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Insurance - Direct Action - Breach of Notice Requirements

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ly relevant that its relevance[16] is outweighed by the danger that the testimony would be misused by the jury.[17] This determination is supported by the observation that men commonly believe silence after arrest is good strategy. It is urged that courts must require at least a high degree of relevance in such cases because of the danger that a jury is likely to give primary weight to the accusatory statements rather than to the resulting ambiguous silence of the accused.

In addition, it seems unfair as a matter of policy to allow the state to place an accused in a position in which he must speak or suffer an adverse inference.[18] To allow such conduct seems contrary to the "spirit if not the letter"[19] of the constitutional privilege against self-incrimination. The court in the instant case, in declaring that the defendant had a "right to remain silent,"[20] seems to accede to this principle. Superadding this constitutional consideration to the weakness of the inference of guilt to be drawn from the defendant's ambiguous silence, the instant decision settles the water muddied by *State v. Ricks* by a compelling reaffirmation of the principle that silence to statements ordinarily calling for a response is not admissible as an admission when the defendant is under arrest.[21]

Herman Stewart, Jr.

INSURANCE — DIRECT ACTION — BREACH OF NOTICE REQUIREMENTS AS DEFENSE

Plaintiff, injured in a collision with an automobile insured by defendant, recovered a default judgment against its operator who was an insured under the omnibus clause of defendant's policy.[1] Neither the owner — named insured — nor the defend-

16. For an analytical discussion of relevance see James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

17. See MCCORMICK § 246, at 529.

18. See State v. Dills, 208 N.C. 313, 315, 180 S.E. 571, 572 (1935): "We think in remaining silent the appellants acted within their legal rights, since no man should be forced to incriminate himself or to make false statements to avoid so doing."

19. Helton v. United States, 221 F.2d 338, 341 (5th Cir. 1955).

20. 243 La. 793, 799, 147 So. 2d 392, 394 (1962).

21. In finding the trial court committed reversible error the court stated that defendant's constitutional right to confrontation of witnesses was violated. See LA. CONST. art. I, § 9. This problem is outside of the scope of this Note. For a general discussion of the right to confrontation see 5 WIGMORE § 1397.

1. "Insured" was defined in the policy as the named insured or anyone using

ant were made parties to that suit. The insurer's first notice of the action was plaintiff's attempt to enforce the default judgment against it under the Louisiana Direct Action Statute.[2] Defendant insurer refused payment, contending that lack of notification of suit — expressly required by the policy — relieved it of liability. Reversing the district court, the Second Circuit Court of Appeal sustained defendant's contention. *Held*, compliance with this notification requirement of the policy is a condition precedent to a direct action against the insurer to enforce a prior judgment against an insured. *Hallman v. Marquette Cas. Co.*, 149 So. 2d 131 (La. App. 2d Cir. 1963).

While Louisiana's Direct Action Statute[3] allows an injured party[4] to proceed directly against a tortfeasor's[5] insurer, the rather liberal rights[6] conferred are not without limitations;[7] such action must be brought "within the terms and limits of the policy."[8] The requirement of most automobile liability policies that notice of accidents and resulting suits be given immediately to the insurer have been held reasonable.[9] Louisiana courts take the position that the terms "immediately" and "promptly" mean within a reasonable time.[10] In most jurisdictions the insured's

the automobile with his permission. The driver borrowed the automobile with the named insured's permission and was therefore an "insured" under the policy. Hallman v. Marquette Cas. Co., 149 So. 2d 131, 132 (La. App. 2d Cir. 1963).

2. LA. R.S. 22:655 (1950).

3. *Ibid.*

4. *Ibid.*: ". . . or his or her heirs or survivors . . . ."

5. It must be kept in mind that the liberality of R.S. 22:655 can in no manner dispense with the necessity of fault on the part of the insured. Continental Casualty Co. v. Quebedeaux, 234 F.2d 241 (5th Cir. 1956); West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950); Davies v. Consolidated Underwriters, 199 La. 459, 6 So. 2d 351 (1942); Musmeci v. American Automobile Ins. Co., 146 So. 2d 496 (La. App. 4th Cir. 1962).

6. Only Wisconsin has gone as far as Louisiana in allowing a suit against the insurer before the tortfeasor is found liable, and the Wisconsin Statute (WIS. STAT. ANN. §§ 85.93, 260.11 (1951) has been criticized as not providing any true liberalities. Comment, 22 LA. L. REV. 243, 245 (1962).

7. By the provisions of R.S. 22:655 the injured party "shall have a right of direct action . . . within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured or the insurer is domiciled . . . provided the accident or injury occurred in the state of Louisiana."

8. *Ibid.*

9. The court in the *Hallman* case, 149 So. 2d at 134, quoted 29A AM. JUR. *Insurance* § 1482 (1960): "While in some cases involving earlier types of policies the question arose whether the insured is under an obligation, under the 'cooperation clause' of a liability policy, to forward suit papers to the insurer, liability policies now contain an express provision requiring the insured [to forward notice] . . . . It is well settled that such a provision is a reasonable, valid, and enforceable one."

10. Jackson v. State Farm Mut. Automobile Ins. Co., 211 La. 9, 23 So. 2d 765 (1945); Jones v. Shehee-Ford Wagon & Harness Co., 183 La. 293, 163 So. 129 (1935); Howard v. Rowan, 154 So. 382 (La. App. 2d Cir. 1934).

failure to give notice of either accident or suit vitiates the injured party's direct action against the insurer even though the injured party is unaware of the provisions of the insurance contract.[11] The direct action depends on the insured's strict compliance with the policy provisions.[12] However, the Louisiana Supreme Court in *West v. Monroe Bakery*,[13] faced with a failure to give notice of an accident, settled a conflict in the jurisprudence[14] by announcing that an injured party's rights were "fixed"[15] at the time of the accident and could not be affected by a subsequent breach of the notice provisions.[16] The court, determining that the direct action statute "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,"[17] held that the limitation "within the terms and limits of the policy" did not include the requirement of notice but referred only to the maximum amount recoverable under the policy and any warranties or conditions

11. See Annots., 18 A.L.R.2d 443 (1951), 106 A.L.R. 516, 532-37 (1937), 76 A.L.R. 201 (1932).

12. 45 C.J.S. *Insurance* § 1047 (1946): "The rights of the injured person can rise no higher than those of the insured, [and in an action by the injured party] the company . . . can set up a defense that notice of accident or claim was not given as required."

13. 217 La. 189, 46 So. 2d 122 (1950).

14. See, *e.g.*, Jones v. American Mut. Liab. Ins. Co., 185 So. 509 (La. App. Orl. Cir. 1939); U-Drive-It Car Co. v. Friedman, 153 So. 500 (La. App. Orl. Cir. 1934); Bougon v. Volunteers of America, 151 So. 797 (La. App. Orl. Cir. 1934); Edwards v. Fidelity & Cas. Co., 123 So. 162 (La. App. Orl. Cir. 1929).

The ruling that an injured party is not affected by breaches of the policy after his injury was first announced in the *Edwards* case. A contrary rule was developed some five years later in Howard v. Rowan, 154 So. 382 (La. App. 2d Cir. 1934) and as a result two lines of authority developed with the *West* case finally settling the issue by affirmatively following the *Edwards* case. The *Howard* case was designated as the minority rule in Louisiana. Arguments for the *Edwards* rule, Comment, 15 TUL. L. REV. 79 (1940); against, Comment, 10 TUL. L. REV. 69 (1935).

15. This "fixed" language first appeared in Judge Kennon's dissent, 39 So. 2d 620, 627 (La. App. 2d Cir. 1949), and was quoted with favor by the Supreme Court in its final disposition of the case. See New Zealand Ins. Co. v. Holloway, 123 F. Supp. 642 (W.D. La. 1954) (rights of the injured party crystallize at the time of the accident).

16. It is necessary to distinguish between a breach prior to an accident and one occurring after the accident. In Phillips v. New Amsterdam Cas. Co., 193 La. 314, 321, 190 So. 565, 568 (1939) the court, in ruling on a breach committed before an accident said the insurer was absolved from liability. New Zealand Ins. Co. v. Holloway, 123 F. Supp. 642, 648 (W.D. La. 1954) said: "Although [*Phillips*] was decided in 1939, its holding is certainly valid . . . . This right against the insurer . . . cannot be prejudiced by the insured's *subsequent* breach of policy, but where the policy breach occurred *before* the accident, . . . cancellation may be obtained by the insurer, and the rights of the third parties under the voided policy are lost."

17. 217 La. at 210, 46 So. 2d at 130. The court quoted from Davies v. Consolidated Underwriters, 199 La. 459, 476, 6 So. 2d 351, 357 (1942).

which must have been fulfilled at the time of the accident for the insurer to incur liability.[18]

The issue in the instant case — effect of failure to give notice of suit — was *res nova* in this state;[19] prior cases dealt only with failure to notify of accidents.[20] The court, without citing or attempting to distinguish the *West* line of cases on notice of accident,[21] held that one of the "terms" of the policy that must be complied with as a condition precedent to recovery under the Direct Action Statute was that the insured immediately forward notice of suit to the insurer. Failure to receive notice of the suit was a defense to liability under the policy and therefore to a direct action based on the policy.[22]

The majority of states do not distinguish between the failure to give notice of accident and of suit, but condition recovery on receipt of both notices as required by the "terms" of the policy.[23] This is open to criticism since the failings do not equally affect the insurer's ability to protect his interests. An insurer, although not notified of the accident, normally can acquire all necessary information about the accident after notice of a pending suit.[24] However, to require an insurer to satisfy a judgment

18. The court added that the insurer's protection in a case where it received no notice would lie in a suit against its insured on the basis of the insured's breach of the contract provisions. Such reasoning raises interesting questions. While this would meet traditional contract practices when applied to the named insured, should such an action be allowed against an omnibus insured who was not a party to the contract of insurance and would have little if any knowledge of its terms? Also, even in such a countersuit against the named insured, would the insurer have to prove it could have defeated the injured party's claim had notice been given?

19. Hallman v. Marquette Cas. Co., 149 So. 2d 131, 132 (La. App. 2d Cir. 1963).

20. See note 14 *supra*.

21. The *West* case was followed in New Zealand Ins. Co. v. Holloway, 123 F. Supp. 642 (W.D. La. 1954); Dumas v. United States Fid. & Guar. Co., 125 So. 2d 12 (La. App. 3d Cir. 1960); Kimball v. Audubon Ins. Co., 103 So. 2d 529 (La. App. 1st Cir. 1958); Churchman v. Ingram, 56 So. 2d 297 (La. App. 2d Cir. 1951).

22. From the *Hallman* case, the surest course for the plaintiff's attorney is to personally forward all process to the insurer, whether that insurer is a party to the proceeding or not. LA. R.S. 22:1522 (1950) provides: "The casualty and surety division of the Louisiana insurance rating commission shall furnish to any claimant, upon request . . . the name of the insurer in personal injury claims, and the provisions and conditions of coverage in the policy . . . of insurance." Of course, the above statute might not be of assistance in a facutal situation similar to *Hallman*. Whether the commission could inform an attorney as to who was the insurer of a person driving an automobile merely loaned to him is open to doubt. Such action could possibly be considered rendering a conclusion of law, a function very probably outside the limits of the commission's powers.

23. See, *e.g.*, Royal Indemnity Co. v. Morris, 37 F.2d 90 (9th Cir. 1929); Metropolitan Cas. Ins. Co. v. Colthurst, 36 F.2d 559 (9th Cir. 1929) and authorities cited therein.

24. Reid v. Monticello, 44 So. 2d 509 (La. App. 1st Cir. 1950) (police reports

rendered in a suit of which it had no notice and therefore no opportunity to defend grates against the ingrained principle that every man shall have his day in court.[25] It is unfortunate that the court in the instant case did not refer to the *West* rule that liability under the Direct Action Statute is fixed at the time of injury and expressly impose a limitation upon it. The decision should be so interpreted; and, as interpreted, the noted decision preserves the Louisiana policy of protecting the injured party except when that policy conflicts with the defendant insurer's fundamental right to a judicial hearing.[26] Thus the accident-suit distinction appears justifiable and desirable; it supports the *Hallman* decision and reconciles the *Hallman* and *West* cases.[27]

John M. King

PARTITION — THE EFFECT OF R.S. 13:4985 ON PARTITIONS MADE WITHOUT REPRESENTATION OF ALL CO-OWNERS

"No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has the right to demand the division of a thing held in common, by the action of partition."[1] The Code characterizes partition as a "sort of exchange" by which one's right in part of a thing is exchanged for others' rights in the remainder which becomes his alone.[2]

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and investigation conducted by injured party's counsel normally furnish necessary details of accident).

25. For recent statements of this ancient heritage see United States *ex rel.* TVA v. McCoy, 198 F. Supp. 716 (W.D. N.C. 1961); Baltz v. The Fair, 178 F. Supp. 691 (N.D. Ill. 1959); Beck v. Jarret, 363 P.2d 215 (1961); O'Niel v. Dux, 101 N.W.2d 588 (1960).

26. Hansberry v. Lee, 311 U.S. 32 (1940) (persons not parties to personam actions are not bound by the judgment therein, and enforcement of the judgment against such persons violates the due process clauses of the fifth and fourteenth amendments).

27. By the combined decisions of *West* and *Hallman*, important qualifications have been read into R.S. 22:655 (Direct Action Statute). Can it be assumed that the *Hallman* rule will also apply to R.S. 32:900(F)(1) (Motor Vehicle Financial Responsibility Act)? It has been held that a "motor vehicle liability policy" as defined in the latter act is not the same as a general liability policy under the former act. New Zealand Ins. Co. v. Holloway, 123 F. Supp. 642 (W.D. La. 1954). Would this case be authority for not applying the *Hallman* decision to cases falling under R.S. 32:900?

1. LA. CIVIL CODE art. 1289 (1870).

2. *Id.* art. 1382. However, all exchanges which terminate ownership of property in indivision are not necessarily partitions. Goodwin v. Chesneau's Heirs, 3 Mart.(N.S.) 409 (La. 1825). A sale by one heir to his coheir definitely terminates the ownership in indivision, but this would be treated as a sale rather than as a partition. LA. CIVIL CODE art. 1405 (1870).