

Louisiana Law Review

Volume 29 | Number 2

The Work of the Louisiana Appellate Courts for the

1967-1968 Term: A Symposium

February 1969

Private Law: Insurance

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Repository Citation

J. Denson Smith, *Private Law: Insurance*, 29 La. L. Rev. (1969)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol29/iss2/13>

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to assume that the growing crops were those of the landowner. Further, the lease exonerated defendant from such damages, and, finally, defendant had paid the landowner \$125.00 and secured a release from damages to the surface. The court noted that plaintiff had abandoned all claims against the landowner for breach of the lessor's warranty of peaceful possession, and, therefore, it did not determine whether plaintiff would have been entitled to recover from his lessor.

INSURANCE

*J. Denson Smith**

Much of the litigation before the courts during the last term involved, as usual, claims against insurers.

The following comments deal with some of the cases which presented significant issues of law relating to the insurance contract.

In *Graves v. Traders & Gen. Ins. Co.*¹ the First Circuit Court of Appeal followed the view of the Third expressed in two earlier cases² and held mutually repugnant an escape clause in a garage liability policy and an excess clause in an automobile policy held by an individual. The vehicle involved in the accident was owned by an automobile sales agency but was being operated by a person to whom the agency had lent it for use while his own vehicle was being repaired. The policy carried by the sales agency, the garage liability policy, covered the car. In addition, the driver was covered under the provisions of a policy carried by him on the vehicle being repaired. The protection afforded by the garage policy applied "if no other valid and collectible insurance either primary or excess" was available. The protection provided for the driver under his own policy while operating a vehicle not owned by him was declared to be "excess insurance over any other valid and collectible insurance." The Supreme Court granted certiorari and "found no reason to depart from the solution" arrived at by the lower courts and followed their view that the excess and escape clauses in the two policies were "mutually repugnant and ineffective." Perhaps much could be said in favor of the consistency which is

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1. 200 So.2d 67 (La. App. 1st Cir. 1967).

2. *Lincombe v. State Farm Mut. Auto Ins. Co.*, 166 So.2d 920 (La. App. 3d Cir. 1964), and *State Farm Mut. Auto. Ins. Co. v. Travelers Ins. Co.*, 184 So.2d 750 (La. App. 3d Cir. 1966).

reflected in the mentioned holdings. Pretermittting, however, consideration of this aspect of the matter, it is believed, for whatever it may be worth, that the result is not in keeping with what the underwriters were trying to accomplish.³

Primarily, it seems worthwhile to observe that most insurers do not prepare the policies they use. They are prepared instead, presently at least,⁴ by the American Insurance Association, and are subject to approval by the Louisiana Casualty and Surety Division. It is not, therefore, permissible to believe that the provisions in question reflect an effort by one insurer to shift responsibility to another.⁵ Presumably, instead, they are designed to distribute coverage equitably between the insurers when more than one is involved. According to the industry, the premium dollar is allocated primarily to the coverage on the car and secondarily to the driver.⁶ Pursuant thereto, the insurance on the car is counted as primary and that on the driver is secondary. To effectuate this purpose, the family automobile policy contains only a pro rata clause with respect to other insurance binding the insurer to pay its proportionate part of a loss where there is other valid and collectible insurance, but qualifies this by providing that if the insured is driving a car that he does not own, the coverage afforded is only excess. Having, by way of illustration, two cars, each covered by such a policy, with the owner of one car driving the other, the excess clause in the policy covering the car being driven would not be applicable and the coverage would be primary, whereas the excess clause in the policy covering the driver would apply. Although the policy covering the driver would provide other valid and collectible insurance, nevertheless, on the facts of the case such other insurance would by its terms be excess only. The principle that the policy on the car is primary and that on the driver is excess is not adhered to, however, in garage liability policies. The reasons supporting this deviation from the basic principle are accurately reflected in the opinion of the Supreme Court. The purpose, it seems, is to make possible a reduction in the premium paid by the garage.⁷ This purpose is effectuated by means of the provision in the garage policy which makes its omnibus coverage ap-

3. This discussion concerns "other insurance" clauses in use in Louisiana in the kind of policies being considered.

4. Formerly prepared by the National Bureau of Casualty Underwriters.

5. *But see* Comment, *Automobile Liability Insurance—Effect of Double Coverage and "Other Insurance" Clauses*, 38 MINN. L. REV. 838 (1954).

6. Hawkes, *Liability Guiding Principles*, 451 INS. L.J. (Aug. 1960); 7 CAS. & SUR. REV. 3 (1963); 9 CAS & SUR. REV. 6 (1965).

7. *See* LOUISIANA AUTOMOBILE CASUALTY MANUAL, Rule 521.

plicable only if there is no other valid and collectible insurance whether primary or excess. The primary insurance is, therefore, shifted from the car, when owned or used by a garage, to the insurer of the individual. Hence, if the driver, while operating the car owned by the garage, is protected by his own policy notwithstanding that the coverage afforded thereby is excess, then the garage policy by its terms will not generally apply. From the standpoint of the driver's policy, there is on the facts no other valid and collectible insurance inasmuch as the clause in it by which excess liability is assumed precludes applicability of the garage policy. It becomes, therefore, the primary insurer. By the same token, if the car being driven is not owned by the garage but is being used in its business, as, for example, in the case of a car in the hands of a dealer for sale, then if there is a policy covering the car it will afford primary coverage, the policy covering the driver excess coverage, and the garage policy will not generally apply. The garage liability policy will apply, however, if the car being used by the garage is owned by another and is not covered by liability insurance and if the driver operating it when the accident occurs is also not covered by a policy of his own. This policy provides another qualification: whatever its limits of liability may be, they are reduced by its terms when the car is being operated by, say, a borrower, or someone trying it out, to the minimum requirements of an applicable financial responsibility law, and if a primary or excess insurer must pay but the coverage is less than the prescribed minimums, the garage insurer is liable for the difference. Of course, it is true that the policies covering the car, the driver, and the garage provide valid and collectible insurance *under some circumstances* but it seems not necessary to conclude from this fact that the clauses in question are mutually repugnant. The Louisiana Civil Code recognizes that when a clause is susceptible of two interpretations it must be understood in that in which it may have some effect rather than in a sense which would render it nugatory⁸ and a clause which presents two meanings must be taken in the sense most congruous to the matter of the contract.⁹ Garage liability policies can be sold at a lower rate only because the coverage afforded when the car is being driven by third persons is made subordinate to any other liability insurance, whether primary or excess, covering the car or the driver. Therefore, to give other insurance clauses effect in the sense most congruous

8. LA. CIV. CODE art. 1951.

9. *Id.* art. 1953.

to the matter of the contract, it seems clear that the term "other valid and collectible insurance" must be applied to the circumstances of the particular case, not any conceivable circumstances.

The court's holding that another provision of the garage policy had the effect of reducing the coverage afforded by it to the minimum required by the Louisiana financial responsibility law seems correct.

Facts on all fours with those in *Graves* were again presented to the First Circuit, although to a different panel, in *Cotton v. Associated Indem. Corp. of San Francisco*,¹⁰ and the court followed the opinion rendered in *Graves*. The garage insurer undertook to introduce evidence at the appellate level through the testimony of a claimed expert concerning the purpose of such provisions and the underlying reasons therefor. The court refused to consider the testimony and added, "We do not believe the motives behind such clauses in insurance policies nor the basis for calculating the premium can be given sufficient weight to justify our holding contra to the well reasoned decision of the Third Circuit in the Lincombe case and the State Farm case." Premitting consideration of the procedural issue, it is believed that policy provisions "must be examined and interpreted in the light of their design and intent," as the Supreme Court once observed.¹¹

A decision which might have gone the other way was rendered in *Harvey v. General Guar. Ins. Co.*¹² Insured, having a \$3,000 policy providing protection against loss by fire of his home payable to a first mortgagee as his interest might appear, procured a second policy in another company for \$5,000 payable to a second mortgagee as his interest might appear. When a total loss occurred the second insurer insisted that its liability was controlled by a pro rata clause which made it not liable for a greater proportion of any loss than the insured amount bore to the whole insurance covering the property against the peril involved. The court, relying on authority from other jurisdictions, held that the valued policy law of the state required payment of the face amount of the policy. The valued policy law requires payment of "the total amount for which the property is insured at the time of such total destruction in the policy of such insurer."¹³ Therefore, the ultimate question was whether

10. 200 So.2d 78 (La. App. 1st Cir. 1967).

11. Pullen v. Employers' Liab. Assur. Corp., 230 La. 867, 89 So.2d 373 (1956).

12. 201 So.2d 689 (La. App. 3d Cir. 1967).

13. LA. R.S. 22:695 (1950).

the total amount in the policy of such insurer was \$5,000 or because of the pro rata clause and the existence of other insurance in the amount of \$3,000 was 5/8ths of \$5,000. The question is a delicate one. However, it is questionable whether the holding in the instant case was required by the valued policy law. Under our jurisprudence this law does not preclude the use of a co-insurance clause although such a clause, in effect, permits the insurer to go into the question of the actual cash value of the property as compared with the face amount of the policy. The purpose, however, is not to determine the amount of the loss but the amount of the insurance. This being true, it would seem to follow that a pro rata clause which merely fixes the amount for which the property is insured does not conflict with the valued policy law. Finally, both the valued policy law and the pro rata clause have legislative sanction¹⁴ and should be reconciled if possible.

The holding in *Fouquier v. Travelers Ins. Co.*,¹⁵ that an insured injured by the joint negligence of an insured and an uninsured motorist is not entitled to a judgment in solido against his own insurer under the uninsured motorist clause, seems open to question. In support of this position it was said that if payment were made by the plaintiff's insurer under the uninsured motorist provision it would be subrogated to the right of its insured against the joint tortfeasors but that, if solidarily liable with them, it would have no such right. It appears, however, that subrogation does apply in the case of co-debtors in solido to the extent of the portion of the debt due by each.¹⁶ And beyond this, the responsibility of the uninsured motorist insurer would actually be in solidum rather than in solido, an imperfect solidarity or solidary responsibility rather than solidary liability, and subrogation would take place to the extent of the payment.¹⁷ In addition, the mere fact that judgment may be obtained in solido against two or more debtors does not preclude recovery in full by one liable only technically and not guilty of negligence against the one whose negligence causes the injury.¹⁸

14. *Id.* 22:691, 22:695.

15. 204 So.2d 400 (La. App. 1st Cir. 1967).

16. *Theus v. Armistead*, 116 La. 795, 41 So. 95 (1906); *Cotton v. Stirling*, 19 La. Ann. 137 (1867).

17. *Gay v. Blanchard*, 32 La. Ann. 497 (1880). See also *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Insurance*, 28 LA. L. REV. 372 (1968).

18. *Appalachian Corp. v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1922); *American Employers' Ins. Co. v. Gulf States Utilities Co.*, 4 So.2d 628 (La. App. 1st Cir. 1941).

Since the policy of the plaintiff insurer bound it "to pay all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile" it owed a responsibility to its insured, although contractual in nature, which was in addition to the solitary responsibility of the joint tortfeasors. The court seemed to recognize a weakness in its position when it reserved the right of plaintiff against his insurer in the event the insurer of the insured tortfeasor might be unable to satisfy the judgment against it. It might have been better to have included the plaintiff's insurer in the judgment leaving to it the opportunity to claim indemnity against the joint tortfeasors if compelled to pay.

The holding of the court in *Temple v. Harper*,¹⁹ that an imperfect solidarity exists between a tortfeasor and the plaintiff's collision insurer to the extent of the liability of the insurer, seems entirely correct. This, again, is the liability in solidum of the Romans rather than liability in solido which stems from agreement or a positive provision of the law. Nevertheless, it supports a judgment against each debtor to the full extent of his responsibility.²⁰

The plaintiff in *Shaw v. New York Fire & Marine Underwriters, Inc.*²¹ was injured when the car in which he was riding as a guest was in collision with another. The drivers of both cars were found contributorily negligent. Suit, however, had been brought against only the insurers of both drivers. Plaintiff's damages were fixed at \$15,000 and judgment was rendered against one insurer, New York, for the limit of its liability, \$5,000, and the other, Liberty Mutual, for the limit of its liability, \$10,000. The court of appeal affirmed the judgment of the trial court and in doing so rejected the claim of New York that it was entitled to contribution from Liberty Mutual in the amount of fifty percent of the judgment against it. The Supreme Court granted certiorari limited to the question of contribution. Its opinion reflects that Liberty Mutual contended for its part that the insurers should have been cast in solido in the amount of \$5,000, and that judgment for an additional \$5,000 should have been rendered against it to exhaust its liability. The Supreme Court felt that the claims of the insurers would operate to the prejudice of plaintiff and, therefore, rejected

19. 200 So.2d 749 (La. App. 4th Cir. 1967).

20. LA. CIV. CODE art. 2082; *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Insurance*, 28 LA. L. REV. 372 (1968).

21. 212 So.2d 419 (La. 1968). See also *DeLatin v. New York Fire & Marine Underwriters, Inc.*, 204 So.2d 690 (La. App. 3d Cir. 1967).

them, saying that Article 2103 of the Civil Code could not be applied to the prejudice of the creditor. This seems to be certainly correct. Actually, it appears that through their insurers one of the solidary debtors had paid one-third of the debt and the other two-thirds. The latter insurer should have a claim to contribution from the insured whose responsibility, in effect, had been fixed at \$7,500 but who had coverage in the amount of only \$5,000.

In an exhaustive and well-documented opinion in *Webb v. Zurich Ins. Co.*,²² the Supreme Court held applicable the Louisiana direct action provision with respect to an accident that occurred outside the state inasmuch as the policy was secured in this state, from an agent of an insurer doing business in this state, and by an insured domiciled in this state. The decision effectuates Louisiana's public policy as reflected in the history of the direct action statute, the details of which are given in the opinion. This case and the companion *Owen* case²³ were held controlling in *Michel v. Bahn*,²⁴ where the accident occurred in Mississippi but the individual defendant was a resident of Louisiana.

In a case of first impression it was held in *Lawrence v. Continental Ins. Co.*²⁵ that a liability insurer could not enforce as against its insured, claiming on the basis of uninsured motorist coverage, a policy provision recognizing a right in the insurer to require joinder of the uninsured motorist, where personal service could not be had against the latter in this state. Section 629 of the Insurance Code was found controlling.

A reservation of a power to change the beneficiary of a life insurance policy is effective. Our Supreme Court has adopted the view, however, that the rights of the parties become fixed at the insured's death. Where he dies before a change of beneficiary has been completed in accordance with the terms of the policy the company may not waive the policy requirement and the attempted change is ineffective.²⁶ In *American Nat. Ins. Co. v. Ramon*²⁷ the policy provided that a change of beneficiary could be effected by filing written request at the home office and that when recorded at the home office the change would take effect as of the date the request was signed "whether or

22. 251 La. 558, 205 So.2d 398 (1967).

23. *Owen v. Zurich Ins. Co.*, 251 La. 590, 205 So.2d 411 (1967).

24. 207 So.2d 150 (La. App. 4th Cir. 1968).

25. 199 So.2d 398 (La. App. 3d Cir. 1967).

26. *Giuffria v. Metropolitan Life Ins. Co.*, 188 La. 837, 178 So. 368 (1937).

27. 208 So.2d 392 (La. App. 4th Cir. 1968).

not the insured is living when the change is recorded." The court distinguished the *Giuffria* case²⁸ on the basis of the policy language and held effective a change of beneficiary request received at the home office prior to the death of the insured but recorded a day thereafter. Since the recordation was a purely ministerial act and the wish of the insured had been clearly and formally expressed, the holding seems not in conflict with the established rule.

In an opinion which contains a scholarly weighing of the jurisprudence covering the application of R.S. 22:619B, the First Circuit held that a finding of an intent to deceive is necessary to support the insurer's defense based on an alleged material misrepresentation in an application for a policy of life insurance.²⁹

The Supreme Court will resolve the issue that has divided some lower appellate courts concerning the nature of an action by an insured against his uninsured motorist insurer and the applicable prescriptive period. Writs of certiorari have been granted in *Booth v. Fireman's Fund Ins. Co.*³⁰ and *Thomas v. Employers Mut. Fire Ins. Co.*³¹ Certiorari has likewise been granted in *Verneco, Inc. v. Fidelity & Cas. Co. of New York*,³² which deals with the application of a fidelity bond provision excluding coverage under stated circumstances, and *Mullin v. Skains*,³³ which held that a release given by an insured to his uninsured motorist insurer did not prejudice the joint tortfeasors.

PUBLIC LAW

STATE AND LOCAL GOVERNMENT

*Michael R. Klein**

The occurrence of elections during the symposium period resulted in a number of noteworthy decisions clarifying the election laws. *Lasseigne v. Martin*¹ presented the First Circuit with

28. *Giuffria v. Metropolitan Life Ins. Co.*, 188 La. 837, 178 So. 368 (1937).

29. *Knight v. Jefferson Standard Life Ins. Co.*, 205 So.2d 485 (La. App. 1st Cir. 1967). For earlier discussions of the problem see *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Insurance*, 18 LA. L. REV. 73 (1957). *The Work of the Louisiana Appellate Circuits for the 1963-1964 Term—Insurance*, 25 LA. L. REV. 386 (1965).

30. 207 So.2d 925 (La. App. 2d Cir. 1968).

31. 208 So.2d 374 (La. App. 1st Cir. 1968).

32. 207 So.2d 828 (La. App. 3d Cir. 1968).

33. 205 So.2d 207 (La. App. 2d Cir. 1967).

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1. 202 So.2d 250 (La. App. 1st Cir. 1967).