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INSURANCE

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UNINSURED MOTORIST COVERAGE

In *Breaux v. Government Employees Insurance Co.*,[1] the Louisiana Supreme Court had to decide for the first time whether a claimant could recover under both the liability and the uninsured motorist provisions of the same automobile insurance policy. The plaintiffs were the survivors of a passenger in the insured vehicle who was killed in an accident caused by the negligence of the operator of that vehicle. They entered into a settlement with GEICO, the insurer of the host driver's vehicle, for the amount which represented their proportionate share of the liability limits. However, they expressly released all claims against GEICO under both the liability and the uninsured motorist provisions of its policy.[2] Since the value of their claim exceeded the amount of the settlement, the plaintiffs sought to recover the remainder of their damages from Traders, their own uninsured motorist carrier.[3] Traders denied responsibility on the ground that GEICO would have provided the primary uninsured motorist coverage if it had not been released by the plaintiffs.[4] Therefore, Traders claimed that it was entitled to credit for the amount of GEICO's uninsured motorist coverage, which coverage would have been sufficient to fully compensate the plaintiffs without resort to Trader's policy.[5]

The First Circuit Court of Appeal[6] agreed with Traders, thus indirectly holding that a claimant was able to recover under both the

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1. 369 So. 2d 1335 (La. 1979).

2. The liability limits were $50,000 per person and $100,000 per accident. The policy afforded uninsured motorist coverage with the same limits. Since there were multiple injuries and deaths, the full liability limits were not available to plaintiffs who settled for $39,700. The trial court concluded that their total damages were $76,904.65, leaving a claim of $37,204.65 in excess of the liability limits. *Id.* at 1336-37.

3. Revised Statutes 22:1406(D)(2)(b) extends the definition of an uninsured motor vehicle to include an underinsured vehicle where liability coverage is less than the amount of damages suffered by the insured.

4. The "other insurance" clauses of uninsured motorist coverage generally provide that the coverage is excess when the insured is occupying a nonowned automobile covered by similar insurance.

5. See note 2, *supra*. Traders argued that the plaintiffs would have received the same proportion of the uninsured motorist limits as liability limits, $39,700.

6. 364 So. 2d 158 (La. App. 1st Cir. 1978).

liability and the uninsured motorist provisions of the same policy for damages caused by the negligence of the host driver. The court followed the logic of the third circuit in *Guillot v. Travelers Indemnity Co.*,[7] which held that the policy provisions designed to prevent such multiple recovery were invalid because they were in derogation of the uninsured motorist coverage required by Louisiana Revised Statutes 22:1406(D).[8]

A unanimous supreme court reversed. In the opinion by Justice Marcus analyzing Louisiana Revised Statutes 22:1406(D), the supreme court concluded that the statute implicitly distinguished between an "insured vehicle" and an "uninsured vehicle" and did not contemplate that a single vehicle could be both the insured and the uninsured vehicle. The court thus concluded that the statute does not require that the uninsured motorist coverage of a policy be extended to occupants of the insured automobile after they have exhausted the liability coverage for the negligent host driver under that policy, with the result that policy provisions which preclude such multiple coverage were enforceable. Since the GEICO uninsured motorist coverage was not available to the plaintiffs, Traders was liable under its uninsured motorist coverage for their damages in excess of the liability coverage up to the limits of the Traders policy. Although this decision worked to the benefit of the plaintiffs in the *Breaux* case, the net effect will be to restrict the amount of uninsured motorist coverage available to guest passengers.[9] However, the decision is certainly consistent with the express provisions of the insurance policy and based upon a reasonable interpretation of the statute.[10]

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7. 338 So. 2d 334 (La. App. 3d Cir. 1976).

8. In uninsured motorist coverage, the insured is entitled to receive from his own insurer the damages he is entitled to recover from the owner or operator of an "uninsured highway vehicle." Policies generally provide that an uninsured highway vehicle shall not include "an insured automobile or an automobile furnished or available for the regular use of the named insured or any relative."

9. Although a recent amendment generally restricts recovery to the limits of one uninsured policy, 1977 La. Acts, No. 623, *amending* LA. R.S. 22:1406(D) (Supp. 1962 & 1975), the statute does permit "stacking" of two policies where the insured is occupying an automobile not owned by him. Therefore, if *Breaux* had permitted recovery under the policy on the vehicle, the passenger also would have been able to stack his own policy if needed to compensate for his damages.

10. Under a different factual situation, there remains a possibility of both coverages being available under the same policy. Suppose the passenger were injured through the joint negligence of his host driver and another motorist who was not insured. If the liability limits of the host driver were inadequate, could the passenger look to the uninsured motorist coverage on the host vehicle based upon the liability of the other motorist? In this situation, the exclusion of the "insured vehicle" from the definition of "uninsured motor vehicle," see note 8, *supra*, would not preclude coverage

In *Niemann v. Travelers Insurance Co.*,[11] a sharply divided Louisiana Supreme Court devastated the "subrogation" rights of the insurer under uninsured motorist coverage. Auto policies generally provide for subrogation upon payment of the uninsured motorist claim to the insured's rights against the negligent motorist and protect the subrogation right with both a general obligation not to prejudice such right and a specific obligation not to settle with the negligent motorist without consent of the insurer.[12] In *Niemann*, the insured settled with the insurer of the negligent motorist for an amount nearly equal to the limits of his liability coverage. He expressly released both the negligent motorist and his insurer without seeking the consent of his own insurer. When the insured, claiming that he had not been fully compensated for his damages, then made demand upon his own insurer under the uninsured motorist provisions of his policy, this insurer defended on the ground that the insured had breached the subrogation and consent-to-settle provisions of the policy. Reversing the lower courts, the supreme court held that these provisions were not enforceable because the insurer was

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since there was another uninsured vehicle to trigger coverage. However, policies seek to prevent such multiple recovery under the liability and uninsured motorist provisions of the same policy by providing that the insurer is entitled to dollar for dollar credit against the limits of liability of one coverage for any amount payable under the other coverage. Decisions such as *Crenwelge v. State Farm Mutual Automobile Insurance Co.*, 277 So. 2d 155 (La. App. 3d Cir. 1973), cast doubt as to whether such credit provisions would be enforceable against the argument that such provisions reduce the coverage below the mandatory limits required by statute.

11. 368 So. 2d 1003 (La. 1979). Justice Calogero authored the majority opinion. Chief Justice Summers and Justices Marcus and Culpepper (ad hoc) dissented.

12. In *Niemann*, the policy provided as follows:

> "30. *Subrogation* Parts I, II, III [Protection Against Uninsured Motorists] and V
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> "In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and, with respect to Part II, all the rights of recovery therefor which the injured person or any one receiving such payment may have against any person or organization. The insured, or with respect to Part II such person, shall execute and deliver instruments and papers, do whatever else is necessary to secure such rights and shall do nothing for loss to prejudice such rights.
>
> "Part III—Protection Against Uninsured Motorists
>
> ". . . .
>
> "*Exclusions*
>
> "This policy does not apply under Part III:
>
> ". . . .
>
> "(b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall without written consent of the company, make any settlement with any person or organization who may be legally liable therefor . . . ."

Id. at 1005.

vested only with a limited right of reimbursement under the provisions of Louisiana Revised Statutes 22:1406(D)(4)[13] and had no right to control the insured's settlement with the negligent motorist or his insurer. In justifying this extremely narrow reading of the statute, the majority pointed to the insured's dilemma in underinsured motorist situations. The liability insurer of the negligent motorist will generally require the insured to release both before it will voluntarily settle for its policy limits.[14] On the other hand, the insured's own uninsured motorist carrier would refuse consent to such settlement in many instances to preserve its subrogation claim against the negligent motorist, thus for its own self-interest preventing its insured from receiving early compensation. However, the decision appears to leave the uninsured motorist carrier completely at the mercy of its own insured without an enforceable right to place the ultimate burden of the loss on the negligent motorist. In addition, the path is open for collusion between the insured and the negligent motorist.[15]

The *Niemann* opinion recommends legislative clarification of the statute, and this is a wise suggestion. The uncertainty which spawned *Breaux*, *Niemann*, and much other uninsured motorist litigation results from legislative and jurisprudential tinkering with specific aspects of the coverage, without a coordinated approach to the entire coverage. The concept has developed dramatically since its inception in 1962 into an extremely important protection for motorists in Louisiana. The legislature should undertake a complete revision of the existing statute in order to coordinate the legislative amendments, clarify the uncertainties, eliminate the need for so much interpretative litigation, and speed the compensation of accident victims.

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13. LA. R.S. 22:1406(D)(4) (Supp. 1975 & 1977) provides:

> In the event of payment to any person under the coverage required by this Section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

14. The insurer will wish not only to protect its insured from liability in excess of the liability policy limits but also to relieve itself of any further obligation to defend its insured.

15. The legislature should seek a compromise between the interests of the insured and his insurer. For example, the right of an uninsured motorist carrier to disapprove a settlement by its insured with the liability insurer and the negligent motorist could be conditioned upon the requirement that the carrier advance the amount of the proposed settlement to its insured pending final resolution of the liability claim.

FIRE POLICIES

In *Rodriguez v. Northwestern National Insurance Co.*,[16] the insurer sought to defeat liability under its fire insurance coverage on a log skidder on the ground that the insured had breached promissory warranties which required the insured to have a certain type of fire extinguisher available at all times and to carry out certain maintenance operations "at frequent intervals" and "before discontinuing work for the day." The evidence showed that the equipment was supplied with a fire extinguisher which differed from the type required by the policy and that the insured performed the maintenance at the beginning of each day and at irregular intervals thereafter depending upon working conditions.

The insured sought to escape the alleged breaches of warranty on the ground that the insurer had failed to show any causal connection between the breaches and the fire which damaged the equipment. The court correctly held that the effect of the warranty provisions was governed by Louisiana Revised Statutes 22:692,[17] an "anti-technical" statute which provides that a breach of any representation, warranty, or condition shall not defeat coverage unless such breach exists at the time of the loss and increases either the moral or physical hazard under the policy. The insurer is *not* required to show a causal connection between the breach and the loss. However, the insurer has the burden of proof that (1) there was a breach of warranty, (2) that the breach materially or substantially increased the moral or physical hazard under the policy, and (3) that both the breach and the increase in hazard existed at the time of the loss. The court concluded that the insurer in *Rodriguez* had not carried its burden of proof because it failed to establish that the fire extinguisher supplied with the equipment differed materially from that required under the policy or that the variation between the actual and required maintenance procedures materially increased the physical hazard.[18]

16. 358 So. 2d 1237 (La. 1978).

17. LA. R.S. 22:692 (1950) provides in pertinent part:

> No policy of fire insurance issued by any insurer on property in this state shall hereafter be declared void by the insurer for the breach of any representation, warranty or condition contained in the said policy or in the application therefor. Such breach shall not avail the insurer to avoid liability unless such breach (1) shall exist at the time of the loss, and be either such a breach as would increase either the moral or physical hazard under the policy . . . .

18. Revised Statutes 22:619 is the anti-technical statute applicable to coverages other than fire coverages.