Louisiana Law Review

Volume 48 | Number 2
Developments in the Law, 1986-1987: A Faculty Symposium
November 1987

Insurance Law

W. Shelby McKenzie

H. Alston Johnson

INSURANCE LAW

W. Shelby McKenzie and
*H. Alston Johnson**

OBLIGATION TO DEFEND

The liability insurer's obligation to defend the insured is determined by the allegations of the injured party's petition and not by the outcome of the litigation. If the factual allegations of the petition set forth the claim that would be covered under the policy, then the insurer is obligated to defend the insured even if the insurer subsequently can prove a coverage defense.[1]

Opinion No. 342 of the Louisiana State Bar Association Committee on Professional Responsibility concluded that, when the insurer denies coverage, it would be improper for the same attorney to represent the insured and the insurer.[2] The Committee found that the conflict of interest between the insured and the insurer asserting a coverage defense necessitated separate counsel.

In *Dugas Pest Control of Baton Rouge, Inc. v. Mutual Fire, Marine and Inland Insurance Co.*,[3] the insurer decided to assert a coverage defense during trial, but it did not provide separate counsel to the insured thereafter. The insured retained its own attorney for post-trial motions and appeal, and subsequently brought suit against the insurer for the resulting legal expenses. The court held that the insurer's failure to provide separate counsel was a breach of the obligation to defend under the liability policy, rendering the insurer liable for defense costs incurred by the insured. The court ruled that ethical considerations

---

* Adjunct Professors of Law, Louisiana State University; Members, Louisiana State Bar Association.

1. American Home Assurance Co. v. Czarniecki, 255 La. 251, 230 So. 2d 253 (1969). Cf. Meloy v. Conoco, Inc., 504 So. 2d 833 (La. 1987) which reaffirmed the *Czarniecki* rule with the observation that, "an insurer's duty to defend arises whenever the pleadings against the insured disclose a possibility of liability under the policy." Id. at 839. *Meloy*, however, determined that the obligation to defend under contractual indemnity agreements is not governed by the *Czarniecki* rule and instead is determined by the outcome of the litigation.

2. The opinion is dated May 30, 1974.

3. 504 So. 2d 1051 (La. App. 1st Cir. 1987).

required the insurer to retain separate counsel for the insured from the moment it asserted a coverage defense.[4]

EXCLUSION FOR INTENTIONAL INJURY

Most liability policies contain an express exclusion for intentional injury. The language of the exclusion must be read carefully in order to determine whether the policy excludes coverage for the vicarious liability of someone who is responsible for the person who committed the intentional injury. In *Lamkin v. Brooks*,[5] the Town of Lecompte was held liable for an assault committed by a police officer. Its liability policy contained an exclusion for "injury arising out of the willful, intentional or malicious conduct of any insured." Since the police officer was an insured under the policy, the court held that coverage for the vicarious liability of the Town of Lecompte was excluded.[6] This decision should be contrasted with cases involving an exclusion for intentional injury by "the insured."[7] Under the jurisprudential rule of interpretation, an exclusion which relates to "the insured" should be read only from the standpoint of "the insured" claiming liability coverage.[8] Thus, a policy excluding coverage for intentional injuries of "the insured" would not preclude coverage for a vicariously liable insured who personally was not a participant in the intentional injury.

UNINSURED MOTORIST COVERAGE

Policies providing uninsured motorist coverage usually extend the protection to persons occupying the insured automobile. An express definition of "occupying" can be found in most policies which is or is similar to "in, upon, entering into or alighting from." In *Westerfield v. LaFleur*,[9] the issue was whether a child was occupying a school bus

---

4. The court chose not to follow earlier decisions such as Breitenbach v. Green, 186 So. 2d 712 (La. App. 4th Cir. 1966) and Champion v. Farm Bureau Ins. Co., 352 So. 2d 737 (La. App. 3d Cir. 1977), writ denied, 354 So. 2d 1050 (1978), which approved defense of the insured and insurer by the same attorney. The *Dugas* court correctly pointed out that the earlier decisions had not evaluated the ethical considerations.

5. 498 So. 2d 1068 (La. 1986).

6. Accord: Applewhite v. City of Baton Rouge, 380 So. 2d 119 (La. App. 1st Cir. 1979). See also, Travelers Ins. Co. v. Blanchard, 431 So. 2d 913 (La. App. 2d Cir. 1983), in which the exclusion of damages "caused intentionally by an insured" was held to preclude the vicarious liability of a father for the intentional acts of his minor son. The son was "an insured" under the policy.

7. See McBride v. Lyles, 303 So. 2d 795 (La. App. 3d Cir. 1974); Baltzar v. Williams, 254 So. 2d 470 (La. App. 3d Cir. 1971).

8. The jurisprudential rule of interpretation was recognized in Pullen v. Employers' Liab. Assurance Corp., 230 La. 867, 89 So. 2d 373 (1956).

9. 493 So. 2d 600 (La. 1986).

at the time of the accident. The child was crossing the highway to board the bus at the time she was struck in the opposite lane by a motorist who had disregarded the school bus signals. The court found that the policy provision was ambiguous. It approved earlier jurisprudence holding that it was the close relationship in time and distance, not physical contact, which determined whether a person was occupying a vehicle.[10] The court held that one reasonable interpretation would provide coverage when the child was proceeding with the intention of boarding the bus through the safety zone provided by statutory law to protect children boarding school buses.

The jurisprudence is unclear concerning whether it is necessary that the injured person was or intended to be a passenger in the vehicle. In *Hastings v. International Service Insurance Co.*,[11] a service station attendant who was struck while filling a car's gas tank was held to be occupying that car. The court found that the definition of "occupying" does not require that the person either have ridden in the vehicle or be preparing to do so. Likewise, the wrecker driver in *Martinez v. Great American Insurance Co.*[12] was injured while standing between his wrecker and the disabled automobile. He was operating the wrecker's lift mechanism when struck by a third vehicle. Finding a "very close relationship, both in time and space," the court held that the driver was occupying the disabled vehicle at the time of the accident.

On the other hand, in *Washington v. Allstate Insurance Co.*,[13] the same circuit which decided *Martinez* determined that a motorist standing between two vehicles while attaching battery cables was not an occupant of the automobile whose driver he had flagged down and asked to render assistance. The *Washington* panel suggested that whether the person is touching the vehicle is not determinative. Focusing on the relationship between the person and the vehicle, the court observed that the plaintiff was never in or getting into or out of the insured vehicle. His only contact with the vehicle was standing between the vehicles with the battery cables. The court further observed that contact resulting from impact should not determine coverage.[14]

---

10. See Breard v. Haynes, 394 So. 2d 1282 (La. App. 1st Cir.), writ denied, 399 So. 2d 594 (1981); Day v. Coca-Cola Bottling Co., 420 So. 2d 518 (La. App. 2d Cir. 1982). See also Crear v. National Fire and Marine Ins. Co., 469 So. 2d 329 (La. App. 2d Cir.), writ denied, 475 So. 2d 364 (1985).

11. 490 So. 2d 656 (La. App. 2d Cir.), writ denied, 493 So. 2d 1223 (1986).

12. 499 So. 2d 364 (La. App. 4th Cir. 1986), remanded on other grounds, 503 So. 2d 1005, 1006 (1987).

13. 499 So. 2d 1255 (La. App. 4th Cir. 1986).

14. But see Smith v. Girley, 260 La. 223, 255 So. 2d 748 (1971). In a case involving a similar accident, the court found that a deputy sheriff injured while attaching battery

AUTOMOBILE LIABILITY INSURANCE

Coverage under an automobile liability policy may depend upon whether the operator is using the automobile with the permission of the named insured. In *Rogillio v. Cazedessus*,[15] the supreme court recognized that an operator, who receives possession of the auto from a permittee rather than directly from the named insured, must still establish express or implied permission from the named insured. In *American Home Assurance Co. v. Czarniecki*,[16] the supreme court suggested that the second permittee had the express or implied permission of the named insured only if under the circumstances of the loan it was reasonably foreseeable to the named insured that the first permittee might allow others to operate the vehicle. In a concurring opinion in *Hughes v. Southeastern Fidelity Insurance Co.*,[17] Justice Tate suggested a return to the pre-*Rogillio* jurisprudence which applied the initial permission rule to find coverage for second permittees.[18]

In *Malmay v. Sizemore*,[19] the supreme court declined the opportunity to adopt the approach suggested by Justice Tate. Upon proof that the named insured had given her son restricted permission to use her truck on the condition that he not allow others to drive, the court held that there was no liability coverage for the operator who received possession of the truck from the son. The court noted that the insured had not granted her son discretion nor had there been any pattern of known uses by others to erode the validity of the restriction. The court correctly concluded that the "named insured's express prohibition and consistent conduct precluded the implication that her permission extended beyond the first permittee."[20]

---

cables between the police vehicle and another auto was "occupying" the police vehicle that he had driven to the accident scene.

15. 241 La. 186, 127 So. 2d 734 (1961).

16. 255 La. 251, 230 So. 2d 253 (1969).

17. 340 So. 2d 293 (La. 1976).

18. The initial permission rule was adopted originally in Parks v. Hall, 189 La. 849, 181 So. 191 (1938). Under the initial permission rule, the grant of permission "in the first instance" by the named insured to the permittee is sufficient to trigger coverage even though the permittee has deviated from the scope of permission at the time of the accident. Application of the rule to second permittees would treat the change of the drivers as a deviation from the scope of permission which is immaterial to coverage. For further discussion of the permission requirement and the initial permission rule, see S. McKenzie & A. Johnson, Insurance Law and Practice §§ 50-57, at pp. 125-144, in 15 Louisiana Civil Law Treatise (1986).

19. 493 So. 2d 620 (La. 1986).

20. Id. at 624.

PROPERTY INSURANCE

Further Recognition of Legal Subrogation Concept

Last year's discussion in this forum[21] heralded the acceptance by supreme court in *Aetna Insurance Co. v. Naquin*[22] of the principle that an insurer should normally be entitled to legal subrogation upon payment to its insured. A brief opinion of the Louisiana Fifth Circuit Court of Appeal during this term indicates that last year's supreme court decision should become well established in the law as time goes on. In *Fireman's Fund Insurance Co. of California v. Lee*,[23] a fire insurer had paid some $9,000.00 to its insureds due to a loss involving property which the insureds owned and had leased to certain tenants. The insurer then instituted suit against the tenants to collect the amount so paid, alleging that the loss was caused by the fault of the tenants. It was thus a garden variety subrogation suit. So far as the brief opinion reflects, the insurer must not have had a written subrogation agreement with the insureds. Had there been such an agreement, the issue of legal subrogation presumably would never have arisen.

But the court held that such an agreement was "not necessary" when payment had been made to the insureds. The court recognized that there might have been disagreements among the appellate circuits on the issue prior to the decision in *Naquin*, but that "any inconsistencies found in this state relative to the subject issue have been ended and made clear with the Supreme Court's decision"[24] in *Naquin*.

Another decision during this term applied *Naquin* properly as to one issue, but concluded that somehow *Naquin* had changed long-standing Louisiana principles with respect to another issue. Since the latter conclusion may be erroneous, some extended comment is required.

Hellmers v. Department of Transportation and Development[25] was litigation involving a very serious automobile accident in which one person was killed and several more were injured. Plaintiff's wife was proceeding south on a two-lane highway when she encountered a line of stopped cars in her lane of travel. She swerved into the other lane

21. McKenzie and Johnson, Developments in the Law, 1985-1986—Part II—Insurance, 47 La. L. Rev. 511, 517-18 (1987).

22. 488 So. 2d 950 (La. 1986).

23. 501 So. 2d 877 (La. App. 5th Cir. 1987).

24. Id. at 878.

25. 503 So. 2d 174 (La. App. 4th Cir.), writ denied, 505 So. 2d 1141 (1987) and 505 So. 2d 1149 (1987).

to avoid a collision, and ran head-on into an oncoming vehicle. She was killed, and two of her children were seriously injured.

It developed that a truck owned by the Department of Transportation and Development (DOTD) had stopped in the southbound lane to effect repairs to a bridge, and traffic had backed up behind that truck. Plaintiff sued the DOTD and its insurer for the death of his wife and for the injuries to his children.

The DOTD insurer denied liability and filed a third party demand against the liability insurer of the wife, alleging that her negligence was the cause of the injury and seeking indemnity. That liability insurer (Liberty Mutual) reconvened against the DOTD insurer and the Department itself for the amounts which it had paid to the plaintiff and to the owner and passengers of the other vehicle involved in the collision. It was the reconventional demand by Liberty Mutual which produced the discussion about legal subrogation.

The district court affirmed the commissioner's determination that fault for the incident should be assigned 85% to the DOTD and 15% to the deceased wife. Among other determinations, the district judge granted recovery to Liberty Mutual on its reconventional demand for 85% of the amount which it had paid to plaintiff and the other driver.

It is important to note that the commissioner and the district judge could have,[26] but did not, consider any fault which might have been assigned to the other driver involved in the collision. But as the matter came to the appellate court, the question to be resolved on the reconventional demand was whether Liberty Mutual was entitled to recover for the amounts which it had paid (1) to plaintiff under the property damage, medical pay and accidental death provisions of its policy; (2) to the owner of the other vehicle for property damage under the liability provisions of its policy; and (3) to the passengers in the other vehicle under the liability provisions for their personal injuries.

The court held, and properly so, that, under *Naquin*, the amounts paid to plaintiff under the first party coverages of property damage, medical pay and accidental death were in fact "owed" by both Liberty Mutual and the driver(s) at fault; and that legal subrogation to the rights of plaintiff against those driver(s) occurred upon the payment.

---

26. Under article 1812(C) of the Louisiana Code of Civil Procedure, a special inquiry asking for the percentages of fault of plaintiff, defendant or even a non-party may be made. In this instance, percentages of fault were assigned to the wife and to the DOTD, but apparently not to the other driver involved in the collision. There may in fact have been no evidence of any fault on the part of that driver, but the opinion does not reflect that the issue was considered or even discussed. In any event, no percentage of fault was assigned to the other driver.

There is no essential difference between such a situation and the situation in *Naquin* itself.

But the court held that the district court had erred in permitting recovery for the amounts paid to the owner of the other vehicle and the passengers. It commented that these amounts were not paid by an insurer to its own insured, not responsible for the damages—which is certainly correct. But it noted further that these were sums paid to the owner and passengers of the other vehicle "before any determination of liability was made," and that since those persons were not part of the litigation, there had been no determination of any liability with respect to their claims.[27] The court is also correct that there had been no determination of liability to such persons, but that does not present an insurmountable obstacle to the possibility of recovery.

It has long been the law in Louisiana that one of two joint tortfeasors might choose to pay a claim which has been or might be brought against the two of them, and then seek recovery against the other.[28] The claiming tortfeasor obviously has the burden of demonstrating that solidarity between the tortfeasors existed and that the amount paid was not in excess of the damage inflicted.[29] The enactment of comparative negligence principles did not change these principles; the "virile" share to be sought by the paying tortfeasor from the other is now determined by percentage of fault rather than by number of tortfeasors.

Seen in this light, there is nothing wrong with the effort by Liberty Mutual (as the insurer of one driver, the wife) to collect from another tortfeasor (the DOTD and its liability insurer) the amounts paid in settlement to other persons who had claims arising from the incident. The fact that these other persons were not "part of the litigation" is not crucial. What is crucial, of course, is whether Liberty Mutual discharged the burden of demonstrating that it paid a debt for which it and the DOTD and its insurer were solidarily bound, and whether it paid an amount which was not in excess of the damage inflicted upon the parties whom it paid. The opinion does not reveal whether it discharged this burden, but it should not have been prevented from doing so under correct legal subrogation principles.

---

27. *Hellmers*, 503 So. 2d at 181.

28. See Morris v. Kospelich, 206 So. 2d 155 (La. App. 4th Cir. 1968), aff'd, 253 La. 413, 218 So. 2d 316 (1969) (settling tortfeasor may seek share of settlement for claims asserted against it from the other, even though settlement was made without knowledge or consent of the other and apparently even though no suit had been filed against the tortfeasor), and the principles derived from Harvey v. Travelers Ins. Co., 163 So. 2d 915 (La. App. 3d Cir. 1964) and Cunningham v. Hardware Mutual Cas. Co., 228 So. 2d 700 (La. App. 1st Cir. 1969).

29. *Morris*, 206 So. 2d at 158.

A Primer on Fire Insurance

The decision in *Economy Auto Salvage v. Allstate Insurance Co.*[30] during this term contains a veritable primer on Louisiana fire insurance law, mixing together issues of arson and the proper standard of proof with respect to it, agency, standard mortgage clauses, material misrepresentations, valued policy and even fifth amendment rights. There is nothing particularly remarkable about the results on any issue, but the opinion bears some comment simply for the breadth of issues that it contains.

Plaintiff, having suffered a fire loss to a building which it owned, sought to recover under an alleged fire insurance binder provided by defendant insurer through its alleged agent (also a defendant). The mortgagee and loss payee in the alleged binder intervened. The defendant insurer sought to escape payment on a number of grounds. The first was arson, but the appellate court agreed with the district judge that the defense had not been established. It also argued that the agent could no longer be considered its agent because it had learned of certain fraud and theft allegations against him (unrelated to the fire) and was in the process of terminating his authority as an agent. From the available evidence, it appeared to be a proper conclusion that the process of termination was not over and that he retained sufficient indicia of authority to permit the conclusion that he was still the insurer's agent.

The appellate court further held that any material misrepresentations were made by its agent and not by the insured, and that the loss payee clause in the binder was a "standard" clause which created a separate policy for the mortgagee, not subject to any defense (such as arson) which could be raised against the mortgagor. Finally, the court held that there was no violation of the valued policy statute[31] on the facts presented.

The reader who seeks a general summary of common problems in the fire insurance area will find the opinion in *Economy Auto Salvage* an efficient place to begin.

Health and Accident Insurance

Two years ago in this forum, we discussed the implications of the decision in *Cataldie v. Louisiana Health Service & Indemnity Co.* and the legislative effort intended to overrule or limit the decision.[32] The

30. 499 So. 2d 963 (La. App. 3d Cir. 1986).

31. La. R.S. 22:695 (1978); see also S. McKenzie & A. Johnson, supra note 18, § 318, at pp. 593-95.

32. McKenzie and Johnson, Developments in the Law, 1984-1985—Insurance, 46 La. L. Rev. 475, 484-88 (1986); 1985 La. Acts No. 249, amending La. R.S. 22:213 and 22:215.

Cataldie decision involved the cancellation of an individual health care policy under circumstances in which the supreme court felt the rights of the insured with respect to a diagnosed condition of a covered individual had been prejudiced. The facts were difficult, as noted in the earlier discussion, with the court concluding that the insurer had "forced" the insured to cancel the policy following dramatic rate increases.

Shortly after the *Cataldie* decision, its tenets were extended in *Cabibi v. Louisiana Health Service & Indemnity Co.* to a cancellation under a group policy,[33] a result which we observed in the same article might have "even greater consequences" than *Cataldie* itself.[34] But during this term, in *Trevino v. Prudential Insurance Co.*,[35] another appellate court, though with dissent, distinguished *Cabibi* and declined to apply the *Cataldie* rationale to a group policy with respect to pregnancy benefits.

Plaintiff husband was employed until May of 1982, when his employment was terminated. His spouse was a covered individual under the group policy issued to his employer, and pregnancy was a covered expense. She had conceived a child in March of 1982 which was born without problem in December of 1982.[36] She did not seek medical care with respect to the pregnancy until October of 1982.

The policy contained standard provisions relative to termination of coverage upon cessation of employment. There were some continuation of coverage provisions, including some with respect to pregnancy, but only relative to surgical procedures in the event of complications. Plaintiff and his wife contended, however, that the principles of *Cataldie* and *Cabibi* prohibited the denial of coverage under these circumstances for the expense of normal birth seven months after termination of employment.

The appellate court distinguished *Cataldie* on the ground that it did not involve a group policy and on the ground that the instant case did not involve a "forced" cancellation of the policy. It distinguished *Cabibi* on the ground that the instant case involved a ter-

---

33. 465 So. 2d 56 (La. App. 4th Cir. 1985). The claimant in *Cabibi* suffered from diabetes and would probably have incurred substantial expense on a long-term basis. The court ordered that the cancellation be effective with respect to everything except the claimant's diabetes-caused expenses, and reserved to the parties the right to seek supplemental relief if an agreement could not be reached on the future premiums to be paid.

34. See McKenzie and Johnson, supra note 32, at 487.

35. 504 So. 2d 1179 (La. App. 3d Cir.), writ denied, 506 So. 2d 1230 (1987).

36. Given the dates in question, there was no occasion for the court to discuss the effect of the legislative amendments to La. R.S. 22:213 and 22:215 by 1985 La. Acts No. 249, and it did not do so.

mination due to cessation of employment, rather than a cancellation; and on the ground that the *Cabibi* court had failed to consider the provisions of Louisiana Revised Statutes 22:221 to the effect that the statute upon which *Cataldie* was based "shall not apply to group or blanket health and accident insurance policies." Accordingly, it upheld the denial of benefits.

The dissenting judge thought the case an appropriate one for consideration of the principle of abuse of right which the supreme court had declined to consider in *Cataldie*.[37] Apparently, the supreme court did not agree, since it denied a writ application in the case.[38]

One has the distinct impression, despite the writ denial by the supreme court, that there is much left to be done in determining the ultimate reach of the *Cataldie* rationale in the area of cancellation of health and accident policies and the residual rights to benefits under certain circumstances if that occurs.

---

37. *Trevino*, 504 So. 2d at 1182 (Domengeaux, J., dissenting).

38. Trevino v. Prudential Ins. Co., 506 So. 2d 1230 (1987). There were no recorded dissents.