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OBLIGATIONS

*Bruce V. Schewe**

The last year witnessed judicial decisions concerning the law of obligations spanning a wide scope of topics: error as a vice of consent,[1] classification of contracts,[2] stipulations pour autrui,[3] repudiation of agreements,[4] compromises,[5] subrogation,[6] stipulated remedies,[7] quasi-

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1. E.g., Brabham v. Harper, 485 So. 2d 231, 233 (La. App. 3d Cir. 1986) ("[T]he burden of proof rests on the one seeking reformation of the instrument to establish the *mutual* error and mistake by clear and convincing proof, parol evidence being admissible for this purpose.") (citing Fontenot v. Lewis, 215 So. 2d 161 (La. App. 3d Cir. 1968); Catyb v. Deville, 246 So. 2d 41 (La. App. 3d Cir. 1971)).

2. E.g., Degeneres v. Burgess, 486 So. 2d 769 (La. App. 1st Cir. 1986).

3. E.g., State Farm Fire & Cas. Co. v. Williams, 486 So. 2d 849, 851 (La. App. 1st Cir. 1986) ("[A] stipulation pour autri [sic] must clearly reveal the intent of the contracting parties to stipulate some advantage for the third party.") (citing Teachers' Retirement Sys. v. Louisiana State Employees Retirement Sys., 444 So. 2d 193 (La. App. 1st Cir. 1983), rev'd on other grounds, 456 So. 2d 594 (La. 1984); HMC Management Corp. v. New Orleans Basketball Club, 375 So. 2d 700 (La. App. 4th Cir. 1979), cert. denied, 378 So. 2d 1384 (La. 1980)); Brooks v. Shipp, 481 So. 2d 655 (La. App. 1st Cir. 1985).

4. E.g., Trinity Carton Co. v. Falstaff Brewing Corp., 767 F.2d 184, 195 n.18 (5th Cir. 1985) ("[A]nticipatory repudiation is actionable under Louisiana law.") (citing Marek v. McHardy, 234 La. 841, 101 So. 2d 689 (1958)), cert. denied, 106 S. Ct. 1202 (1986).

5. E.g., Miller v. Lumbermens Mutual Casualty Co., 488 So. 2d 273, 279 (La. App. 3d Cir. 1986); Diggs v. Hood, 772 F.2d 190 (5th Cir. 1985).

6. E.g., Aetna Ins. Co. v. Naquin, 488 So. 2d 950 (La. 1986); Toce Oil Co. v. Central Indus., Inc., 488 So. 2d 331, 336 (La. App. 3d Cir.), cert. denied, 492 So. 2d 1221 (La. 1986); Anthony v. New Orleans Public Serv., Inc., 480 So. 2d 440, 441-42 (La. App. 4th Cir.), cert. denied, 482 So. 2d 628 (La. 1986); United States Fidelity & Guaranty Co. v. Richardson, 486 So. 2d 929, 932 (La. App. 1st Cir. 1986) ("Conventional subrogation by consent of the creditor is possible in all cases and may be given to any third person who is willing to pay the debt and become subrogated to the creditor's rights.") (citing LeBoeuf v. Dupre, 378 So. 2d 150 (La. App. 1st Cir. 1979)); Theriot v. Commercial Union Ins. Co., 478 So. 2d 741, 745 (La. App. 3d Cir. 1985).

7. E.g., Bonfanti v. Davis, 487 So. 2d 165, 169-70 (La. App. 3d Cir. 1986).

contracts,[8] proof of obligations,[9] interest,[10] contribution,[11] solidarity,[12] compensation,[13] novation,[14] and unjust enrichment.[15] In this survey, the highlights from the past term are discussed.

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8. E.g., Marine Design, Inc. v. Zigler Shipyards, 791 F.2d 375, 377 (5th Cir. 1986); Till v. Delta School of Commerce, Inc., 487 So. 2d 180, 182 (La. App. 3d Cir. 1986) ("The burden is on the party seeking quantum meruit to show the value of the services rendered.") (citing Dalgarn v. New Orleans Land Co., 162 La. 891, 111 So. 271 (1927)); Coastal Timbers, Inc. v. Regard, 483 So. 2d 1110, 1113 (La. App. 3d Cir. 1986) ("Recoverable items include the actual cost of materials and labor, including general overhead, and a reasonable or fair profit.") (citing Houma Armature Works & Supply, Inc. v. Landry, 417 So. 2d 42 (La. App. 1st Cir. 1982); Skains v. White, 391 So. 2d 1327 (La. App. 2d Cir. 1980); Brummett v. Hamel's Dairy, Inc., 324 So. 2d 502 (La. App. 2d Cir. 1975)); Remn Constr. Corp. v. Keating, 478 So. 2d 207, 210 (La. App. 3d Cir. 1985); Boudreaux v. Lininger, 475 So. 2d 1113, 1114 (La. App. 4th Cir. 1985).

9. E.g., Viator v. Bishop, 488 So. 2d 1228, 1229 (La. App 4th Cir. 1986) ("A party to the suit may qualify as the 'one credible witness' required by La.C.C. Art. 1846.") (citing Samuels v. Firestone Tire & Rubber Co., 342 So. 2d 661 (La. 1977); Strecker v. Credico Fin., Inc., 444 So. 2d 783 (La. App. 4th Cir. 1984); B. M. Albrecht Elec., Inc. v. Griffin, 413 So. 2d 246 (La. App. 4th Cir. 1982)); Hilliard v. Yarbrough, 488 So. 2d 1038, 1040 (La. App. 2d Cir. 1986) ("Although a plaintiff may serve as the witness, other corroborating circumstances must be proved. The corroborating circumstances may be 'general' and need not prove every detail of plaintiff's case.") (citing Bordlee v. Pat's Constr. Co., Inc., 316 So. 2d 16 (La. App. 4th Cir. 1975); Miller v. Harvey, 408 So. 2d 946 (La. App. 2d Cir. 1981)); Nash v. Nash, 486 So. 2d 1011, 1014-15 (La. App. 2d Cir. 1986); Courtesy Ford, Inc. v. Weatherly, 485 So. 2d 93, 96 (La. App. 2d Cir. 1986).

10. E.g., McLaurin v. Holley, 484 So. 2d 807 (La. App. 1st Cir. 1986).

11. E.g., Martin v. American Petrofina, Inc., 785 F.2d 543 (5th Cir. 1986); Diggs v. Hood, 772 F.2d 190 (5th Cir. 1985); Thompson v. Cane Garden Apartments, 480 So. 2d 373 (La. App. 3d Cir. 1985); Bergeron v. Amerada Hess Corp., 478 So. 2d 1308 (La. App. 5th Cir. 1985).

12. E.g., Martin v. American Petrofina, Inc., 785 F.2d 543 (5th Cir. 1986); Aetna Ins. Co. v. Naquin, 488 So. 2d 950 (La. 1986); Diggs v. Hood, 772 F. 2d 190 (5th Cir. 1985).

13. E.g., Publicker Chem. Corp. v. Belcher Oil Co., 792 F.2d 482, 485 (5th Cir. 1986); United States Fidelity & Guar. Co. v. Southern Excavation, Inc., 480 So. 2d 920 (La. App. 2d Cir. 1985), cert. denied, 481 So. 2d 1337 (La. 1986).

14. E.g., Holloway v. Acadian News Agency, Inc., 488 So. 2d 328, 330 (La. App. 3d Cir. 1986) ("Novation may not be presumed; the intention to extinguish the original obligation must be clear and unequivocal."); City Bank & Trust Co. v. New Iberia Hotel Partners, 486 So. 2d 1201, 1204 (La. App. 3d Cir. 1986) ("The general rule is that the new obligation must be valid and binding in order to replace the former obligation and thus effect a novation.") (citing Tucker v. Stone, 115 So. 2d 636 (La. App. 2d Cir. 1959)).

15. E.g., Scafide v. C. Itoh Indus. Mach., Inc., 483 So. 2d 151, 154 (La. App. 1st Cir. 1985); West Bldg. Materials, Inc. v. Daley, 476 So. 2d 554, 559 (La. App. 3d Cir. 1985).

Contribution and Indemnification

Two years ago the United States Fifth Circuit Court of Appeals in *Ducre v. Executive Officers of Halter Marine, Inc.*[16] rather remarkably stated that "a tortfeasor's cause of action for contribution against its cotortfeasor, where they are liable in solido, arises, not when the tort occurs but when judicial demand by the injured party is made upon one of the cotortfeasors."[17] To support this conclusion, the court relied upon the decision of the Supreme Court of Louisiana in *Brown v. New Amsterdam Casualty Co.*[18] and the opinion of the Louisiana Second Circuit Court of Appeal in *Lanier v. T. L. James & Co.*[19] It appears, particularly since the federal Fifth Circuit reaffirmed its view from *Ducre* this past year in *Martin v. American Petrofina, Inc.*,[20] the time has come to sort through these matters.

To start, it must be noted that under *Erie*[21] the federal courts are bound to follow the pronouncements in the reported opinions of the appellate courts of Louisiana regarding substantive issues of the law of Louisiana.[22] And the unmistakable assessment of the appellate courts of the State of Louisiana is that a claim in tort for contribution or indemnification does not vest until one debtor

16. 752 F.2d 976 (5th Cir. 1985).

17. Id. at 987-88 (footnote omitted).

18. 243 La. 271, 142 So. 2d 796 (La. 1962).

19. 148 So. 2d 100 (La. App. 1st Cir. 1962).

20. 785 F.2d 543 (5th Cir. 1986).

21. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

22. Section 34 of the Judiciary Act of 1789, otherwise known as the Rules of Decision Act, proclaimed that "[t]he laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This policy now exists at 28 U.S.C. § 1652 (1982). In the words of Justice Brandeis, the author for the Court in *Erie*,

> And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts.

304 U.S. at 78, 58 S. Ct. at 822. The quintessential summary of *Erie*, its implications, and its progeny (including Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464 (1945), Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), and Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136 (1965)) is found in C. Wright, Handbook of the Law of the Federal Courts, §§ 54-56 (3d ed. 1976).

in solido either is cast in judgment[23] or actually pays the judgment.[24] Nonetheless, because the three federal district courts of Louisiana[25] are constrained to honor the precedents of the United States Fifth Circuit Court of Appeals,[26] the following comments are directed at the Fifth Circuit as a call for the reappraisal and reexamination of *Ducre* and *Martin*.

Prior to the Third Party Practice Act of 1954, no mechanism existed for one debtor in solido to compel the appearance in the litigation of other potential solidary obligors.[27] Therefore, each debtor in solido, bound for the whole of the obligation,[28] was at the mercy of the creditor's whim in naming defendants in the petition. The solidary debtor, moreover, "could not enforce contribution from a person whom he asserted to be a joint wrongdoer unless and until both had been cast in solido by a judgment."[29] Due to judicial resistance[30] to the scheme of the Third Party Practice Act, a work-

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23. E.g., Thompson v. Cane Garden Apartments, 480 So. 2d 373, 374 (La. App. 3d Cir. 1985) ("[P]rescription does not begin to run on a claim for idemnification [or contribution] until the party seeking it is, itself, cast in judgment.") (citing Smith v. Hartford Accident & Indem. Co., 399 So. 2d 1193 (La. App. 3d Cir.), cert. denied, 406 So. 2d 604 (La. 1981)); Bergeron v. Amerada Hess Corp., 478 So. 2d 1308 (La. App. 5th Cir. 1985); McKneely v. Don Coleman Constr. Co., Inc., 441 So. 2d 497 (La. App. 2d Cir. 1983); Guidry v. Hoogvliets, 411 So. 2d 629 (La. App. 4th Cir. 1982); Matt v. Cox 408 So. 2d 389 (La. App. 1st Cir.), cert. denied, 499 So. 2d 913 (La. 1986); Blue Streak Enterprises, Inc. v. Gulf Coast Marine, Inc., 370 So. 2d 633 (La. App. 4th Cir. 1979).

24. E.g., Thomas v. W & W Clarklift, Inc., 375 So. 2d 375, 378 (La. 1979) ("The right to enforce contribution is not complete until payment of the common obligation."); Brown v. New Amsterdam Casualty Co., 243 La. 271, 142 So. 2d 796 (1962); Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Sincer v. Bell, 47 La. Ann. 1548, 18 So. 755 (1895).

25. The three federal district courts are the Eastern, the Middle, and the Western.

26. E.g., Howard v. Gonzales, 658 F.2d 352, 359 (5th Cir. 1981) ("[I]n this circuit one *panel* cannot overrule another . . . .") (emphasis added). With even greater force the district courts must adhere to the opinions of the Fifth Circuit.

27. 1954 La. Acts 433. See McMahon, Courts and Judicial Procedure, 15 La. L. Rev. 38 (1954).

28. Old article 2091 of the Louisiana Civil Code stated as follows: "There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor." New article 1794 continues this view of passive solidarity: "An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee."

29. *Brown*, 243 La. at 275, 142 So. 2d at 798.

30. Perhaps many of the difficulties may be traced to an improper focus of the function of impleader. In Ferrantelli v. Sanchez, 90 So. 2d 351, 354-55 (La.

able method for solidary obligors seeking contribution did not appear until the adoption of the Code of Civil Procedure[31] and the attendant amendments to the Civil Code.[32]

When difficulties in the operation and interplay of old[33] article 2103 of the Civil Code,[34] as amended by Act 30 of 1960, and articles 1111[35] through 1116 of the Code of Civil Procedure surfaced in *Brown v. New Amsterdam Casualty Co.*, the Supreme Court of Louisiana noted this:

> It is true that as of that time the injured party's right and cause of action against either or both of two joint tortfeasors come into being; and conversely, the obligation of each of the latter to the claimant also commences. On the other hand, the *rights and obligations as between the joint wrongdoers do not then arise*, because they are not created by virtue of the commission of the tort and of the provisions of Revised Civil Code Article 2315. Rather, *they spring from the principle of contribution*, enunciated in Ar-

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App. Orl. 1956), it was assumed "that the Third-Party Practice Act was enacted to afford an additional remedy to a plaintiff." Quite to the contrary, "[t]he Louisiana concept of impleader appears to exist in order to grant the defendant, not the plaintiff, a valuable procedural right . . . ." Note, Louisiana Civil Procedure—Prescription of Third Party Demands—A Proposed Amendment to the Louisiana Code of Civil Procedure, 46 Tul. L. Rev. 1044, 1051 n.48 (1972).

31. 1960 La. Acts 30.

32. One part of Act 30 of 1960, effective January 1, 1961, amended and reenacted old article 2103 of the Civil Code to read as follows:

> When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or a quasi offense, it should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation.
>
> A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary codebtor by making him a third party defendant in the suit, as provided in Article 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff.

33. The revised articles of the Civil Code, under Act 331 of 1984, are referred to as "new" and any prior law, repealed or amended and re-enacted by Act 331 of 1984, is designated as "old." See Schewe, Developments in the Law, 1983-1984—Obligations, 45 La. L. Rev. 447, 447 n.2 (1985).

34. The essentials of old article 2103 presently are contained in new articles 1804 and 1805.

35. La. Code Civ. P. art. 1111, in part, provides that the "defendant in a principal action by petition may bring in any person, including a codefendant, who is his warrantor, or who is or may be liable to him for all or part of the principal demand." See Note, supra note 30.

> ticle 2103 and our jurisprudence, *which is required of solidary obligors when one has been compelled to pay the full amount of the obligation.* See Sincer v. Bell, 47 La. Ann. 1548, 18 So. 755 and Quatray v. Wicker et al., 178 La. 289, 151 So. 208. And it is only after judicial demand has been made on one of two or more solidarily obligated tort feasors that he can have any possible interest in seeking contribution.[36]

Accordingly, the opinion of the court in *Brown* stands precisely for the conclusion *opposite* the one reached by the panel in *Ducre*. In other words, the right to demand contribution vests in a debtor in solido when he has satisfied fully the obligation. The paying obligor then is subrogated[37] to the position of the creditor, and a claim for contribution or indemnification is ripe. Of course, to truncate procedurally the unwieldy system of staying the demand for contribution or indemnification until one solidary debtor completely performs in favor of the creditor, a third-party demand may be asserted much earlier[38]—during the litigation of the creditor's action.

Speculation is fruitless as to why the United States Fifth Circuit has so poorly read the law of Louisiana regarding when a demand for contribution or indemnification must be brought. A reversal en banc now may be needed[39] to overturn *Ducre* and *Martin*; this, however, is what should be done. The correct statement of law is put forward simply: while a claim for contribution or indemnification may be asserted procedurally by one debtor in solido against

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36. 243 La. at 275, 142 So. 2d at 798 (emphasis added).

37. Old article 2161(3) stated that subrogation takes place of right "[f]or the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it." New article 1829(3) basically repeats this text. While the traditional view has been that the language "bound with or for" demanded a solidary relationship among the debtors, Pringle-Associated Mortgage Corp. v. Eanes, 254 La. 705, 226 So. 2d 502 (1969), the recent ruling in Aetna Ins. Co. v. Naquin, 488 So. 2d 950 (La. 1986), has rejected that premise. The opinion in *Naquin* is reviewed in this survey. See infra notes 42-61 and accompanying text.

38. La. Code Civ. P. art 1111. The claim may be reserved, however, for reasons of strategy to avoid the plaintiff/creditor from benefiting from the skirmishes among the debtors/defendants.

39. E.g., Farnham v. Bristow Helicopters, Inc., 776 F.2d 535, 537 (5th Cir. 1985); United States v. Albert, 675 F.2d 712, 713 (5th Cir. 1982); Howard v. Gonzalez, 658 F.2d 352, 359 (5th Cir. 1981). Another solution to the pernicious problem is for a state court opinion, preferably of the Supreme Court of Louisiana, to announce plainly the correct rule. In "diversity cases" the Fifth Circuit is "to follow subsequent state court decisions . . . clearly contrary to a previous decision" of the Fifth Circuit. *Farnham*, 776 F.2d at 537.

one or more other solidary obligors, prior to payment of the entire debt, the demand does not vest until the performance to the creditor has been rendered.[40] As one of several consequences, prescription does not commence to run on the action for contribution or indemnification until payment.[41]

Solidarity and Subrogation

Several years ago Professor H. Alston Johnson III, writing in this forum,[42] waxed eloquent on the "curious dichotomy in Louisiana law on the question of legal subrogation of an insurer to the rights of its insured against a wrongdoer upon payment of the insured's claim."[43] Certainly, according to Professor Johnson, "legal subrogation should be the rule and . . . cases holding the contrary should be disapproved."[44] In *Aetna Insurance Co. v. Naquin*,[45] the supreme court adopted the result suggested by Professor Johnson; the rationale employed in the decision, however, is questionable, given the backdrop to the litigation.

The consolidated lawsuits reported as *Aetna Insurance Co. v. Naquin* involved these fundamental facts: Denis Ficarra, the owner of an apartment building, contracted with Robert Naquin for the repair of a roof of the building; the work was not performed properly, and as a consequence, the structure and the property of certain lessees of the premises were damaged by a rainstorm; the tenants made claims for the losses against Mr. Ficarra; and Aetna Insurance Company, Mr. Ficarra's insurer, after settling with the lessees, instituted an action for reimbursement from Mr. Naquin.[46] After a bench trial, the district court rendered judgment against Mr. Naquin, and the intermediate appellate court affirmed.[47]

The principal legal question posed to the supreme court was whether "Aetna will be subrogated [to the rights of Mr. Ficarra or his lessees against Mr. Naquin] if . . . it was bound with or for Naquin and . . . Aetna had an interest in discharging the debt."[48]

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40. *Thomas*, 375 So. 2d at 378; *Brown*, 243 La. at 275, 142 So. 2d at 798; *Quatray*, 178 La. at 292, 151 So. at 212; *Sincer*, 47 La. Ann. at 1549, 18 So. at 755.

41. E.g., *Thomas*, 375 So. 2d at 378. This subject is addressed in Note, supra note 30.

42. Johnson, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Obligations, 39 La. L. Rev. 675 (1979).

43. Id. at 675.

44. Id.

45. 488 So. 2d 950 (La. 1986).

46. Id. at 951.

47. 478 So. 2d 1352 (La. App. 5th Cir. 1985).

48. 488 So. 2d at 953.

In opposition to the subrogation, Mr. Naquin urged that Aetna Insurance Company had not been solidarily bound with any debtor and that the relationship in solido was mandated for legal subrogation to flow under the old article 2161 of the Civil Code.[49] The supreme court, through Justice Blanche, rejected this argument: "It is unnecessary to examine the relationship of the parties for solidarity . . . LSA-C.C. art. 2161(3) does not require solidarity."[50] Rather, persuaded by desirable reasons of policy, the majority proclaimed as follows:

> [L]egal subrogation is the more desirable and legally cohesive rule. First and foremost are the promptness and certainty of recovery guaranteed the victim. The victim will receive from the wrongdoer and his insurer the full amount of his damages. He will also receive this payment quickly from his insurer, especially if the insurer knows it will later be able to recover from the wrongdoer. If the insurer is able to be reimbursed for a loss caused by another's fault, this success will be reflected in lower premiums. Although the insured is paying for this quick and prompt coverage, the premium he pays ought to reflect the record of success of the insurer in casting this loss back on the wrongdoer when possible. To refuse to give the insurer a right to subrogation is to cast the loss on the insured class, rather than the person by whose fault the loss occurred. This undoubtedly has the effect of higher premiums on these types of insurance. Neither can the wrongdoer complain that he has not been accorded a reduction in the damages which he has caused. Society has an interest in requiring the wrongdoer to pay the full amount of damage he has caused if he is able.[51]

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49. The court divided the contentions against subrogation into two parts: First the argument is raised that Aetna cannot be validly subrogated to the Ficarras [sic] contract claim because payment under the insurance policy was made to the tenants and not the Ficarras. . . . The second argument . . . [is] that to be bound with or for Naquin, within the meaning of LSA-C.C. art. 2161(3), Aetna and Naquin must be solidary obligors. Id. at 952-53.

50. Id. at 954.

51. Id. The language of the court follows the thoughts earlier expressed by Professor Johnson:

> Should there be a rule of law (legal subrogation) which would require that a proven wrongdoer eventually bear the loss caused by his wrongdoing, by reimbursing an insurer which may have borne that loss because of a contract with the injured party? Or, on the other hand, should the

Accordingly, Aetna Insurance Company, not "a mere volunteer,"[52] paid the claims of the lessees in its own name and was subrogated to their position as a matter of law.

The result reached by the court undeniably is laudable,[53] but the reasoning of the decision is flawed at best and somewhat tortured. With respect to the latter notation, in relying upon comment (c) to new article 1829 of the Civil Code[54] in furtherance of the proposition that solidarity is unnecessary under paragraph (3) of either old article 2161 or new article 1829 for subrogation to function, the majority begs the question.[55] The comment simply is a restatement of the substance of new article 1797,[56] the sentiments

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> wrongdoer escape eventual responsibility for any of the loss because he had the good fortune to injure a party who had provided for the loss through a contract of insurance?

Johnson, supra note 42, at 679.

52. 488 So. 2d at 954. Because an insurer is not a mere volunteer, it "should not fit under the general rule of [old] LSA-C.C. art. 2134." Id. Old article 2134 of the Civil Code provided as follows:

> An obligation may be discharged by any person concerned in it, such as a coobligor or a surety.
>
> The obligation may even be discharged by a third person no way concerned in it, provided that person act in the name and for the discharge of the debtor, or that, if he act in his own name, he be not subrogated to the rights of the creditor.

53. Only Chief Justice Dixon and Associate Justice Calogero disagreed, and they dissented: "The insurer pays its own obligation. There is no subrogation without contract or statute." 488 So. 2d at 955 (Dixon, C.J., dissenting).

54. La. Civ. Code art. 1829, comment (c):

> Under this Article, an obligor who pays a debt he owes with others or for others is legally subrogated to the rights of the obligee only if he brings an action against the others as a result of that payment. An obligor is bound "with" another under this Article regardless of whether his obligation arises from the same act as the obligation of the other or from a different act. See Gay & Co. v. Blanchard, 32 La. Ann. 497 (1880).

55. The case of Gay & Co. v. Blanchard, 32 La. Ann. 497 (1880), relied upon by the drafters of comment (c) to new article 1829, plainly involved solidarity. Indeed, the issue addressed by the court was whether the commencement of an action against the endorser of a promissory note served to interrupt the prescription running against the maker of the instrument. For this, the court noted the following:

> Solidarity may be perfect or imperfect. It is perfect, and the obligors are the mandataries of each other, when by the same act, at the same time, they bind themselves to the performance of the same thing. It is imperfect . . . when they bind themselves to the same thing by different acts or at different times.

Id. at 502.

56. La. Civ. Code art. 1797: "An obligation may be solidary though it derives from a different source for each obligor."

of old article 2092,[57] and the principles of the now-dismissed doctrine of imperfect solidarity.[58] Comment (c) to new article 1829(3), however, is not authority for the statement that solidarity is irrelevant for that provision of the law of legal subrogation. Perhaps even more significant, from a perspective of methodology, is the failure of the court to align the parties correctly and identify Aetna Insurance Company as a solidary debtor with either Mr. Naquin or Mr. Ficarra or both.

The court would have been on firm ground if it had stated that Aetna Insurance Company was solidarily liable with Mr. Ficarra under the Direct Action Statute[59] vis-a-vis the tenants. Additionally, the court would have been justified in so doing if it had likened Aetna Insurance Company to an uninsured/underinsured motorist carrier[60] and, thus, liable in solido with Mr. Naquin for the claims of the lessees or Mr. Ficarra or both.[61]

Unnecessarily, the court abandoned the requirement of solidarity between or among the debtors to trigger the invocation of old article 2161(3), or new article 1829(3) when one of the obligors satisfies the debt of the creditor. Without overturning *Aetna In-*

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57. Old article 2092 of the Civil Code provided as follows:

> The obligation may be *in solido*, although one of the debtors be obliged differently from the other to the payment of one and the same thing; for instance, if the one be but conditionally bound, whilst the engagement of the other is pure and simple, or if the one is allowed a term which is not granted to the other.

See Schewe, Debtors in Solido: On Plain Language and Uncertainty with Mention of the Revocatory Action, 32 Loy. L. Rev. 13 (1986).

58. "The distinction drawn between perfect and imperfect solidarity is untenable and must be rejected." Foster v. Hampton, 381 So. 2d 789, 791 (La. 1980). See Comment, Tilting against Windmills: A Solidary Rejoinder, 41 La. L. Rev. 1279 (1981); Comment, Prescribing Solidarity: Contributing to the Indemnity Dilemma, 41 La. L. Rev. 659 (1981).

59. La. R.S. 22:655 (1978) states, in part, as follows:

> The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido . . . .

60. Basically, an uninsured/underinsured motorist carrier provides coverage for the plaintiff/creditor when the debtor/defendant is not adequately insured. Under Hoefly v. Govt. Emp. Ins. Co., 418 So. 2d 443 (La. 1982), the carrier is liable solidarily with the tortfeasor and the insurer of the tortfeasor in favor of the plaintiff/creditor.

61. See Fertitta v. All State Ins. Co., 462 So. 2d 159 (La. 1982); McKenzie & Johnson, Developments in the Law, 1984-1985—Insurance Law, 46 La. L. Rev. 475 (1986); Schewe, Developments in the Law, 1984-1985—Obligations, 46 La. L. Rev. 595, 600-06 (1986).

surance Co. v. Naquin, the supreme court may disclaim the reasoning of the opinion and return certainty and stability to this area of the law, through one substantial improvement—the ruling that an insurer is entitled to the benefits of legal subrogation to the rights of the insured upon payment.

Compromises and Solidarity—Revisited Again

Last year[62] critical attention was devoted to the case of *Fertitta v. Allstate Insurance Co.*[63] Subsequently, the United States Fifth Circuit Court of Appeals treated the same issue—the evaluation of a plaintiff's/creditor's claim after the release of one or more, but less than all obligors in solido—in *Diggs v. Hood.*[64] While commentary regarding the opinion in *Diggs v. Hood* exists elsewhere,[65] a brief mention of this subject and a proposed analysis of the often thorny problems attendant to it certainly are worthwhile.

An automobile accident involving Billie Hood and Clarence Diggs, who was severely injured, resulted in Billie Hood, the owner of the vehicle driven by Billie Hood, and their insurers filing a third-party demand against Ford Motor Company, the manufacturer, for contribution or indemnification. The plaintiff also amended his complaint to name Ford Motor Company as a defendant. Afterwards, the "Hood interests paid Diggs $1 million to compromise his claims against them."[66] Each party to the contract of compromise reserved "any and all claims" against Ford Motor Company. In turn, Ford Motor Company sought summary dismissal of the third-party action against it, and the district court sustained the motion. A panel of the fifth circuit, with Judge Rubin serving as the author of the opinion, affirmed.[67]

Although neither the old nor the new articles of the Civil Code address the "question whether the settling defendant has a claim for contribution,"[68] the realistic possibilities created by the creditor's compromise with one or more, but not all, solidary obligors are two-fold: "(1) the nonsettling tortfeasor later cast in judgment may seek contribution from the settling tortfeasor; and (2) the settling tortfeasor may seek contribution for the settlement amount

62. Schewe, supra note 61, at 600-06.
63. 462 So. 2d 159 (La. 1985).
64. 772 F.2d 190 (5th Cir. 1985).
65. Schewe, supra note 57, at 33-36.
66. 772 F.2d at 192.
67. Id. at 197.
68. Id. at 195.

in excess of his share of liability from the nonsettling tortfeasor."[69] The first proposal is not available under the law of Louisiana,[70] for no action may be brought by the nonsettling debtor in solido.[71] In addition, nothing may be demanded by the solidary obligor executing the compromise because he has not paid *all* of the debt, or any part which would accrue to the nonsettling obligor.[72] Since the liability of the nonsettling obligor "is reduced . . . by the *share* that would have been due [in contribution] by the settling tortfeasor had he not been released,"[73] the debtor not a party to the compromise will not have to pay the share of the debt attributable to the settling tortfeasor. To state it simply, "[t]he right to contribution exists only in favor of a party who has paid what someone else owes."[74] Even though the settling tortfeasor may have paid more than his share, since the nonsettling tortfeasors' shares are not reduced by this overpayment, they owe no contribution.

With respect to this subject, the following conclusions have been printed previously but an echo may prove of value:

> [T]he analysis in *Diggs v. Hood* is right; the court in *Fertitta v. Allstate Insurance Co.* completely missed the mark; and there is a need for clear and specific legislation on the subject. The first paragraph of article 1803 requires modification to provide plainly that the release of one obligor in solido results in a deduction by operation of law from the claim of the creditor the *share* of the debt owed by the obligor compromising, *not* the sum paid in consideration

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69. Id. The court further elaborated upon the dilemma:

> Under Louisiana Code of Civil Procedure article 1812 and Civil Code article 2103, the nonsettling tortfeasor's liability is reduced only by the share that would have been due by the settling tortfeasor had he not been released. The remaining tortfeasor, therefore, can be held liable for no more, and for no less, than his own share of the judgment. While in theory each joint tortfeasor is potentially liable for all of the plaintiff's damages, the effect of the settlement is to reduce the actual exposure of the nonsettling tortfeasor to that part of the damages his fault is found to have caused. He remains liable, however, for the full amount of damage his own negligence occasioned. No part of what has already been paid in settlement accrues to his benefit. Consequently, the settling tortfeasor has no claim for contribution because his payment does not discharge any part of the debt due by the other tortfeasor.

Id. at 195-96 (footnote omitted).

70. Id. (citing Garrett v. Safeco Ins. Co., 433 So. 2d 209, 210 (La. App. 2d Cir. 1983)).

71. Schewe, supra note 57, at 33-36.

72. 772 F.2d at 196-97.

73. Id. at 196 (emphasis added) (footnote omitted).

74. Id. at 197.

> in the transaction. If a statutory change is not made and if the supreme court does not reverse its stand in *Fertitta v. Allstate Insurance Co.*, the cloud of uncertainty in this area will continue to cast a shadow over what should be straight-forward principles promoting settlements.[75]

Perhaps solidarity will not demand so much attention next year.[76]

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75. Schewe, supra note 57, at 36 (emphasis in original) (footnote omitted).

76. But do not count on it. See, e.g., Schewe, supra note 61; Schewe, supra note 33; Johnson, Developments in the Law, 1980-1981—Obligations, 42 La. L. Rev. 388 (1982); Johnson, Developments in the Law, 1979-1980—Obligations, 41 La. L. Rev. 355 (1981); Johnson, supra note 42; Johnson, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations, 36 La. L. Rev. 375 (1976); Johnson, The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations, 35 La. L. Rev. 280 (1975); Johnson, The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations, 34 La. L. Rev. 231 (1974).