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Proportionate Prescription - An Alternative for Applying Changes in Liberative Prescriptive Periods

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PROPORTIONATE PRESCRIPTION—AN ALTERNATIVE FOR APPLYING CHANGES IN LIBERATIVE PRESCRIPTIVE PERIODS

In *Matthews v. Insurance Company of North America*,[1] plaintiff's automobile was struck by a vehicle driven by an uninsured motorist. The accident occurred on May 7, 1976, and on April 27, 1977, plaintiff sued the tortfeasor and his alleged liability insurer. On November 2, 1979, plaintiff amended the original petition to name her uninsured motorist carrier as a defendant, alleging that the tortfeasor was uninsured.

During the period between the filing of the original petition and the filing of the amended petition, the legislature enacted Louisiana Revised Statutes 9:5629. Effective July 1, 1978, it reduced the prescriptive period for actions by an insured against his own uninsured motorist carrier from ten years to two years.[2] Under the new, shorter period, plaintiff's suit would have been barred since it was brought more than two years after the date of the accident.

The trial court, however, applied the doctrine of "proportionate prescription"[3] and held that the cause of action against the uninsured motorist carrier was timely filed. The Fourth Circuit Court of Appeal issued a writ of mandamus directing the trial court to sustain the plea of prescription. The supreme court granted writs and reversed.

The supreme court's reasoning process differed from that of the trial court without specifically rejecting the lower court's rationale. Citing its decision in *Hoefly v. Government Employees Insurance Co.*,[4] rendered on the same day as *Matthews*, the supreme court held that the uninsured tortfeasor and the uninsured motorist carrier were solidarily liable to the victim. Thus the timely suit against the tort-

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1. 418 So. 2d 582 (La. 1982).

2. LA. R.S. 9:5629 (Supp. 1977). Before the statute's enactment, the 10-year prescription for suits on contract had applied. LA. CIV. CODE art. 3544; Booth v. Fireman's Fund Ins. Co., 253 La. 521, 218 So. 2d 580 (1969); Thomas v. Employer's Mut. Fire Ins. Co., 253 La. 531, 218 So. 2d 584 (1969).

3. 418 So. 2d at 582. The formula used to describe this doctrine originally did not have the name "proportionate prescription"; when used, the formula was cited in full. Later cases refer to the doctrine as proportionate prescription, however, and as it is an effective shorthand description of the formula, that name is used in this note. See text following note 22, *infra*, for a mathematical definition of proportionate prescription.

4. 418 So. 2d 575 (La. 1982).

feasor interrupted the liberative prescription running in favor of the carrier.[5]

The supreme court chose to base its decision on the consequences of the solidary obligation between the tortfeasor and the uninsured motorist carrier,[6] thereby avoiding discussion of the concept of "proportionate prescription," which had been the basis for the decision of the trial court. But its implicit recognition of the doctrine for the first time in this century merits consideration and discussion. The purpose of this note is to define what has become known as the doctrine of proportionate prescription, to discuss its historical development, and to determine the practicality and advisability of its continued application.

The doctrine of proportionate prescription can be traced to the 1834 case of *Goddard's Heirs v. Urquhart*,[7] in which the court stated:

> Where the law is changed after prescription begins to run, the time which elapsed under the law preceding the alteration is to be computed according to that law, and that which follows is to be reckoned according to the new law; and the time acquired under the old law is to be added to that acquired under the new law, in the proportion that each *time* bears to the *term* required by the old and new laws.[8]

From its beginning in *Goddard's Heirs*, proportionate prescription was applied consistently during most of the nineteenth century as the general rule for application of changes in prescriptive periods. In some cases the court found that the suit had not prescribed; in others proportionate prescription caused the plaintiff's suit to be barred. The kinds of cases in which the supreme court applied proportionate

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5. LA CIV. CODE art. 2097 provides: "A suit brought against one of the debtors *in solido* interrupts prescription with regard to all." *See* Baker v. Payne & Keller of La., Inc., 390 So. 2d 1272 (La. 1980).

6. The *Hoefly* court expressly avoided discussing the effects of solidarity, other than interruption of prescription, in uninsured motorist cases. 418 So. 2d at 580. The questions of the effect of payment by one debtor and the right to contribution or indemnity will have to be determined at a later date. One serious question remaining is whether the effect of interruption of prescription will flow in the opposite direction, *i.e.*, whether the court intended that suit against the carrier interrupts prescription as to the tortfeasor.

7. 6 La. 659 (1834). Before the enactment of the Louisiana Civil Code of 1825, prescription for contract suits was ten years as to all persons; the Code of 1825, however, provided a twenty-year prescription for absentees. At the time the Code was promulgated, five months of the ten-year prescription had not run; multiplying that number by two (the proportion of the new time to the old), the court held that plaintiff's action was barred ten months after the Code's promulgation, several years before suit was actually instituted.

8. *Id.* at 660.

prescription ran the gamut of civil cases, including contract,[9] successions,[10] promissory notes,[11] judgments,[12] open accounts,[13] tax,[14] and petitory[15] actions. Courts in two later appellate cases applied the doctrine to a suit to recover erroneous freight charges[16] and a suit for workers' compensation.[17]

At the end of the nineteenth century, proportionate prescription fell into disuse as problems of prescription began to be considered in light of due process guarantees. The doctrine resurfaced in 1950 in a federal case dealing with mineral interests.[18] The only recent cases discussing proportionate prescription arose in the first and fourth circuits. The respective circuits disagreed on the correctness of a modern application of proportionate prescription. The first circuit expressly adopted proportionate prescription as the rule to be applied in the absence of a legislative intent to the contrary,[19] while the fourth cir-

9. Goddard's Heirs v. Urquhart, 6 La. 659 (1834).

10. Xanpi v. Orso, 11 La. 57 (1837). This case involved the Civil Code of 1825 provision for prescription against absentees (see note 7, *supra*) but concerned successions, for which the former prescription was thirty years. At the time of the Code's promulgation, half of the thirty-year period had accrued. Proportionate prescription barred plaintiff's suit because it was brought more than ten years after the Code's effective date.

11. Mayor v. Ripley, 11 La. 144 (1837). The 1825 Civil Code reduced the liberative prescription on promissory notes from ten years to five years. In this case the court declared suit to have been brought eighteen days too late. That the court emphasized eighteen days to be more than must be allowed for leap years indicates the extent of the court's reliance on proportionate prescription.

12. Whitworth v. Ferguson, 18 La. Ann. 602 (1866). In 1853, after seven years had run against the judgment, the prescriptive period for domestic judgments was reduced from thirty years to ten. Plaintiff sued before the suit prescribed in 1861.

13. Tate v. Garland, 12 La. Ann. 525 (1857). The legislature reduced the prescriptive period for suits on open accounts from ten years to three years. Applying proportionate prescription, the court held that the suit had prescribed because two-thirds of the old prescription had yet to run when the change was made and more than two years (two-thirds of the new prescription period) had run before plaintiff sued.

14. Dunlop & McCance v. Minor, 26 La. Ann. 117 (1874). This case is apparently the last case in which the supreme court applied proportionate prescription. The prescriptive question involved the applicable prescription for tax liens for the years 1867 and 1868; the court held that the former had prescribed but the latter had not.

15. Kellar v. Parish, 11 La. Ann. 111 (1856), applied proportionate prescription in an acquisitive prescription situation. This Note does not address the issue of the appropriateness of the doctrine's application to cases involving acquisitive prescription; it concerns only the application of the doctrine to liberative prescription.

16. McAdams v. Southern Express Co., 14 Orl. App. 276 (La. App. 1917). The *McAdams* court rejected arguments that proportionate prescription is unconstitutional and arbitrary.

17. Musick v. Central Carbon, 8 La. App. 136 (2d Cir. 1927).

18. United States v. Nebo Oil Co., 90 F. Supp. 73 (W.D. La. 1950).

19. Henson v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 612, 616 (La. App. 1st Cir. 1977), *aff'd*, 363 So. 2d 711 (La. 1978).

cuit expressly rejected the first circuit's application of proportionate prescription, stating that the doctrine had been superseded by modern rules applicable to prescription statutes.[20]

Doctrinal treatment of proportionate prescription has been limited. Indeed, only a few twentieth century Louisiana works mention proportionate prescription.[21] Perhaps the best doctrinal treatment of the subject comes from Planiol, who described in his treatise what amounts to practically the same formula announced by the Louisiana Supreme Court in *Goddard's Heirs*.[22] Unlike the application in the Louisiana case, however, Planiol's suggestion for proportioning prescription concerned changes in periods for acquisitive prescription of property.

It is not difficult to see how this formula came to be called proportionate prescription. The time the plaintiff has in which to sue is determined by forming a proportion of the new time to the old and multiplying that fraction by the amount of time remaining under the old prescriptive period at the effective date of the new period. For example, if, at the inception of the plaintiff's cause of action, the applicable prescriptive period is two years and, one year after the cause of action has arisen, the legislature reduces the period to one year, arguably the plaintiff's action has prescribed. But under proportionate prescription, the plaintiff has six months remaining in which to sue, since the proportion of the new time (one year) to the old (two years) multiplied by the time remaining at the effective date of the new period (one year) equals six months. Thus, the plaintiff has six months in which to sue. In the same example, if only three months have passed at the time the period is reduced, the plaintiff has ten months and two weeks left to sue; one-half multiplied by the remaining twenty-one months is equal to ten and one-half months.

In *Matthews*, at the effective date of the change in the prescriptive period, only two years and two months of the former ten-year period had run. The proportion of the new time to the old (2/10) multiplied by the time remaining under the old prescriptive period (7 years, 10 months) equals one year, six months and twenty-four days.

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20. Lott v. Haley, 363 So. 2d 1270, 1273 (La. App. 4th Cir. 1978), *rev'd*, 370 So. 2d 521 (La. 1979). Other fourth circuit cases mentioning proportionate prescription are Orleans Parish School Board v. Pittman Constr. Co., 244 So. 2d 641 (La. App. 4th Cir. 1971) and LaGraize v. New Orleans Armature Works, 387 So. 2d 687 (La. App. 4th Cir. 1980).

21. Wall, *Imprescriptible Mineral Interests in Louisiana*, 42 LA. L. REV. 123, 127 (1981); Yiannopoulos, *Real Actions in Louisiana and Comparative Law*, 25 LA. L. REV. 589, 625 n.178 (1965); Comment, *Imprescriptible Mineral Reservations in Sales of Land to the State and Federal Governments*, 22 TUL. L. REV. 496, 503 n.45 (1948).

22. 1 M. PLANIOL, CIVIL LAW TREATISE pt. 1, no. 248 at 177 (11th ed. La. St. L. Inst. trans. 1959). See text at note 9, *supra*.

Mrs. Matthews' suit against the uninsured motorist carrier on November 2, 1979, was filed within one year, six months and twenty-four days of the statute's effective date. Therefore, under proportionate prescription, the plaintiff's suit was timely.

The factual circumstances of each case will determine whether proportionate prescription will operate to grant the plaintiff a temporary reprieve from the bar posed by a new statute of limitations. Nevertheless, several fact patterns can be considered. First, consider a statute that shortens the prescription period. For example, the prescriptive period is shortened from four years to two, two years already having elapsed under the old period when the new period takes effect. If proportionate prescription allows the plaintiff one additional year to sue after the prescription change, a suit brought within one year of the change will not be barred but a suit brought more than one year after the change will be barred.

The doctrine of proportionate prescription applies equally well to statutes that lengthen the prescriptive period. For example, if a liberative period of prescription is lengthened from one year to two years after six months of the old time has passed, proportionate prescription would allow the plaintiff an additional year after the effective date of the statute (*i.e.*, 2/1 times six months equals twelve months) in which to bring his action.

If the entire amount of the former prescription has accrued at the time the period is changed, proportionate prescription would not extend the time for the plaintiff's suit because the amount of time remaining under the former period would equal zero. The possibility of extension does not arise when the prescriptive period is shortened because accrual of the former, longer period necessarily includes accrual of the newer, shorter period. The possibility may arise, however, when a prescriptive period is lengthened, since accrual of the shorter period does not necessarily include accrual of the longer period. However, in either case the amount of time remaining under the former period equals zero. The plaintiff's suit will always be barred after the accrual of the former period because zero multiplied by any proportion of the new time to the old time will always equal zero.

Furthermore, the proportionate prescription formula works only when a former prescription is either lengthened or shortened. The formula is not applicable when a prescriptive period is first established or when one is abolished. In either of the latter cases, the formula is impossible to compute. When a prescription is first established, the time of the former period in the proportion equals zero; when one is abolished, the time of the new period in the proportion equals zero. In either case, there is no proportion to be multiplied.

The supreme court's failure to apply the doctrine in over a century raises the issue of whether proportionate prescription remains a viable doctrine. The fourth circuit stated that proportionate prescription had been superseded by "modern rules" that developed to solve the problem which proportionate prescription had addressed in the nineteenth century.[23] These modern rules developed to answer the charge that retroactive application of a prescriptive provision violated article 8 of the Civil Code (prohibiting retrospective application of laws), the due process clause, and the constitutional proscription of divesting vested rights and impairing the obligation of contracts. Formulated over a period of several years, these rules were most recently summarized by the supreme court in *Lott v. Haley*:[24]

> [T]he general rule of prospective application applies only to substantive laws as distinguished from merely procedural or remedial laws which will be given retroactive effect in the absence of language showing a contrary intention . . . .
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> . . . [S]tatutes of limitation are remedial in nature and as such are generally accorded retroactive application. However, statutes of limitation, like any other procedural or remedial law, cannot consistently with state and federal constitutions apply retroactively to disturb a person of a preexisting right. Nonetheless, *a newly-created statute of limitation or one which shortens existing periods of limitation will not violate the constitutional prohibition against divesting a vested right provided it allows a reasonable time for those affected by the act to assert their rights.* Moreover, the legislature is the judge of the reasonableness of the time and the courts will not interfere except where the time is so short as to amount to a denial of justice.[25]

While these rules themselves are not without problems of application,[26] the thrust of the modern rules is that in order for a prescriptive provision to be retroactive in application, a reasonable time must be provided for those affected to assert their rights. Both the courts and the legislature must comply with this due process requirement. The legislature can satisfy due process by providing a reasonable saving clause or by allowing a reasonable period of delay before the statute's effective date.

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23. Lott v. Haley, 363 So. 2d 1270 (La. App. 4th Cir. 1978), *rev'd*, 370 So. 2d 521 (La. 1979).

24. 370 So. 2d 521 (La. 1979).

25. *Id.* at 523-24 (citations omitted; emphasis added).

26. For a discussion of some of these problems, see Hargrave, *Developments in the Law, 1980-1981—Louisiana Constitutional Law*, 42 LA. L. REV. 596, 601 (1982).

Courts also must act within the confines of due process when applying the doctrine of proportionate prescription. By definition, proportionate prescription involves a proportionate *retroactive* application of the new prescriptive provision. Thus the doctrine cannot apply unless the court determines that the legislature has provided a reasonable length of time for those affected to assert their rights before the new statute takes effect. In concluding that the legislature has provided a reasonable time, the court has already determined that the due process rights of the plaintiff are not offended by terminating his right to sue as of the date indicated in the statute. *A fortiori*, his rights will not be offended by the additional period proportionate prescription grants him to sue when the new statute shortens the prescriptive period. When the statute lengthens the prescriptive period but proportionate prescription allows less than the complete extension, the plaintiff cannot complain since he still has longer to sue than he would have had under the prescriptive period in effect at the time his cause of action arose.

The defendant's due process rights also must be considered. In *Chase Securities Corp. v. Donaldson*,[27] the United States Supreme Court held that restoring a remedy lost through mere lapse of time is not a due process violation per se. Although, under certain circumstances, restoring the plaintiff's remedy may violate the defendant's due process rights, arguably the application of proportionate prescription will not offend the defendant's rights. If the new statute extends the prescriptive period, the defendant is benefitted by proportionate prescription because the plaintiff ends up with less time to sue than he would have had under the revised prescriptive period. If the new statute shortens the prescriptive period, even though proportionate prescription allows the plaintiff more time than the new statute allows, the plaintiff still has less time to sue than he had under the period in effect at the time the cause of action arose.

Nevertheless, the argument could be made that application of the doctrine should be precluded as contrary to legislative intent. Consider the situation in which the legislature, in addition to enacting the prescriptive change, has provided a saving clause. The saving clause indicates an express legislative intent that the new statute will become effective immediately and that, after the specified time period, those adversely affected by the act may not bring suit.[28] Proportionate

27. 325 U.S. 304 (1945).

28. An example of a typical saving clause is found in 1944 La. Acts, No. 232, § 2: "[T]his Act is intended to and does affect presently existing mineral or royalty rights; notwithstanding which, any person whose rights would be affected hereby shall have a period of one year from and after the effective date of this Act in which to

prescription should not be applied in such a case because it would extend the time to sue, in direct conflict with the expression of legislative intent in the saving clause. On the other hand, when the legislature has not provided a saving clause but has simply allowed a period of delay between the statute's enactment and its effective date, proportionate prescription may be applied. Merely providing that the statute is not effective until a future date does not indicate a legislative intent that the right to sue of those affected by the act be terminated on that date.[29] Proportionate prescription in this situation, therefore, is not contrary to the legislative intent.

Another possible objection to the application of proportionate prescription may be based on the jurisprudential presumption that statutes of limitation are to be retroactively applied.[30] Arguably when a new prescriptive period is adopted, it alone should apply, running from the date of the event giving rise to the cause of action. However, proportionate prescription is a type of retroactive application of the new period, since by definition it applies the new statute proportionately to causes of action arising before the effective date of the statute. Therefore, proportionate prescription does not conflict with the judicial presumption that prescriptive statutes are to be applied retroactively.

Furthermore, the presumption of retroactivity is judicially created;[31] it is not based on a legislative mandate that the right to sue on a previously arising cause of action terminates as of the effective date of the new statute. Since the courts established the presump-

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exercise his rights." The constitutionality of this provision was challenged in Cooper v. Lykes, 218 La. 251, 49 So. 2d 3 (1950). The Louisiana Supreme Court held that the one-year period was reasonable and constitutionally valid.

A saving clause could have been provided in LA. R.S. 9:5629, the statute at issue in *Hoefly* and *Matthews*, to the effect that the statute was effective on publication (for instance, on August 15, 1977), but those whose rights would be affected would have one year from that date in which to exercise their rights. If the accident occurred on August 1, 1975, the action would prescribe on August 2, 1977, if the new two-year period applied. Under the saving clause, however, the plaintiffs would have until August 15, 1978, to exercise their rights.

29. The delay period is provided by the legislature's statement of the statute's effective date, as, for example, in the act in question in *Hoefly* and *Matthews*: "This Act shall become effective on July 1, 1978." Publication occurred on August 8, 1977. 1977 La. Acts, No. 444, § 4, *adding* LA. R.S. 9:5604 (later changed to 9:5629). From August 8, 1977 to July 1, 1978, the former period still applied.

30. Lott v. Haley, 370 So. 2d 521 (La. 1979).

31. Indeed, the presumption is contrary to the principle of LA. R.S. 1:2 (1950), which provides that "[n]o section of the Revised Statutes is retroactive unless it is expressly so stated." The courts, however, have avoided conflict by distinguishing procedural and remedial statutes from substantive ones—a distinction not made in the statute. *See* Lott v. Haley, 370 So. 2d 521 (La. 1979).

tion, they should be free to derogate from it. Although the due process reasonableness test should always be applied first, whether the question of retroactivity involves a saving clause or merely a period of delay, in the absence of a saving clause, a finding that the delay before the statute's effective date is reasonable need not end the inquiry. Absent an expression of legislative intent to the contrary, courts should not be bound by the strictures of the reasonableness test when it produces inequitable results. Proportionate prescription provides a means for courts to avoid such results. If, although the period of delay is reasonable, the court is faced with a case in which a prescriptive bar would be inequitable, proportionate prescription offers the court a way to achieve an equitable result by applying the new prescriptive period proportionately.

In *Matthews*, the supreme court declined an opportunity to affirm the district court's application of proportionate prescription and revive this useful doctrine, choosing instead to hold the uninsured motorist carrier solidarily liable with the tortfeasor. This holding of solidarity has effectively precluded any further problems with retroactive application of Louisiana Revised Statutes 9:5629, at least for those plaintiffs who timely sued the tortfeasor,[32] but similar changes in the prescriptive periods of other statutes may raise the same issues faced in *Hoefly* and *Matthews*. The statute may provide a reasonable time before its effective date; thus retroactive application is not unconstitutional. However, under the facts of a particular case, a nonproportional application of the new prescriptive period to bar plaintiff's cause of action may be unjust. In such a case, proportionate prescription is available to the court to achieve what it perceives to be an equitable result. Proportionate prescription recognizes that the new prescriptive period applies but also takes into account the parties' reliance on the former period; it is, therefore, one way for the court in an appropriate case to accommodate both the legislature and the parties.

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32. Reichenphader v. Allstate Ins. Co., 418 So. 2d 648 (La. 1982), is a hit-and-run uninsured motorist case in which the plaintiff did not timely sue the tortfeasor. The Louisiana Supreme Court determined that the eleven-month delay allowed in the act was reasonable and the plaintiff's suit four years after the accident was too late. The court emphasized that promulgation of a statute charges citizens with notice of its existence, "implicitly grant[ing] time for filing suit to persons whose actions would prescribe" in the interim. *Id.* at 649.