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Preserving Contribution Rights After Settlement: A Need for Resolution

James A. Brown*
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I. INTRODUCTION

Under the Louisiana Civil Code, the solidary obligor who satisfies the underlying solidary obligation has the right to seek contribution from non-settling solidary co-obligors. Louisiana jurisprudence, however, is in a state of some disarray regarding the proper method for preserving contribution rights after settlement. The two lines of decisions on point require contradictory actions by the settling obligor. This legal uncertainty poses a serious problem for settling parties and their lawyers, so serious that it merits the attention of the Louisiana Supreme Court. This article outlines the conflicting lines of jurisprudence and suggests an analysis and course of action for legal counsel based upon Civil Code rules of legal subrogation and contribution.

II. THE PROBLEM

A. *The Civil Code*

Under Louisiana law, the right of "contribution" arises from principles of legal subrogation and solidarity. Louisiana Civil Code article 1829 provides, in part, that "[s]ubrogation takes place by operation of law . . . [i]n favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment. . . ." Similarly, Article 1804 provides in part that "[a] solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from the other obligors no more than the virile portion of each."

Under Article 1804, if the underlying solidary obligation arises from an offense or quasi-offense, the "virile portion" of each solidary obligor is proportionate to its fault as judicially determined at trial of the contribution claim. If the underlying obligation arises from a contract or quasi-contract, each obligor's virile portion is equal "in the absence of agreement or judgment to the contrary." If the solidary obligation thus satisfied "concern[s] only one of the obligors," as when a

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vicariously or constructively liable obligor satisfies the debt of the primary obligor, Article 1804 grants a right of full recoupment from the primary obligor.¹

B. *The Devil in the Details*

Beginning with the Louisiana Supreme Court's decision in *Morris v. Kospelich*² almost thirty years ago, Louisiana courts have consistently recognized that solidary co-obligors may settle with the claimant while preserving the right to seek contribution from non-paying solidary co-obligors.³ The decisions of Louisiana's intermediate appellate courts, however, have fallen into a state of confusion on how the settlement must be structured to preserve contribution rights. Under one line of appellate decisions, the "partial release" cases, the settling party loses its right of contribution from other responsible parties if the entire claim is compromised. By contrast, another line of decisions, the "total release" line, requires the settling party to obtain a full release of all responsible parties in order to preserve contribution rights against those parties.

C. *The "Partial Release" Decisions*

The "partial release" decisions hold that to preserve contribution rights against non-paying obligors, the settling party must preserve—not compromise—the claimant's rights against non-settling solidary co-obligors. These decisions are based on the rationale that because contribution stems from legal subrogation to the obligee's rights, the compromise of the obligee's entire claim against all solidary obligors extinguishes any rights that could have been subrogated to the settling obligor. Under this view, a full release of all claims eliminates the settling obligor's contribution rights, while a partial release of only the settling obligor's portion preserves those rights.⁴

The first circuit followed this reasoning in *U.S. Fidelity & Guaranty Co. v. Safeco Insurance Co.*⁵ The court held that a settlement agreement by which the

1. Under Louisiana Civil Code article 1805, a solidary obligor may enforce contribution rights prior to satisfaction or compromise of the principal claim through third party demands against solidary co-obligors. If the principal claim is not compromised before trial, the virile portions of the solidary obligors are adjudicated along with the principal claim. See La. Code Civ. P. art. 1812 C; *Ducote v. Commercial Union Ins. Co.*, 616 So. 2d 1366, 1370 (La. App. 3d Cir.), writ denied, 620 So. 2d 877 (1993); *Diggs v. Hood*, 772 F.2d 190, 195 (5th Cir. 1985).

2. 253 La. 413, 218 So. 2d 316 (1969).

3. See generally *Ducote*, 616 So. 2d at 1366; *Green v. Pesson Plumbing & Heating Co.*, 599 So. 2d 492 (La. App. 3d Cir. 1992); *Illinois Cent. Gulf R. v. Deaton, Inc.*, 581 So. 2d 714 (La. App. 4th Cir.), writ denied, 588 So. 2d 1117 (1991); *Pitre v. Ecko Housewares Co.*, 521 So. 2d 563 (La. App. 1st Cir. 1988); *U.S. Fidelity & Guar. Co. v. Safeco Ins. Co.*, 420 So. 2d 484 (La. App. 1st Cir. 1982); *Diggs*, 772 F.2d at 190 (applying Louisiana Law).

4. See *Illinois Cent. Gulf R.R. Co.*, 581 So. 2d at 714; *Green*, 599 So. 2d at 493; *U.S. Fidelity & Guar. Co.*, 420 So. 2d at 484.

5. 420 So. 2d at 487.

plaintiffs were deemed to have released all claims against all potential joint tortfeasors defeated both legal and conventional subrogation of the claims to the settling defendants. The settling defendants therefore had no rights of contribution against non-settling joint tortfeasors.⁶

Similarly, in *Illinois Central Gulf Railroad v. Deaton*,⁷ the fourth circuit, citing the *Safeco* decision, held that the plaintiff's general release of all personal injury claims prevented legal or conventional subrogation of the claims and thereby extinguished the settling defendant's contribution rights against non-settling joint tortfeasors. The court concluded, nonetheless, that the settling defendant, who was later absolved of fault, retained a right of indemnification from the culpable tortfeasor under principles of unjust enrichment.⁸ Under the court's reasoning, this right of indemnification, predicated upon the theory that the culpable co-obligor is unjustly enriched by the innocent obligor's discharge of his obligation, would be available only to a settling obligor found to be free of actual fault or merely "constructively" or "technically" liable.⁹ The Louisiana Supreme Court refused to review the *Deaton* decision.¹⁰

The third circuit reached the same result in *Green v. Pesson Plumbing & Heating Co.*,¹¹ holding that the obligee's general release of all potential obligors extinguished any rights that could have been subrogated or assigned to the settling obligor. As in *Deaton*, the court observed that the settling obligor might have a right of indemnification against the culpable co-obligors, but only after the settling obligor had been absolved of actual fault.¹²

Under the "partial release" decisions, failing to preserve the underlying claim against non-settling obligors defeats legal subrogation and extinguishes rights of contribution. The settling obligor who wishes to reserve contribution rights must secure the release of only its own liability, along with a conventional assignment or subrogation of the plaintiff's remaining claims against non-released co-obligors.¹³ The agreement should expressly reserve the settling obligor's rights to seek contribution and indemnification from non-settling co-obligors.

D. The "Total Release" Decisions

The "total release" decisions require precisely opposite actions by the settling solidary obligor. Under these precedents, the settling obligor who desires to

6. *Id.* at 486-87.

7. 581 So. 2d at 716.

8. *Id.* at 716-18.

9. *Id.* The indemnification claim also is addressed in *Diggs v. Hood*, 772 F.2d 190, 193 (5th Cir. 1985); and *Pitre v. Ecko Housewares Co.*, 521 So. 2d 563, 568 (La. App. 1st Cir. 1988).

10. 588 So. 2d 1117 (La. 1991).

11. 599 So. 2d 492, 493 (La. App. 3d Cir. 1992).

12. *Id.* at 493.

13. See *Green*, 599 So. 2d at 493; *Illinois Cent. Gulf R.R. Co. v. Deaton, Inc.*, 581 So. 2d 714, 716 (La. App. 4th Cir.), writ denied, 588 So. 2d 1117 (1991); *U.S. Fidelity & Guar. Co. v. Safeco Ins. Co.*, 420 So. 2d 484, 487 (La. App. 1st Cir. 1982).

preserve contribution rights must obtain the release of the entire claim against all solidary co-obligors.¹⁴ These decisions follow the rationale that an obligor who settles only his own liability is presumed to have paid no more than a "virile share" under Article 1804. Hence, the obligor is not legally subrogated to the claimant's rights against non-released co-obligors and has no right of contribution from them.¹⁵

In *Diggs v. Hood*,¹⁶ the United States Fifth Circuit, applying Louisiana law, held that a settling tortfeasor's compromise of only his own liability and the plaintiff's preservation of rights against non-released joint tortfeasors prevented legal or conventional subrogation of the plaintiff's claims. Because the settlement did not discharge any portion of the solidary debt owed by the non-settling tortfeasors, the settlement provided no contribution rights to the settling obligor.

The first circuit, citing *Diggs*, applied the same analysis in *Pitre v. Ecko Housewares Co.*,¹⁷ concluding that a settlement agreement which released only the settling tortfeasor, but purported to partially subrogate him to the plaintiff's claims against non-released joint tortfeasors only to the extent of the settlement payment, failed to effect either legal or conventional subrogation of any of the plaintiff's claims. The settling tortfeasor therefore received no right of contribution against non-settling joint tortfeasors. The court distinguished the Louisiana Supreme Court's decision in *Morris v. Kospelich*¹⁸ on the ground that in that case, the joint tortfeasor had compromised the plaintiff's "entire" claim and hence had received a right of contribution against non-settling tortfeasors.¹⁹

More recently, the third circuit, in *Ducote v. Commercial Union Insurance Co.*,²⁰ without citing its earlier "partial release" decision in *Green*,²¹ held that a settlement agreement releasing the plaintiff's claims against all potential tortfeasors, and reserving the settling tortfeasor's contribution and indemnity claims against non-settling joint tortfeasors, legally subrogated the plaintiff's claims to the settling tortfeasor and vested him with rights of contribution.²² The *Ducote* court succinctly stated the central proposition of the "total release" cases:

In order for appellees to be legally subrogated to the rights of plaintiffs, the settlement must have been for the entire debt and not just to satisfy

14. See generally *Diggs v. Hood*, 772 F.2d 190 (5th Cir. 1985) (applying Louisiana law); *Pitre v. Ecko Housewares Co.*, 521 So. 2d 563, 566 (La. App. 1st Cir. 1988); *Ducote v. Commercial Union Ins. Co.*, 616 So. 2d 1366, 1370 (La. App. 3d Cir.), writ denied, 620 So. 2d 877 (1993).

15. See analysis in *Diggs*, 772 F.2d at 194; and *Ducote*, 616 So. 2d at 1370.

16. 772 F.2d at 194.

17. 521 So. 2d at 567 & n.3.

18. 253 La. 413, 218 So. 2d 316 (1969).

19. *Pitre*, 521 So. 2d at 567.

20. 616 So. 2d 1366, 1370 (La. App. 3d Cir.), writ denied, 620 So. 2d 877 (1993).

21. 599 So. 2d 492, 493 (La. App. 3d Cir. 1992).

22. *Ducote*, 616 So. 2d at 1370-71.

appellees [sic] portion—an event which, if proved true, would extinguish appellees' claim for contribution.²³

The Louisiana Supreme Court denied review of the *Ducote* decision.²⁴

E. *Between a Rock and a Hard Place*

The two lines of decisions appear impossible to reconcile. A solidary obligor who settles with the claimant in accordance with the "partial release" decisions risks the loss of contribution rights under the "total release" cases, and *vice versa*. This conflicting jurisprudence leaves legal counsel to solidary obligors unable to advise their clients of a risk-free method of structuring a settlement agreement so as to preserve contribution rights.

III. ANALYSIS AND RESOLUTION

The Civil Code rests the right of contribution firmly upon the foundation of legal subrogation.²⁵ Under Articles 1829 and 1804, legal subrogation results from the discharge of a common obligation "owed with others or for others."²⁶ The settling obligor's discharge of all or part of his co-obligor's liability is the key to legal subrogation and the right of contribution.²⁷

The reasoning of the "partial release" decisions conflicts with these principles. Under Articles 1829 and 1804, the obligee's partial release of only the settling obligor's liability prevents subrogation of the obligee's remaining claims. Without having discharged all or part of his solidary co-obligors' debt, the settling obligor has no ground for seeking contribution of their virile portions of the debt. Further, if the "partial release" cases are accurate, the non-paying obligor would simultaneously owe both the original claimant and the settling obligor for the identical debt. By contrast, the "total release" decisions are

23. *Id.* at 1370.

24. 620 So. 2d at 877.

25. See Saúl Litvinoff, Obligations § 11.55, at 299, in 5 Louisiana Civil Law Treatise (1992) (citing Civil Code articles and jurisprudence) ("Thus, once it is adjudged that two persons who through their fault caused damage to another are solidarily liable to the victim, the one who pays the whole benefits from legal subrogation for the contribution he is entitled to recover from the other."). See also *Perkins v. Scaffolding Rental and Erection Serv., Inc.*, 568 So. 2d 549, 551 (La. 1990) ("The source of the right to contribution is subrogation.").

26. La. Civ. Code art. 1829.

27. While Louisiana Civil Code article 1804 speaks in terms of the obligor's rendering of the "whole performance," the discharge of a portion, but not all, of the co-obligor's share of the debt should effect both legal subrogation and contribution to the extent that the co-obligor's portion has been satisfied. See the analysis in *Diggs v. Hood*, 772 F.2d 190, 194 (5th Cir. 1985), construing Article 2104, the predecessor to the present Article 1804. ("The Hood interests may claim contribution from Ford only if their payment to Diggs may in some way discharge part of Ford's potential liability . . . Contribution may be demanded only by one who has paid the 'part or portion' of an obligation for which another is liable.").

consistent with basic Civil Code rules of legal subrogation and contribution. As these decisions hold, the compromise and release of the entire claim triggers both legal subrogation to the settling obligor and the right to contribution from non-settling solidary co-obligors.²⁸

IV. WHAT IS A LAWYER TO DO?

Until the Louisiana Supreme Court resolves these issues, the settling obligor runs a risk of losing contribution rights no matter how his legal counsel structures the settlement documents. In the face of this conflicting jurisprudence, how should a lawyer proceed? It would seem best to adhere to the Civil Code. The settlement agreement should recite that the settlement payment is made as the "whole performance" and in full satisfaction of the claim. The claimant should accept the payment in full satisfaction and release of his claim against all obligors, with the intent to legally subrogate to the settling obligor the plaintiff's rights against all potential obligors. It would not hurt to recite the parties' intent to comply with Civil Code articles 1829 and 1804. Further, the agreement should explicitly reserve the settling obligor's rights of contribution and indemnity against all other potential obligors.

In some circumstances, parties can hedge against the potential application of the "partial release" precedents by securing a contractual assignment and conventional subrogation of the underlying claim. If the claim is contractual or otherwise not "strictly personal" to the claimant, the conventional assignment of the claim should be structured in accordance with the Civil Code articles governing the assignment of rights.²⁹

This device is more problematic in the field of personal injury claims. In *Ducote v. Commercial Union Insurance Co.*,³⁰ a "total release" decision, the third circuit held that a personal injury claim is "strictly personal" to the claimant and hence may not be conventionally assigned.³¹ The court, however, found that the settling parties' attempt at a conventional assignment of personal injury claims evidenced their intent to legally subrogate the claims to the settling

28. See, e.g., *Diggs*, 772 F.2d at 194, 197; *Ducote*, 616 So. 2d at 1370.

29. La. Civ. Code arts. 2642-2654. See also *Keith v. Comco Ins. Co.*, 574 So. 2d 1270, 1276 (La. App. 2d Cir.), writ denied, 577 So. 2d 16 (1991) (recognizing the effect of a conventional assignment of contract claims under a settlement agreement).

30. 616 So. 2d at 1369.

31. *Id.* La. Civ. Code arts. 2642-2654 provide a method for the contractual assignment of rights. Article 2642, however, provides that rights "pertaining to obligations that are strictly personal" may not be assigned contractually. Louisiana jurisprudence is fairly well settled on the point that personal injury claims may not be contractually assigned during the lifetime of the injured party because such claims are "strictly personal" to the victim. See, e.g., *Gilboy v. American Tobacco Co.*, 540 So. 2d 391, 393 (La. App. 1st Cir. 1989) (noting "well settled" rule prohibiting "transfer of a personal injury cause of action during the lifetime of the injured party . . . because of the intensely personal nature of such actions").

obligor and to preserve the obligor's contribution rights.³² Hence, even in the personal injury context, a conventional assignment may help ensure that the settling party retains its contribution rights.

V. MEASURE OF RECOVERY AFTER SETTLEMENT

Some confusion exists among the district courts as to the measure of recovery on a contribution claim after discharge of the underlying solidary obligation. In *Ducote*,³³ for example, the district court awarded the settling tortfeasor recovery on a contribution claim measured by the amount of the victim's damages. On appeal, the third circuit correctly held that recovery on the contribution claim should be limited to the amount paid in settlement of the plaintiff's claim.³⁴ Under Civil Code article 1830, legal subrogation permits the subrogee to recover only "to the extent of the performance rendered to the original obligee." The subrogee "may not recover more by invoking conventional subrogation."³⁵ Consistent with this principle, Article 2652 provides that the conventional assignment of a litigious right provides the assignee the right to recover no more than the "price the assignee paid for the assignment, with interest from the time of the assignment."³⁶ Hence, in the personal injury context, the quantum of the victim's damages is normally not at issue in the post-settlement contribution action. The action need address only the respective percentages of the joint tortfeasors' fault so that their "virile portions" of the payment rendered may be determined in accordance with Article 1804.³⁷

VI. RELATIONSHIP BETWEEN ARTICLE 2324 AND LEGAL SUBROGATION PRINCIPLES

The "limited solidarity" rules of Louisiana Civil Code article 2324(B) may create an additional pitfall for tortfeasors seeking to retain contribution rights following settlement. By limiting the solidary portion of tort obligations to "fifty percent of [the] recoverable damages," the Article arguably curtails the contribution rights of settling tortfeasors. It might be argued that because contribution stems from legal subrogation, and because the source of this legal subrogation is solidarity, restricting solidarity must also restrict contribution. Though the argument likely will not withstand analysis, particularly since Article 2324(B) provides that "[u]nder the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution," it is yet another twist

32. 616 So. 2d at 1370-71.

33. *Id.* at 1371.

34. *Id.*

35. La. Civ. Code art. 1830.

36. The obvious policy behind these codal articles is the traditional prohibition against speculation in litigious rights, otherwise known as champerty.

37. See *Ducote*, 616 So. 2d at 1371-72, for a discussion of this point.

on the already tortuous road toward maintaining contribution rights following settlement.

VII. CONCLUSION

As Judge Rubin concluded in *Diggs v. Hood*:

Apparently complex legal questions may sometimes be resolved by principles as elementary as those Sherlock Holmes postulated to "My dear Watson." The right to contribution exists only in favor of a party who has paid what someone else owes. Unless the payment discharges all or a part of the debt of the person from whom contribution is sought, there is no debt to be repaid and no liability for contribution.³⁸

This simple principle resolves the legal issues discussed in this article, but the "partial release" decisions seem to have overlooked it. The resulting confusion in the jurisprudence prevents settling parties from preserving their rights of contribution without substantial risk and uncertainty. It is respectfully submitted that the Louisiana Supreme Court should accept the next invitation to address and resolve these issues. When doing so, the court should keep in mind basic Civil Code principles of subrogation and contribution.

38. 772 F.2d 190, 197 (5th Cir. 1985).