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"Other Insurance" Clauses in Uninsured Motorist Provisions

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with cut timber.[37] This principle could be easily adapted to the real property area by treating the appreciation in value of the property while held as an investment as capital gain, and the profits made in developing and selling as ordinary income.[38] Such a scheme would surely restore equity and certainty in this much-litigated area.

Leon J. Reymond, Jr.

"OTHER INSURANCE" CLAUSES IN UNINSURED MOTORIST PROVISIONS

Plaintiff and Courville were guest passengers in a vehicle when it collided with an uninsured automobile. The uninsured motorist's negligence was the sole cause of the accident. The host's insurer deposited $10,000.00, the policy limit, of which Courville[1] was awarded $5,000.00, the host $2,000.00, and plaintiff $3,000.00. Each claimant would have been entitled to a larger recovery but for the size of the policy limit. Plaintiff then brought suit against his own insurer, under his policy's uninsured motorist provisions. Defendant insurer argued that under the "other insurance" clause in plaintiff's policy[2] its liability was extinguished by the host's insurer's payment of $3,000.00, since the uninsured motorist limits of both plaintiff's and the host's policies were identical. The district court allowed plaintiff full recovery ($5,000.00) under his policy. *Held*, amended and

37. The Internal Revenue Code treats the application in value of the standing timber as capital gain to be considered realized when the timber is cut, and the profits made in selling the cut timber as ordinary income. *Id.* § 631(a).

38. SURREY & WARREN, FEDERAL INCOME TAXATION, CASES AND MATERIALS 695 (1960); Dakin, *The Capital Gains Treasure Chest: Rational Extension or Expedient Distortion?*, 14 LA. L. REV. 505, 522 (1954). A similar effect could be created by the taxpayer by the establishment of another entity to acquire the property for development if he already holds the land for investment purposes. Berge, *Special Tax Problems of Participants in Real Estate Developments*, 45 TAXES 161, 163 (1967).

1. Courville was denied recovery under his own policy's uninsured motorist coverage in the companion case of Courville v. State Farm Mut. Auto. Ins. Co., 194 So.2d 797 (La. App. 3d Cir. 1967), *writs refused*, 197 So.2d 79 (1967).

2. The clause contained the following language: "Other Insurance. With respect to bodily injury to an insured while occupying an automobile now (sic) owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance." LeBlanc v. Allstate Ins. Co., 194 So.2d 791, 792 (La. App. 3d Cir. 1967).

affirmed. Plaintiff can recover only $2,000.00 from his insurer. *LeBlanc v. Allstate Ins. Co.*, 194 So.2d 791 (La. App. 3d Cir. 1967).

The general types of "other insurance" clauses and their interaction have been treated elsewhere.[3] The "other insurance" clause in question here is a variation of the "excess" type—if there is other insurance available to the insured, the insurer will be liable only for the amount by which the insured's limit of liability for uninsured motorist coverage exceeds the pertinent limits of liability of all other applicable insurance.

This case of first impression to Louisiana courts presents two basic issues—does the "other insurance" clause in the uninsured motorist provisions of plaintiff's policy contravene La. R.S. 22:1406(D),[4] which provides for mandatory uninsured motorist coverage of $5,000.00/$10,000.00 in every automobile liability policy unless the insured rejects it, and if it does not, what effect is to be given to this clause? The court noted that both La. R.S. 22:620(A)[5] and the 1960 amendment to La. R.S. 22:1406(D) gave the Insurance Commissioner the duty of approving provisions of automobile liability policies. Interpreting these statutes, the court cited *Roberts v. City of Baton Rouge*[6] and *Bacon v. Reed.*[7] In *Roberts* it was held that only where the construction or application of a statute is doubtful should great weight in judicial interpretation be given to the administrator's interpretation. *Bacon* held that where a statute

3. See Note, 27 LA. L. REV. 114, 115 (1966). It is pointed out that " 'other insurance' clauses are of three principal types: *pro rata clauses* under which if there is other insurance the issuer will be liable only for the proportion of the loss that represents the ratio between his limit of liability and the total limit of liability of all insurance covering the loss; *excess clauses*, under which if there is other insurance the issuer will be liable only for the amount of loss that exceeds the limits of the other policy; and *escape clauses* under which if there is other insurance the insurer is not liable at all."

4. LA. R.S. 22:1406(D)(1) (1950) provides: "No automobile liability insurance . . . shall be delivered . . . unless coverage is provided . . . in not less than the limits described in the Motor Vehicle Safety Responsibility Law of Louisiana, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage."

5. LA. R.S. 22:620(A) (1950) provides: "No basic insurance policy form . . . shall be issued, delivered, or used unless it has been filed with and approved by the Commissioner of Insurance."

6. 236 La. 521, 108 So.2d 111 (1958).

7. 130 So.2d 141 (La. App. 4th Cir. 1961).

is subject to two interpretations, the view of the administrators, if reasonable and equitable, should be accepted by the courts. The majority in the instant case felt that the meaning of R.S. 22:1406(D) was obscure, and that the interpretation by the Casualty and Surety Division was reasonable and equitable.[8] However, the result reached in the instant case went beyond this interpretation of R.S. 22:1406(D) by the Casualty and Surety Division.

The purpose of R.S. 22:1406(D), said the court, is to give the same protection to the injured insured as he would have had if the uninsured motorist had been covered by a standard liability policy.[9] This purpose is consistent with the opinions cited as authority. It is submitted, however, that this stated purpose of R.S. 22:1406(D) and the decisions cited for authority are in conflict with the result reached in the principal case.[10]

8. H. P. Walker, stipulated by both parties to be the spokesman for the Insurance Commissioner, was asked whether an insured could collect under his $5,000.00/$10,000.00 uninsured motorist provisions if he had already recovered $5,000.00 from his host's $5,000.00/$10,000.00 uninsured motorist provisions. Walker stated that the insured could collect nothing from his own uninsured motorist provisions, since these provisions were not intended to apply as excess coverage under such circumstances. It should be noted, however, that this hypothetical factual situation can be distinguished from that of the instant case in that LeBlanc was one of three insureds under the provisions of the host's policy and recovered only $3,000.00; not $5,000.00 as the insured in the situation envisioned by Walker. Walker did not, therefore, state whether or not an insured's policy would apply as excess in the factual situation of the instant case.

9. 194 So.2d 791, 796, citing COUCH, INSURANCE § 45:623, at 570 (2d ed. 1964). The dissent in the instant case disagreed with the legislative purpose of uninsured motorist protection as set out by the majority. The dissent interpreted this statute in its most literal terms — every automobile liability policy in Louisiana must contain uninsured motorist provisions of $5,000.00/$10,000.00. Since the Louisiana statutes nowhere specifically gave the insurer the right to limit its liability below this, the dissent would require that an insured be covered to the full extent of his own policy limits, regardless of the number of policies under which he is covered.

The dissent pointed out that a Florida statute was almost identical to R.S. 22:1406. A Florida case factually similar to the instant case held that this statute invalidated such "other insurance" clauses in uninsured motorist provisions. Sellers v. United States Fid. & Guar. Co., 185 So.2d 689 (Fla. 1966). Hence, in Florida an uninsured recovers to the full limits of his own policy, regardless of the number of other policies under which he is an insured unless, of course, the amount of total injuries is less than the sum of all the policies. The dissent's position of awarding plaintiff $5,000.00 under his own policy would, therefore, be in accord with the result reached in Florida.

10. All of the cases cited by the court for authority were concerned with "other insurance" clauses similar to that in the instant case. In each case the plaintiff's and the host's policies contained the same liability limits. In none of these cases was the plaintiff allowed any recovery under his own policy. This difference in result may be justified, however, since in none of these cases did the stated facts clearly indicate that the factual situation was similar to that in this case, *i.e.*, that the plaintiff had to share the coverage of the host's policy with one or more other parties. Kirby v. Ohio

The host's policy contained $5,000.00/$10,000.00 uninsured motorist limits, which guaranteed plaintiff the same protection he would have had if the uninsured motorist had standard liability coverage.[11] But by awarding plaintiff $2,000.00 from Allstate, his own insurer, the court allowed plaintiff more protection than he would have had if injured by a motorist with standard coverage.

Although the court assigned no reasons for awarding the plaintiff $2,000.00, it may have reasoned that, as the only person covered by his own policy, plaintiff would be protected to the extent of $5,000.00; whereas as one of three persons covered by the host's policy, the limit of liability of the host's insurer to plaintiff was only $3,000.00. Therefore, the court apparently concluded that plaintiff's policy should be treated as providing excess insurance of $2,000.00 under the facts of this case. Under this approach the terms "limit of liability for this coverage" and "applicable limit of liability of such other coverage" in the standard "other insurance" clause, would not mean the theoretical maximum limits of the coverage ($5,000.00/$10,000.00) but rather the actual amount of coverage available to the insured from each policy under a particular factual situation. It is submitted that this interpretation of the "other insurance" clause is reasonable and would not conflict with the opinion of the Casualty and Surety Division, because under that factual situation the coverage available to the insured under *both* policies was $5,000.00.

While the reasons for the court's decision are not clear, its effect seems evident. An insured with an "other insurance" clause in a $5,000.00/$10,000.00 policy, when injured as a guest passenger (in a vehicle with $5,000.00/$10,000.00 uninsured motorist coverage) by the fault of an uninsured motorist, and who has recovered *less* than $5,000.00 from the host's insurer, can recover under his uninsured motorist provisions an amount equal to the difference between $5,000.00 and the amount re-

Cas. Ins. Co., 232 Cal. App. 2d 9, 42 Cal. Rptr. 509 (1965); Grunfeld v. Pacific Auto. Ins. Co., 232 Cal. App. 2d 4, 42 Cal. Rptr. 516 (1965); Burcham v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500 (1963); Miller v. Allstate Ins. Co., 66 Wash.2d 871, 405 P.2d 712 (1965).

11. La. R.S. 32.900(B) (1950) provides: "Such owner's policy of liability insurance shall insure the person named therein . . . as follows: five thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, ten thousand dollars because of bodily injury to or death of two or more persons in any one accident."

ceived from the host's insurer.[12] The insured can recover, therefore, a maximum of $5,000.00, regardless of the number of policies under which he is covered. It is not clear from the decision in the instant case, however, whether the court, by awarding plaintiff $2,000.00, was invalidating the standard "other insurance" clause approved by the Commissioner of Insurance, or whether it was merely interpreting the terms "limit of liability" and "applicable limits of liability" in the "other insurance" clause as meaning the *actual amount of recovery* available to the insured from each policy under the particular facts of each case. It is submitted that a clarification of the meaning and legal status of such clauses, under the factual situation of the instant case, is in order by both the courts and the Insurance Commissioner.

Shelby H. Moore, Jr.

PROPERTY LAW—CONTINUOUS SERVITUDE—ACT OF MAN TEST AND POSSESSION OF TEN YEARS

Plaintiff pumped irrigation water into his rice field, and at harvest time opened a gap to release it through a ditch across defendant's estate. He had been doing this two out of every four years for thirty years. *Held:* Irrigation drainage is a continuous-apparent servitude which may be acquired by possession of ten years. The flow of water or the exercise of the servitude is continuous even though acts of man on the dominant estate are necessary to replenish the supply, or to reset the state of affairs necessary for the exercise of the servitude. A servitude is continuous as long as the servitude's use survives an act of man performed outside the servient estate. *Wild v. LeBlanc*, 191 So.2d 146 (La. App. 3d Cir. 1966).

Since continuity and possession[1] are critical requirements for acquisitive prescription of servitudes, the meaning of these

12. Of course the insured can only recover under his own policy as far as its total limits go. For example, if more than one person qualifies as an insured under his policy, the court might distribute the limits of plaintiff's policy between the other insured[s] or give plaintiff less than the difference between $5,000.00 and what he recovered from the primary insurer.

1. "Continuous and apparent servitudes may be acquired by title, or by a possession of ten years. . . ." LA. CIVIL CODE art. 765 (1870).

"Continuous nonapparent servitudes, and discontinuous servitudes, whether apparent or not, can be established only by a title. . . ." *Id.* art. 766.