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INSURANCE

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"EXCESS" COVERAGE

Liability insurance protection is often afforded by writing "primary" coverage with one company and "excess" coverage with another company whose excess policy does not take effect until the limits of liability under the primary policy are exhausted. It is a common practice among excess insurance carriers intending to cover the same risks protected against under the primary policy to adopt by reference the provisions of the primary policy. The foundations of the excess industry were severely shaken by the decision in *Spain v. Travelers Insurance Co.*,[1] holding that the excess carrier could not rely on an exclusion in the primary policy unless the primary policy was physically attached to the excess policy.[2] The decision was based upon LA. R.S. 22:628[3] which was amended by Act 150 of 1976[4] to legislatively overrule the *Spain* case.

GROUP INSURANCE

In *Colvin v. Louisiana Hospital Service, Inc.*[5] the plaintiff was insured

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1. 332 So.2d 827 (La. 1976).

2. There was no coverage under the primary policy because of exclusion for "bodily injury to any employee of the insured . . . ." The excess policy provided: "The provisions of the *immediate underlying policy* are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any 'other insurance' provision and any other provisions therein which are inconsistent with the provisions of this policy." *Id.* at 829.

3. LA. R.S. 22:628 (1950), *as amended by* La. Acts 1958, No. 125 provides: "No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless in writing and made a part of the policy. This Section shall not apply to the contracts as provided in Part XV of this Chapter."

4. This act added the following language:

"This Section shall not apply to the following: . . .

b) to contracts of reinsurance, warranties and/or excess liability insurance which incorporate by specific reference the limitations and provisions of the primary and/or underlying insurance contracts. In connection with insurance contracts wherein primary and/or underlying coverage are coupled with contracts of reinsurance, warranties and/or excess liability insurance, the contents of all of the related contracts when read together shall constitute the entire insuring agreement. . . ."

5. 321 So.2d 416 (La. App. 2d Cir.), *cert. denied*, 323 So.2d 476 (La. 1976).

under a group hospitalization policy which contained a "coordination of benefits" condition providing that covered medical expenses would be paid to the extent that such expenses were not covered under another policy. The plaintiff was not given a copy of the master policy but was furnished with a certificate of insurance booklet containing a brief summary of the group health plan, which did not mention the coordination of benefits provisions. The insurer refused to pay for medical expenses for which the plaintiff had already been reimbursed under another hospitalization policy. The court held that the coordination of benefits provisions was ineffective because it was not contained in the insurance booklet given to the insured. The court relied on LA. R.S. 22:215[6] and several cases from other states holding that the certificate prevailed where there was a conflict between the master policy and the certificate given to the individual insured. The court concluded that a significant omission was as grievous as a contradictory statement. Since the plaintiff was reimbursed for all of her medical expenses and the coordination of benefits provision only prevents double recovery, the significance of the omission in the certificate of insurance booklet is questionable.

UNINSURED MOTORIST COVERAGE—STACKING

Uninsured motorist coverage continues to occupy substantial judicial time. The most significant case of the year was the Louisiana Supreme Court decision in *Barbin v. United States Fidelity and Guaranty Co.*[7] Barbin owned two automobiles which were insured under a single policy issued after the effective date of the 1972 amendment to LA. R.S. 22:1406. Barbin, as driver, and his wife and two other couples, as passengers, were occupying one of the insured vehicles when they were injured through the negligence of an uninsured motorist. The court held that the 1972 amendment did not legislatively overrule the *Graham*[8] and *Deane*[9] decisions authorizing the stacking of uninsured motorist coverages even where the combined limits exceeded the liability coverage provided by the policy.[10] In

6. LA. R.S. 22:215 (A)(1)(a) (1950), *as amended by* La. Acts 1972, No. 138, § 1 provides: "The insurer shall issue to the employer or association for delivery to each employee or member insured under such group policy, an individual certificate containing a statement as to the insurance protection to which he is entitled and to whom payable."

7. 315 So.2d 754 (La. 1975).

8. Graham v. American Cas. Co., 261 La. 85, 259 So.2d 22 (1972).

9. Deane v. McGee, 261 La. 686, 260 So.2d 669 (1972).

10. The Court of Appeal had held that language in the 1972 amendment authorizing the insured to increase his uninsured motorist coverage "to any amount not in excess of the limits of the automobile liability insurance carried by such insured"

addition, the court gave its stamp of approval to *Wilkinson v. Fireman's Fund Insurance Co.*,[11] which permitted the stacking of coverages for multiple vehicles insured under a single policy. Finally, stacking was made available not only to Barbin and his wife who were named insureds, but also to the other passengers who under the terms of the policy were insured only "while occupying an insured automobile." Engaging in more of the strained logic which gave birth to stacking in the first place, the court pointed out that an "insured automobile" was defined as "an automobile described in the policy" and concluded that the passengers were entitled to stack the limits for both vehicles while occupying either insured vehicle.

The Court of Appeal has gone one step further in *Seaton v. Kelly*[12] by allowing a passenger in one of two vehicles owned by the same person but insured under separate policies to stack the limits of uninsured motorist coverage under both policies. The Louisiana Supreme Court has granted writs on this case.[13]

Making an "interest analysis" under the *Jagers*[14] theory of conflicts of laws, the court in *Sutton v. Langley*[15] concluded that a Texas resident who was a guest passenger in an automobile driven by another Texas resident and who was injured in an accident which occurred in Louisiana was entitled to recover stacked uninsured motorist coverages under a policy issued in Texas even though Texas law permits neither stacking nor recovery by a guest passenger. It is difficult to understand why Louisiana had an overriding interest in the interpretation of the insurance policy.

PENALTIES

The statutes providing penalties for failure to pay insurance claims timely may be summarized as follows:

1) LA. R.S. 22:656 provides that all death claims shall be settled within sixty days from receipt of due proof of death. If the insurer fails to pay "without just cause," then the amount due bears interest at the rate of six percent from date of receipt of proof of death.

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prevented stacking beyond the liability limits. 302 So.2d 631 (La. App. 3d Cir. 1974). LA. R.S. 22:1406 was again amended in 1974 to require writing uninsured motorist coverage with the same limits as liability coverage unless the insured rejects the coverage or selects lower limits. The appellate courts have not yet had an opportunity to say what effect, if any, the 1974 amendment has on stacking.

11. 298 So.2d 915 (La. App. 3d Cir. 1974).
12. 327 So.2d 512 (La. App. 3d Cir.), *cert. granted*, 330 So.2d 312 (La. 1976).
13. 330 So.2d 312 (La. 1976).
14. Jagers v. Royal Indem. Co., 276 So.2d 309 (La. 1973).
15. 330 So.2d 321 (La. App. 2d Cir.), *cert. denied*, 333 So.2d 242 (La. 1976).

2) LA. R.S. 22:657 (A) subjects the insurer who fails to pay claims under health, accident and disability policies without "just and reasonable grounds"[16] within thirty days from date of filing of proof of claim to a penalty of double the benefits due, plus attorney's fees to be determined by the court. Section 657 (B) is similar to LA. R.S. 22:656 providing a six percent penalty without attorney's fees for failure without just cause to pay death claims timely under health and accident policies.
3) LA. R.S. 22:658 provides that insurers issuing any type of contract other than those specified in Sections 655 and 656 shall pay the claim within sixty days after receipt of proof of loss. If the failure to pay timely is found to be "arbitrary, capricious or without probable cause," the claimant is entitled to a penalty of twelve percent of the amount due, plus reasonable attorney's fees. This section is made expressly applicable to workmen's compensation claims and also provides a 25% penalty for fire and theft claims under policies covering certain movables.

Although the statutes use different language to express the standard of conduct required of insurers, the courts do not appear to make any real distinction. Recent cases illustrate that the courts take a "no foolishness" approach to the payment of claims and will readily cast with penalties the insurer who cannot justify failure to pay by a serious dispute.[17] There has not been unanimity among the courts as to whether a serious legal dispute is sufficient justification. Some courts have held that an insurer may seek a judicial interpretation of its policy only at the peril of penalties if its interpretation is not upheld.[18] However, the latest jurisprudence recognizes that an insurer advancing a reasonable interpretation of its policy is entitled

16. "[U]nless just and reasonable grounds, such as would put a reasonable and prudent business man on his guard, exist. . . ." LA. R.S. 22:657 (A) (1950), *as amended by* La. Acts 1960, No. 287, § 1.

17. *E.g.*, Baghramain v. MFA Mut. Ins. Co., 315 So.2d 849 (La. App. 3d Cir. 1975); Witherwax v. Zurich Ins. Co., 315 So.2d 420 (La. App. 3d Cir. 1975). *See, e.g.*, Davis v. Aetna Cas. & Sur. Co., 329 So.2d 868 (La. App. 2d Cir. 1976).

18. Campasi v. Mutual Benefit Health & Accident Ass'n, 207 La. 758, 22 So.2d 55 (1945); Reichert v. Continental Ins. Co., 290 So.2d 730 (La. App. 1st Cir.), *cert. denied*, 294 So.2d 545 (La. 1974). "Our jurisprudence has established the rule that an insurer's failure to properly interpret its own policy provisions does not constitute reasonable ground for refusal to pay a claim thereunder. Even though the issue raised is res nova under our jurisprudence, the risk of erroneous interpretation is deemed made at insurer's risk, not the insured's." 290 So.2d at 735. Tingle v. Globe Life Ins. Co., 290 So.2d 460, 463 (La. App. 2d Cir. 1974): "If it undertook to deny liability in order to ascertain the meaning of a provision, it assumed the risk, including the payment of penalties and attorney's fees."

to its day in court without penalty even if its interpretation is rejected.[19] A legal dispute should be considered just as reasonable grounds for failure to pay as a factual dispute.[20]

The substantial differences in the penalty statutes are unnecessary. The penalties under Section 656 are barely a wrist slap whereas those under Section 657 are unduly harsh. Since reasonable men often differ as to what constitutes reasonable conduct, the jurisprudence does not demonstrate consistent application of the statutes. Even where there is a serious factual or legal dispute, the insured who is forced to incur the expense and delay of litigation in order to have his claim paid has received something less than he paid for with his premium dollars. The legislature should consider substitution of a statute governing all claims between the insurer and its insured providing that the insurer shall be liable for a fixed bonus percentage of the claim in all cases in which the insurer fails to pay timely and the insured ultimately recovers.[21]

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19. Lea v. St. Paul Fire and Marine Ins. Co., 306 So.2d 740 (La. 1975); Martin v. American Benefit Life Ins. Co., 294 So.2d 200 (La. 1974) (Dixon & Tate, JJ., dissenting); Colvin v. Louisiana Hosp. Serv., Inc., 321 So.2d 416 (La. App. 2d Cir.), *cert. denied*, 323 So.2d 476 (La. 1975); Cotlar v. Gulf Ins. Co., 318 So.2d 923 (La. App. 4th Cir. 1975); Gomez v. Security Ins. Co., 314 So.2d 747 (La. App. 4th Cir. 1975).

20. It cannot be argued that a "prudent business man" (the test under LA. R.S. 22:657) would pay a claim which is not recoverable under his reasonable interpretation of the contract even though the other party contends another interpretation is possible.

21. This approach is utilized for surety bonds under LA. R.S. 9:3902 (1950) which provides a statutory 10% attorney's fee. A minimum bonus may be necessary to discourage arbitrary conduct with small claims.