Louisiana Law Review

Volume 49 | Number 2
Developments in the Law, 1987-1988: A Faculty Symposium
November 1988

Insurance

W. Shelby McKenzie

H. Alston Johnson

INSURANCE

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

UNINSURED MOTORIST COVERAGE

Applicability of the Uninsured Motorist (UM) Statute

Prior to its amendments in 1987 and 1988, Louisiana Revised Statutes 22:1406(D)(1)(a)(i) had required uninsured motorist coverage as an adjunct to any automobile liability insurance policy that was "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state." A conflict had developed among the courts of appeal concerning whether the mandatory provisions of this UM statute were applicable when the accident occurred in Louisiana and the policy was issued and delivered in another state on a vehicle registered and principally garaged in that state.[1] In *Snider v. Murray*,[2] the supreme court resolved this conflict. The insurance policy in the *Snider* case had been delivered in Texas and listed a vehicle that was principally garaged in Texas at the time of delivery. The insured, Snider, had a Texas domicile when he procured the insurance policy. According to the court, the statute, by its express terms, mandated UM coverage only for automobile liability policies "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state." Therefore, the court concluded, even though the accident occurred in Louisiana and only Louisiana domiciliaries were involved, the Louisiana statute did not mandate UM coverage by the out-of-state policy.[3]

---

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

1. See, e.g., Wilson v. State Farm Ins. Co., 448 So. 2d 1379 (La. App. 2d Cir. 1984) (Louisiana law applied to a policy issued and delivered in Texas, which was to cover a vehicle registered in Texas, where action was brought by a Louisiana victim and the accident occurred in Louisiana); Richard v. Beacon Nat'l Ins. Co., 442 So. 2d 875 (La. App. 3d Cir. 1983) (Texas law applied to a policy issued and delivered in Texas); Abel v. White, 430 So. 2d 202 (La. App. 4th Cir. 1983) (Louisiana law did not apply to a policy issued in Texas to Texas residents on vehicles principally garaged in Texas).

2. 461 So. 2d 1051 (La. 1985).

3. As the *Snider* court noted, the language of the UM statute setting out its scope is somewhat similar to the scope language of the Direct Action Statute, which applies when: (i) the policy was issued or delivered in Louisiana; *or* (ii) when the accident or injury occurred in Louisiana regardless of the state of the policy's delivery. See La. R.S. 22:655 (1978); *Snider*, 461 So. 2d at 1054 n.4.

During the last year, the Louisiana Supreme Court once again turned its attention to the applicability of the UM statute to policies issued and delivered in another state. In *Roger v. Estate of Moulton*,[4] the insurance policy in question was issued and delivered to a national firm in another state. The policy provided liability coverage for the vehicle, which the firm had registered and principally garaged in Louisiana, but no UM coverage. The court held that the Louisiana UM statute applied to any vehicle registered or principally garaged in this state regardless of where the policy had been issued or delivered.[5] Thus, the court concluded, the insurer was required to provide UM coverage on a Louisiana vehicle in conformity with the statute even though the insurance policy was issued and delivered in another state.

By Act 444 of 1987, the legislature extended the coverage of the UM statute. The Act adds language to provide that the UM statute should apply not only as previously provided but also "as provided in this Sub-paragraph." The new subparagraph (iii) reads as follows:

> (iii) This Sub-paragraph and its requirement for uninsured motorist coverage shall apply to any liability insurance covering any accident which occurs in this state and involves a resident of this state.[6]

The apparent purpose of this legislation is to make the coverage mandated by the UM statute available in cases like *Snider*, where the policy is issued out-of-state on an out-of-state vehicle and the accident occurs in Louisiana and involves a Louisiana resident. The imprecise language in the amendment, which may be vulnerable to constitutional challenge, is certain to spawn considerable litigation.[7] Can the Louisiana statute, which seems to regulate the *issuance* of automobile insurance, define the mandatory terms of an insurance policy on a vehicle whose only relationship with the state of Louisiana at the time of issuance of the policy is the possibility that the vehicle may be driven in the state during the policy term? What is meant by an accident that "involves a resident of this state?" Must the owner of the insured auto be a resident or will it suffice that any operator or even that any UM claimant is a

---

4. 513 So. 2d 1126 (La. 1987).

5. The court justified its decision with "the vital interest Louisiana has in the application of the UM statute as a matter of public policy." Id. at 1130-31. Cf. Courville v. State Farm Mut. Auto. Ins. Co., 393 So. 2d 703, 705-06 (La. 1981).

6. La. R.S. 22:1406(D)(1)(a)(iii) (Supp. 1988) (as amended by 1987 La. Acts. No. 444, § 1).

7. The principal attraction of the Louisiana statute appears to be its more generous requirement of underinsured motorist protection. In most states, underinsured motorist coverage is available only to the extent that the UM limits of liability exceed the tortfeasor's liability limits. The entire UM limits are available to the Louisiana insured in addition to the tortfeasor's liability coverage. La. R.S. 22:1406(D)(1)(b) (1978).

resident? Does the amendment intend to mandate coverage only for resident claimants?

While the legislature expanded the circumstances under which UM coverage is mandated, it restricted the types of vehicles to which the coverage requirements apply. Prior to Act 203 of 1988, Louisiana Revised Statutes 22:1406(D)(1)(a)(i) required that UM coverage be provided on "any motor vehicle registered or principally garaged in this state." Act 203 limited the requirement to "any motor vehicle designed for use on public highways and required to be registered in this state." Therefore, the statute now mandates UM coverage only for motor vehicles that both are designed for use on public highways and must be registered.[8]

The statute uses the term "motor vehicle" in two contexts. First, the statute describes the *insured* motor vehicle for which the insurer must provide uninsured motorist coverage. Second, it refers to the *uninsured* motor vehicle, whose owner or operator is liable to the insured. Does the amendment's limitation of the definition of the *insured* motor vehicle likewise affect the definition of *uninsured* motor vehicles? As originally enacted, the statute did not define the term "motor vehicle" for either purpose.[9] Now that the legislature has provided some content to the term as it is used in the first context, one can reasonably argue that the same content was intended for the term as it is used in the second context.

As a general rule, courts have not enforced insurance policy provisions that purport to limit UM coverage.[10] In Act 233 of 1988, the legislature expressly sanctioned one particular type of limitation. Apparently to permit an exception to this general rule, Louisiana Revised Statutes 22:1406(D)(1)(a)(iv), added by that Act, provides that the insurer and insured may limit uninsured motorist coverage on a school bus to "an accident or incident involving the school bus."[11]

---

8. La. R.S. 22:1406(D)(1)(a)(i), as amended by 1988 La. Acts No. 203, reads: "[W]ith respect to any motor vehicle designed for use on public highways and required to be registered in this state *or as provided in this Sub-paragraph. . . .*" (emphasis added). Presumably, the extension of coverage under section 1406(D)(1)(a)(iii), quoted above in the text, is limited to vehicles designed for use on public highways and subject to registration since the "requirement for uninsured motorist coverage" under subparagraph (i) is now only applicable to motor vehicles which meet that description.

9. This ambiguity led to the suggestion that UM coverage might be triggered by negligence arising out of the use of a non-highway motor vehicle. See Posey v. Commercial Union Ins. Co., 332 So. 2d 909 (La. App. 2d Cir. 1976); cf. Hidalgo v. Allstate Ins. Co., 374 So. 2d 1261 (La. App. 3d Cir. 1979); Crowe v. State Farm Mut. Auto. Ins. Co., 416 So. 2d 1376 (La. App. 3d Cir. 1982).

10. See Fisher v. Morrison, 519 So. 2d 805 (La. App. 1st Cir. 1987).

11. 1988 La. Acts No. 233, § 1.

Waiver of Coverage

The UM statute permits the insured to reject coverage entirely or to select lower coverage limits.[12] Prior to the 1987 legislation, the supreme court had indicated that an unequivocal, written expression of rejection is necessary for an effective waiver of coverage.[13] Through the passage of Act 436 of 1987, the legislature further delineated the formal requirements for waiver of coverage:

> [R]ejection or selection of lower limits shall be made only on a form designated by each insurer. The form shall be provided by the insurer and signed by the named insured or his legal representative.[14]

During the most recent regular legislative session, the legislature made another clarification in the waiver provisions of the UM statute. Before its amendment, Louisiana Revised Statutes 22:1406(D)(1)(a)(i) provided as follows:

> Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer.[15]

Act 203 of 1988 expanded the circumstances under which the execution of a new waiver is not necessary. As amended, the section's exemption extends to "a renewal, *reinstatement*, or substitute policy . . . issued to him by the same insurer *or any of its affiliates*."[16]

Amount of Coverage

Prior to 1988 legislation, Louisiana Revised Statutes 22:1406(D)(1)(b) required an insurer to permit the insured, at his written request, to increase his UM coverage "to any amount." Act 203 of 1988 imposes a limit on the insured's right to request additional coverage. Now the insured may obtain coverage up "to any available limit up to the bodily injury liability coverage limits afforded under the policy."[17]

Stacking of Multiple Coverages

During the past session, the legislature restricted the exception to the anti-stacking rule found in Louisiana Revised Statutes 22:1406(D)(1)(c).

---

12. La. R.S. 22:1406(D)(1)(a)(i) (Supp. 1988).
13. Giroir v. Theriot, 513 So. 2d 1166, 1168 (La. 1987); Roger v. Estate of Moulton, 513 So. 2d 1126, 1131 (La. 1987).
14. La. R.S. 22:1406(D)(1)(a)(ii) (Supp. 1988).
15. La. R.S. 22:1406(D)(1)(a)(i) (1978).
16. 1988 La. Acts No. 203, § 1 (emphasis added).
17. Id.

Prior to the amendment, the statute permitted any party "injured . . . while occupying an automobile not owned by said injured party" to obtain coverage under more than one policy. Family members of the owner were allowed to take advantage of the limited stacking permitted by the statute even though the owner himself could not.[18] Act 203 of 1988, however, permits such stacking only "when the injured party occup[ies] an automobile not owned by said injured party, *resident spouse*, or *resident relative*."[19] The amendment apparently places the vehicle owner and those family members who reside with him in the same position, limiting all of them to one coverage.

Right to Select Policy

A person injured while occupying an automobile that he owns also may be an insured under other policies that he or a resident spouse or relative purchased on other vehicles. There was a conflict in the jurisprudence whether a person occupying an insured automobile must accept the coverage on that vehicle or whether he could select another, more favorable policy. In *Branch v. O'Brien*,[20] the plaintiff owned four vehicles, each of which was insured under a separate State Farm policy. Three of the policies, including the one on the vehicle in which the plaintiff was riding when she was injured by an uninsured motorist, had UM limits of $10,000. The other policy, however, had UM limits of $100,000. Although the UM statute clearly prohibited recovery under all the policies, it did not specify which policy was available to the plaintiff. The Louisiana Second Circuit Court of Appeal permitted the plaintiff to elect the policy under which she would collect, and she quite naturally chose the $100,000 policy.

The Louisiana First Circuit Court of Appeal reached a different result in *Breaux v. Louisiana Farm Bureau Mutual Insurance Co.*[21] The plaintiff, while operating his motorcycle, was injured by an uninsured motorist. While the policy on the motorcycle provided UM coverage of up to $10,000, that on the plaintiff's automobile provided UM coverage of up to $50,000. The court held that the plaintiff, who was limited by statute to one policy only, had to accept the coverage available under the motorcycle policy and could not select the more favorable automobile policy.

---

18. Courville v. State Farm Mut. Auto. Ins. Co., 393 So. 2d 703 (La. 1981); Worsham v. Walker, 498 So. 2d 260 (La. App. 1st Cir. 1986), writ denied, 500 So. 2d 423, 424 (1987).

19. 1988 La. Acts No. 203 (emphasis added).

20. 396 So. 2d 1372 (La. App. 2d Cir.), writ denied, 400 So. 2d 905 (1981).

21. 413 So. 2d 988 (La. App. 1st Cir.), writ denied, 420 So. 2d 453 (1982).

In *Wyatt v. Robin*,[22] the supreme court resolved the conflict in favor of the right of selection, accepting the view of the second circuit. Wyatt was injured by an underinsured motorist. He had obtained UM coverage through a policy issued on his vehicle. Wyatt, however, resided with his parents and was therefore also an insured under their automobile insurance policies, which provided significantly higher UM coverage limits. The supreme court held that Wyatt was not relegated to his own policy but rather was free to select one of his parents' more favorable UM policies.[23]

Perhaps in response to *Wyatt*, the legislature passed Act 203 of 1988, which amends Louisiana Revised Statutes 22:1406(D)(1)(e). That statute now reads:

> (e) The uninsured motorist coverage does not apply to bodily injury, sickness, or disease, including death of an insured resulting therefrom, while occupying a motor vehicle owned by the insured if such motor vehicle is not described in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy.[24]

The new subparagraph thus provides that when an insured suffers bodily injury while occupying a certain motor vehicle that he owns, he may not demand payment under any policy that does not specifically cover that vehicle.[25] Apparently, the purpose of the amendment was to cripple the right of selection recognized in *Wyatt*. In cases like *Wyatt* and *Branch*, in which the insured suffers injury while occupying an automobile owned by him, subparagraph (e) would permit recovery only under the particular policy issued on that automobile.

Limits of Liability

The UM coverage clause of an automobile insurance policy often includes a "per person" limit of liability, which represents the maximum recovery available for "bodily injury to one person." In *Carroll v. State Farm Insurance Co.*,[26] the court correctly applied this limitation to a

---

22. 518 So. 2d 594 (La. 1988).

23. The court also held that Wyatt's acceptance of the tender of its UM limits from his own insurer did not bar pursuit of his parents' insurers so long as his ultimate recovery did not exceed the UM limits of the most favorable policy. See Taylor v. Tanner, 442 So. 2d 435 (La. 1983).

24. 1988 La. Acts No. 203, § 1.

25. Previously, the courts had refused to enforce similar exclusions contained in insurance policies on the ground such limitation of coverage conflicted with the UM coverage mandated by statute. See, e.g., Thomas v. Nelson, 295 So. 2d 847 (La. App. 1st Cir.), writ denied, 299 So. 2d 791 (1974).

26. 519 So. 2d 265 (La. App. 5th Cir.), writ denied, 520 So. 2d 756 (1988).

claim for loss of consortium. The wife was injured by an uninsured motorist. The husband, who was not involved in the automobile accident, allegedly suffered loss of consortium. According to the court, the husband's claim was not for a separate and distinct "bodily injury"; instead, his claim arose out of, and was therefore an extension of, the wife's bodily injury. Since there was bodily injury to only one person, the court reasoned a single "per person" limit governed both the wife's claim for personal injuries and the husband's claim for loss of consortium. The court therefore concluded that the sum of the amount recovered by the husband and the amount recovered by the wife could not exceed that single "per person" limit.[27]

Subrogation

For some time now it has been well-settled that a UM insurer may not use "consent-to-settle" and subrogation provisions in the policy to prevent the insured from settling with the tortfeasor and his liability insurer.[28] A fifth circuit decision, *Moncrief v. Panepinto*,[29] raised doubt whether the insured's release of the tortfeasor precluded a subsequent claim by the UM insurer against the tortfeasor for recovery of the amount it had paid the insured under UM coverage. This doubt was dispelled in *Bosch v. Cummings*.[30] The supreme court, reasoning that the UM insurer has no independent right of recovery against the tortfeasor, concluded that the insurer can acquire against the tortfeasor only those rights that are authorized by the general Civil Code provisions governing subrogation.[31] According to the court, if the insured releases the tortfeasor before payment by the UM insurer, no claim remains to which the UM insurer may be subrogated.

Penalties

In *Cantrelle Fence & Supply Co. v. Allstate Insurance Co.*,[32] the insured parties, after successfully suing their UM insurer for benefits

---

27. Cf. Albin v. State Farm Mut. Auto. Ins. Co., 498 So. 2d 171 (La. App. 1st Cir.), writ denied, 498 So. 2d 1088 (1986), which suggests that loss of consortium may not be "bodily injury" within the meaning of the insurance policy. *Carroll* presents the more appropriate analysis, recognizing that it is the bodily injury of the spouse that triggers coverage for loss of consortium subject to the single "per person" limit for the combined claims of both spouses.

28. Neimann v. Travelers Ins. Co., 368 So. 2d 1003 (La. 1979).

29. 489 So. 2d 938 (La. App. 5th Cir. 1986).

30. 520 So. 2d 721 (La. 1988). See also Pace v. Cage, 419 So. 2d 443 (La. 1982).

31. Bond v. Commercial Union Assurance Co., 407 So. 2d 401 (La. 1981). *Bosch* further points out that if the UM insurer reimburses the insured for only a portion of his damages, the UM insurer receives only a partial, subordinate subrogation. 520 So. 2d at 723.

32. 515 So. 2d 1074 (La. 1987).

under the policy, filed a separate suit against the insurer to recover penalties and attorneys fees under Louisiana Revised Statutes 22:658. The insurer countered with the argument that by failing to bring the suit based on section 658 at the same time as the suit on the policy, the plaintiff forfeited the right of action under section 658. This argument relied on Louisiana Code of Civil Procedure article 425, which prohibits separate suits on parts of an obligation. Holding that the claim under section 658 was a separate cause of action from the claim for UM benefits, the supreme court concluded that the trial court erred in maintaining the insurer's exception of improper division of an obligation.

DIRECT ACTION STATUTE

The 1988 Regular Session of the Louisiana Legislature produced an interesting change in the Direct Action Statute.[33] As originally drafted, the proposed amendment was a part of the governor's tort and insurance reform package, but it was subjected to substantial amendment during the legislative process. Consequently, the amendment's potential for dramatically altering the application of the statute is probably quite limited.

As finally enacted, the act[34] does not change the law with respect to the naming of a liability insurer as a direct defendant in a personal injury action. Thus, an injured plaintiff may still include the wrongdoer's liability insurer as a defendant in an action to recover for his injuries. The act does require, however, that the *insured* be named as a defendant whenever the insurer is so named, except in five specific instances: (1) when the insured has been adjudged a bankrupt, or bankruptcy proceedings have been commenced properly against him; (2) when the insured is insolvent; (3) when the insured cannot be served; (4) when the action is for damages resulting from an offense or quasi-offense and the suit is between a child and his parent or between married persons; and (5) when the insurer is an uninsured motorist carrier.[35]

The practical effect of this amendment is difficult to gauge. It will require at least the formality of a suit against the alleged wrongdoer by name, whereas the prior statute would have permitted suit against the wrongdoer's liability carrier without the necessity of naming the insured himself. Whether the new requirement will actually deter potential litigation remains to be seen, but it seems unlikely. This amendment,

---

33. La. R.S. 22:655 (1978).

34. 1988 La. Acts No. 934.

35. This last exception is incongruous. An uninsured motorist carrier is not a liability carrier, and its obligation to its insured is a matter of contract, not tort. A suit against such a carrier by its own insured, for the first-party coverage offered by such insurance, would never have been governed by the Direct Action Statute in any event.

which represents only a partial solution to the problems that exist under the Direct Action Statute, may prove to be more a nuisance than anything else. Undoubtedly it would be better for the legislature to resolve once and for all the fundamental question raised by the present practice: should personal injury litigation be conducted between the injured party and the alleged wrongdoer, or between the injured party and the wrongdoer's insurer?[36]

INSURABILITY OF PUNITIVE DAMAGES

Shortly after the passage of the "modern" Louisiana version of punitive damages in 1984,[37] academic debate began on the subject of the insurability of such damages. The legislature, characteristically silent on the question, apparently was content to leave the matter to be thrashed out in individual cases.

Given the distinct flavoring that the Direct Action Statute and its jurisprudential progeny give to Louisiana law, the authors entertained very little doubt that the judiciary would ultimately resolve the issue in favor of insurability. Whether the courts would in fact reach that result remained an open question for some time after passage of the articles.

The answer to this question, however, is rapidly becoming settled. Some initial district court opinions indicated that insuring against punitive damages does not violate Louisiana public policy.[38] Then during this

---

36. In the new Louisiana Code of Evidence, the legislature appears to have expressed itself as generally opposed to the communication of the policy limits to the jury, which may be taken as an indication that it leans toward the former alternative. La. Code Evid. art. 412, enacted by 1988 La. Acts No. 515, provides: "Although a policy of insurance may be admissible, the amount of coverage under the policy shall not be communicated to the jury unless the amount of coverage is a disputed issue which the jury will decide."

37. Contrary to popular belief, Louisiana did recognize punitive damages in its early jurisprudence. See Bentley v. Fischer Lumber & Mfg. Co., 51 La. Ann. 451, 25 So. 262 (1899); Burkett v. Lanata, 15 La. Ann. 337 (1860); Grant v. McDonogh, 7 La. Ann. 447 (1852); Summers v. Baumgard, 9 La. 161 (1836). Awards were usually for what we would now term wrongful seizure. This line of cases comes to a mysterious end about the turn of the twentieth century. These same cases stand for the proposition that the punitive damages had to bear some reasonable relationship to the compensatory damages which were awarded. Another interesting group of cases established the proposition that punitive damages could not be assessed on the basis of vicarious liability. See Patterson v. New Orleans & Carrolton R.R. Co., 110 La. 797, 34 So. 782 (1903); Graham v. St. Charles St. R.R. Co., 47 La. Ann. 1656, 18 So. 707 (1895); Hill v. New Orleans, Opelousas & Great W. R.R. Co., 11 La. Ann. 292 (1856); Keene v. Lizardi, 8 La. 26 (1835).

38. In Levet v. Calais & Sons, 514 So. 2d 153 (La. App. 5th Cir. 1987), it appears to have been taken for granted by the parties and the trial court that the punitive damages which were awarded could properly fall within the coverage of the liability insurance policy. The entire subject of insurability of punitive damages is explored in a recent student article. See Comment, The Insurability of Punitive Damages in Louisiana, 48 La. L. Rev. 1161 (1988).

past year the Louisiana Second Circuit Court of Appeal faced the issue squarely in *Creech v. Aetna Casualty & Surety Co.*[39] In the *Creech* case, the plaintiff grounded his claim for punitive damages on the allegation that the defendant was intoxicated at the time of the accident. The insurer contended that its policy did not cover punitive damages and, alternatively, that if the policy could be construed to cover such damages, the coverage would be against Louisiana public policy. The appellate court disagreed on both counts.

The court found that the policy covered punitive damages, noting that an insurer which accepts a premium for covering "all liability for damages" should honor its obligation.[40] In rejecting the insurer's alternative argument, the court was influenced by the legislature's silence on the point of insurability. It was also influenced by the judiciary's long-standing opinion that the Direct Action Statute establishes a policy in favor of coverage, for the benefit of both the insured and the victim.

In a special concurrence, Judge Sexton, who joined in the majority opinion, pointedly urged the legislature either to repeal the punitive damages statute or to prohibit insurance coverage of such damages. In his view, insurance coverage negates whatever "punitive" aspect these damages may have, and instead simply rewards "the victim (and his attorney) beyond the measure of that victim's actual damages."[41]

Obviously, there is much more to be done on this subject after *Creech*. The arguments that would support disallowing insurance coverage of punitive damages for DWI—namely, that such damages should punish the wrongdoer who was actually intoxicated, not all those persons who buy automobile liability insurance—may not apply with equal vigor to punitive damages for the transportation, storage, or handling of hazardous or toxic substances. Though one can argue that there should be no vicarious liability for any punitive damage award, the contention seems to have more force in the DWI setting than in the hazardous or toxic substance setting. For the moment, however, it seems that the question of the insurability of punitive damages in all contexts is well on its way to judicial resolution.

LIFE INSURANCE

Familiar problems in the field of life insurance are created by the delay in issuance of a life insurance policy following application and payment of an initial premium. These problems arose again recently within a somewhat unusual factual context in *Mauroner v. Massachusetts*

39. 516 So. 2d 1168 (La. App. 2d Cir. 1987), writ denied, 519 So. 2d 128 (1988).
40. Id. at 1174.
41. Id. (Sexton, J., concurring).

Indemnity & Life Insurance Co.[42] Through a local agent of the insurer, the insured and his spouse applied for a $100,000 life insurance policy on the insured's life, with a $10,000 rider on his spouse's life. The language of the application, which included a fairly standard "binding receipt" clause, announced that coverage would be retroactive to the date of the application once the conditions of the application were met and the policy issued. The policy also contained a two-year suicide provision, stating that if the insured should commit suicide within two years of the date of issuance, the insurer's liability would be limited to the amount of the premiums paid.

The agent mailed the application on November 6, 1981, along with the insured's check for one month's premium. Apparently because the agent erred in choosing the particular mixture of insurance plans that were to provide the $100,000 coverage with the appropriate rider for the spouse, the insurer did not act upon the application promptly. Two weeks after the application was mailed, the insurer wrote to the agent noting the error and asking for a clarification. Nothing happened until January 4, 1982, when the agent and the insurer, through a series of telephone calls, began to determine the source of the problem. The agent corrected the problem, and the insurer issued the policy ten days later on February 4, 1982 (though the issuance date stated on the policy was February 11, 1982).[43] The insured committed suicide on January 13, 1984—more than two years after the mailing of the application but less than two years from the issuance date on the policy. The insurer refused to pay the proceeds and returned the premiums.

The trial court took a direct approach, simply reforming the issuance date of the policy, on the basis of the insurer's negligence, to November 6, 1981. Having selected that date as the date of issuance, it was then an easy matter for the court to find that the suicide occurred more than two years after the issuance date. The appellate court reached the same result, but for different reasons. As the appellate court correctly noted, there is no authority for substituting a different issuance date because the insurer has, through its negligence, delayed the issuance of the policy. The court, however, concluded that the insurer's negligence in delaying the issuance of the policy *had* caused the beneficiary to lose the right to the policy proceeds. In its view, if the insurer had not been

42. 520 So. 2d 451 (La. App. 5th Cir.), writ denied, 524 So. 2d 518 (1988).

43. According to the opinion, the agent brought the policy to the residence of the insured and his spouse on February 28, 1982. He allegedly discussed the contents of the policy with them, including the two-year suicide provision. He also allegedly made the unfortunate but prophetic statement that the insured could not "blow his brains out" for at least two years after the issue date in order for the beneficiary to collect the proceeds. Id. at 453.

negligent, the policy would have been issued well before the actual issuance date, and the suicide would have occurred after the expiration of the two-year period from issuance. Thus, rather than arbitrarily reforming the policy issuance date to the application date as had the district court, the appellate court reasoned that so long as the last day upon which a careful insurer would have issued the policy was more than two years before the suicide, the plaintiff could recover by showing a breach of duty and causation.

While the result of *Mauroner* seems fair in light of the unusually long delay between application and issuance and considering the policy's binding receipt clause, one is entitled to ask whether there is any more authority for the appellate court's choice of an unknown date than there is for the trial court's substitution of the application date. In defense of the appellate court, one can at least point to some jurisprudence that affords substantial remedies to the insured upon a showing of negligent delay by the insurer.[44] Until this decision, however, the argument had not enjoyed much success.[45]

HEALTH AND ACCIDENT INSURANCE

Partial Subrogation Under "Reimbursement Clause"

During this term an insurer learned something surprising about the "reimbursement agreement" called for under its health and accident policy. In *Smith v. Manville Forest Products Corp.*,[46] the court held that such an agreement, which the insurer probably expected would produce full reimbursement regardless of the amount collected by the insured from a tortfeasor, instead permits only partial reimbursement as a result of the partial subordinate subrogation rule in the Civil Code.[47]

Plaintiff, an employee of Manville, and his family were members of the company's employee health care plan. After his wife and son were injured in an automobile accident, plaintiff submitted a statement of medical and hospital expenses to the administrator of the plan. A provision of the plan required the employee to sign a "right of reimbursement agreement" under such circumstances prior to the payment

---

44. See, e.g., Woods v. Integon Life Ins. Corp., 507 So. 2d 259 (La. App. 3d Cir.), writ denied, 512 So. 2d 461 (1987); Antoine v. Sentry Life Ins. Co., 352 So. 2d 768 (La. App. 3d Cir. 1977).

45. See, e.g., Brunt v. Standard Life Ins. Co., 259 So. 2d 575 (La. App. 1st Cir. 1972); Duplissey v. Southern United Life Ins. Co., 385 So. 2d 540 (La. App. 3d Cir.), writ denied, 392 So. 2d 1067 (1980); Duke v. Valley Forge Life Ins. Co., 341 So. 2d 1366 (La. App. 4th Cir. 1977).

46. 521 So. 2d 772 (La. App. 2d Cir.), writ denied, 522 So. 2d 570 (1988).

47. La. Civ. Code art. 1826.

of any such expenses.[48] Plaintiff ultimately signed such an agreement, and the plan administrator paid him for some, but not all, of the expenses. Plaintiff had already received some funds in a settlement with the tortfeasor's insurer, and later received additional funds in a settlement with his own uninsured motorist carrier. When he submitted a statement for additional medical expenses to the health care plan administrator, the administrator refused to make payment and demanded a refund of prior payments. The administrator reasoned that since plaintiff had not reimbursed the plan for its payment of the expenses, the plan had already paid more than required. Plaintiff contended that since he had not received the full amount of his damage in those settlements, he was not required to reimburse the plan administrator for the entire amount it had paid on his behalf.

The controversy highlights the difference between a conventional subrogation clause (called by the court a "pure" subrogation clause) which arguably would require reimbursement only according to the level of funds realized by the subrogor through settlement with the tortfeasor; and the reimbursement clause of the Manville plan, which Manville thought entitled it to reimbursement from the first dollars received by the plan participant, regardless of whether the settlement with the tortfeasor fully compensated the participant for his damages. The appellate court sided with the plaintiff and against Manville, finding that the agreement was one of conventional subrogation and therefore that it was subject to the subrogation rules of the Civil Code.

One of those rules, which is now contained in Civil Code article 1826, rests on the premise that subrogation should not operate to the detriment of the subrogor when he has received only partial payment from the subrogee.[49] The subrogor retains the right to obtain the balance of the debt from the obligor, and his right is in preference to the right of his subrogee. Once the court had determined in this instance that the "reimbursement agreement" accomplished nothing more than a standard conventional subrogation, the result in this case was inevitable.

---

48. The provision in question was entitled "Subrogation" and required the plan participant to "reimburse this Plan . . . immediately upon collection of damages, if any, whether by legal action, settlement or otherwise." Another portion of the provision authorized the filing of a lien to protect this right and permitted the plan to intervene if necessary in the proceedings. Functionally, the court saw the provision as the equivalent of a conventional subrogation. While the court's interpretation of the provision as a conventional subrogation is not ineluctable, it is a plausible interpretation given the effect of the provision.

49. See Southern Farm Bureau Casualty Ins. Co. v. Sonnier, 406 So. 2d 178 (La. 1981); Johnson, Developments in the Law, 1980-1981—Obligations, 42 La. L. Rev. 388, 400-02 (1982).

The Maturing of Cataldie

This term saw a continued trend toward narrowing the rule of *Cataldie v. Louisiana Health Service and Indemnity Co.*,[50] which has not proved particularly popular among the appellate courts since its announcement four years ago. In *Cataldie*, the supreme court held that a health and accident policy is deemed to continue when the insurer, after learning that the insured has been diagnosed with a catastrophic illness, effectively forces him to cancel his policy by radically reducing his coverage while substantially increasing his premiums.[51] An appellate court subsequently extended that ruling to a group policy under somewhat similar circumstances.[52]

Since that appellate court decision, disappointed insureds have invoked *Cataldie* in a variety of factual situations, most often without success. In *Mezzacappo v. Travelers Insurance Co.*,[53] plaintiff, who was covered by a group policy issued to her employer, was seriously injured in an automobile accident in April, 1983. In the fall of that year, her employer sold the radio station at which she worked to another entity, and her employment came to an end. Her former employer paid the last premium for the policy at about the same time. Although she was entitled under the terms of the group policy to convert to an individual policy, she did not do so. She was also entitled to reimbursement for expenses "during the calendar year in which" the coverage terminated and "during the next calendar year." Under that provision, the insurer paid the medical expenses arising out of the April, 1983 accident until December 31, 1984.

Plaintiff, not satisfied with those payments, sued for continuing reimbursement of the expenses. Citing *Cataldie*, plaintiff was successful in the trial court. The appellate court reversed, properly noting that the insurer had not cancelled the coverage, as the insurer in *Cataldie* effectively had. Rather, the court concluded, the coverage terminated according to the terms of the policy, and for that reason, the statute did not require continuation of the coverage past December 31, 1984.

The plaintiffs in *Viada v. Blue Cross of Louisiana*[54] were likewise unsuccessful in invoking *Cataldie*, but for much more mundane reasons. Two policies were involved in *Viada*. The first was cancelled for the

50. 456 So. 2d 1373 (La. 1984).

51. The court was interpreting La. R.S. 22:213(B)(7) (1978), and in particular the portion of the statute that provides that any cancellation of an individual policy "shall be without prejudice to any claim originating prior thereto."

52. Cabibi v. Louisiana Health Serv. & Indem. Co., 465 So. 2d 56 (La. App. 4th Cir. 1985).

53. 523 So. 2d 291 (La. App. 3d Cir. 1988).

54. 524 So. 2d 101 (La. App. 4th Cir. 1988).

plaintiffs' failure to pay the premiums; the second was retroactively cancelled when the insurer discovered that the plaintiffs had made serious material misrepresentations in the application. Both the trial court and the appellate court held that these were legitimate reasons for cancellation and that *Cataldie* did not mandate a continuation of coverage under such circumstances.

PROPERTY INSURANCE

Legislation

During this past year the most important development in the field of property insurance was legislative rather than jurisprudential. Act 951, effective when signed by the governor on July 27, 1988, repealed Louisiana Revised Statutes 22:695 in its entirety.[55] This statute, known as the "valued policy statute," required a fire insurer to pay the total amount for which "any inanimate property, immovable by nature or destination" was insured if that property was totally destroyed.

This provision of the Insurance Code had always been controversial. The valued policy concept is the counterpart to a co-insurance clause. The latter, which requires an insured to bear a percentage of his own loss if he does not purchase coverage up to a certain portion of the value of the property, is intended to protect the insurer against an insured who intentionally underinsures and then tries to get more coverage for his money than he is really entitled to. The valued policy, on the other hand, protects the insured against an insurer that permits him to overinsure the property, but then wants to pay less than the policy amount. Either type of coverage provision may, depending upon the circumstances, be violative of the fundamental insurance principle of indemnity, which dictates that a loss should be reimbursed at its actual value, neither more nor less.

An "open" or "unvalued" policy does not fix in advance the amount of recovery available in the event of a loss, but leaves the matter to be determined by a formula such as "actual cash value at the time of loss." A "valued" policy eliminates such valuations by fixing in advance the recovery available in the case of total destruction.

There had always been something of a fifth column within Louisiana Revised Statutes 22:695(E). That subsection limited the recovery of the insured, even under a valued policy and in the case of total destruction, to the "insurable interest" of the insured in the property. Thus, the insurer was able to argue, in a given case, that he should not be compelled to pay the full value dictated by other portions of the statute. If the insurer could show that such a payment would be greater than

55. 1988 La. Acts No. 951.

the insured's insurable interest in the property, the insurer could then limit its payment to the lesser amount.[56]

The repeal of section 695 is an interesting turn of events, accomplished with very little fanfare. In theory, it is pro-insurer legislation, arguably enabling an insurer to return to open or unvalued policies and thereby to immunize itself from the complaint that it is permitting over-insurance and then paying less than the premium actually purchased. It might also give insurers an additional weapon in the struggle against arson-induced losses, which would not be a bad idea at all, but that remains to be seen. Through the repeal, Louisiana joins the apparent majority of states that have no valued policy requirement.

Right to Insurance Proceeds Under "Standard" Mortgage Clause After Sale Without Appraisal

During this term, an intermediate appellate court apparently resolved, at least for its circuit, a minor dispute about what effect a mortgagee's sale of secured property without appraisal has upon the mortgagee's right to insurance proceeds under a "standard" mortgage clause. This dispute was spawned in part by the earlier decision in *Rushing v. Dairyland Insurance Co.*[57]

In that case, the purchaser of a truck subjected it to a chattel mortgage and then purchased collision insurance from Dairyland. The policy contained an "open" mortgage clause, permitting the mortgagee to recover from Dairyland in those circumstances under which the insured could himself recover under the policy. Under such a clause, if the insured were for some reason barred from recovery, then the mortgagee would be barred as well, since the mortgagee's rights are wholly derivative from those of the insured. As a result of an accident, the truck had been declared a total loss and the owner filed suit against his collision insurer. The chattel mortgagee seized the vehicle, had it sold without appraisal, and then intervened in the owner's suit, seeking the insurance proceeds. The supreme court held that the sale without appraisal extinguished the debt owed by the owner to the chattel mortgagee, and thus that the mortgagee had no right to the insurance proceeds.

---

56. The subsection was added by 1964 La. Acts No. 464 probably in an effort to overrule some appellate decisions that had undermined Lighting Fixture Supply v. Pacific Fire Ins. Co., 176 La. 499, 146 So. 35 (1932). See generally Harvey v. General Guar. Ins. Co., 201 So. 2d 689 (La. App. 3d Cir. 1967); Note, 29 La. L. Rev. 144 (1968); S. McKenzie & A. Johnson, Insurance Law and Practice, § 334, in 15 Louisiana Civil Law Treatise (1986).

57. 456 So. 2d 599 (La. 1984).

Because of some difference of opinion in the lower courts prior to *Rushing*,[58] it was unclear even after the supreme court's decision whether the same rule would apply if the mortgage clause were "standard" or "union" rather than "open." The decision this term in *Federal National Mortgage v. Prudential Property*[59] answered that question in the affirmative.

The insurer in the *Federal National Mortgage* case issued a policy that contained a standard mortgage clause, which insures the rights of the mortgagee on a basis independent of the rights of the insured. The mortgagee later seized the mortgaged property and eventually sold it without appraisal, thereby cutting off its right to a deficiency judgment and rendering the debt "fully satisfied and discharged insofar as it constitute[d] a personal obligation of the debtor."[60] After the seizure but before the sale the property was damaged by fire, and the mortgagee sued the insurer for the proceeds of the policy. When the owners intervened, the insurer deposited the proceeds with the court, admitting that either the mortgagee or the owners were entitled to them.

The mortgagee argued that the result in *Rushing* should not obtain when the mortgage clause was the standard type, that is, when the clause granted rights to the mortgagee that were independent of the rights of the mortgagor. The appellate court did not disagree with the contention that the mortgagee had independent rights. However, it reasoned that any action of the mortgagee, including seizure and sale without appraisal, that extinguishes the debt, and with it the accessory obligation of mortgage, could effectively defeat those independent rights. The court thus extended the *Rushing* rule to cases involving mortgagees that are insured under standard or union clauses.

---

58. Compare American Bank & Trust Co. v. Byron, 347 So. 2d 850 (La. App. 2d Cir.), writ denied, 351 So. 2d 155 (1977) with Powell v. Motors Ins. Corp., 235 So. 2d 593 (La. App. 1st Cir. 1970).

59. 517 So. 2d 201 (La. App. 1st Cir. 1987).

60. La. R.S. 13:4106 (1968).