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Insurance

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INSURANCE

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I. AUTOMOBILE LIABILITY COVERAGE

A. Initial Permission

Automobile liability policies commonly contain an "omnibus" clause that extends coverage to persons using the insured vehicle with the permission of the owner. To determine the permission sufficient to trigger coverage, the Supreme Court of Louisiana, in its 1938 landmark decision in *Parks v. Hall*,[1] adopted the initial permission rule. *Norton v. Lewis*[2] is the modern reaffirmation of that principle under which an omnibus clause will be construed "in its broadest possible sense."[3] If the initial use of the vehicle is with the express or implied consent of the insured, subsequent deviation from the scope of permission will not preclude coverage unless the deviation "amounts to theft or other conduct displaying utter disregard for the return or safekeeping of the vehicle."[4]

In *Norton*, the court found that the determinative issue was whether the operator had initial permission to use the automobile at the time of the accident. The court noted that "[n]o presumption burdens or aids either party" with this issue which "must be proved as any fact by a preponderance of the evidence."[5] The driver was the used car lot porter of an automobile dealer who, when on duty, had permission to use vehicles for work-related purposes. The porter, however, was not working on the day of the accident. Without permission, he had taken a vehicle from the lot for a personal mission. Under these circumstances, the porter did not have the initial permission necessary to trigger omnibus coverage under an automobile liability policy.

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1. 189 La. 849, 181 So. 191 (1938).
2. 623 So. 2d 874 (La. 1993).
3. *Id.* at 875.
4. *Id.* The court justified the initial permission rule as (1) protecting innocent accident victims, (2) discouraging collusion between lender and lendee, and (3) reducing a costly type of litigation. In support of the initial permission rule, the court cited a number of its decisions and those of other courts, including Carey v. Ory, 421 So. 2d 1003 (La. App. 3d Cir. 1982), *writ denied*, 426 So. 2d 178 (1983). That case involved a clear deviation from the scope of permission both in destination and time under an insurance policy that expressly required the use be not only with the permission of the insured but also "within the scope of such permission." *Id.* at 1006 n.1. In disregarding such policy language to affirm a directed verdict of coverage, the court observed that the initial permission rule was so well-established that "[e]ither legislation or a decision of our Supreme Court will be required to change this rule." *Id.* at 1007.
5. *Norton*, 623 So. 2d at 876.

B. Second Permittees

When the person (second permittee) using the vehicle at the time of the accident obtained possession from someone (first permittee) who borrowed the vehicle from the owner, the issue under a policy requiring permission is whether the second permittee has the express or implied permission of the owner.[6] In *American Home Assurance Co. v. Czarniecki*,[7] the Supreme Court of Louisiana established as the test for implied permission whether it was reasonably foreseeable to the owner at the time of the loan that the first permittee would allow others to operate the automobile.[8] *Perkins v. McDow*[9] announced a corollary to this rule. A father gave virtually exclusive use and control of an auto to his 18-year-old son, "except for general, broad admonitions to be careful, don't go too fast, and don't let anyone else drive the car . . . ."[10] A friend, who borrowed the auto from the son, caused a fatal accident. In finding coverage for the friend's negligence, the court concluded that, when "general and regular use" is given by the named insured to an adult child, "it is reasonably foreseeable that the adult child will, on occasion, allow someone else to drive the car, regardless of an admonition by the parent named insured to not let anyone else drive it."[11]

Previously, the court had recognized that the admonition not to lend the car except "in emergencies and when circumstances warranted" vested discretion in the first permittee to allow others to drive.[12] In addition, courts of appeal have found implied permission despite a restriction when the use was in an emergency situation, or for the benefit of the named insured, or after violation of the restriction to the named insured's knowledge without objection.[13] In *Malmay v. Sizemore*,[14] however, the court found that a restriction barred coverage when the parent had given the adult child "conditional consent to use the automobile for a specific, limited purpose."[15]

Is *Perkins* limited to situations in which a parent gives general use to an adult child with only a general admonition, or does *Perkins* foreshadow further deterioration of the named insured's ability to control coverage through restrictive permission? While the owner has an undeniable right to control the use of his automobile and a premium-payer's interest in limiting the exposure of his insurer, the owner's interest must be weighed against the public policy

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6. *See* Rogillio v. Cazedessus, 241 La. 186, 127 So. 2d 734 (1961).
7. 255 La. 251, 230 So. 2d 253 (1970).
8. *See also* Hughes v. Southeastern Fidelity Ins. Co., 340 So. 2d 293 (La. 1976).
9. 615 So. 2d 312 (La. 1993).
10. *Id.* at 317.
11. *Id.*
12. Morgan v. Matlack, Inc., 342 So. 2d 167, 169 (La. 1977).
13. King v. Louisiana Farm Bureau Ins. Co., 549 So. 2d 367 (La. App. 2d Cir.), *writ denied*, 552 So. 2d 387 (1989); Solice v. State Farm Mut. Auto. Ins. Co., 488 So. 2d 1159 (La. App. 2d Cir. 1986). *See also Perkins*, 615 So. 2d at 316, citing these cases with approval.
14. 493 So. 2d 620 (La. 1986).
15. *See Perkins*, 615 So. 2d at 316.

concern for compensation of accident victims and the common experience that automobiles are frequently lent without due consideration of authority. The court apparently is searching for the proper balance somewhere between *Malmay* and *Perkins*.[16]

In certain policy forms, insurers have liberalized the permission requirement. In the Personal Auto Policy published by the Insurance Services Office and used in whole or in part by many insurers, the permission requirement has been changed from an element of coverage to an exclusion for anyone "using a vehicle without a reasonable belief that that person is entitled to do so." This policy form shifts the inquiry from the express or implied intent of the owner to the subjective belief of the user. In addition, it shifts the burden of proof from the person claiming coverage to the insurer, that must show the absence of a reasonable belief.[17]

C. *Carrying Property For A Fee*

Policies covering personal automobiles generally contain an exclusion that precludes coverage while the vehicle "is being used to carry persons or property for a fee."[18] In *RPM Pizza, Inc. v. Automobile Casualty Insurance Co.*,[19] the supreme court held that pizza delivery persons using their own autos, who were compensated only by hourly wages, were not carrying property for a fee within the meaning of the exclusion. In reaching this conclusion, the court applied two well-settled rules of interpretation of insurance policies. First, policy provisions should be interpreted "in light of each other so that each is given the meaning suggested by the insurance contract as a whole . . . ."[20] In this case, another

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16. In his concurring opinion in Hughes v. Southeastern Fidelity Ins. Co., 340 So. 2d 293, 295 (La. 1976), Justice Tate suggested that the initial permission rule be applied to second permittee cases. If the first permittee had permission to use the vehicle, a deviation in drivers, just as a deviation in route, would have no effect on coverage. Both *Malmay* and *Perkins* offered the supreme court the opportunity to accept Justice Tate's recommendation, and the court apparently chose not to go that far.

17. Insurers bear the burden of proof that an exclusion is applicable. *See, e.g.*, Capital Bank & Trust Co. v. Equitable Life Assurance Soc'y, 542 So. 2d 494, 496 (La. 1989). The predecessor to the Personal Auto Policy was the Family Automobile Policy. That policy provided coverage for anyone using the "owned" automobile with the permission of the named insured, but extended coverage to the named insured and any "relative" for use of other automobiles when such use was "reasonably believed to be with the permission" of the owner. For the distinction between "permission" and "reasonable belief," see Francois v. Ybarzabal, 483 So. 2d 602 (La. 1986); Johnson v. Aetna Casualty & Sur. Co., 274 So. 2d 769 (La. App. 3d Cir. 1973). *See also* American Home Assurance Co. v. Czarniecki, 255 La. 251, 230 So. 2d 253 (1969), in which the court found neither "permission" nor "reasonable belief."

18. This exclusion is sometimes referred to as the "public or livery conveyance" exclusion, based upon the language used in earlier policy forms. *See, e.g.*, Leonard v. Travelers Ins. Co., 183 So. 2d 447 (La. App. 2d Cir. 1966); Spears v. Phoenix Ins. Co., 149 So. 2d 118 (La. App. 2d Cir. 1963).

19. 601 So. 2d 1366 (La. 1992).

20. *Id.* at 1368.

exclusion, the "business use" exclusion, permitted business use of the personal automobile in the employer's business. If "fee" were interpreted so broadly as to include any compensation, the court suggested, the "use for a fee" exclusion would conflict with the intent of the "business use" exclusion to retain coverage for use of the personal auto in business. Second, the court applied the rule that policy "provisions susceptible of different meanings must be interpreted with a meaning that renders coverage effective . . . ."[21] Therefore, while "fee" could mean any compensation, it is also reasonable to construe "fee" narrowly to encompass only carriage of property for a specific payment. Delivery persons compensated only by their hourly wages were not using their autos to carry property for a fee within the narrow meaning of "fee."

To the consternation of a concurring justice, the court pretermitted the issue whether the exclusion violates the public policy of Louisiana's Motor Vehicle Safety Responsibility Law.[22] Under most circumstances, compliance with this law requires a Motor Vehicle Liability Policy as described in Louisiana Revised Statutes 32:900. That statute does not expressly recognize a number of the exclusions commonly found in automobile liability policies. While the decisions are not consistent, courts of appeal have found some unlisted exclusions to be unenforceable.[23] In addition, there are conflicting decisions concerning the effect of invalidity.[24] Legislative and judicial resolution of these issues is needed.

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21. *Id.* at 1369.

22. La. R.S. 32:851-1043 (1989).

23. The following exclusions have been held invalid: (1) Auto Business Exclusion—Arnaud v. Commercial Union Ins. Co., 594 So. 2d 992 (La. App. 3d Cir.), *writ denied*, 604 So. 2d 994 (1992); Louisiana Farm Bureau Casualty Ins. Co. v. Darjean, 554 So. 2d 1376 (La. App. 1st Cir. 1989), *writ denied*, 558 So. 2d 571 (1990); Rudison v. Richard, 526 So. 2d 369 (La. App. 4th Cir. 1988); (2) Other Business Use Exclusion—Stanfel v. Shelton, 563 So. 2d 410 (La. App. 1st Cir. 1990); (3) Cross Employee Exclusion—Akers v. Avis Rent-A-Car, 587 So. 2d 831 (La. App. 4th Cir. 1991), *writ denied*, 592 So. 2d 1299 (1992); (4) Bodily Injury To Family Members Exclusion—Pitcher v. Pitcher, 607 So. 2d 838 (La. App. 1st Cir. 1992); (5) Named Driver Exclusion—Raimer v. New England Ins. Co., 595 So. 2d 1218 (La. App. 3d Cir. 1992); Lewis v. Narcisse, 595 So. 2d 329 (La. App. 3d Cir. 1992). But see the 1992 Amendment adding La. R.S. 32:900(L) to permit policies to "exclude from coverage any named person who is a resident of the same household as the named insured." Generally, on the issue of conflict with La. R.S. 32:900, see Hearty v. Harris, 574 So. 2d 1234, 1241 n.21 (La. 1991).

The following exclusions have been held valid: (1) Autos Owned By A Family Member Exclusion—Martin v. Willis, 584 So. 2d 1192 (La. App. 2d Cir. 1991), *writ denied*, 590 So. 2d 589 (1992); (2) Intentional Injury Exclusion—Williams v. Diggs, 593 So. 2d 385 (La. App. 1st Cir. 1991); (3) Punitive Damages Exclusion—Taylor v. Lumar, 612 So. 2d 798 (La. App. 1st Cir. 1992); and (4) Use For A Fee Exclusion. This last exclusion was held invalid by the lower courts in *RPM Pizza*, 590 So. 2d 1349 (La. App. 5th Cir. 1991), but held valid in McPherson v. Viola, 593 So. 2d 1370 (La. App. 5th Cir. 1992) and Morris v. American Sur. & Fidelity Ins. Co., 573 So. 2d 1227 (La. App. 4th Cir. 1991). *Morris* suggested that unlisted exclusions could be applied against the owner but not against omnibus insureds.

24. If the exclusion conflicts with La. R.S. 32:900, is the exclusion unenforceable only as to the 10/20/10 limits of liability required by that statute, or is it unenforceable in its entirety for the full policy limits? *Compare* Arnaud v. Commercial Union Ins. Co., 594 So. 2d 992 (La. App. 3d Cir.),

II. UNINSURED MOTORIST COVERAGE

A. *Waiver*

What constitutes an effective waiver of uninsured motorist coverage is a continuing saga unfolding annually from the legislature or the courts. This year's installment is provided by *Tugwell v. State Farm Insurance Co.*[25] The insured signed a document which stated unmistakably that the insured rejected UM coverage.[26] The waiver, however, made no reference to the insured's option of selecting lower limits. The court held the rejection invalid because the insured must be given "the opportunity to make a 'meaningful selection' from his options provided by the statute: (1) UM coverage equal to bodily injury limits in the policy, (2) UM coverage lower than bodily injury limits in the policy, or (3) no UM coverage."[27]

The UM statute does not require a new waiver in connection with a "renewal, reinstatement, or substitute policy,"[28] but the developing jurisprudence seems to be taking a narrow view of that exception.[29]

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writ denied, 604 So. 2d 994 (1992) (unenforceable for 10/20/10 only) *with* Cinquemano v. Underwood, 611 So. 2d 838 (La. App. 4th Cir. 1992), *writ denied*, 617 So. 2d 909 (1993) (unenforceable for full policy limits).

25. 609 So. 2d 195 (La. 1992).

26. In the application for a $1,000,000 umbrella liability policy, the insured signed a blank entitled "Rejection Of Uninsured Motorists Coverage" which stated above his signature, "In keeping with the provisions of the laws of my state, I have been offered the opportunity to purchase Uninsured Motorists coverage, and I hereby reject Uninsured Motorists coverage as part of this application." *Id.* at 196.

27. *Id.* at 197. In cases subsequent to *Tugwell*, waiver forms leaving a blank for selection of lower limits have been found effective. Allen v. State Farm Mut. Auto. Ins. Co., 617 So. 2d 1308 (La. App. 3d Cir. 1993); Mosley v. Dairyland Ins. Co., 614 So. 2d 792 (La. App. 2d Cir.), *writ granted, judgment vacated by* 620 So. 2d 828 (1993). In the 1993 Faculty Symposium, it was reported that Act 980 of 1992 added 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." W. Shelby McKenzie & H. Alston Johnson, *Insurance, Developments in the Law, 1991-1992*, 53 La. L. Rev. 809, 810 (1993). In the Symposium, it was suggested that under this amendment "the insured apparently no longer has the option of totally rejecting UM coverage." *Id.* Upon further reflection, this amendment probably was not intended to eliminate the option of a full waiver, but only to restrict the selection of lower limits to an amount equal to or greater than the minimum coverage (10/20/10) required by the Financial Responsibility Law.

28. La. R.S. 22:1406(D)(1)(a)(i) (1989).

29. Recent cases include Thibodeaux v. Champion Ins. Co., 614 So. 2d 232 (La. App. 3d Cir. 1993) (new waiver was required even though only change was addition of a third vehicle to policy previously covering two vehicles); Donaghey v. Cumis Ins. Soc'y, 600 So. 2d 829 (La. App. 3d Cir. 1992) (same); Troha v. State Farm Ins. Co., 606 So. 2d 89 (La. App. 3d Cir. 1992) (addition of coverages for an owned automobile to a non-ownership policy required new waiver). *But see*, Allen v. State Farm Mut. Auto. Ins. Co., 617 So. 2d 1308 (La. App. 3d Cir. 1993) (new waiver was not required where the only policy changes were the substitution of an auto and the addition of collision and comprehensive coverage).

B. Subrogation

In *Egros v. Pempton*,[30] the supreme court resolved a conflict among the circuits by holding that the UM statute permits subrogation against a non-motorist joint tortfeasor. The plaintiff struck the rear of a truck that was backing onto the premises of a millwork company. A portion of the fault was allocated to the millwork company. The plaintiff's UM insurer, who had paid its policy limits in satisfaction of the judgment against it based upon the fault of the truck driver, was permitted to subrogate against the millwork company and its liability insurer.[31] Although the obligations arise from different sources, the millwork company, its liability insurer and the plaintiff's UM insurer were solidary obligors.[32] As between solidary obligors, however, the court noted that the UM insurer, under the UM statute,[33] was subrogated to its insured's rights against the joint tortfeasors and their liability insurers.[34]

III. INTENTIONAL INJURY EXCLUSION

Liability policies commonly exclude coverage for bodily injury or property damage which is "expected or intended from the standpoint of the insured." Expanding on its earlier recognition that only intentional injury is excluded,[35] the supreme court in *Breland v. Schilling*[36] held that the exclusion requires inquiry into the subjective intention of the insured. Further, "when minor injury is intended, and a substantially greater or more severe injury results, whether by chance, coincidence, accident, or whatever, coverage for the more severe injury

30. 606 So. 2d 780 (La. 1992).

31. The court emphasized that if the millwork company's liability insurer exhausted its full limits in satisfaction of the plaintiff's judgment, the UM insurer's subrogation claim would be against the underinsured motorist only. The insured is entitled to full compensation in preference to the insurer's subrogation claim. *Id.* at 784, 786. The court also noted that, because the UM insurer paid prior to its insured's settlement with the millwork company, the insured's subsequent release of the millwork company did not affect the UM insurer's subrogation rights against the millwork company. *Id.* at 784 n.6.

32. The insurers are solidary obligors only to the extent of their policy limits.

33. La. R.S. 22:1406(D)(4) (1989).

34. The court pointed out that the UM insurer was subrogated to the plaintiff's rights and that it was not asserting an independent right to contribution or indemnity. *Egros*, 606 So. 2d at 786. *Egros* supports the conclusion in Edwards v. Dairyland Ins. Co., 560 So. 2d 95 (La. App. 3d Cir.), *writ denied*, 565 So. 2d 446 (1990) that, while the UM insurer should be cast in judgment to the insured for the fault attributable to the uninsured motorist, the UM insurer is entitled to subrogate against joint tortfeasors to the extent of their solidary obligation. Both *Egros* and *Edwards* arose prior to September 1, 1987, the effective date of the amendment to La. Civ. Code art. 2324, which limits the solidary obligation of joint tortfeasors to 50% of the damages under most circumstances. In *Egros*, the court pretermitted consideration of the effect of this amendment. *Egros*, 606 So. 2d at 786 n.10.

35. Pique v. Saia, 450 So. 2d 654 (La. 1984).

36. 550 So. 2d 609 (La. 1989).

is not barred."[37] In *Great American Insurance Co. v. Gaspard*,[38] an arsonist had set fire to his store in a strip shopping center. The fire spread to the stores of other merchants. The lower courts found that the arsonist's liability policy covered the damages awarded the other merchants, using *Breland* to reason that the insured only intended to damage his own store. Clarifying *Breland*, the supreme court found that all damages were excluded under the circumstances. It held that "[t]he subjective intent of the insured, as well as his reasonable expectations as to the scope of his insurance coverage, will determine whether an act is intentional."[39] From the excessive amount of gasoline used by the arsonist, the court concluded that he either intended to damage the other merchants or "had a subjective belief that such a result was certain or substantially certain to follow."[40] In addition, the court concluded that no reasonable policyholder could expect an insurance policy to cover his criminal act of arson.

Since *Breland*, insureds have been somewhat successful in retaining coverage when they have not used weapons to inflict injury.[41] However, the "I didn't mean to do it" excuse has not been accepted for gunshot wounds[42] or sexual molestation.[43] Insurers have been successful in limiting the effect of *Breland* with variations in policy language.[44]

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37. *Id.* at 614.

38. 608 So. 2d 981 (La. 1992).

39. *Id.* at 985.

40. *Id.* at 986.

41. Provost v. Provost, 617 So. 2d 1267 (La. App. 3d Cir. 1993) (ex-husband choked ex-wife after she sprayed him with mace); Baugh v. Redmond, 565 So. 2d 953 (La. App. 2d Cir. 1990) (single blow after softball game "was more a gesture of anger and frustration than a deliberate effort on the part of the defendant to inflict bodily harm"). *But see*, Yount v. Maisano, 627 So. 2d 148 (La. 1993) (injuries from numerous blows and kicks were intentional, and coverage was beyond the reasonable expectations of an insured); Cavalier v. Suberville, 592 So. 2d 506 (La. App. 5th Cir. 1991), *writ denied*, 594 So. 2d 1318 (1992) (severe facial injuries were reasonably expected from single blow to face inflicted by insured who tracked plaintiff down, grabbed him, spun him around and punched him in the face).

42. Cavin v. Elliot, 597 So. 2d 1255, 1257 (La. App. 3d Cir. 1992) ("[T]he aggressive act of pulling a loaded gun and firing it at a third party, in and of itself, supports the conclusion that the defendant/insured intended the resulting injuries . . . ."); Ellison v. Valley Forge Ins. Co., 571 So. 2d 726 (La. App. 2d Cir. 1990), *writ denied*, 577 So. 2d 14 (1991).

43. Piraro v. Dupuy, 618 So. 2d 48 (La. App. 3d Cir. 1993); Shaw v. Bourn, 615 So. 2d 466 (La. App. 4th Cir. 1993); Duplantis v. State Farm Gen. Ins. Co., 606 So. 2d 51 (La. App. 3d Cir. 1992) (policy contained "molestation exclusion endorsement"); Doe v. Smith, 573 So. 2d 238 (La. App. 1st Cir. 1990), *writ denied*, 573 So. 2d 1139 (1991); Menard v. Zeno, 558 So. 2d 744 (La. App. 3d Cir.), *writ denied*, 561 So. 2d 121 (1990).

44. *Willful Or Malicious Acts.* In addition to the "expected or intended" exclusion, some policies exclude coverage for damage "which is the result of willful or malicious acts of any insured." This exclusion was held to preclude coverage in LaFever v. Whitely, 613 So. 2d 1007 (La. App. 1st Cir.), *writ denied*, 614 So. 2d 64 (1992) (emphasizing his complaint about foam on his beer, defendant/insured hit plaintiff/waitress in the head with a crock pot of salad dressing) and Keathley v. State Farm Fire & Casualty Ins. Co., 594 So. 2d 963 (La. App. 3d Cir. 1992) (believing plaintiff had tripped him, the insured struck the plaintiff with a single blow).

Different Kind Or Degree. After the plaintiff called him a derogatory name, the insured in

IV. PENALTIES

A. Unconditional Tender

When only the amount of the insured's claim is in dispute, the insurer has the duty under the penalty statutes[45] to tender a reasonable amount to the insured within the statutory payment period.[46] The jurisprudence conflicted concerning whether the insurer could seek reimbursement from the insured in the event that the tender exceeded its actual liability as determined in subsequent judicial proceedings. A sharply divided supreme court held in *State Farm Mutual Automobile Insurance Co. v. Azhar*[47] that the insurer cannot recover any portion of an unconditional tender. The three dissenting justices warned that the "result of this opinion will be to discourage UM insurance carriers from making early, substantial tenders."[48]

B. Vexatious Conduct

In *Louisiana Maintenance Services, Inc. v. Certain Underwriters at Lloyd's of London*,[49] the insurer denied coverage prior to suit on one ground and then, after suit was filed, abandoned the original ground to assert another unsuccessful coverage defense. In assessing penalties, the court described the insurer's conduct as "vexatious refusal to pay" and as an "indicia of bad faith" sufficient to trigger the penalty provisions of Louisiana Revised Statutes 22:658.[50]

V. DIRECT ACTION STATUTE

Confusion continues to reign with respect to the availability of a direct action under Louisiana Revised Statutes 22:655 against an insurer offering "ocean marine insurance."[51] The United States Fifth Circuit Court of Appeals first speculated about forty years ago in *Cushing v. Maryland Casualty Co.* that Louisiana state courts would hear such an action and therefore reversed a summary judgment that had denied such a direct action to personal injury

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Simpson v. Angel, 598 So. 2d 584 (La. App. 4th Cir.), *writ denied*, 605 So. 2d 1091 (1992), punched the plaintiff twice in the face. His intentional injury exclusion contained the additional sentence: "This exclusion applies even if the bodily injury is of a different kind or degree, or is sustained by a different person or property, than that intended or expected . . . ." Distinguishing the policy language in *Breland*, the court held this policy unambiguously excluded coverage.

45. La. R.S. 22:656-658, 1220 (Supp. 1993).
46. McDill v. Utica Mut. Ins. Co., 475 So. 2d 1085 (La. 1985).
47. 620 So. 2d 1158 (La. 1993).
48. *Id.* at 1160.
49. 616 So. 2d 1250 (La. 1993).
50. *Id.* at 1253.
51. La. R.S. 22:655 (1989).

plaintiffs.[52] The United States Supreme Court weighed in with its view, but a perplexing 4-1-4 opinion shed very little light on the issue.[53] At about the same time, the Louisiana legislature was enacting what became Louisiana Revised Statutes 22:611 which introduces Part XIV of Chapter 1 of the Insurance Code (the part that contains the Direct Action Statute). That enactment stated very plainly that Part XIV "shall apply to insurances other than ocean marine and foreign trade insurances."[54] Some years later, the legislature made a similar pronouncement in Louisiana Revised Statutes 22:1377, a section dealing only with the Louisiana Insurance Guaranty Association fund (LIGA).[55]

The inconsistency between these early judicial and legislative pronouncements has not waned in the intervening decades. The United States Fifth Circuit long adhered to its view that a direct action should be permitted, when no limitation of liability proceeding was involved.[56] Less certainty existed when

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52. Cushing v. Maryland Casualty Co., 198 F.2d 536 (5th Cir.), *reh'g denied*, 198 F.2d 1021 (1952). It should be noted that two separate policies were involved. One of them appeared to involve a typical "no action" clause and spoke of the necessity of having the loss "fixed and rendered certain" by judgment or agreement prior to any action against the company. This is the kind of clause that has regularly been invalidated by the Direct Action Statute. The other was styled a "protection and indemnity" policy and contained language specifying that the insurer's responsibility under it was enforceable only when the assured shipowner "shall have become liable to pay, and shall have in fact paid" a loss. *See* Maryland Casualty Co. v. Cushing, 347 U.S. 409, 411 n.3, 74 S. Ct. 608, 609 n.3 (1954).

53. *Maryland Casualty Co.*, 347 U.S. 409, 74 S. Ct. 608. The Supreme Court was particularly concerned with whether the Louisiana Direct Action Statute interfered with the federal Limited Liability Act, permitting a shipowner to limit its liability to the value of the ship and freight. 46 U.S.C. § 183 (1952). Four justices thought the Louisiana statute was inconsistent with the federal statute and could not be used at all when limitation of liability was at issue; four other justices thought there was no conflict at all. The ninth and deciding justice thought that direct action should not be available until the limitation of liability proceeding was concluded. He joined with the four who found the inconsistency to remand the case to the district court "to be continued until after the completion of the limitation proceeding." *Maryland Casualty Co.*, 347 U.S. at 423, 74 S. Ct. at 615.

54. La. R.S. 22:611 (1989). The authors are not aware of any rationale that has been offered for this exception. The most likely explanation is that the drafters of the Insurance Code, writing in 1948 in a climate in which the power of the states to regulate the business of insurance was under intense debate, mistrusted the legislative jurisdiction of the Louisiana legislature to make laws governing insurers and their policies that impacted interstate and foreign commerce.

55. When originally enacted, the provision stated simply that the statutes governing LIGA "shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance." 1970 La. Acts No. 81. The section has been amended several times since, but the exception of "ocean marine insurance" has remained in the law. 1989 La. Acts No. 618; 1989 La. Acts No. 620; 1990 La. Acts No. 101. Some courts have cited La. R.S. 22:1377 as further indication that the Direct Action Statute does not apply to ocean marine insurance, even though the section addresses only LIGA. Presumably the thinking is that LIGA exists to provide a remedy to those who have claims against "liability" carriers which are insolvent, and that if LIGA does not reach a certain type of policy, that policy must not be a "liability" policy. This logic is of course flawed, since LIGA does not reach a number of other types of policies which are clearly "liability" policies. Thus, the set of those policies which LIGA does not reach is not identical to the set of non-liability policies.

56. Lovless v. Employers' Liab. Assurance Corp., 218 F.2d 714 (5th Cir. 1955).

a pending limitation of liability proceeding brought *Cushing* to the fore.[57] The Supreme Court of Louisiana gradually edged its way into a seemingly contrary position. It first held that a standard workers' compensation and employers' liability policy with a maritime endorsement was not "ocean marine insurance" and thus, was not excluded from coverage by LIGA under Louisiana Revised Statutes 22:1377.[58] But very shortly thereafter, it held by the narrowest of margins that "protection and indemnity" insurance issued to a vessel operator was "ocean marine insurance" and thus was excluded from LIGA coverage under Louisiana Revised Statutes 22:1377.[59] While these decisions shed some light on the issue of whether "ocean marine insurance" could be the subject of a direct action, neither directly addressed that issue.[60]

Reading the more recent tea leaves spread by the Supreme Court of Louisiana, federal district courts began to abandon the "federal" position that a direct action was permissible on the ground that the state's highest court had essentially "overruled" the speculation in *Cushing*.[61] Then, to add to the confusion, some Louisiana appellate courts, including one during this term, held that a direct action was permissible with respect to ocean marine insurance[62] and another during this term held that it was not.[63]

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57. Coleman v. Jahncke Serv., Inc., 341 F.2d 956 (5th Cir. 1965). The opinion first resolved the limitation of liability issue against the shipowner, thus removing any possibility that *Cushing* would require a conclusion that the Direct Action Statute was inconsistent with the federal Limitation of Liability Act. Having thus resolved the limitation of liability situation, the court had no trouble saying that there should be a direct action.

58. Deshotels v. SHRM Catering Services, 538 So. 2d 988 (La. 1989).

59. Backhus v. Transit Casualty Co., 549 So. 2d 283 (La. 1989). The opinion contains a good discussion of the nature of "protection and indemnity" insurance, a phrase which gained prominence in the 19th century to describe the coverage created by "protection and indemnity clubs" (or P & I clubs) of shipowners on a mutual basis to supplement the liability coverage being written by Lloyd's syndicates. Syndicates were unwilling to write complete coverage for liability claims, preferring to leave a fairly substantial percentage of the loss with the shipowner. The shipowners, in turn, joined together in mutual "P & I clubs" to spread and cover the remaining portion of the risk. Being "indemnity" or "pay-to-be-paid" insurers, such entities do not expect to be subjected to a "direct action" by a claimant, but rather expect indemnification claims from members who have paid a loss. Whether such policies are "liability" policies or "indemnity" policies for Louisiana law purposes is of course critical to the determination of whether a direct action exists. *See* Quinlan v. Liberty Bank & Trust Co., 575 So. 2d 336 (La. 1990).

60. See also Sifers v. General Marine Catering Co., 892 F.2d 386 (5th Cir. 1990), which followed the decisions of the Supreme Court of Louisiana in *Deshotels* and *Backhus* in holding that protection and indemnity coverage against personal injury claims and property damage claims for the property of third persons is "ocean marine insurance" for which LIGA is not responsible.

61. *See* Bodden v. Texas Marine Underwriters Agency, Inc., 785 F. Supp. 77 (E.D. La. 1991); Delaune v. Saint Marine Transp. Co., 749 F. Supp. 1463 (E.D. La. 1991).

62. Giannouleas v. Phoenix Maritime Agencies, 621 So. 2d 1131 (La. App. 1st Cir. 1993); Hae Woo Youn v. Maritime Overseas Corp., 605 So. 2d 187 (La. App. 5th Cir.), *writ denied*, 609 So. 2d 240, *writ granted on other grounds*, 609 So. 2d 239 (1992).

63. Doxey v. Zapata Haynie Corp., 615 So. 2d 36 (La. App. 3d Cir. 1993).

It appeared that the United States Fifth Circuit, at least, had resigned itself to the position that the Louisiana courts had finally decided that there was no direct action against an ocean marine insurer. Its opinion in *Grubbs v. Gulf International Marine, Inc.*[64] analyzed the various Louisiana cases and reached that conclusion.[65] But then that opinion was withdrawn and the question was certified to the Supreme Court of Louisiana. To no one's great surprise, the Supreme Court of Louisiana answered the certified question of whether the Direct Action Statute permits a direct action against a marine protection and indemnity insurer in the affirmative.[66] The court properly noted that its earlier opinions in *Deshotels* and *Backhus*, discussed above, had not addressed the issue squarely. Its holding may not be popular in some quarters, but it seems proper in the light of the legislative and jurisprudential underpinnings of the direct action in this state. In the very least, the opinion appears to settle an issue which had become needlessly cloudy.

VI. LIFE INSURANCE

The issue of the rights of creditors in life insurance payable to the estate of the decedent was addressed in *Succession of Sweeney*.[67] Upon Mr. Sweeney's death, the proceeds of a life insurance policy on the life of the decedent were payable in equal shares to his spouse and to his estate. With respect to the latter share, the insurer paid the sum in question to the administrator of the succession, who sought authority to transfer the proceeds to a trust established by the decedent's testament for the benefit of his children. Since the testament also stated the decedent's "desire that all my just debts be paid," certain creditors objected to the process by which this sum would escape their clutches.

The trial court held that the creditors were entitled to the benefit of the proceeds, and thus denied the request of the administrator. The appellate court reversed. The appellate court correctly noted that the pertinent provision in the insurance code prefers the lawful beneficiary of a life insurance policy, including the insured's estate, over the creditors of the insured.[68] And while there is an exception in another portion of that provision, the exception concerns a debt

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64. 975 F.2d 186 (5th Cir. 1992) (later withdrawn from the bound volume).

65. *Id.* at 191 n.6.

66. Grubbs v. Gulf Int'l Marine, Inc., 625 So. 2d 495 (La. 1993) (Watson, J., not on panel). The court predictably relied upon its opinion in Quinlan v. Liberty Bank and Trust Co., 575 So. 2d 336 (La. 1990), in reaching its decision.

67. 607 So. 2d 996 (La. App. 3d Cir. 1992), *writ denied*, 610 So. 2d 818 (1993).

68. La. R.S. 22:647(A) (1989) provides:

> A. The lawful beneficiary, assignee, or payee, including the insured's estate, of a life insurance policy . . . shall be entitled to the proceeds and avails of the policy against the creditors . . . of the insured . . . and against the heirs and legatees . . . , and such proceeds and avails shall also be exempt from all liability for any debt of such beneficiary, payee, or assignee or estate, existing at the time the proceeds or avails are made available for his own use . . . .

secured by the pledge of a policy or the assignment of rights under the policy to the creditor.[69]

The creditors argued that the portion of the statute preferring the beneficiaries over the creditors should not apply when, as here, the insurer expressed in his will his desire that his debts be paid, citing *Michiels v. Succession of Gladden*.[70] In that case, the testator had directed that certain described land be sold and those proceeds "together with my life insurance" be "distributed as follows," and then listed first the payment of all of his "honest debts."[71] The court followed this specific direction and gave the creditors first preference to the proceeds of the life insurance policy, largely on the basis that a testator could override the statutory protection of the proceeds payable to his estate against the claims of the creditors if he wished to do so. In *Sweeney*, however, the appellate court believed that the testator merely expressed his general desire that his debts be paid, without specifically earmarking the proceeds of the life insurance policy as the source of such payment. In that instance, the "clear language of the statute" when balanced against the "precatory statement" of the testator should prevail.[72]

One creditor also argued that the mortgage which it held required an assignment of the policy, which would bring the proceeds of the policy within Louisiana Revised Statutes 22:647(E). The court disagreed with that contention as well, since the language in the mortgage specified that the assignment should occur "when required by the mortgagee," who had never actually made such a request.

There is probably no reason to disagree with the result reached by the appellate court on the facts before it. However, the distinction between a "precatory request" that debts be "satisfied" from assets available to the estate and a specific direction that this occur with a reference to proceeds of life insurance policies may prove somewhat ephemeral. Creditors, insurers and drafters of testaments should probably take note and be certain that the interests and desires of all parties involved are properly documented.

VII. HEALTH AND ACCIDENT INSURANCE

Two decisions during this term appear to suffer from a very result-oriented approach. The court seemed to be determined to produce a decision of coverage despite the fact that the policies in question rather plainly did not purport to cover the incidents. While one is inclined to sympathize with the insured in each instance, and while sympathy no doubt had something to do with the decisions rendered, there should not be retrospective coverage for risks which were not rated and therefore were not included within the premium. The net result, when coverage

69. La. R.S. 22:647(E) (1989).

70. 190 La. 917, 183 So. 217 (1938).

71. *Succession of Gladden*, 180 So. 862, 863 (La. App. 2d Cir. 1938). The issue of which debts were "honest" and which "dishonest" was not apparently raised or resolved.

72. Succession of Sweeney, 607 So. 2d 996, 999 (La. App. 3rd Cir. 1992).

is extended to unforeseen risks, can only be a defensive increase in premiums to cover all eventualities.

In *Jefferson v. Monumental General Insurance Co.*,[73] the insured suffered a crushed left foot in an automobile accident which ultimately required the amputation of most of his foot. He sought recovery under an accident and dismemberment policy which permitted recovery for one half of the face amount of the policy for "loss of one member."[74] In turn, "loss of a member" with regard to a foot was defined as "physical separation at or above the ankle joint."[75] Unfortunately, the policy did not define "ankle joint."

The company resisted payment and the plaintiff filed suit. The trial court used a dictionary definition of "ankle joint" and granted summary judgment in plaintiff's favor. The appellate court reversed, remanding the case for a full trial.[76] After a trial, the district court again rendered judgment in plaintiff's favor, but the appellate court again reversed.[77] Ultimately, the supreme court granted a writ and reinstated the trial court's judgment. The supreme court's opinion utilized interpretive rules from the Louisiana Civil Code and definitions from ordinary and medical dictionaries to conclude that "ankle joint" might mean a complex meeting point between various bones and ligaments, and that "at" the ankle joint was an ambiguous phrase and was, therefore, construed against the insurer. Justice Lemmon's dissent, utilizing a graphic diagram of the human foot and the actual amputation as well as the testimony of the actual surgeon, concluded that the phrase "at the ankle joint" was clear and that the plaintiff's amputation was below that joint, not at or above it.[78] Justice Lemmon seems to have had the better side of the argument, but he wrote for himself alone.

A somewhat similar teleological approach seems to have been taken in the 3-2 decision in *Ralston v. Connecticut General Life Insurance Co.*[79] Plaintiffs, a husband and wife, filed suit under a health insurance policy for their expenses related to an *in vitro* fertilization procedure. Summary judgment in plaintiffs' favor had been granted and the defendant insurer appealed. Medical expenses were covered under the policy "to the extent that the services or supplies are recommended by a physician and are essential for the necessary care and treatment of the injury, sickness or covered pregnancy."[80] In turn, the policy defined "sickness" as "physical sickness, mental illness or pregnancy," a definition which admittedly does not add much to the reader's understanding of the word.[81]

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73. 620 So. 2d 271 (La. 1993).

74. *Id.* at 272.

75. *Id.*

76. Jefferson v. Monumental General Ins. Co., 577 So. 2d 1184 (La. App. 2d Cir. 1991).

77. Jefferson v. Monumental General Ins. Co., 607 So. 2d 851 (La. App. 2d Cir. 1992).

78. Jefferson v. Monumental General Ins. Co., 620 So. 2d 271, 275-76 (Lemmon, J., dissenting).

79. 617 So. 2d 1379 (La. App. 3d Cir.), *writ granted, judgment reversed by* 625 So. 2d 156 (1993).

80. *Id.* at 1383 (Stoker and Guidry, JJ., dissenting).

81. *Id.* at 1381.

The majority held that the wife's "sickness" was that her reproductive organs, "viewed in the totality of their function," were not serving their intended purpose.[82] It held that her condition was "not normal" and that a "vital function" was "impaired," constituting a "sickness."[83] Even more surprisingly, the trial court's award of $9,104.39 in penalties and $5,000.00 in attorney's fees was affirmed, apparently on the basis that the insurer had no reasonable grounds for its refusal to pay these expenses. This expansive view of coverage appears unwarranted, however sympathetic the plaintiffs' case may have been.

VIII. PROPERTY INSURANCE

It was observed in this forum last year that "difficult economic times lead to property insurance claims that are, shall we say, unusual."[84] In particular, fire loss cases involving arson are increasingly frequent, and that trend has continued during this term. And this defense to coverage, once termed "as notoriously difficult to prove as it is commonly raised,"[85] seems to be much more successful. In three cases decided during this term, the defense of arson was successful and the creative efforts of the property owners or their creditors to recover the proceeds of the policy were rejected.

In *Del-Remy Corporation v. Lafayette Insurance Co.*,[86] the jury was convinced by the evidence that the two elements of an arson defense had been successfully proven: (1) that the fire was of an incendiary rather than an accidental origin and (2) that the insured was responsible for the fire. The first seemed not to be in serious doubt. The typical evidence of serious financial difficulties on the part of the owner apparently persuaded the jury that it or its principal was responsible for the fire. The only serious debate was over whether a mortgagee could recover the proceeds of the policy despite the arson of the mortgagor. The mortgagor had assigned the policy proceeds to the mortgagee, but only after the occurrence of the fire. This assignment did not resolve the question of whether there was any coverage for the mortgagee.

The policy did not contain a so-called "standard" or "union" mortgage clause, which would have specifically provided that the mortgagee is entitled to recovery up to the amount of the loan owed to it regardless of the conduct of the mortgagor.[87] Rather, it simply provided that the insurance proceeds were available to a mortgagee if the mortgagee was a named insured under the policy, which was not the case. The court thus properly rejected the argument by the mortgagee that it

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82. *Id.* at 1381-82.

83. *Id.* It is interesting to note that the court's decision in the plaintiffs' favor was reached even without the benefit of a brief on the plaintiffs' behalf in the appellate court. *Id.* at 1383.

84. McKenzie & Johnson, *Developments in the Law, supra* note 27, at 819.

85. W. Shelby McKenzie & H. Alston Johnson, Louisiana Insurance Law and Practice § 337, at 659, *in* 15 Louisiana Civil Law Treatise (1986).

86. 616 So. 2d 231 (La. App. 5th Cir.), *writ denied*, 617 So. 2d 941 (1993).

87. *See generally* McKenzie & Johnson, *supra* note 78, § 332.

should be entitled to a share of the proceeds. If the mortgagee had been more careful about the protection of its own rights, there might have been a different result.

Arson also figured prominently in the decision in *Chisholm v. State Farm Fire & Casualty Co.*,[88] though without the overlay of a creditor's rights. The parties stipulated that the fire in question was of incendiary origin; thus, the only issue before the court was whether the insured was responsible for the fire. The insured was in dire financial straits and had actually moved to Tennessee in an attempt to improve his family's situation. The insured and his sons had returned to the property from their out-of-state residence, ostensibly to collect some items left behind, and they were apparently the only ones in or around the property at the time of the fire. The insured's testimony on the circumstances surrounding the fire was described as "incredible" by the appellate court,[89] and not surprisingly, it was insufficient to overcome the presumption of arson established by defendant's proof of incendiary origin and responsibility of the insured.

The third case in this arson trilogy is *Osbon v. National Union Fire Insurance Co.*,[90] a case in which a concurring judge suggested legislative action to correct an inequity in the law.[91] The named insured had divorced her husband and then purchased a house three years later. She insured the house with the defendant. Some years later, she remarried her husband, but the status of the house as the separate property of the wife was not changed. The house burned a number of years later while still insured by the defendant. Upon evidence not discussed by the appellate court, the jury concluded that the fire was the result of the intentional conduct of the husband.

The insured wife and owner of the property argued that she was an "innocent spouse" and that under authorities in other states, she should be entitled to recover despite the conduct of her husband. This is, of course, a variation of the argument typically made by a mortgagee that it should be entitled to recover the proceeds of a fire policy despite the conduct of its mortgagor. The appellate court reviewed the "innocent spouse" cases from other states and found most persuasive the theory that permitted an innocent spouse to recover only when there were ambiguities in the insurance contract. Finding that maxim to be simply a specific application of the general rule applicable to the interpretation of insurance policies in Louisiana, the court adopted that theory. The court determined that the policy issued to the wife by the defendant contained no ambiguities. It included the husband, as a resident of the household, as an insured, and did not limit the exclusion for arson to the conduct of the named insured. Under the circumstances, the only proper conclusion was that an insured had been guilty of intentional conduct that caused the fire, and that such conduct by an insured was excluded from coverage. The concurring

88. 618 So. 2d 1059 (La. App. 1st Cir. 1993).
89. *Id.* at 1062.
90. 621 So. 2d 78 (La. App. 2d Cir. 1993).
91. *Id.* at 83 (Norris, J., concurring).

judge opined that the legislature should consider a provision recognizing the possibility of a recovery by the "innocent spouse" under these and similar circumstances.