Louisiana Law Review

Volume 53 | Number 3
Review of Recent Developments: 1991-1992
January 1993

Insurance

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I. General Liability Coverage

In *Cole v. Celotex Corporation*,[1] the jury found that nine corporate executive officers were negligent in failing to provide plaintiffs, who had contracted asbestos-related occupational diseases, with a safe place to work in every year from 1945 through 1976. Insurance Company of North America (INA) provided the primary coverage for the executive officers during the relevant years. Since the policy limit in any single year of coverage was not adequate to satisfy the judgment, one issue in the case was whether coverage under each annual policy could be "horizontally stacked."[2] Liability actions arising out of "long-tail" injuries such as asbestosis, which result from repeated exposure to a substance over a long term and which generally do not become manifest until long after initial exposure, present the perplexing issue of which liability policies should provide coverage for such injuries. Selecting from several theories that have emerged in the jurisprudence of other states, the Supreme Court of Louisiana in *Cole* adopted the "exposure theory" under which "coverage is triggered by the mere exposure to the harmful conditions during the policy period."[3]

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1. 599 So. 2d 1058 (La. 1992).

2. Before reaching the coverage issue, the court determined that the plaintiffs' claims were governed by pre-Act 431 of 1979 (effective August 1, 1980) contributory negligence and not post-Act comparative fault and that the allocation among defendants found to be solidarily liable was governed by pre-Act virile share law. The claims against the executive officers terminated in 1976 due to the amendment of La. R.S. 23:1032, amending the Louisiana Worker's Compensation Law to eliminate negligence suits against executive officers of corporate employers.

3. *Cole*, 599 So. 2d at 1076. Federal courts, applying Louisiana law, previously had utilized the exposure theory. *E.g.*, Ducre v. Executive Officers of Halter Marine, 752 F.2d 976 (5th Cir. 1985). Other theories considered and rejected by the court were (1) the "manifestation theory," under which coverage is triggered only under the policy in effect when the injury becomes manifest, and (2) the "continuous or triple trigger theory," under which all policies in effect during exposure, while the latent disease progresses after exposure and at manifestation provide coverage. In a footnote, the court also discussed the "contraction theory" which had been used in certain Louisiana cases to determine the applicability of the 1976 amendment to the worker's compensation laws. Recognizing the difficulty inherent in determining when the disease is contracted, the court cast doubt on the continued validity of the contraction theory, but left that issue "for another day." *Cole*, 599 So. 2d at 1075-76.

After determining that coverage under each INA policy in effect during the plaintiffs' exposure was triggered, the court then considered whether these policies could be horizontally stacked. Finding no basis to depart from the general rule that an insured may recover under all available coverages, the court held that the limits of each policy were available. The court noted that, if coverage during the exposure period were provided by multiple insurers, such a rule would be necessary to enforce contribution among the insurers. In *Cole*, the holding "merely spreads each plaintiff's judgment over the applicable INA policies, thereby, in effect, enforcing INA's contribution rights against itself."[4]

II. Uninsured Motorist Coverage

A. Waiver of Coverage

Since its original enactment in 1962, Louisiana's uninsured motorist (UM) statute has permitted the insured to reject UM coverage. In 1974, when the mandatory coverage became "not less than the limits of bodily injury liability provided by the policy," the insured was given options to reject coverage or select lower limits. While these options remain in the statute, Act 980 of 1992 adds the provision: "In no event shall the policy limits of an uninsured motorist policy be less than the minimum liability limits required under R.S. 32:900."

Louisiana Revised Statutes 32:900 specifies the required provisions of a motor vehicle liability policy which may be used to satisfy the requirements of the Louisiana Compulsory Motor Vehicle Liability Security Law.[5] The bodily injury liability limits presently required are $10,000 per person and $20,000 per accident. After the 1992 amendment, the insured apparently no longer has the option of totally rejecting UM coverage and may not select limits lower than the liability limits required by Louisiana Revised Statutes 32:900.

In *Henson v. Safeco Insurance Co.*,[6] the Supreme Court of Louisiana emphasized that "any exception to UM coverage must be expressed clearly, unambiguously and unmistakably,"[7] and that "the insurer must place the insured in a position to make an informed rejection of UM coverage."[8] In *Henson*, under facts arising before the 1992 amendment, the agent filled out the application, marking under Item 18 that the

4. *Cole*, 599 So. 2d at 1080.

5. La. R.S. 32:861-865 (1989).

6. 585 So. 2d 534 (La. 1991).

7. *Id.* at 538. The court also observed that "policies are to be liberally construed in favor of UM coverage, and any exception to the mandatory UM coverage is to be strictly construed." *Id.* at 537.

8. *Id.* at 539.

insured rejected UM coverage. Observing that the rejection was "not conspicuous on the application," the court pointed out that "Henson's merely signing the general application for insurance unambiguously signified only the intent to obtain an insurance policy."[9] Therefore, the court concluded that the rejection in the application was not effective because "there was no express, affirmative act on the part of the insured which clearly, unmistakably and unambiguously rejected UM coverage."[10]

B. Punitive Damages

In 1990, the Supreme Court of Louisiana held that exemplary damages were recoverable under UM coverage.[11] Act 335 of 1992 amended the UM statute to permit insurers to exclude coverage for punitive or exemplary damages from UM coverage.[12]

C. Self-Insurers

In 1991, the UM statute was amended to provide that anyone possessing a certificate of self-insurance under the Louisiana Motor Vehicle Safety Responsibility Law would be an "insurer" within the meaning of the UM coverage. In the last symposium,[13] it was suggested

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9. *Id.* The application showed no limits for UM coverage. In footnote 3, the court noted that the failure to fill in the blanks was ambiguous because it could have indicated that the insured wanted the same limits as liability limits. Such "ambiguous conduct did not satisfy the statutory requirement for rejection." *Id.* at 539 n.3.

10. *Id.* at 539. The court cited with approval several cases finding valid rejections: Bertrand v. Shelter Gen. Ins. Co., 571 So. 2d 861 (La. App. 3d Cir. 1990) (insured signed application and wrote "no" next to question about UM coverage); Guilbeau v. Gabriel, 553 So. 2d 1078 (La. App. 3d Cir. 1989), *writ denied*, 559 So. 2d 138 (1990) (insured's signing a separate rejection was valid even though insured did not recall being offered UM coverage); Oncale v. Aetna Casualty & Sur. Co., 417 So. 2d 471 (La. App. 1st Cir. 1982) (rejection form detailed options available for UM coverage). The court also noted two cases in which the insured validly selected lower limits by signing the application and actually writing in the limits requested. McCall v. Nguyen, 509 So. 2d 651 (La. App. 3d Cir. 1987) and Moore v. Young, 490 So. 2d 519 (La. App. 4th Cir. 1986).

11. Sharp v. Daigre, 555 So. 2d 1361 (La. 1990). In *Sharp*, the tortfeasor, upon whose intoxication the punitive damages were based, had been released from liability by the insured prior to the award of exemplary damages against the UM insurer. The court rejected the insurer's argument that exemplary damages were not for "bodily injury" within the meaning of UM coverage and that the award of punitive damages against the insurer did not serve the public policy justification for such damages. *See also* Gonzalez v. Casadaban, 556 So. 2d 1291 (La. App. 5th Cir. 1990); Morvant v. United States Fidelity and Guar. Co., 538 So. 2d 1107 (La. App. 5th Cir.), *writ denied*, 541 So. 2d 875 (1989); Bauer v. White, 532 So. 2d 506 (La. App. 1st Cir. 1988).

12. To be codified at La. R.S. 22:1406(D)(1)(a)(i).

13. W. Shelby McKenzie, H. Alston Johnson, *Insurance, Developments in the Law, 1990-1991*, 52 La. L. Rev. 529 (1992).

that the amendment probably was intended to overrule legislatively the decision in *Jones v. Henry*[14] that a vehicle owned by a qualified self-insured was still an uninsured motor vehicle within the meaning of the UM statute. It was noted also that the argument might be advanced that the amendment had the broader effect of requiring qualified self-insurers to provide UM coverage. The latter argument was foreclosed by Act 583 of 1992, which expressly states that the 1991 amendment "shall not be construed to require that a party possessing a certificate of self-insurance provide uninsured motorists coverage or that such coverage is provided by any party possessing such a certificate."[15]

III. AUTOMOBILE INSURANCE

A. "Borrowed" Auto

The business auto policy form commonly used by insurers contains an omnibus clause providing that "(a)nyone else is an insured while using with your permission a covered auto you own, hire or borrow. . . ." In *Schroeder v. Board of Supervisors of Louisiana State University*,[16] the Supreme Court of Louisiana was required for the first time to determine the meaning of "borrow" within the policy provision. A high school student used his father's car to give a ride to a fellow student who, at the request of a teacher, had volunteered to run a school-related errand. Analogizing to the Louisiana Civil Code concept of loan for use under Articles 2891-2909, the court concluded that

> the prevailing meaning of the term *borrow* in the context of automobile lending requires that the borrower acquire substantial possession, dominion, control or the right to direct the use of the vehicle, and not merely that the use of the vehicle by another person redound by chance to the benefit of a purported borrower.[17]

Since the teacher had no knowledge of or control over the student's means of transportation, the school did not have the requisite possession and control of the auto to trigger coverage under its policy as a borrowed auto.[18]

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14. 542 So. 2d 507 (La. 1989).
15. To be codified at La. R.S. 22:1406(D)(3).
16. 591 So. 2d 342 (La. 1991).
17. *Id.* at 347.
18. *Cf.* Ureta v. Thompson, 892 F.2d 426 (5th Cir. 1990). Dr. Ureta was the sole employee of his professional medical corporation (PMC). His PMC was a partner in Brown-McHardy Clinic, and the clinic was the named insured under a business auto policy. While operating his own auto, Dr. Ureta was involved in an accident on his way

B. *Auto Rental Agreements*

Lindsey v. Colonial Lloyd's Insurance Co.[19] considered the enforceability of "two tier" coverage under the liability policy of an automobile rental agency. The insurer issued a business automobile policy to the rental agency providing $500,000 limits to lessees of the insured. The policy, however, contained an endorsement that the coverage was "subject to the terms, including any limits of liability . . . contained in the lease or rental agreement . . . ."[20] The insured agency entered into a rental agreement with the negligent driver under which the agency agreed to provide "liability coverage with limits of liability equal to the minimum limits required by the financial responsibility laws of the State in which the vehicle is rented."[21] The issue was whether Louisiana Revised Statutes 22:628, known as the "Entire Contract Policy Statute," rendered ineffective the provisions of the rental agreement purportedly reducing the insurance policy's limits of liability.[22]

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to the birthday party of a friend's son. The court reversed the summary judgment in favor of the insurer, suggesting that, if Dr. Ureta were found to be on clinic business to develop patient contacts, the clinic might be found to have "borrowed" his auto. While *Ureta* was decided before *Schroeder*, the possession by the partner may have been sufficient possession by the insured partnership to satisfy the *Schroeder* test. *Also cf.* Sturgeon v. Strachan Shipping Co., 731 F.2d 255 (5th Cir. 1984), *cert. denied*, 469 U.S. 883, 105 S. Ct. 251 (1984) (suggests guidelines regarding what constitutes sufficient dominion and control for one to become "borrower" of a vehicle).

19. 595 So. 2d 606 (La. 1992).

20. *Id.* at 608.

21. *Id.* (emphasis omitted). Under La. R.S. 32:900, the minimum limits in Louisiana are 10/20/10.

22. La. R.S. 22:628 provides:

> No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless it is in writing and physically made a part of the policy or other written evidence of insurance, or it is incorporated in the policy or other written evidence of insurance by specific reference to another policy or written evidence of insurance. This Section shall not apply to contracts as provided in Part XV of this Chapter.
>
> The provisions of this Section shall apply where a policy or other written evidence of insurance is coupled by specific reference with another policy or written evidence of insurance in existence as of the effective date hereof or issued thereafter.
>
> Any written agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be deemed to be physically made a part of a policy or other written evidence of insurance, within the meaning of this section, whenever such written agreement makes reference to such policy or evidence of insurance and is sent to the holder of such policy or evidence of insurance by United States mail, postage prepaid, at such holder's last known address as shown on such policy or evidence of insurance or is personally delivered to such holder.

La. R.S. 22:628 (1978 and Supp. 1992).

The court pointed out that the purpose of section 628 is "to protect the parties to the insurance contract by assuring that both have in their possession the entire contract."[23] The statute requires that the written document modifying an insurance contract be (1) physically attached to the policy, or (2) incorporated by reference "to another policy of insurance or written evidence of insurance," or (3) make reference to the policy and be mailed or delivered to the policyholder.[24] Since the term "evidence of insurance" is not defined, the court suggested that the rental agreement, with its specific insurance provisions, may comply with the second alternative of section 628.[25]

The plurality opinion, however, chose to base its decision primarily upon the conclusion that section 628 was for the protection of the policyholder, and not third parties. As between the insurance company and the rental agency, the policy clearly authorized the agent to reduce the policy limits in its rental agreements. The court then considered whether there was any statutory or public policy prohibition for such "two tier" coverage.[26] The court found that there is no statutory or public policy requirement that all classes of insureds under a policy receive the same amount of coverage. Since the lower level of the two tier coverage in *Lindsey* provided the minimum liability coverage required by statute, there was no public policy argument to invalidate the agreement reached by the parties under the insurance contract and the rental agreement.

Justice Hall and Justice Lemmon concurred, and Justice Dennis and Justice Watson dissented. Finding compliance with section 628, Justice Hall concurred, but disagreed with the plurality opinion that section 628 protected only the named insured, suggesting that the section provided protection also to other insureds and claimants.[27]

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23. *Lindsey*, 595 So. 2d at 611.

24. La. R.S. 22:628 (1978 and Supp. 1992).

25. The court noted that rental agreements of self-insuring rental agencies have been recognized as automobile liability policies. *Lindsey*, 595 So. 2d at 610 (citing Hearty v. Harris, 574 So. 2d 1234, 1241 (La. 1991)). It also pointed out that car rental agencies with insurance policies have been held to be in the business of selling insurance to their customers. *Id.* (citing Quittem v. National Car Rental Systems, 582 So. 2d 1337, 1340 (La. App. 4th Cir. 1991)). The *Quittem* case held that such car rental agency was required to provide UM insurance unless such coverage was effectively waived by the customer. 582 So. 2d at 1340.

26. The plurality opinion suggested that its leading rental agency decision, Jones v. Breaux, 289 So. 2d 110 (La. 1974), should have been decided on public policy grounds rather than under section 628. In *Jones*, the court held invalid a provision of the rental agreement cancelling coverage if anyone under age twenty-one was driving the rental auto. *Lindsey* suggested that the court should have reached the same result by requiring as a matter of public policy that the minimum limits required by La. R.S. 32:900 be applicable to such operator. *Lindsey*, 595 So. 2d at 613.

27. *Id.* at 614.

C. *Exclusion of Named Person*

Act 979 of 1992 enacted Louisiana Revised Statutes 32:900(L) to provide that the insurer and the insured by written agreement may exclude from coverage under a motor vehicle liability policy "any named person who is a resident of the same household as the named insured."[28]

IV. PENALTIES

Prior to its amendment in 1992, Louisiana Revised Statues 22:658 provided that the insurer's arbitrary failure to pay certain claims within thirty days after receipt of satisfactory proof of loss subjected the insurer to a penalty "of ten percent damages of the total amount of the loss, or $1,000, whichever is greater . . . ." In *Malbrough v. Wallace*,[29] the court found that the insured, whose UM limit of liability was $100,000, actually sustained damages totalling approximately $283,000. Under its interpretation of Louisiana Revised Statutes 22:658, the majority awarded penalties based upon the total "loss" and not upon the policy limits. Act 879 of 1992 amended Louisiana Revised Statutes 22:658 to specify the basis of the penalty as "the amount found to be due from the insurer to the insured," rather than "the total amount of the loss." Using *Malbrough* as an example, the ten percent penalty after the 1992 amendment would be based upon the UM limits of $100,000, rather than the total damages of approximately $283,000.

V. DIRECT ACTION STATUTE

As has been the case in almost all similar circumstances, a Louisiana court during this term held that a tort victim does not have a right of direct action against an agent for an alleged failure to procure liability coverage for a tortfeasor. The current decision, however, arises in a factual context which approaches the incredible.

In *Clark v. Durbin*,[30] the defendant's vehicle rear-ended plaintiff's vehicle on a Louisiana highway about noon on a given day. There was no liability coverage on the vehicle at that time; the prior coverage had lapsed about a month earlier. About an hour after the accident, the

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28. The apparent purpose of this amendment was to overrule legislatively Raimer v. New England Ins. Co., 595 So. 2d 1218 (La. App. 3d Cir. 1992). *Raimer* held that exclusion of a named driver was not permitted with respect to the minimum limits of liability required by La. R.S. 32:900(B)(2). Since the authorization to exclude coverage is limited expressly to residents of the same household as the named insured, presumably the amendment would not affect other decisions invalidating exclusions of other specified persons. *See, e.g.*, Fields v. Western Preferred Cas. Co., 437 So. 2d 344 (La. App. 2d Cir.), *writ denied*, 440 So. 2d 528 (1983).

29. 594 So. 2d 428 (La. App. 1st Cir. 1991), *writ denied*, 596 So. 2d 196 (1992).

30. 590 So. 2d 633 (La. App. 3d Cir. 1991).

defendant called his wife in Texas, told her about the accident and told her to procure immediate coverage on the vehicle from their agent without informing the agent of the accident in Louisiana. Within about fifteen minutes of the telephone call, the wife had procured such coverage, concealing the fact of the accident.

Once the insurer discovered this turn of events, it filed an action in Texas to declare the policy null, and that judgment became final. Thereafter, plaintiff filed suit in Louisiana against Durbin, the agent and the insurer, seeking damages for the injuries suffered in the accident. The claim against the agent was based on the theory of negligent failure to procure insurance coverage in a timely fashion. The claim against the insurer was simply as the "alleged liability carrier" on the Durbin vehicle.

Peremptory exceptions in favor of the agent and the insurer had been sustained by the trial court and those rulings were affirmed by the third circuit. The agent argued, and properly so, that an agent's duty of due care to procure insurance for its client does not extend to the protection of a tort victim. Under those circumstances, there is nothing in the Direct Action Statute[31] which provides the tort victim with a right of action against the agent. There is some contrary opinion in the cases,[32] but the majority and better-reasoned position is that even a negligent agent is not subject to a direct action by the disappointed tort victim.[33]

As for the deceived insurer, the only possible right of action against it would rest upon the actual existence of a policy of liability insurance.[34]

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31. La. R.S. 22:655 (1978 and Supp. 1992).

32. *See* Sturcke v. Clark, 261 So. 2d 717 (La. App. 4th Cir.), *writ denied*, 262 La. 308, 263 So. 2d 46 (1972). The opinion is dubious authority at best for the proposition that a tort victim has a right of direct action against a negligent agent for an alleged failure to procure insurance for the tortfeasor, and the *Clark* court—though disagreeing with *Sturcke*—may have read more into *Sturcke* than is really there. In *Sturcke*, the injured victim actually recovered against his own UM carrier because the tortfeasor had paid a premium for liability coverage, but the coverage was never issued because of his agent's negligence. The UM carrier who paid the victim recovered on a third-party demand against the tortfeasor and the tortfeasor's negligent agent, since its payment for an "uninsured" motorist was solely due to the error of the agent in not assuring that the "uninsured" motorist was in fact "insured." However, the court's rationale is that the victim was the beneficiary of a *stipulation pour autrui*, and the court specifically stated that the agent "did not become an insurer liable to direct action under R.S. 22:655." *Sturcke*, 261 So. 2d at 721.

33. See Bustamante v. State Farm Mut. Auto. Ins. Co., 517 So. 2d 232 (La. App. 1st Cir.), *writ denied*, 518 So. 2d 510 (1987); LeBouef v. Colony Ins. Co., 486 So. 2d 760 (La. App. 1st Cir. 1986); Guillory v. Morein, 468 So. 2d 1254 (La. App. 3d Cir. 1985); Campbell v. Continental-Emsco Co., 445 So. 2d 70 (La. App. 2d Cir.), *writ denied*, 446 So. 2d 1223 (1984).

34. Though the policy was not issued or delivered in Louisiana, occurrence of the

The Texas proceedings had determined that there was no such policy, and the final result in that litigation was entitled to full faith and credit in Louisiana courts. Moreover, the Direct Action Statute preserves the right of an insurer to raise in a direct action proceeding all defenses which it could urge in a suit brought by its own insured.[35] Since a second suit by the alleged insured against the insurer to try to declare that there was a valid liability policy would clearly be barred by the result in the Texas proceedings, this immunity was a valid defense to the claim being asserted by the tort victim as well.

VI. LIFE INSURANCE

The always-troublesome issue of whether a death was a suicide was presented during this term under very tragic circumstances, and the ruling that it was not then brought the court to consider an award of penalties and attorney's fees under two different standards against two different insurers. In *Brown v. Hartford Life Companies*,[36] the decedent was discovered in the swimming pool at his residence under mysterious circumstances. Conflicting reasons for death were given, and no autopsy was performed due to religious reasons. The trial court ultimately concluded that the death was not a suicide (the decedent could not swim); and the appellate court failed to conclude that the finding was clearly wrong. The appellate court thus concluded that the proceeds of two different insurance policies were payable. The first policy (written by Hartford) was an ERISA[37] policy and was thus governed by that federal statute. The second (written by Pan American) was not governed by ERISA and was thus to be interpreted under Louisiana law.

Since Hartford had declined to pay benefits for the decedent's death (because of its belief that the death was a suicide and thus excluded), the issue of an award of attorney's fees under ERISA was presented. The appellate court held that the proper standard of review[38] was whether the decision of the plan administrator was arbitrary and capricious. Holding that it was, and that the decision by Hartford not to pay was based on a "selective review" of the available evidence about the death, the appellate court affirmed the trial judge's award of $35,000 in attorney's fees. As for Pan American, its refusal to pay was held to entitle the plaintiffs to the statutory penalty outlined by Louisiana Revised Statutes 22:656.

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accident here would be sufficient to invoke the Direct Action Statute according to its terms.

35. La. R.S. 22:655(C) (1978 and Supp. 1992).

36. 593 So. 2d 1376 (La. App. 5th Cir. 1992).

37. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988).

38. On the basis of Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948 (1989).

VII. HEALTH AND ACCIDENT INSURANCE

The well-documented difficulties which smaller employers sometimes have in procuring affordable health insurance for their employees gave rise to an interesting and important decision during this term. In *Shrader v. Life General Security Insurance Co.*,[39] the plaintiff was diagnosed in late 1988 with coronary artery disease and underwent coronary angioplasty. Medical expenses related to this condition were paid by his employer's health carrier (Shenandoah Life). As of January 1, 1989, the employer shifted health coverage to a so-called "multiple employer trust" (MET) issued by the defendant through United Employers Trust.[40] The policy issued through the MET contained a provision limiting coverage for pre-existing conditions to $7,500.

About three weeks after issuance, plaintiff underwent further treatment for his coronary disease, ultimately incurring almost $70,000 in expenses. At first, defendant denied the claim altogether, but later paid $7,500. When it refused to pay any more than the pre-existing condition limit, plaintiff sued.

Defendant knew that it had to contend with the language of Louisiana Revised Statutes 22:215.6, the so-called "no loss, no gain" concept. In essence, this statute requires that upon the "replacement" of one carrier by another as insurer of a group of ten or more persons, any limitation on pre-existing conditions in the succeeding carrier's policy had to be at least the equivalent of the benefits of the prior plan. In other words, the insured employee should experience neither a loss nor a gain in coverage by the change in carriers.

The defendant argued that its policy was really not a "replacement" since the Shenandoah policy was issued to the employer and the defendant's policy was issued to the MET. This was too much form over substance for the appellate court, which held that the practical effect of the change in carriers was to replace one insurance entity with another. Accordingly, it held that the statute was applicable. It also rejected the defendant's argument that the Department of Insurance might have a different view,[41] and that "public policy" required that the statute not be enforced as written.

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39. 588 So. 2d 1309 (La. App. 2d Cir. 1991), *writ denied*, 592 So. 2d 1317 (1992).

40. The court described an MET as "an umbrella by which an insurance company issues a group policy to a number of employers who have relatively few employees" so as to create a larger group for more economical underwriting of health insurance. *Id.* at 1312. Plaintiff's employer thus arguably joined a "group" already in existence, and simply gained access to the benefits of a policy already issued and in existence. This characterization of the nature of the coverage was of course important to the defendant's argument in the instant case.

41. While the court recognized that the interpretation by an agency charged with

The defendant raised for the first time in the appellate court the argument that ERISA pre-empted any award of penalties and attorney's fees. The court held that such a contention was in the nature of an affirmative defense, and had to be specially pleaded in the trial court. It therefore rejected that contention.

Finally, the court agreed with the trial court that penalties and attorney's fees were due for the failure to pay the $7,500 amount under the new policy, and agreed as well with the trial court's refusal to award any such penalties and fees for the excess amount. In doing so, it properly recognized that the defendant had a plausible basis for contesting the excess amount, and should not be penalized for defending its position.

VIII. PROPERTY INSURANCE

A. Misrepresentations, Arson and the Like

Perhaps difficult economic times lead to property insurance claims that are, shall we say, unusual. Decisions during this term might indicate the truth of that observation, since misrepresentations, arson and theft[42] were grist for the judicial mill.

In *First Guaranty Bank v. Pelican State Mutual Insurance Co.*,[43] Mr. Hawkins had purchased a restaurant from the prior owners, with the building and property being subject to a first mortgage in favor of the plaintiff bank. Three months after the purchase, the building and its contents were damaged by fire. Hawkins had purchased two commercial insurance policies. Under a loss payee clause, the bank proceeded against the two insurers, who paid a certain amount to the bank and the prior owners. For that payment, the insurers were assigned the claims of the bank and the prior owners against Hawkins. The insurers claimed that Hawkins should reimburse their payments, on the grounds that he

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administering a statute might be "very persuasive," such a construction could not be given effect if it were contrary to or inconsistent with legislative intent. *Id.* at 1313. *See also* Sales Tax District No. 1 v. Express Boat Co., 500 So. 2d 364 (La. 1987).

42. *See* Romero v. State Farm Mut. Auto. Ins. Co., 595 So. 2d 402 (La. App. 3d Cir. 1992), in which the distinction between theft and conversion was critical to the denial of coverage. The insured had placed an RV with an agent under a consignment agreement. The agent "sold" the vehicle but never accounted to the insured for the proceeds, so the insured declined to deliver the title certificate and denied that there was a sale. The "buyer" successfully sued the insured and the agent, and the insured was ordered to execute the title certificate, which he did. Then he sued his insurer, alleging that there had been "theft" of the RV. The insurer was successful in convincing the court that there had been "conversion" of the RV, which was excluded.

43. 590 So. 2d 1306 (La. App. 1st Cir. 1991), *writ denied*, 592 So. 2d 1303 (1992).

had intentionally inflated his claim for damages and that he had committed arson.

The trial court disagreed with the insurers' position, and the appellate court affirmed with minor amendments. The trial court had actually declined to submit the intentional inflation of damages defense to the jury for consideration because it believed that the insurers had to show detrimental reliance upon the misrepresented information. The appellate court concluded that the trial court erred in refusing to submit this claim to the jury, but held the error harmless because the insurers had not sustained their burden of proving that the insured intentionally attempted to defraud them. Similarly, though the fire was of suspicious origin, the insurers also did not discharge their difficult burden of showing that Hawkins had set the fire himself or had someone do so. As a result, the insurers were unsuccessful in their effort to achieve reimbursement of the loss from Hawkins.

The insurer in *Williams v. United Fire and Casualty Co.*[44] had more success. Plaintiff's sister and brother-in-law had "discovered" the door of plaintiff's residence ajar while plaintiff was out of town. The sister called the police, who wrote up a burglary report listing several items that the sister believed were missing. Later, plaintiff submitted a claim for a very substantial number of items allegedly stolen during the "burglary." There seemed to be considerable evidence that there was a good deal of furniture still in the house immediately after the alleged burglary, which then seemed to disappear prior to the appearance of the insurance adjuster. In the end, the appellate court affirmed the jury's determination that the plaintiff had failed to prove that the claimed loss was a result of theft and that the defendant had proved that plaintiff materially misrepresented his claim with an intent to defraud the insurer.

Also during this term, an insurer was successful in discharging the difficult burden of proving arson. In *Dawson v. Miller*,[45] the insured attempted to establish through his own testimony that he awakened to the smell of smoke in his house and barely escaped with his life before the house was completely destroyed by fire. The expert testimony was that gasoline was involved in the fire, and that the plaintiff's testimony about the occurrence of the fire was "incredible." It was also shown that the plaintiff was alone in the house at the time and that he had been experiencing financial difficulties. This is the necessary mixture to succeed in proving an arson defense, but still such defenses are rare.

Plaintiff also argued unsuccessfully on appeal that he should have been permitted to put into evidence before the jury correspondence showing that the district attorney had decided not to prosecute plaintiff

44. 594 So. 2d 455 (La. App. 1st Cir. 1991).
45. 594 So. 2d 970 (La. App. 3d Cir. 1992).

for arson, noting the criminal standard of proof and the difficulty in succeeding in a "circumstantial arson case" prompted the decision not to prosecute.

B. Exculpatory Clauses in Leases

A very serious fire on the premises of a food store in a shopping center provided the factual context during this term for an interesting decision interpreting the exculpatory language in a lease. In *Home Insurance Co. v. National Tea Co.*,[46] the defendant lessee was found to be responsible for the occurrence of a fire on its premises which caused damage both to the leased premises themselves and to surrounding premises leased to others. Both the subrogated fire insurer of the lessor and the similarly-situated fire insurers of the other lessees (or those lessees themselves) sued the defendant lessee for reimbursement of losses paid or for damages.

Two lease provisions were relevant. The first arguably was a release by the lessor of the lessee for any damages to the leased premises due to fire.[47] The second was a "surrender" provision which similarly might have excepted fire loss from the lessee's responsibility.[48] The trial court had been persuaded that the first provision was intended to be an indemnity provision and was not sufficiently explicit to survive analysis under established law on such provisions.[49] The appellate court agreed by a divided vote.[50]

The supreme court ultimately determined that the release provision was exactly that—an allocation of loss by fire between the lessor and the lessee according to the contract. The supreme court should probably have concluded then that the agreement was not an indemnity or hold

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46. 588 So. 2d 361 (La. 1991).

47. Paragraph 11 of the lease, quoted *id.*, at 363, read:

> The Lessor hereby convenants and agrees to carry replacement insurance in limits sufficient to rebuild total development including demised premises and does hereby release and discharge the Lessee, its agents, successors and assigns from any and all claims and damages whatsoever from any cause resulting from or arising out of any fire or other casualty on the herein demised premises or on said total development or any part thereof. (emphasis omitted).

48. *Id.* Paragraph 4, entitled Repairs, read: "At expiration of said term, Lessee will quit and surrender the premises hereby demised in as good state and condition as received, reasonable wear and tear incident to Lessee's business and damage by fire or the elements, or from other causes beyond its control excepted." (emphasis omitted).

49. *See primarily* Polozola v. Garlock, Inc., 343 So. 2d 1000 (La. 1977) (discussing indemnity agreements involving negligence) and Sovereign Ins. Co. v. Texas Pipe Line Co., 488 So. 2d 982 (La. 1986) (a slightly different approach when strict liability principles are applicable).

50. Home Ins. Co. v. National Tea Co., 577 So. 2d 65 (La. App. 1st Cir. 1990), *aff'd in part, rev'd in part*, 588 So. 2d 361 (1991).

harmless agreement, and that the jurisprudence governing such agreements was not applicable. It did not squarely do so, but reached the same result by determining that the precision required by that jurisprudence was satisfied and that the lessor had to bear the loss of the premises by fire even through the lessee's fault.[51]

A good deal of energy was exerted by the parties in helping the court interpret the portion of the pertinent lease paragraph that required the lessor to secure replacement insurance. The lessor argued that such a provision did not establish an allocation of risk of loss to the lessor, a common conclusion in other states. The lessee argued that the issue should not be decided on the basis of the requirement of replacement insurance alone, since there was additional language in the provision that specifically addressed release and allocation of risk. The result in the case suggests that the lessee's argument prevailed, and that we may wait somewhat longer in Louisiana for a specific determination by the supreme court of the meaning of a lease provision which only calls for the lessor to carry replacement insurance without the additional verbiage which was present in the instant case.

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51. The claim by the lessee that the release paragraph was sufficient to establish that the lessor should also indemnify the lessee against the claims of the other tenants was rejected. Obviously, the language with respect to the claims of the other tenants, if an indemnity at all, was much less clear than the specific allocation of risk between the lessor and the lessee as to fire damage to the leased premises themselves.