurance fund only in the proportion that his claim bears to the aggregate of all claims. In support of this contention, it has been urged that multiple claimants are in the nature of multiple lien creditors and that, according to the principles of suretyship, creditors of the same rank should share ratably in the limited fund.¹⁹ This argument has been cast in various procedural forms. Some claimants have sought to enjoin settlements between the insurer and co-claimants which would exhaust the insurance proceeds.²⁰ Others have pursued their claims to judgment and then sought to overturn prior settlements on the theory that a judgment creditor of the insured has a higher priority to the fund than a claimant without judgment.²¹ To date, all such actions have failed and no court has permitted a claimant, with or without judgment against the insured, to prevent or overturn a settlement on any theory militating against the insurer's freedom to settle under the terms of the policy. Although again unsuccessfully, some claimants have argued that the insurer has a duty to each claimant to

19. *Bruyette v. Sandini*, 291 Mass. 373, 197 N.E. 29 (1935), 49 HARV. L. REV. 658 (1936). *Contra*, *Burchfield v. Bevans*, 242 F.2d 239 (10th Cir. 1957); *Gallo v. Foley*, 296 Mass. 306, 5 N.E.2d 425 (1936).

20. *Turk v. Goldberg*, 91 N.J. Eq. 283, 285, 109 Atl. 732, 733 (Ch. 1920): "To hold that the policy is for the benefit of all injured persons pro-rata would make it necessary for the insurance company to ascertain, before it could safely pay any one, how many persons might have claims thereon. . . and what the total amount of the judgments which might be presented would be." See also *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957); *Pisciotta v. Preston*, 170 Misc. 376, 10 N.Y.S.2d 44 (Sup. Ct. 1938).

21. *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957); *O'Donnell v. New Amsterdam Cas. Co.*, 50 R.I. 275, 146 Atl. 770 (1929). In one such suit a policyholder's survivor claimed a superior right to the proceeds because she was a *beneficiary* of the policy with rights to the proceeds fixed at the moment of death which could not be impinged upon by subsequent settlements with injured parties. The court was not persuaded, holding that *all* claimants' rights are fixed at the moment the insured becomes liable. *Alford v. Textile Insurance Co.*, 248 N.C. 224, 103 S.E.2d 8 (1958). In another case, an injured party was unsuccessful in overturning a prior settlement which the carrier had made with the *insured*, indemnifying the latter for his property damages as a result of the accident and thereby exhausting the policy proceeds. *Connecticut Wholesale Drug Co. v. New England Fire Ins. Co.*, 186 Atl. 551 (Conn. Ct. Err. 1936).

refrain from settling disproportionately with other claimants and that disproportionate settlement should give rise to an action, by the prejudiced claimant, against the company for damages.²² Possibly a claimant could bring an action on behalf of himself and all other claimants similarly situated; but it is perhaps unlikely that he would be so generous since, under the present jurisprudence, if he obtains the first judgment he is entitled to full satisfaction and can be required to share with no one.

*Intervention in Actions Instituted by Other Claimants
Against the Insurer*

In actions against an insurer, brought by judgment creditors of the insured, or by claimants without judgments under a direct action statute, the court is called upon to decide to whom the fund is to be distributed. Once that judgment becomes definitive, the rights of the parties to the insurance fund become fixed. Suppose that one of several claimants discovers that his co-claimants have already instituted action against the insurer and he desires to intervene lest they obtain first judgment against the insurer and the proceeds be exhausted before he can obtain a separate judgment. Though there are no reported cases in point, it is suggested that both the Federal and Louisiana courts would probably approve his application to intervene.

Under the Federal Rules,²³ a party has a right to intervene when he is so situated as to be adversely affected by a distribution of property subject to the disposition of the court. In order successfully to assert "intervention of right," he must have an interest in the property such as a claim of ownership or a legal or equitable lien.²⁴ Whether or not such a right exists is, of course, a matter of substantive law in the state of forum. In most states it has not been decided whether the judgment creditor of the insured has a property right or lien in the insurance fund; but where the issue has been considered, the decisions are mixed.²⁵ Though the courts of Louisiana have not ruled on

22. *Duncan v. Lumbermen's Mut. Cas. Co.*, 23 A.2d 325, 326 (N.H. 1941): "[T]he duty of an insurance company to protect its insured against liability cannot consistently be extended to include protection to the one who is seeking to hold the insured liable." See also *Bartlett v. Travelers Ins. Co.*, 117 Conn. 147, 167 Atl. 180 (1933); *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957).

23. FED. R. CIV. P. 24(a)(3).

24. 4 MOORE, FEDERAL PRACTICE ¶ 24.09[2] and cases cited therein (1960).

25. *Bruyette v. Sandini*, 291 Mass. 373, 197 N.E. 29 (1935) (the court viewed the claimant without judgment against the insured as one in the nature

the point, it is suggested that since the legislature has declared that "all liability policies . . . are executed for the benefit of all injured persons,"²⁶ a court might be persuaded to recognize a property right in the fund on the part of an injured claimant. It is perhaps unlikely that Louisiana courts would recognize a lien since, though a debtor's property is the common pledge of his creditors,²⁷ privilege can be claimed only for those debts to which it is expressly granted by positive legislation²⁸ — none has been granted in favor of an insurance claimant.

Even if no property right is recognized, the federal courts might permit a claimant to intervene under Rule 24(b) (2) :

"Where an applicant's claim . . . and the main action have a question of law or fact in common In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties."²⁹

It is suggested that a court faced with an application for permissive intervention could not avoid re-evaluating the "first come, first served" rule. If it permits the intervention, then the original plaintiff's right to initial satisfaction from the insurance fund might be impinged upon if he is required to share ratably with the intervenor. On the other hand, if the court refuses intervention, it would necessarily perpetuate the first come, first served principle.

of a lienor but without any property rights in the fund). *Contra*, *Burchfield v. Bevans*, 242 F.2d 239 (10th Cir. 1957) (applying Oklahoma law); *Century Indemnity Co. v. Kofsky*, 115 Conn. 193, 161 Atl. 101 (1932); *Gallo v. Foley*, 296 Mass. 306, 5 N.E.2d 425 (1936).

In the *Burchfield* case, ten persons pressed claims against a \$5,000/\$10,000 liability policy. Seven had secured judgment against the policyholder. Before any had obtained judgment against his insurer, the insurerimpleaded all claimants in an interpleader proceeding. The court denied the claims of parties without judgments since Oklahoma law recognized no property right or lien status on the part of claimants without judgments against the insured. The court distributed the fund pro rata among the seven judgment creditors, rejecting the argument that the creditor who first obtained judgment against the *insured* should have a preference in dictum (*id.* at 242) the court stated that "if the judgment creditor last in point of time of entry of his judgment had filed the first suit against the insurance company and obtained a prior judgment against it, he would no doubt be entitled to collect his judgment without regard to the other common creditors who had not instituted suit against the insurance company." This would seem to indicate that Oklahoma law would not recognize a property right in the fund *even on the part of a judgment creditor of the insured who, by virtue of the "no action clause, has an enforceable right in the proceeds!*

26. LA. R.S. 22:655 (1950), as amended and re-enacted, La. Acts 1953, No. 125.

27. LA. CIVIL CODE art. 3183 (1870).

28. *Id.* art. 3185.

29. FED. R. CIV. P. 24(b) (2).

If a claimant sought to intervene in a prior instituted direct action in a Louisiana court, his right to intervene would be governed by Article 1091 of the Code of Civil Procedure, wherein it is provided that:

“. . . a third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto by . . . joining with plaintiff in demanding the same or similar relief against the defendant.”³⁰

The redactors of the Code of Civil Procedure considered the concepts of “intervention of right” and “permissive intervention” of Federal Rule 24 to be unsuitable for implementing Louisiana substantive law and the test of “question of law or fact in common” of the permissive intervention too narrow and inflexible.³¹ However, no attempt was made to define what constitutes an “interest in enforcing a right related to or connected with the object of the pending action”; moreover, there has been no adequate definition in the jurisprudence.³² It is to be noted, however, that under a similar provision of the now superseded Code of Practice,³³ it was held that a privileged creditor had sufficient “interest” to intervene in an action by another privileged creditor in an action against a common debtor,³⁴ but that an ordinary creditor lacked sufficient interest to intervene in an action against the debtor by another ordinary creditor.³⁵ It is suggested, however, that the breadth of Article 1091, coupled with the statutory recognition that the principal purpose of liability insurance is to provide a fund for the injured parties, might well lead courts to permit intervention by a co-claimant in a direct action against an insurer. To favor the most diligent claimant by refusing the intervention would seem contrary to articulate legislative policy.

Interpleader Proceedings Initiated by the Insurer

It is perhaps not an uncommon practice in Louisiana for an insurer, unable to secure a comprehensive settlement with all

30. LA. CODE OF CIVIL PROCEDURE art. 1091 (1960).

31. *Id.* comment (b).

32. *Ibid.*

33. LA. CODE OF PRACTICE art. 390 (1870).

34. *H. B. Clafin Co. v. Feibleman*, 44 La. Ann. 518, 10 So. 862 (1892).

35. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937 (1893).

parties, to implead multiple claimants in a concursus (interpleader) proceeding when it is likely that their combined judgments would exceed the policy maximum.³⁶ In all reported proceedings of this type, the courts have distributed the proceeds pro rata among the claimants. Though insurers have used the interpleader proceeding to distribute policy proceeds of the policy among judgment creditors of the insured,³⁷ it is only recently that a federal court has approved its use where the tort claims were yet unliquidated.³⁸

Considerations of Public Policy

Thus far, the courts have refused to implement pro rata distribution at the instance of a claimant. It is suggested, however, that this jurisprudence may be a bit stale in the light of modern thinking regarding the purposes of liability insurance. It is noteworthy that the cases, which forthrightly support the insurer's privilege to distribute the proceeds disproportionately, are few in number and most are at least thirty years old.³⁹ In the meanwhile, one finds numerous authorities becoming committed to the proposition that the primary purpose of liability insurance is to provide a fund for the injured parties and to spread the risks of liability among the motoring public — that the social purpose of liability insurance is no longer to protect individual policyholders from financial disaster.⁴⁰ If the courts also are committed to this notion, then perhaps the path of logic would lead to recognition of a claimant's right to protect a pro rata share of the policy proceeds before they are dissipated among co-claimants. Informal conversations with insurance

36. *Poirrier v. Audubon Insurance Co.*, 120 So.2d 90 (La. App. 1st Cir. 1960); *Futrell v. Pacific Indemnity Co.*, 79 So.2d 903 (La. App. Orl. Cir. 1955): In the former case, ten persons asserted claims against a \$5,000/\$10,000 policy. Total judgments were slightly less than \$100,000.

37. *E.g.*, *Burchfield v. Bevans*, 242 F.2d 239 (10th Cir. 1957).

38. *Pan American Fire & Cas. Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960). The case is extraordinarily well reasoned and contains an exhaustive discussion of authorities. The court held that the jury would be allowed to decide the issues of liability and damages and reserved to itself the task of apportioning the policy proceeds. The text writers have long insisted that such is contemplated under the Federal Rules, Chafee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 419-21 (1940); Chafee, *The Federal Interpleader Act of 1936*: II, 45 YALE L.J. 1161-67 (1936).

39. See note 17 *supra*.

40. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); Note, *Legislative Efforts To Make Insurance Guarantee the Payment of Tort Claims*, 46 HARV. L. REV. 1325 (1933). The shift from indemnity thinking to a concept of liability perhaps began with protection of the injured parties' rights to the proceeds against insolvency or bankruptcy of the insured. See note 16 *supra* and accompanying text.

counsel indicate that the insurance industry is fearful of just such an eventuality and that most companies go to some lengths to distribute the fund as nearly as possible on a pro rata basis. One insurance attorney has suggested that the only reason a few recent decisions still support the insurer's freedom to distribute the proceeds is that the companies make a strenuous effort not to abuse this privilege.⁴¹

The Tentative Allocation Order Plan

Professor Robert Keeton has suggested a method of allowing claimants, insurers, and policyholders to enforce pro rata distribution.⁴² He proposes that in multiple claims situations, the parties be entitled to an interlocutory order of court tentatively allocating the policy proceeds to each claimant based upon an "estimate of the probable results of trial" and authorizing the company to settle individually with each claimant up to the amount tentatively allocated as his pro rata share. The allocation would be on a percentage basis, rather than a cash figure, so as to conceal a judicial inkling as to what the claim would be worth if reduced to judgment. Professor Keeton urges that allowing all parties to obtain an allocation order would work not only to the claimant's advantage in preserving his pro rata share, but also to the advantage of the insurer in defeating exorbitant demands. Further, it would reduce competition among claimants leading to inflated demands and would free the company from the risk of liability to the insured for disproportionate commitment of the proceeds. The author admits at least two principal objections to his plan — it is inconsistent with the "no action" clause in allowing the claimant to enforce rights in the policy before obtaining judgment, and there is a likelihood that the plan could increase litigation. He suggests, however, that the availability of the allocation order should place the parties at interest in the position of trying to reach a comprehensive settlement before going to court. In the face of these objections, Professor Keeton suggests that this plan should ultimately serve to strengthen the settlement process by giving each party to the settlement a weapon of judicial allocation unless all are fair and reasonable in their demands. If, however, such a system would

41. Fisher, *Multiple Claims Under the Automobile Liability Policy*, 19 *INS. COUNSEL J.* 419 (1952).

42. Keeton, *Preferential Settlement of Liability-Insurance Claims*, 70 *HARV. L. REV.* 27, 46-50 (1956).

greatly increase litigation, then the remedy would not be worth the treatment.

Conclusions

In the reported cases, the courts have protected the insurer's freedom to distribute the policy proceeds among multiple claimants and have refused to permit claimants to protect a pro rata share. Such freedom, however, could be easily abused. The insurer could offer a claimant the choice of accepting what the company has to offer, or risk exhaustion of the proceeds in settlements with other claimants who will accept the company's terms. If such a practice were widespread, or if disproportionate distribution were common, perhaps courts or legislatures should provide claimants with enforceable rights in the proceeds. However, it is submitted that there is insufficient evidence to indicate that these practices are commonplace. There are very few reported cases in which a claimant contests a disproportionate settlement. Further, there are indications that carriers go to some lengths to distribute the proceeds pro rata, lest claimants be permitted to preserve their shares in court. Moreover, there is a lack of agitation from text writers⁴³ or plaintiffs' attorneys to change the present system of free distribution by the insurer. If the freedom which the companies now enjoy is not being abused, then allowing claimants enforceable interests in the proceeds would entitle them to nothing more than they now receive. Allowing enforceable proration under any plan thus far suggested would serve needlessly to increase litigation in courts whose dockets are already overcrowded.

Gerald LeVan

The Role of Subrogation by Operation of Law and Related Problems in the Insurance Field

Introduction

Subrogation accompanies payment. Payment discharges the obligation, but the fiction of subrogation operates to continue the existence of the rights, privileges, and powers of the former

43. Professor Keeton does not suggest commonplace abuse by the insurance companies. He only suggests that the company's duty to the insured and its obligations to the claimant be *consistent*. *Id.* at 28.