The Louisiana Direct Action Statute

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There may be no other Louisiana statute which has so affected the development of an area of the law as has the Direct Action Statute. The only real challenger for the honor is the fountainhead of tort liability itself, article 2315 of the Civil Code. But within the specific field of insurance law, the Direct Action Statute has a unique role. Certainly no student of Louisiana insurance law can count himself as knowledgeable on the subject without a thorough understanding of the Direct Action Statute. So far as the author can determine, no one has undertaken to provide a complete discussion of the statute in any other forum. Cognizant of the wisdom of the aphorism regarding fools who rush in where angels fear to tread, the writer has nonetheless had the temerity to attempt such a treatment in the present article.

The discussion will follow the outline displayed at the outset of the article, and the reader who seeks specific information on one of the sub-topics is urged to consult the pages dealing with that topic. For the more courageous and adventuresome, the complete story begins with the history of the present statute.

HISTORICAL DEVELOPMENT OF THE RIGHT OF DIRECT ACTION

The present right of a victim of the tortious conduct of an insured to proceed directly against the insurance company in Louisiana
is the product of a lengthy legislative and judicial process.\(^1\) At its most basic, it is an application of the principle of contract law that a third-party beneficiary may sue to enforce a contract made for his benefit even though not himself a party to the agreement. But since insurance is a special contract subject to its own rules, it will not suffice simply to say that the Direct Action Statute in Louisiana is an early example of a stipulation pou autrui.\(^2\) There are important factors at work in this part of the law that must be taken into account, and that task cannot be accomplished without an overview of the historical development of the concept of direct action.

At about the turn of the century, when insurance was still in its infancy in American jurisdictions, the concept of direct action was unknown. The language of the insurance contract itself was controlling, and the character of the insurance policy itself contradicted any possibility of direct action. In keeping with the principle of indemnity,\(^3\) an insurance contract provided indemnification for loss by the insured rather than coverage of the liability of an insured to a third person. Liability of the insured to the victim was certainly an issue, since no indemnification of the insured would ever be demanded if the insured were not liable to the victim. But payment by the insurer was for the purpose of making the insured whole for loss he had suffered, and thus only an actual loss through payment of a judgment to a third

\(^1\) Some of the stages in this process may be observed in the commentaries found in Purvis, Legislation Affecting Insurance, 17 LA. L. REV. 64, 65-67 (1956); Comment, The Louisiana Direct Action Statute, 22 LA. L. REV. 243 (1961); Comment, Direct Action—Insurance Contracts, 13 LA. L. REV. 495 (1953); Comment, Direct Rights of Action Against Public Liability Insurers: Louisiana Act 55 of 1930, 11 TUL. L. REV. 443 (1937); Comment, Public Liability Insurance: The Injured Person’s Right of Recovery When the Policy Holder Fails to Give Immediate Notice to the Insurer, 10 TUL. L. REV. 69 (1935); Note, Liability Insurance—Personal Defenses—Right of Wife to Sue Husband’s Insurer—Louisiana Act 253 of 1918 as Amended by Act 55 of 1930, 10 TUL. L. REV. 312 (1936).

\(^2\) In fact, the analogy to third-party beneficiary agreements breaks down at several points. Ordinarily, the promisor (the insurer) does not have to perform in favor of the beneficiary (the victim) if the stipulator (the insured) has breached his agreement with the promisor. Thus, if the insured should fail to give timely notice of an accident to the insurer, the insurer arguably could deny coverage to the victim. But, as we shall see, this has not been the rule in Louisiana. Moreover, the supreme court has at least once specifically rejected the analogy. Esteve v. Allstate Ins. Co., 351 So. 2d 117 (La. 1977).

\(^3\) "...insurance is aimed at reimbursement, but not more. The principle that insurance contracts shall be interpreted and enforced consistently with this objective of conferring a benefit no greater in value than the loss suffered will be referred to ... as the principle of indemnity." R. KEETON, BASIC TEXT ON INSURANCE LAW, § 3.1(a) at 88 (1971). That insurance contracts of this type ultimately became "liability" policies, rather than "indemnity" policies, is not a departure from this principle. They simply became "indemnity" policies for the victim instead of the insured.
person based upon legal liability would trigger the coverage of this “indemnity” policy.

In some instances, the policy would call for “indemnity against liability,” and it was held that a judgment against the insured created a sufficient liability to give the judgment creditor a right to the insurance proceeds. Probably as a reaction to such holdings, insurers frequently included “no action” clauses in policies. Such clauses limited coverage under the policy to loss “actually sustained and paid by” the insured, sometimes with the addition that the payment was pursuant to a judgment rendered after trial on the merits. It followed, rigidly but logically, that if the insured were insolvent and perhaps declared bankruptcy (and thus never paid any amount on the judgment), no “loss” was suffered and no amount was collectible by the victim from the insurer.

This seemed an unfortunate result. The fund created by the payment of premiums for the coverage was not being used, although the evil that suggested its creation in the first place had occurred: uncompensated injury to the victim of the assured’s conduct. It was at this point that the insurance contract first became infused, through legislative and judicial action, with important public policy considerations that would guide its interpretation from then until the present.

Louisiana first acted on the question in 1918. Act 253 of that year made it a misdemeanor for a company to issue any policy “against liability unless it contains a provision . . . that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy.” In such a case, i.e., the insolvency of the insured, “an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer.” A little-noted companion measure was introduced and failed

4. In pertinent part, Act 253 of 1918 provided:

Section 1. Be it enacted by the General Assembly of the State of Louisiana. That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company.

Section 2. Be it further enacted, etc., That the issuance of any policy against liability which does not contain the clause above specified shall be a misdemeanor, punishable by a fine of not less than fifty dollars ($50.00) and not more than five hundred dollars ($500.00) or imprisonment of not less than one month and not more than twelve months, or both at the discretion of the judge.

The criminal sanction for violation of Act 253 was retained in Act 55 of 1930 and,
to pass. Senate Bill 109 of that same year provided that no policy could be issued unless it contained the provision that the insurer would pay to the person entitled thereto all loss or damage sustained during the life of the policy, making that a direct obligation by the insurer to the victim enforceable "by direct action" against the insurer. Early commentators noted the absence of the qualifying phrase "within the terms and limits of the policy" and suggested that the unsuccessful bill would have imposed a form of absolute liability. But probably more significant was the "direct action" concept which lost out in the legislative wars to the more limited "direct action if insolvent" concept.

The first interpretation of the 1918 statute was in Edwards v. Fidelity & Casualty Co., decided in 1929. The plaintiff claimed that one Monahan had injured him through negligent operation of a motor vehicle, and he was awarded a judgment on that claim. Monahan appealed devolutively but not suspensively, and the plaintiff attempted to execute on the judgment. The execution was returned nulla bona. The plaintiff then tried to garnish the fund represented by insurance proceeds available to Monahan and held by the defendant, but he was unsuccessful. Then he brought an action directly against the insurer on the basis of Act 253 of 1918.

The insurer's defense rested primarily on two points. The insurer had received no notice of the incident until eleven months after its occurrence. Accordingly, it claimed that the terms of the policy requiring "immediate written notice" from the insured had been violated. Under the circumstances, it argued, the claimant had no action "within

for that matter, in the enactment of the new Insurance Code in Act 195 of 1948, although deleted in favor of a comprehensive criminal sanction for any code violation. Obviously, the criminal sanction was nowhere near as worrisome for the insurers as what ultimately occurred as a sanction, which was reading that provision into policies rather than imposing a fine for its omission.

5. Comment, Public Liability Insurance: The Injured Person's Right of Recovery When the Policy Holder Fails to Give Immediate Notice to the Insurer, 10 Tul. L. Rev. 69 (1935). The same source traces the Louisiana statute of 1918 to a similar New York law.

6. 11 La. App. 176, 123 So. 162 (Orl. 1929). The Edwards decision did not escape criticism. See Comment, supra note 5, at 76-77. See also Lawrason v. Owners' Auto. Ins. Co., 172 La. 1075, 136 So. 57 (1931), in which the supreme court appeared to accept a similar view. The defendant claimed that its policy providing coverage to an insured for tortious conduct was not an "accident" policy and thus could not be governed by the venue provisions with regard to such policies. The court held that the inclusion in the policy of the language of Act 253 of 1918 made the policy "inure to the benefit of the injured party, and [made] it, in effect, one of accident insurance in favor of the person injured when the accident [was] caused by the insolvent or bankrupt." 172 La. at 1079, 136 So. at 58. Thus venue under the "accident" policy provision was proper.
the terms and limits of the policy." Had Monahan paid the judgment, he probably could not have recovered under the policy because of his failure to notify. The court was correct in noting that the question was not whether Monahan could recover, but whether the plaintiff could. The court expressed doubt that the legislature could have meant that the plaintiff's right to recover under the policy was dependent upon the actions of another person over whom he had no control (Monahan). The court's reasoning, as we shall see, ultimately would be reflected in the language of the statute itself:

We think it was the purpose of the statute to create, immediately upon the happening of the accident, a cause of action in the injured party against the insurer, if any, of the party at fault. Of course, the right to present and enforce this cause of action is conditioned upon the obtaining of a judgment against the party at fault and upon unsuccessful efforts to collect that judgment, but these are conditions with which it is within the power of the injured party to comply.7

The insurer also argued that the insolvency or bankruptcy of the insured had to be judicially established, in addition to a showing of the inability to execute a judgment. Such an interpretation of the statute was deemed "unreasonable" by the court and rejected. The court held that an unsatisfied execution of a judgment was proof of the statutory requirement of insolvency or bankruptcy, giving rise to the right of direct action authorized by the statute.

In the next legislative session, Act 55 of 1930 was enacted, virtually codifying the decision in Edwards. As introduced, the bill proposed the addition of two concepts: (1) that a judgment against the insured which had become executory was prima facie evidence of insolvency, and (2) that, at their option, the injured person or his heirs had a "right of direct action" against the insurer within the terms and limits of the policy. A Senate committee proposed, and the full body adopted, amendments which provided that the act was to have no effect on the terms of an insurance policy if the terms were not in violation of Louisiana law and that any action brought under the statute was subject to "all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct

7. 11 La. App. at 178, 123 So. at 163. Not all Louisiana judges were immediately taken with the sweep of the statute. In Lacy v. Lucky, 19 La. App. 743, 140 So. 857 (La. App. 2d Cir. 1932), the victim alleged that the insurer had furnished the tortfeasor with insurance protecting him (the tortfeasor) against loss or damage and that thus the insurer was liable to the victim. The court upheld the sustaining of an exception of no cause of action filed by the insurer, on the ground that the victim had not alleged that the policy provided him (the victim) with any coverage.
One must speculate that there was something in these amendments for both sides. The codification of Edwards was helpful from the victim's standpoint. In the first place, it obviated judicial establishment of insolvency, other than by making a judgment executory. Even the requirement in Edwards that the judgment be returned nulla bona was not included. More importantly, the injured person could at his option omit the action against the insured altogether and proceed directly against the insurer in the parish where the accident occurred or the parish of the insured's domicile. However, the insurers apparently gained legislative sanction of the concept that this direct action was more a matter of procedure than of substance. The direct action was subject to all lawful conditions of the policy and the defenses which could be urged by the insurer to an action brought by the insured for indemnity. This could be seen as, and perhaps was,

8. In pertinent part, Act 55 of 1930 provided:
Section 1. That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and any judgment which may be rendered against the assured for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer company. Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido.
Provided that nothing contained in this act shall be construed to affect the provisions of the policy contract if the same are not in violation of the laws of this State. It being the intent of this act that any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured; provided the term and conditions of such policy contract are not in violation of the laws of this State.
The bill first had been reported favorably without amendments and then recommitted to the same committee, which then proposed the amendments which became the last two paragraphs. Official Journal of the Proceedings of the Senate of the State of Louisiana, 5th Reg. Sess. at 187 (June 5, 1930).
9. The venue provisions were the subject of later amendments. See text at notes 83-91, infra.
10. See Comment, Direct Rights of Action Against Public Liability Insurers: Louisiana Act 55 of 1930, 11 Tul. L. Rev. 443, 446 (1937), which took that view and asserted that the effect of the amendment was to require compliance by the victim with those
an overruling of the holding in Edwards that an eleven-month delay in notification of an accident could not bar the victim's recovery as it would have barred the insured's. Indeed, there hardly could have been any other meaning to the amendment.

Perhaps it was somehow a matter of destiny that Act 55 of 1930 first should be subjected to the tender ministrations of the judicial process at the hands of the same appellate judge who had written the Edwards opinion. In Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., the court upheld the act against constitutional attacks based upon multiplicity of objects and impairment of contracts, giving it retroactive effect by applying it to a policy apparently issued prior to enactment of the statute. The court saw no "substantial right" of the insurer which was interfered with, since liability still rested on proof of fault on the part of the insured.

Very quickly, insurers discovered that the statute was a force to be reckoned with. They may have hastened that result by some spurious initial arguments. In Rambin v. Southern Sales Co., the insurer argued that since the direct action by the victim was maintainable only under "the terms and limits of the policy," a clause in the policy not permitting the action except upon proof of insolvency of the insured could be enforced. In other words, the act passed in 1930 had changed nothing. Understandably, the court interpreted the statute to prohibit such a result; otherwise, the 1930 amendment would have been rendered nugatory. The court held that the expression "within the terms and limits of the policy" referred to—

... the amount of the policy, the character of the risk, and the time in which suit [might] be brought, and such like provisions. The insurer [could not] insert "terms and limits" in a policy that would contravene the right of the injured party to bring a direct action, as provided by the act.

At least part of the court's reasoning was that the direct action conferred no greater right on the victim than the insured already had, and thus the insurer really had nothing to complain about. Its remarks

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policy terms that did not "deprive the third party [victim] of his right of direct action against the insurer."


12. 145 So. 46 (La. App. 2d Cir. 1932); see also Bougon v. Volunteers of Am., Inc., 151 So. 797 (La. App. Orl. Cir. 1934); cf. Graham v. American Employers' Ins. Co., 171 So. 471 (La. App. 2d Cir. 1937) (statute prevails over policy as to "no action" clause, but not as to coverage questions; statute does not make insurer liable when insured is not; statute "does not furnish substantive rights... . Its benefits are procedural in nature." Id. at 476.).

13. 145 So. at 50.
are particularly interesting since subsequent cases appear to have violated the principles upon which the holding was based.

The remedy in each case [insolvent insured, solvent insured] is absolutely equal in so far as the result is concerned, and neither is superior to or greater than the other.

... [The insurer's] obligation to pay in the event of damage caused by its principal cannot be said to be impaired by the fact that payment may be demanded directly by the injured party, instead of indirectly through the insured.14

Despite an early isolated ruling or two to the contrary,15 it also became quickly apparent that the Edwards holding—violation of a policy term requiring notice of the accident by the insured would eliminate coverage for the victim—would not be regarded as legislatively overruled. First, the cases defined "immediate" notice as required by policies to be "reasonable" notice, in order not to deprive the victim of coverage.16 And then notice, reasonable or not, became largely immaterial as the Edwards rationale regained authority.17 This process took quite a while, but by the time West v. Monroe Bakery, Inc.18 was decided by the Louisiana Supreme Court in 1950, a divided court could announce that even notice more than a year after the accident without any plausible excuse for the delay would not defeat coverage for the victim. For a more detailed discussion of the expression "within the terms and limits of the policy," the reader is referred to the later section in this article on that subject.19

Coverage "within the terms and conditions of the policy" also quickly led the court into what was to become one of the most important and complex issues under the statute. There was now general agreement that the victim could pursue his remedy directly against the insurer without naming the insured at all. There were indications that the statute did not confer substantive rights on the victim and

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14. Id.
15. Howard v. Rowan, 154 So. 382 (La. App. 2d Cir. 1934) (notice after a "reasonable" period is required; notice delayed for 44 days is a violation, defeating any coverage by victim); State Farm Mut. Auto. Ins. Co., 47 F. Supp. 458 (W.D. La. 1942) (an eight-month delay is a violation, defeating any coverage by victim).
18. 217 La. 189, 46 So. 2d 122 (1950).
19. See text at notes 93-119, infra.
statements that the liability of the insurer rested upon the liability of the insured. But would that mean that the insurer had all the defenses against the victim’s suit that the insured would have had in the same suit? The statute itself provided that in a direct action by the victim, the insurer would have all the defenses “which could be urged by the insurer to a direct action brought by the insured.” That statement did not directly answer the question, however, since a direct action by the insured against the insurer would not concern “personal” defenses which the insured might have against the victim.

Thus the courts were asked to rule on the question of whether a victim who could not sue a tortfeasor because of an immunity to suit and liability could nonetheless sue and recover against the tortfeasor’s insurer.20 Such suits were permitted, and for the first time, it could be said that the statute conferred substantive rights on the victim which he would not have had against the insured.21

There were no amendments to the Direct Action Statute between 1930 and 1948. In the latter year, the legislature compiled the various insurance statutes into an insurance code, in which the statute was included as section 14.45. One small but significant change was made in the revision. In place of the opening language “it shall be illegal for any company to issue any policy,” the statute now provided, “No policy or contract of liability insurance shall be issued or delivered in this State . . . .”22 This was certainly a legislative response to confusion which had arisen, especially in the federal courts,23 over the

20. Harvey v. New Amsterdam Casualty Co., 6 So. 2d 774 (La. App. Orl. Cir. 1942) (insurer could not plead insured husband’s immunity from liability to wife); Edwards v. Royal Indem. Co., 182 La. 171, 161 So. 191 (1935) (similar, although tort occurred prior to marriage); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935) (insurer could not plead immunity of father to suits from children in case in which father was deceased and administrator of succession was actual defendant); Rome v. London & Lancashire Indem. Co. of Am., 181 La. 630, 160 So. 121 (1935), on remand, 169 So. 132 (La. App. Orl. Cir. 1936) (insurer could not plead governmental immunity of insured, although case might have turned on proprietary versus governmental capacity; the latter overruling Loustalot v. New Orleans City Park Improvement Ass’n, 164 So. 183 (La. App. Orl. 1935), which had held that when the entity acted in its governmental capacity, the immunity could be raised by the insurer); Messina v. Societe Francaise, 170 So. 801 (La. App. Orl. 1936) (insurer could not raise defense of immunity for hospital; court did not determine whether hospital was immune as governmental entity or as charitable entity).

21. Other defenses, not “personal” to the insured, were nonetheless permitted to be raised by the insurer. These developments are too complicated to be discussed in this review, and the reader is urged to pursue the inquiry in a later section in this article. See text at notes 120-165, infra.

22. 1948 La. Acts, No. 195 (printed as a separate volume). The other change effected by Act 195 was to change the phrase “during the life of the policy” to “during the existence of the policy.”

23. See generally Comment, Direct Action—Insurance Contracts, 13 La. L. Rev. 495 (1953); text at notes 56-57, infra.
application of the Direct Action Statute to policies issued in other states. The legislative response must have been thought to be incomplete, for the legislature returned to the statute two years later in Act 541 of 1950, adding the following important language: "This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana." This language in turn became the point of departure for a new series of decisions dealing with the extraterritorial effect of the statute. These decisions culminated in the fascinating case of Webb v. Zurich Insurance Co., holding, despite the above language, that a right of direct action existed if the policy was issued or delivered in Louisiana or if the accident or injury occurred in Louisiana.

In 1956, the statute was amended again, the last amendment of any real importance. Act 475 of that year:

- specified that the "heir or heirs" of the victim included the designated beneficiaries under article 2315 for survival and wrongful death actions,
- added the insurer's domicile or principal place of business as possible venues,
- expressed the intent that all liability policies "within their terms and limits" are executed for the benefit of all injured persons to

24. A companion act, Act 542 of 1950, added La. R.S. 22:983(E) to provide:

No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in [La. R.S. 22:655], whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana.

As introduced, both bills (Senate Bill 199 and Senate Bill 201) contained an additional phrase in the proviso concerning occurrence of the accident or injury in Louisiana, viz, "or the injured person or his or her heirs are residents of this State." This phrase was deleted from each bill in the legislative process.

In the same year, earlier in the session, the legislature adopted La. S. Con. Res. No. 13, declaring that it was never the intent of the legislature by its 1948 amendment to "repeal, amend, limit or in any wise restrict" the Direct Action Statute.

25. 251 La. 558, 205 So. 2d 398 (1968).

26. See text at notes 54-82, infra.

27. Probably a codification of the view taken in Benroth v. Continental Cas. Co., 132 F. Supp. 270 (W.D. La. 1955), that a widow was an "heir" for purposes of the Direct Action Statute because she was a beneficiary under article 2315 of the Civil Code. In Benroth, the widow was also an "heir" for succession purposes, but in many instances, she would not be.
whom the insured is liable,\textsuperscript{28} and
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\item stated that the purpose of such policies is to give protection and
coverage to "all insureds, whether they are named insureds or
additional insureds under the omnibus clause, for any legal liability
said insured may have as or for a tort-feasor [sic] within the terms
and limits of said policy."\textsuperscript{29}
\end{itemize}

In 1958, the Direct Action Statute was re-enacted without substan-
tive change in a revision of the Insurance Code.\textsuperscript{30} And finally, in 1962,
the venue provisions were expanded by Act 471 of that year to in-
clude the general venue rules of article 42 of the Code of Civil
Procedure.\textsuperscript{31}

A vetoed legislative act also plays a role in this history. In 1962,
the bill which became Act 471, altering the venue provisions, re-
enacted the remainder of the statute, including the phrase "provided
the accident or injury occurred in Louisiana." Another bill (House Bill
935) also passed, re-enacting the statute without the changed venue
provisions but deleting the proviso about location of the accident or
injury. The latter bill was vetoed. Opinions differed as to the reason
for passage of the bill and the reason for its veto. Arguably, the bill
was introduced to delete what had been regarded in some cases as
limiting language—authorizing a direct action only when the accident
or injury occurred in Louisiana. If that is true, its veto would sug-
gest that the governor disagreed with the removal of the limitation.
However, the writing justice in \textit{Webb v. Zurich Insurance Co.}\textsuperscript{32} opined
that the bill was vetoed simply to avoid any conflict with Act 471
of the same year (the venue bill).

The latter opinion seems improbable on two accounts. First, the
titles to the two bills (change of venue in one, deletion of the proviso
in the other) reveal no conflict in substance, and they both could have
been signed and easily reconciled. Second, even if there were a con-

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\item 28. Probably a codification of the view expressed in such cases as Lewis v. Manufac-
\item 29. Probably a codification of the statements and interpretations in such cases
as McDowell v. National Sur. Corp., 68 So. 2d 189 (La. App. 1st Cir. 1953), \textit{appeal
\item 31. Prior to the amendment by Act 471 of 1962, venue was provided in the parish
of the accident or injury and the domicile of the insured or insurer or "their principal
place of business in Louisiana." The amendment provided venue in the parish of the
accident or injury and in the parish "in which an action could be brought against either
the insured or the insurer under the general rules of venue prescribed by Art. 42,
Code of Civil Procedure."
\item 32. 251 La. 558, 577 n.17, 205 So. 2d 398, 405 n.17 (1968).
\end{footnotes}
lict and assuming that the governor agreed with the deletion of the limiting language in the proviso, it would stand to reason that he would sign House Bill 935 and veto the other. The venue changes were not that drastic or important and were probably introduced because of the recent adoption of the Code of Civil Procedure. They could well have waited for another legislative session.

Be that as it may, the deletion of the proviso was vetoed without announced reason. Since the 1962 session, there have been no further successful attempts to amend the statute.

This brief summary of the legislative and jurisprudential history of the Direct Action Statute will permit the reader to understand the specific principles developed in the following sections. For the last twenty years at least, the main focus of the interpretive process has shifted to the judicial arena, where there has never been a dearth of difficult problems to solve.

RELATED PROBLEMS OF JURISDICTION, RIGHT OF ACTION, AND VENUE UNDER THE DIRECT ACTION STATUTE

There has been much consternation over the years caused by confusion over the superficially related but disparate problems of (1) jurisdiction, (2) availability of right of direct action, and (3) venue. By subjecting the problems to separate analytical discussion in this section, it is hoped some of the confusion will be dispelled.

Of course, not all of the problems foreseen in this section are present in each lawsuit. Nonetheless, any analysis of a problem in this area should proceed along the following lines:

- Does a Louisiana court have the legal power and authority to render a judgment against the insurer as a legal person or, at least, the power to render a judgment limited to property of the insurer in this state? These are questions of jurisdiction over the defendant, either on a personal or quasi in rem basis.

- If a Louisiana court does have jurisdiction, does the plaintiff have a right of direct action against the insurer? This is primarily a matter of interpretation of the Direct Action Statute itself.

33. LOUISIANA LEGISLATURE, RESUME OF ACTS, RESOLUTIONS, VETOED BILLS 171, 183-84 (1962), which contains a list of veto messages, but no message is included for House Bill 935.

34. This is the language of the statute, but one should be careful not to characterize this authority of the plaintiff to proceed directly as a “right of action” in the procedural sense. It is more accurately a “cause of action” because it grants to the plaintiff a remedy for the harm revealed by his pleadings which—but for the statute—he would not have.
And, assuming an affirmative answer to the first two inquiries, where does a proper venue exist in Louisiana for such an action? This is also primarily a matter of interpretation of the statute and the articles of the Code of Civil Procedure to which it refers. None of these questions is directed at a related matter often mixed into such cases: what substantive law should a Louisiana court apply? If a Louisiana court has jurisdiction over an insurer; and if the plaintiff may proceed by direct action against the insurer; and if the suit has been brought in a proper venue, that Louisiana forum sometimes may be faced with a genuine choice of law question. However, such a question is beyond the scope of the present inquiry, except in so far as some of these considerations may affect the decision on applicability of the Direct Action Statute.

Also, the above questions are not concerned with whether a court has subject matter jurisdiction. Subject matter jurisdiction is rarely a problem in Louisiana state courts, where the statutory grant of subject matter jurisdiction is broad. There was a period of time in the past when there were problems in the federal courts involving the Direct Action Statute. In this context, the subject matter jurisdiction of the federal courts is based upon diversity of citizenship and jurisdictional amount. Injured Louisiana citizens frequently had sought to invoke the diversity jurisdiction of the federal courts in Louisiana to sue the insurers of other Louisiana citizens. Had such an action been brought by a plaintiff against the tortfeasor himself, there would have been no diversity and no subject matter jurisdiction. Federal courts took the view that a suit under the Direct Action Statute against a foreign insurer presented diversity of citizenship and the statute created substantive rights which the federal court was bound to enforce under *Erie Railroad v. Tompkins*.

The United States Supreme Court approved this view in *Lumbermen's Mutual Casualty Co. v. Elbert* in 1954. Federal courts became popular forums for such suits, since jury trials were less common in state courts, delay was minimal, and the state operated under a system of appellate review of fact and law in civil cases. But in 1964, Congress amended 28 U.S.C. § 1332 to eliminate diversity jurisdiction in such cases by providing that—

in any direct action against the insurer of a policy or contract

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36. 28 U.S.C. § 1332 (1976): "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between (1) citizens of different States; . . . ."
37. 304 U.S. 64 (1938).
of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.\textsuperscript{39}

With this amendment, the bulk of the ordinary proceedings against liability insurers under the Direct Action Statute returned to Louisiana state courts.

\textit{Jurisdiction}

The Direct Action Statute does not attempt to, nor does it unintentionally, confer jurisdiction of any kind on Louisiana courts. Although occasionally the cases recognize this simple proposition, many times it seems ignored or poorly understood. Had we firmly had this principle in mind from the outset, a good deal of the confusion in this area of the jurisprudence could have been avoided. The Direct Action Statute announces a permissible type of procedure (suit against an insurer directly) and an appropriate venue for such a suit. But it assumes without any direct expression on the subject that the issue of jurisdiction over the insurer already will have been determined. Obviously, if Louisiana does not have personal jurisdiction over the insurer or quasi in rem jurisdiction over the insurer's property, it can make no constitutionally binding pronouncements about the applicability of the Direct Action Statute or venue or anything else.\textsuperscript{40}

It is often said, and indeed the Code of Civil Procedure provides, that personal jurisdiction is “based upon” service of process on the defendant or on his agent for service.\textsuperscript{41} Such an agent is either designated by a person or by the law itself to receive process in actions brought against an individual or entity in a Louisiana court.\textsuperscript{42} In the context of the present discussion, designation of agents for service of process is the usual method under which personal jurisdiction is claimed.

We may assume that where the insurance company is a domestic insurer (\textit{i.e.}, it is organized under Louisiana law and is domiciled here),

\begin{footnotesize}
40. This discussion is certainly not intended as an exhaustive analysis of the complex questions of personal and in rem jurisdiction, in part because the author is not qualified to engage in such a discussion. But it is intended to demonstrate the rudiments of resolving these questions so that the discussion may move forward to the more specific questions of applicability of the Direct Action Statute and appropriate venue.
42. \textit{La. Code Civ. P. art. 5251}.}
\end{footnotesize}
service of process and acquisition of personal jurisdiction thereby will cause no particular problems. But where the insurer is a foreign insurer, some additional considerations enter the picture. Primary among these is the question of whether the insurer has sufficient "minimum contacts" with Louisiana to permit this state to designate, within the acceptable constitutional parameters dictated by due process, an agent for service of process upon whom service sufficient to acquire personal jurisdiction may be made. It is axiomatic that Louisiana would violate basic notions of due process of law by a bootstrap scheme which would appoint an agent for service of process for an insurer having no contact whatever with the state, and then announce personal jurisdiction over that insurer upon service on that agent.

Thus, following the gradual expansions in the constitutional cases concerning due process, Louisiana has announced the bases on which it will designate agents for service as to foreign insurers and, in turn, permit the acquisition of personal jurisdiction by service on these agents.\(^4\) For example, Louisiana Revised Statutes 13:3474 designates the secretary of state as the agent for service of process for the "public liability and property damage insurer" of a vehicle driven here by a non-resident or his authorized agent or employee as to causes of action "growing out of any accident or collision" in which the vehicle so driven may be involved.\(^4\)

This statute serves the intended purpose for the great majority of actions against insurers, since automobile liability insurance is the predominant variety of insurance which is at issue in these cases. However, Louisiana Revised Statutes 22:985 also provides a basis for acquisition of personal jurisdiction over a foreign insurer that is not limited to automobile coverage:

Every foreign or alien insurer shall appoint the secretary of state to be its true and lawful attorney in this state upon whom . . . all lawful process in any action or proceeding against such insurer

\(^4\) Louisiana Revised Statutes 13:3201 (Supp. 1977 & 1981), the so-called long arm statute, is not helpful in this respect. It extends personal jurisdiction to a nonresident as to a cause of action "arising from" the nonresident's transacting any business in this state or contracting to supply services or things in this state, among other grounds. But a claim against a nonresident insurer because of a policy issued to a tortfeasor does not "arise from" the insurer's transacting business here or contracting to supply services here. It "arises from" the tort. \textit{See} McKeithen v. M/T Frosta, 435 F. Supp. 572 (E.D. La. 1977); Hall v. Scott, 416 So. 2d 223 (La. App. 1st Cir. 1982).

may be served, which shall constitute service on such insurer. Such appointment shall continue in force so long as any contract or other liability of such insurer in this state shall remain outstanding.45 There is little doubt that, at the very least, this provision is aimed at extending personal jurisdiction over a foreign insurer as to a loss occurring in this state. But the statute is broader and by its terms could extend to causes of action arising out of state. The Louisiana decisions show a tendency to make this acquisition of personal jurisdiction broad enough to include even "transitory" causes of action.46

Thus, insofar as acquisition of personal jurisdiction through service of process on the secretary of state is concerned, a Louisiana court may have such jurisdiction even though the policy in question was issued outside Louisiana and the injury occurred outside Louisiana.47 But the fact that Louisiana may have jurisdiction does

45. LA. R.S. 22:1253(A) (Supp. 1968) makes a similar provision as to foreign insurers transacting business here without a certificate of authority to do so. Such conduct is equivalent to an appointment by such insurer of the Secretary of State... to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding... arising out of such policy or contract of insurance, and the said transacting of business by such insurer is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this state upon it. In theory, this extension of jurisdiction is more limited than that in LA. R.S. 22:985 (1950), since this statute provides for "any action... out of such policy" (presumably the one written while the insurer was transacting business here without a certificate). See generally McKeithen v. M/T Frosta, 435 F. Supp. 572 (E.D. La. 1977). LA. R.S. 22:985, on the other hand, does not qualify "any action" with specific reference to a policy written here.
46. See Morrison v. New Hampshire Ins. Co., 249 La. 546, 187 So. 2d 729 (1966) (LA. R.S. 22:985 was constitutional grant of personal jurisdiction over New Hampshire insurer, qualified to do and doing business in Louisiana, which had issued fire policy in Mississippi on Mississippi residence, delivered in Louisiana; plaintiffs were Louisiana residents and fire loss was in Mississippi); Smith v. Globe Indem. Co., 243 So. 2d 882 (La. App. 1st Cir. 1971) (LA. R.S. 22:985 gives Louisiana court discretion to exercise personal jurisdiction over New York insurer authorized to do business in Louisiana; suit concerned workers' compensation claim of Louisiana resident for injury suffered in Tennessee while working for a Tennessee employer under a Tennessee contract of employment). See also Note, Civil Procedure—Applicability of Direct Action Statute and Foreign Insurance's Statutory Consent to Suit, 52 Tul. L. Rev. 610 (1978).
47. This was the situation in Esteve v. Allstate Ins. Co., 351 So. 2d 117 (La. 1977) (plaintiff was a Louisiana resident injured in Florida in a collision with a vehicle owned and operated by a Florida resident; the policy was issued and delivered in Florida by an insurer foreign to Louisiana but authorized to do business here; the Louisiana court had personal jurisdiction after service of process under LA. R.S. 22:985, but no right of direct action on the basis of the Direct Action Statute).
not answer the question of whether the plaintiff may proceed directly against the insurer.\textsuperscript{48}

One further problem area in jurisdiction should be mentioned. This is an effort by the plaintiff to obtain jurisdiction over the insured by the attachment of the “debt” or “obligation” owed to him under an insurance policy not issued or delivered in the forum state. This is actually something of a substitute for a statutory right of direct action. This concept was first utilized in the celebrated New York decision of \textit{Seider v. Roth}.\textsuperscript{49}

A New York resident was injured in Vermont at the hands of a resident of Quebec, insured by Hartford under a policy issued in Canada. Hartford was a Connecticut corporation authorized to do business in New York. New York had no direct action statute. Thus Hartford could not have been sued directly in the New York courts, regardless of whether there might have been jurisdiction over Hartford there. Although the plaintiff certainly had a right of “direct action” against the tortfeasor, there was no jurisdiction over him in the New York courts because the injury occurred in Vermont. The plaintiff argued successfully that the New York courts could obtain jurisdiction over the tortfeasor (as to whom the “direct action” already existed) by the attachment procedure. What plaintiff actually achieves by such a procedure is the convenience of suing in his own state on a cause of action arising in a second state against a resident of a third state.

An attempt to use this concept in Louisiana was rejected in \textit{Kirchman v. Mikula}.\textsuperscript{50} The case was one in which Louisiana probably had jurisdiction over the insurer under 22:985, but it would not have granted a right of direct action because the policy was issued in New Jersey and the accident occurred there. The court saw plaintiff’s effort as one to accomplish the result of a direct action statute (making a fund directly available to him by jurisdiction over the insured up to the amount of that fund, or policy) in circumstances in which the Direct

\textsuperscript{48} Compare Morse v. Hartford Cas. Ins. Co., 301 So. 2d 741 (La. App. 3d Cir. 1974) (the court had jurisdiction over the foreign insurer under LA. R.S. 22:985, but it had no authority to proceed directly since policy was not issued or delivered here and accident did not occur here) with Farrell v. Wilbert, 369 So. 2d 1087 (La. App. 1st Cir.), \textit{cert. denied}, 371 So. 2d 1342 (La. 1979) (the court has jurisdiction over foreign insurer under LA. R.S. 22:985 and authority to proceed directly since injury occurred in Louisiana).


\textsuperscript{50} 258 So. 2d 701 (La. App. 3d Cir. 1972).
Action Statute clearly would not apply. Other Louisiana cases have rejected the concept, and ultimately, the United States Supreme Court held the acquisition of jurisdiction over the insured in such a fashion to be unconstitutional.

Louisiana thus guessed correctly about the validity of the attachment cases such as *Seider*, but perhaps for the wrong reasons. New York probably adopted the *Seider* approach for the convenience and protection of its own residents, in part because it did not recognize a statutory direct action against the insurer itself. With the attachment procedure, New York could at least put the "fund" itself at issue, even though it could not put the insurer in the lawsuit as a defendant.

Louisiana, on the other hand, has long extended to its residents the advantages of broad personal jurisdiction over foreign insurers and the right of direct action in specific instances. Because of this, we had very little experience with the attachment procedure in this context as a substitute for the right of direct action. The court in *Kirchman* thus rejected the concept, noting that Louisiana has made a fund directly available to its injured residents, but within the "minimum contacts" of (1) accident or injury within the state or (2) policy issued or delivered here. The court seemed to have viewed the Direct Action Statute as the limit to which Louisiana was willing to go in making the fund available.

Thus the court's rejection of the *Seider* approach was based more on the ground that Louisiana had expressed itself on direct approach to the insurance "fund" in other ways than it was on the ground that there could be constitutional doubts about the validity of the proceeding. Be that as it may, it appears settled that a Louisiana resident who does not have a right of direct action against an insurer over whom the Louisiana court has personal jurisdiction cannot obtain the effect of such an action by having the court assume quasi in rem jurisdiction over a policy covering a nonresident.

51. Grinnell v. Garrett, 295 So. 2d 496 (La. App. 3d Cir.), cert. denied, 300 So. 2d 181 (La. 1974) (same facts as *Kirchman*, except that plaintiffs failed to join the insurer in the lawsuit; Louisiana had personal jurisdiction over the insurer, but it would not have granted direct action; the court rejected use of the attachment procedure to establish jurisdiction over nonresident tortfeasor).


53. At least prior to the expressions of the United States Supreme Court in the two cases cited in the preceding footnote, Louisiana might have attempted to make its grant of a statutory direct action coextensive with its exercise of personal jurisdiction over a foreign insurer. We have seen in note 48, supra, examples of cases in which Louisiana courts have recognized statutory limitations to a direct action against insurers as to which there are no constitutional limitations on personal jurisdiction. Were it not for *Rush* and *Shaffer*, one could have said there might be no constitutional
Availability of the Direct Action

Assuming proper jurisdiction over an insurer, under what circumstances will Louisiana authorize a claimant to proceed directly against that insurance company as a defendant? As we have seen, this is a matter of statutory interpretation.

As originally enacted, the Direct Action Statute almost certainly extended only to policies issued in Louisiana. It hardly could have been otherwise, since the announced sanction was a criminal penalty and Louisiana probably could not apply a criminal penalty to conduct outside the state. The 1930 amendments made no substantive change on that point, but the cases decided under the statute following that date began to extend the right of direct action not only to policies issued here but also to policies issued elsewhere as to injuries which occurred here. At the time, the statute made no specific reference to direct action in cases in which the injuries occurred here.

Although the Louisiana courts tentatively had expressed the notion that the direct action statute was available to litigate out-of-state contracts covering in-state injuries, the federal courts seemed not to have had the same view, though even they were not in complete accord among themselves. At this juncture, the legislature passed the Insurance Code in Act 195 of 1948, containing what it may have thought to be a minor revision of the Direct Action Statute. The phrase which had been "it shall be illegal for any company to issue any policy" became:

limits. If there were personal jurisdiction, there could be a right of direct action if Louisiana statutes provided it. Even in light of Rush and Shaffer, one might still contend the validity of this proposition. Rush involved quasi in rem jurisdiction through attachment. If Louisiana achieves its personal jurisdiction through La. R.S. 22:985 or La. R.S. 13:3474, could it grant a right of direct action on that basis? See Esteve v. Allstate Ins. Co., 343 So. 2d 353, 356 (La. App. 4th Cir. 1977) (Lemmon, J., dissenting).

54. Gager v. Teche Transfer Co., 143 So. 62 (La. App. 1st Cir. 1932) (so far as opinion reflects, policy issued in Louisiana); Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., 18 La. App. 725, 138 So. 183 (Orl. 1931) (same).

55. Robbins v. Short, 165 So. 512 (La. App. 1st Cir. 1936) (injury in Louisiana; policy issued in Missouri contained "no action" clause; court held Direct Action Statute was procedural in nature, deprived the insurer of no substantive right, and thus could be applied by the forum state even though the contract was governed by a different provision under Missouri law; court seemed unaware of fact that the Louisiana statute did not by its terms grant a direct action when the injury occurred here); Stephenson v. List Laundry & Dry Cleaners, 182 La. 383, 162 So. 19 (1935) (injury in Louisiana; policy issued in Texas).

56. See Wheat v. White, 38 F. Supp. 796 (E.D. La. 1941) (statute not applicable to insurance contract issued in Mississippi).

No policy or contract of liability insurance shall be issued or delivered in this State, unless it contains [a right of direct action]...

Very shortly after the amendment, in Belanger v. Great American Indemnity Co., a federal district judge ruled in a diversity case that a direct action was available only as to policies issued or delivered in Louisiana and not in actions on out-of-state policies concerning in-state injuries. His reasoning was two-fold. First, the state decisions holding the contrary were decided under Act 55 of 1930, which had been repealed by the legislature, with full knowledge of the cases, in the revision which produced the above language. Second, application of the Direct Action Statute to an out-of-state contract would be unconstitutional, depriving the insurer of substantive rights.

As we have seen, the legislature acted promptly (perhaps in response to Belanger) to clarify the Direct Action Statute by adding the perplexing language of Act 541 of 1950. This amendment stated that the right of direct action existed whether the policy "was written or delivered in the State of Louisiana or not, and whether or not such policy [contained] a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana." The legislature also passed Act 542 of 1950, requiring foreign insurers to consent to a direct action in order to obtain a certificate of authority to do business here, with the same proviso as contained in Act 541.

Given the ambiguity of the amendment, the change eliminated neither the confusion over the meaning of the statute nor its constitutionality. The opening portion of the statute now mentioned policies "issued or delivered" in Louisiana, but the amendment specified the right of direct action existed whether the policy was

59. 89 F. Supp. 736 (E.D. La. 1950), aff'd per curiam, 188 F.2d 196 (5th Cir. 1951).
60. The writing judge did not note, however, that Act 55 of 1930 also did not contain any reference to injuries occurring within the state but this had not prevented the state courts from applying the statute to out-of-state contracts covering such injuries. He opined that the 1948 amendment resulted from the legislature's recognition of the "risk" inherent in the "possibility of Section 14.45 being declared unconstitutional as applied to out of state liability policies," and thus the amendment "specifically limited its application to policies issued in Louisiana." 89 F. Supp. at 738.
61. Senate Concurrent Resolution 13 of 1950, passed early in the session, stated that it was "never the intention" of the legislature in enacting Act 195 of 1948 "to repeal, amend, limit or in any wise restrict the application of Act 253 of 1918 as amended by Act 55 of 1930 in so far as that Act [provided] a direct action against liability insurers."
62. Now appearing as La. R.S. 22:983(E) (1950). This is not a grant of personal jurisdiction over such insurers, but rather their agreement that they consent to be subject to the Direct Action Statute.
"written or delivered" in Louisiana or not, provided the accident or injury occurred here. Read as a whole, the statute now could have called for application of the direct action (a) only to cases of in-state injury, regardless of the place of issuance or delivery of the policy or (b) to cases in which either the policy was issued or delivered here or the injury occurred here. To the extent it was read to continue to apply the direct action to out-of-state contracts, constitutional problems also might be presented.

Belanger and the legislative amendments opened a brief period of total confusion as to the application of the statute. One federal judge first ruled that the statute could be applied to out-of-state insurance contracts and then changed his mind. Another federal judge in the same district agreed with that original position, but many other judges disagreed.

In such cases, there appeared to be a trend toward concluding that there were constitutional problems with applying the statute to out-of-state contracts. These decisions were not as concerned with the specific language of the statute as with the validity of its application to out-of-state contracts. No matter what the reading chosen for the statute, it was clearly the minimum legislative intent that it be applied to out-of-state contracts and in-state injuries.

At the same time, a line of cases was developing involving out-of-state injuries and in-state contracts. Here, the constitutional problems were less serious or perhaps non-existent, but the interpretation of the statute itself was essential. In many instances, the 1950 amendment was interpreted as denying application of the statute to out-of-state injuries altogether.

63. Bouis v. Aetna Casualty & Sur. Co., 91 F. Supp. 954 (W.D. La. 1950) (he did so by applying Acts 541 and 542 of 1950 retroactively to cure the problems expressed in Belanger, after determining that the statute was procedural only in nature).
67. Weingartner v. Fidelity Mut. Ins. Co., 205 F.2d 833 (5th Cir. 1953) (1950 amendment read at face value, meaning no application to out-of-state injuries regardless of place of contract; Rives, J., specially concurring and offering opinion that 1950 amendment was an attempt to reach out-of-state contracts, not an attempt to deny application to in-state contracts; Hidalgo v. Fidelity & Cas. Co., 205 F.2d 834 (5th Cir. 1953). In the state courts, the same position was adopted with almost no discussion what-
The constitutional objections to an application of the statute to out-of-state contracts when an in-state injury had occurred were removed in *Watson v. Employers Liability Assurance Corp.* The plaintiff was a Louisiana citizen injured in Louisiana by a product purchased here. The defendant was an insurer authorized to do, and doing, business here, and it had consented to be sued by direct action under 22:983(E). The policy in question was issued and delivered in states other than Louisiana. The defendant objected to both the Direct Action Statute itself and the consent statute on constitutional grounds, when applied to out-of-state policies. A unanimous court upheld such an application of the statute, emphasizing Louisiana's interest in protecting those injured within its borders. The court found no denial of equal protection, since domestic and foreign insurers were treated alike on the question of availability of a direct action. Since the statute was effective before the policy at issue was written, the court found no impairment of the obligation of contract by application of the statute. The court also found no violation of due process requirements because of the importance of Louisiana's interest in persons injured here and, for the same reason, no basis in the full faith and credit clause to deny Louisiana the right to enforce its direct action statute. Subsequent to *Watson*, there has been no serious contention that Louisiana can not apply the statute to cases involving in-state injuries and out-of-state contracts.

But there remained after *Watson* the problem of statutory interpretation, one largely without constitutional overtones. Could the legislature by its 1950 amendments have intended to deny the right of direct action on in-state contracts when the injury occurred out of state? This question was answered in the celebrated decision of *Webb v. Zurich Insurance Co.* Several prominent Louisiana citizens died in an airplane crash in Michigan, allegedly through the negligence of another Louisiana citizen who was piloting the plane. A policy covering the operation of the plane had been obtained in Louisiana from the defendant's agent here. Zurich had successfully urged in the courts below that no direct action could be brought against it because the 1950 amendments to the statute had limited the direct action to in-
stances of injuries within the state. The supreme court undertook to review the entire history of the Direct Action Statute on the point and concluded that despite the plain language of the proviso enacted in 1950, the legislature had no intent to limit the direct action remedy to in-state injuries.

The majority opinion deserves brief comment, particularly since it has remained the standard by which the applicability of the Direct Action Statute is measured. The most charitable thing that can be said of the opinion is that it announced what the writing justice believed the legislature "must have meant" or "could have enacted" as opposed to the meaning to be derived from the plain language of the enactment. In order to reach this conclusion, the majority had to dispose of the contention by the defendant that it was attempting to amend the statute judicially.

The majority took the view that the predecessors to the 1948 and 1950 statutes, although mentioning only issuance of the policy and not the place of injury, had been applied by some courts to out-of-state policies so long as the injury occurred in Louisiana. Against this background and the refusal by the federal court in Belanger to apply the statute to an out-of-state contract even with an in-state injury, the court saw the 1950 amendment as an effort to extend the direct action remedy to claims involving out-of-state contracts on the relatively safe constitutional ground of in-state injury. It was thus able to conclude that the proviso applied only to out-of-state contracts and should not be interpreted as narrowing the applicability

71. Plaintiffs apparently did not contend that since the actions were wrongful death actions for the loss they suffered, the "injury" occurred in Louisiana, although the "accident" occurred in Michigan. Such a contention, if successful, would have obviated the discussion of applicability of the statute altogether. Cf. Hebert v. Aetna Cas. & Sur. Co., 400 So. 2d 695 (La. App. 1st Cir. 1981).

72. I.e., constitutionally. As the decision in Watson v. Employers' Liab. Assur. Corp., 348 U.S. 66 (1954), demonstrated, Louisiana could apply its direct action statute to out-of-state contracts so long as in-state injuries were at issue. But the real question was whether the Louisiana legislature meant that and only that by its proviso added by Act 541 of 1950. It could have stated more simply and directly that the right of direct action exists on a contract written outside the state so long as the injury or accident occurred in the state. Then there would have been no doubt that the applicability of the statute to in-state contracts was not affected by the extension to out-of-state contracts under certain circumstances.

73. See notes 55 & 57, supra.

74. See text at note 59 and following, supra.

75. See Taylor v. Fishing Tools, Inc., 274 F. Supp. 666 (E.D. La. 1967); Note, Insurance—Conflict of Laws—Direct Action, 15 Loy. L. Rev. 174 (1968). Perhaps, this is also demonstrated by the deletion from the bill during the legislative process of an alternative ground for application of the statute which might have been thought to be doubtful from a constitutional standpoint: residency of the injured person or his heirs in Louisiana.
of the statute to in-state contracts with an in-state injury requirement. The court dismissed the 1962 gubernatorial veto of a bill to delete the proviso on the ground that the veto's purpose was simply to avoid conflict with a bill changing venue under the statute and the veto did not show disapproval of the view the court now expressed.\footnote{6}

When all was said and done, the court reached the conclusion as to application of the statute which has continued to the present. The direct action is available to a claimant when either of these two facts is present:

- the policy was issued or delivered in Louisiana or
- the accident or injury occurred in Louisiana.\footnote{7}

Invitations to extend the applicability of the statute to insurers over whom Louisiana has personal jurisdiction when the policy was issued out of state and the injury occurred out of state have been declined. In \textit{Esteve v. Allstate Insurance Co.},\footnote{78} the plaintiff was a Louisiana resident injured in Florida while riding in a car owned by another Louisiana resident and operated by a third Louisiana resident. The other involved driver was a Florida resident insured under a policy issued in Florida by Allstate, an insurer foreign to Louisiana but authorized to do, and doing, business here. There was apparently no dispute as to the existence of jurisdiction in the Louisiana courts over Allstate. Rather, the issue was whether there was a right of direct action against Allstate under the foregoing facts. Both lower courts had rejected any right of direct action in plaintiff against Allstate.\footnote{79}

Plaintiff argued in the supreme court that the existence of personal jurisdiction over Allstate in the Louisiana courts also should determine the question of a right of direct action. We have seen earlier that the questions are separate, but Louisiana might have been able

\footnote{6. 251 La. at 578 n.17, 205 So. 2d at 405 n.17.}
\footnote{7. Subsequent to \textit{Webb}, a right of direct action was denied when neither of these facts was present. \textit{Cambre v. St. Paul Fire & Marine Ins. Co.}, 331 So. 2d 585 (La. App. 1st Cir.), \textit{cert. denied}, 334 So. 2d 434, 435 (La. 1976); \textit{Morse v. Hartford Cas. Ins. Co.}, 301 So. 2d 741 (La. App. 3d Cir. 1974); \textit{see also} \textit{Signal Oil & Gas Co. v. Barge W-701}, 654 F.2d 1164 (5th Cir. 1981) (accident in Gulf more than three miles offshore; policy written in London and delivered in Texas).}
\footnote{78. 351 So. 2d 117 (La. 1977).}
\footnote{79. \textit{Esteve v. Allstate Ins. Co.}, 343 So. 2d 353 (La. App. 4th Cir. 1977). Judge Lemmon dissented on the ground that plaintiff could bring her direct action in either Louisiana or Florida as a third-party beneficiary under the insurance contract. He also noted in an appendix that either Louisiana or Florida would permit a direct action-based in tort, inferentially accepting the proposition that Louisiana would grant a direct action in a case involving an out-of-state contract and out-of-state injury. 343 So. 2d at 356-58.}
to so provide had it chosen to do so. Since it had not, plaintiff's argument on that point was summarily dismissed. Plaintiff also argued that the Direct Action Statute itself should be broadly construed to include her claim, but the court held that Webb represented the maximum extent to which the statute could be given application. Decisions subsequent to Esteve have maintained the Webb boundaries, and no serious effort has been made to test the constitutional fringes of the direct action provision by equating the direct action remedy with the acquisition of personal jurisdiction over an insurer.

Venue

Assuming the existence of jurisdiction over the insurer and the availability of the direct action against it, proper venue for such an action has not proved difficult to establish. Since 1930, the statute consistently has provided proper venue in the parish in which the accident or injury occurred. From 1930 until its amendment in 1956, the other proper venue under the statute was the parish of the domicile of the insured. In 1956, the domicile of the insurer or its "principal place of business" was added as a proper venue. Finally,

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80. See note 53, supra.
81. Justice Tate concurred, arguing that the real issue was whether La. R.S. 22:985 gave the Louisiana courts jurisdiction over Allstate on a foreign cause of action to decide whether plaintiff had a direct action under Florida law. Since he determined that Florida law would not permit the plaintiff to proceed directly against an insurer without joining the insured and she had not done so, Justice Tate could agree with the result reached by the majority. He also agreed that the Louisiana Direct Action Statute would not cover her claim, but he found this issue to be irrelevant. 351 So. 2d at 121-22.
83. See Richburg v. Massachusetts Bonding & Ins. Co., 74 F. Supp. 442 (W.D. La. 1947) (when accident occurred in any of the parishes falling within a federal district, venue was proper in that district within appropriate division; accident did not have to occur in parish in which court happened to sit).
84. It was held, rather rigidly, that the domicile of the actual defendant, the insurer, was not a proper venue. E.g., Miller v. Commercial Standard Ins. Co., 199 La. 515, 6 So. 2d 646 (1942); Note, Venue of Direct Action Against Tortfeasor's Insurer—Louisiana Act 55 of 1930, 4 La. L. Rev. 455 (1942). This result was ultimately overcome by legislative amendment. See 1956 La. Acts, No. 475; Grand v. American Gen. Ins. Co., 241 La. 733, 131 So. 2d 46 (1961).
85. 1956 La. Acts, No. 475. As to the meaning of "principal place of business," see Aetna Ins. Co. v. Great Am. Indem. Co., 124 So. 2d 626 (La. App. 3d Cir. 1960). The flawed nature of this amendment led to some confusion. The amendment left the venue provision reading:

The injured person . . . shall have a right of direct action against the insurer . . . in the parish where the accident or injury occurred or in the parish where the insured or insurer is domiciled, and said action may be brought against the insurer alone or against both the insured and insurer, jointly and in solido, at either of their domiciles or principal place of business in Louisiana.
in 1962, following the adoption of the Code of Civil Procedure, the venue provisions were amended to read as they do today, providing a proper venue in (1) the parish in which the accident or injury occurred or (2) any parish in which an action could be brought against the insured or the insurer under article 42 of the Code of Civil Procedure.\textsuperscript{66} Article 42, in turn, contains the general rule that a defendant may be sued at his domicile, with a designation of domicile by law for nonresidents and foreign corporations.

The only real problem posed by the venue provisions as they presently stand is the question of whether the reference to article 42 of the Code of Civil Procedure "picks up" the various supplementary venue provisions of that code, some preferred and some alternative. This problem was first addressed by the supreme court in \textit{Surridge v. Benanti}.\textsuperscript{67} As is commonly the case, the battleground was nominally proper venue, but the real issue was prescription. If venue is proper, mere filing of suit interrupts prescription. If improper, only service will interrupt prescription.\textsuperscript{68} If that service comes after the prescriptive period has expired, the plaintiff is without authority to proceed to the merits.

In \textit{Surridge}, the accident happened in Jefferson Parish, the tortfeasor was domiciled in St. Bernard Parish, and the foreign insurer was deemed to be domiciled in East Baton Rouge Parish. The suit was filed in Orleans Parish. The "principal place of business" of the insurer had been deleted as a proper venue by the 1962 amendments, and it appeared that only the first three parishes would be proper venues under the statute and article 42 of the Code of Civil Procedure. To withstand the anticipated plea of prescription, plaintiff argued that Orleans Parish was also a proper venue under article 77 of the Code


of Civil Procedure. That article provides that "[a]n action against a person having a business office or establishment in a parish other than that where he may be sued under Article 42, on a matter over which this office or establishment had supervision, may be brought in the parish where this office or establishment is located."

The court properly held that the language in the Direct Action Statute referring to the "general rules of venue prescribed by Art. 42" must be interpreted to include the so-called exceptions to the rules of general venue provided in the following code articles. Thus plaintiff's technique was correct. However, despite an ingenious argument that "person" in article 77 meant "corporation" and that "corporation" in turn meant "insurer," the court held that article 77 would not provide an additional venue in the case. Plaintiff had not shown that an office in Orleans had supervision over the policy in question.

The court in Davis v. Hanover Insurance Co., however, confused matters somewhat, reaching the right conclusion for the wrong reasons. Again, prescription was the real issue although venue was the point under discussion. The accident happened in Jefferson Davis Parish. Plaintiff was a guest passenger, and the domiciles of the two potential tortfeasors were Calcasieu and Vermilion Parishes. Their insurers were Hanover and Travelers, both deemed to be domiciled in East Baton Rouge Parish. Suit against the two insurers was filed in Calcasieu Parish before the prescriptive period expired, but the insurers were served through the secretary of state after the period expired. As the court of appeal correctly noted, if venue was proper in Calcasieu, the suit was not prescribed. On the other hand, if venue was improper, the suit was prescribed.

The insurer argued that under article 73 of the Code of Civil Procedure, concerning suits against solidary obligors, venue would only be proper in Calcasieu if the tortfeasor domiciled there were made a defendant, which he was not. The plaintiff argued that since the reference in the Direct Action Statute was only to article 42 of the Code of Civil Procedure, the legislature did not intend to refer to or incorporate any of the other venue articles. In effect, plaintiff argued that venue was proper as to the insurer in any venue which was proper as to the insured under article 42. Since the insured could always be sued at his domicile, it was clear under this argument that venue was proper in Calcasieu.

The court accepted plaintiff's argument, holding that the "excep-
tions" to venue were not incorporated. Thus it overruled the plea of prescription as to Hanover (the insurer of the Calcasieu domiciliary) and Travelers (whose insured was a Vermilion domiciliary). The result is clearly correct, but the decision should not have been based on non-incorporation of the supplemental venue rules. The court simply should have said that application of the rule of article 73 that one solidary obligor could be sued in a parish of proper venue as to another if that other also was named as a defendant would be counter to the consistent and clear public policy behind the Direct Action Statute. The whole thrust of the statute is to authorize a suit against the insurer without joining the insured. Application of the general rule of article 73 to the specific situation of the Direct Action Statute would frustrate that policy altogether. The court simply should have said that the 1962 amendment was inartfully drawn and the drafters should have given specific reference to the non-application of article 73.  

The court's opinion itself reflects the problems with using article 42 and ignoring the other articles. The court overruled the pleas of prescription and improper venue as to Travelers as well. Travelers' insured was domiciled in Vermilion. Thus, as to Travelers, if only article 42 was used, the only proper venue would have been in Jefferson Davis, Vermilion, or East Baton Rouge. The only way to conclude that venue in Calcasieu was proper as to Travelers was to use article 73: Travelers could be sued in Calcasieu because a "joint or solidary obligor" (Hanover) was made a defendant there.

Very recently, in Meyers v. Smith, the supreme court appeared to prefer the strict construction given the Direct Action Statute by the Hanover opinion over its own earlier view in Surridge. The accident in question had occurred in St. John the Baptist Parish, and suit was filed in Jefferson Parish against four defendants. The only arguable basis for venue in Jefferson Parish was article 77 of the Code of Civil Procedure, as applied to an insurer defendant said to be "handling this claim" out of its office in Jefferson Parish. The two lower courts had disagreed as to the plea of improper venue, with the appellate court sustaining it and ordering the case transferred to St. John the Baptist Parish. In a three-judge plurality opinion, the supreme court held that the Direct Action Statute should be read literally to offer only those venues specified as proper in article 42

91. Article 73 is primarily aimed at defeating collusive joinder in an attempt to establish venue. This is shown to some extent by the second paragraph of the article: "If the action against this defendant is compromised prior to judgment, or dismissed after a trial on the merits, the venue shall remain proper as to the other defendants, unless the joinder was made for the sole purpose of establishing venue as to the other defendants." See Greene v. Engolio, 257 So. 2d 831 (La. App. 1st Cir. 1972).
92. 419 So. 2d 449 (La. 1982).
of the Code of Civil Procedure. The court did not overrule *Surridge*, choosing to treat its discussion of the issue as dicta.

There is no sound basis for the court’s conclusion that the legislature intended by its reference in the Direct Action Statute to ignore the supplementary venue articles of the Code of Civil Procedure. While it is not implausible to argue that the peculiar wording of the 1962 amendment to the Direct Action Statute limits venue to Article 42 only, such an argument is inconsistent with the traditional legislative treatment of the Direct Action Statute. Plaintiff should be able to proceed in a proper venue under the terms of the Direct Action Statute itself or under the complete venue provisions of the Code of Civil Procedure.

**MEANING OF THE PHRASE "WITHIN THE TERMS AND LIMITS OF THE POLICY"**

One of the most important observations which can be made about the Direct Action Statute is that its language and its judicial interpretations almost entirely remove the insurance contract from governance by the established principles of contract law. The contract becomes one infused with important public policy concerns, and candidly described as written for the benefit of a non-party: the person injured by the blameworthy conduct of one of the contracting parties. Nowhere is this concept made clearer than in the interpretation of the language of the statute granting a direct action to the injured person “within the terms and limits of the policy.”

We have seen in the section on the historical development of the right of direct action that this phrase first entered the statute at its inception in 1918 and referred only to the right which an injured party had to sue the insurer after the insolvency or bankruptcy of the insured. When the true right of direct action without reference to the solvency of the insured was proposed in 1930, it also was limited by the phrase “within the terms and limits of the policy.”

The 1930 legislature no doubt was aware of the decision in *Edwards v. Fidelity & Casualty Co.*, 93 decided in 1929. So far as the opinion in the case reflects, the insurer had not received notice of any incident involving its insured until eleven months after the incident, probably when suit was filed. After the plaintiff had successfully litigated the claim against the insured and had the execution returned *nulla bona*, he sought to recover from the insurer. To the insurer’s defense that the “terms and limits of the policy” had been violated by the lack of “immediate written notice” of the incident as

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93. 11 La. App. 176, 123 So. 162 (Orl. 1929).
required by the policy, the court responded with announcement of
the principle which guides interpretations of the statute to this day.
It noted that if the insurer's position was accepted, the right given
to the injured party by the statute would depend upon the conduct
of the insured, over whom the injured party had no control. The court
opined that the legislature did not intend to make the right contingent
in that fashion. It observed:

It is quite true that Monahan's failure to give notice to his in-
surer would have prevented his recovery from the insurer, had
he himself paid the judgment . . . , but that is because Monahan
had so contracted. As between parties to a contract, the contract
itself is the law of the case. Here, however, the law of the case
is not found solely within the four corners of the policy of in-
urance, but is contained primarily in the statute to which we
have referred. 94

Committee amendments were offered to the bill in the 1930 legislature
and were adopted. These amendments are still found in the body of
the statute and provide the following limitation to the true right of
direct action proposed by the bill:

Provided that nothing contained in this act shall be construed
to affect the provisions of the policy contract if the same are not
in violation of the laws of this State.

It being the intent of this act that any action brought hereunder
shall be subject to all of the lawful conditions of the policy con-
tract and the defenses which could be urged by the insurer to
a direct action brought by the insured; provided the term and
conditions of such policy contract are not in violation of the laws
of this State. 95

Perhaps this was an effort to overrule Edwards on the point that
an insurer could not raise policy violations by the insured in a suit
brought by the injured party. If so, the effort was undermined by
a fifth column within the statute itself. The "terms and conditions"
of the policy could be urged as a defense, but not if they were "in
violation of the laws of this State." And if they frustrated the whole
foundation of the right of direct action, were they not "in violation"
of Louisiana law? If there were legislators sponsoring the amendments
who thought they were overruling Edwards on the point, they forgot
to notice the important paragraph in Edwards quoted earlier. The
contract was not just a contract any more. Its terms could not be
used, standing alone, to deny a right of direct action directly or in-
directly.

94. 11 La. App. at 178, 123 So. at 163.
This position was made clear in the early cases interpreting the phrase "within the terms and limits of the policy." In *U-Drive-It Car Co. v. Freidman*, the insured had signed a statement following the accident admitting that he was solely to blame for the accident. When sued directly by the plaintiff, the insurer contended that the statement violated the obligation of the insured under the policy to cooperate fully in the defense of the matter, as well as the obligation not "to voluntarily assume any liability" without the consent of the insurer. Citing Edwards, the court held that such a breach of the obligation might be raised to defeat the insured's claim for indemnity against the insurer after paying a judgment, but it could not be raised to defeat the claim of the injured person.

The breach of the insurance contract most commonly urged, both in the earlier and more recent cases, is the failure of the insured to give the insurer notice of the accident. In a very early case, such a breach was held to bar a direct action against the insurer by the injured party. However, the court's authority was a case refusing to permit indemnity and enforcement of the contract in a suit between the insured and the insurer after the insured had paid a judgment.0 The supreme court was able to duck the question in an early case by interpreting the policy to require "reasonable" notice of the accident and determining that no breach of the requirement had been proven; but even in that case, there were indications that proof of such a breach would not bar the direct action. As this line of cases

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96. 153 So. 500 (La. App. Orl. 1934). The writing judge was the same one who had decided Edwards. He candidly conceded that the decision had drawn considerable criticism. He repeated his remark in Bougon v. Volunteers of Am., 151 So. 797, 802 (La. App. Orl. 1934), concerning such criticism:

We realize that the current of judicial authority is usually right, and therefore that we are probably wrong, but, if so, the mists of misunderstanding have not cleared, and we are still enveloped in the Plutonian darkness of error, for we arise from a reconsideration of that case with a new and more abiding faith in its correctness.

97. The insured was a person who under modern policies would be described as an omnibus insured, driving the insured vehicle with the permission of the named insured.

98. The court quibbled with the insurer's characterization of the statement as an "assumption of liability." The court suggested that he "merely admitted fault on his part" and did not assume any liability. However, it then treated the case as one in which he had actually assumed liability, and it addressed the question of breach of the insurance contract.


100. Dennis Sheen Transfer v. Georgia Casualty Co., 163 La. 969, 113 So. 165 (1927).

was developing, insurers did not help themselves by technical arguments that although they had received notice, it was not the right kind of notice. 102

Finally, in West v. Monroe Bakery, 103 the supreme court faced the issue squarely. Suit had been filed only against the insured, one day short of a year after the accident. About a week later, the insured sent a copy of the petition to the insurer, which claimed that was the first notice of the accident which it had received. The insurer was made a party by supplemental petition some four months later. The court reviewed all the prior cases and concluded that with very few exceptions, the consistent holding of the decisions was that the Direct Action Statute conferred—

... substantive rights on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they [were] injured, subject only to such defenses as the tort-feasor himself [might] legally interpose. The facts in each case [might] be different, but ... the result [had] been the same—the upholding of the statutorily granted right against the insurer regardless of a stipulation to the contrary between the insurer and the insured in the policy contract and regardless of dilatory conduct on the insured's part in giving notice. 104

Thus the court rejected the insurer's denial of coverage on the ground of the insured's failure to notify of the accident.

This was an interesting way of phrasing the collective holdings. The court recognized the immediate vesting of "substantive rights" notion of Edwards and concurred in the earlier judicial limitations

102. In Davies v. Consolidated Underwriters, 199 La. 459, 6 So. 2d 351 (1942), the notice issue concerned an optional omnibus insured coverage no longer found in Louisiana policies. A named insured could establish "optional" coverage under the policy for a driver using the car with his permission by notifying the company within 30 days of such use and an accident. The court rejected the contention that the information conveyed by the named insured to the company through its local agent was merely the required notice-of-accident and not the optional-coverage notice. He conveyed and the company acknowledged by letter the occurrence of an accident while the vehicle was being driven by his nephew.

103. 217 La. 189, 46 So. 2d 122 (1950) (three justices dissenting). Prior to West, the court had decided Jackson v. State Farm Mut. Auto. Ins. Co., 211 La. 19, 29 So. 2d 177 (1946). In that case, the accident had occurred in March, but the potential claimants told the insured that they would not be pursuing the matter. In June, they told him they would pursue the matter, and he promptly informed the insurer. The delay between incident and report was 82 days, but under the circumstances, the court found no evidence of fraud or collusion and rejected the argument of no coverage. However, the issue was said to be one which had to be determined on a case-by-case basis, leaving open the possibility that some delayed notices of accident might defeat coverage as to the injured party.

104. 217 La. at 191, 46 So. 2d at 123 (emphasis in original).
on the authority of the insurer to raise those defenses to the direct action that it could raise in an action by its own insured. Although the insurer could raise the defense of policy breach against its own insured, the nature of the direct action in the injured person had been interpreted to deny this defense in a direct action suit. But the court also added that the injured person's right of direct action was subject to the defenses which the tortfeasor himself could interpose, a phrase not found in the statute or, indeed, in any previous case. No doubt the court simply was attempting to make the point that since the tortfeasor could not raise his own breach of a contract with the insurer as a defense in a suit against him by the injured person, neither could the insurer in a suit by the injured person. However, the court's language also could be read to mean that the insurer could use any defense in the direct action which the tortfeasor could have used, a proposition which was problematic then\textsuperscript{105} and now.\textsuperscript{106}

The West decision did not enjoy immediate popularity.\textsuperscript{107} What seemed finally to emerge as the rule applied by the appellate courts was a hybrid of the West rationale and some factors mentioned earlier by the supreme court in its decision in Jackson v. State Farm Mutual Automobile Insurance Co.\textsuperscript{108} In suggesting a case-by-case approach to the question of failure to notify, the court in Jackson reasoned that one should consider the time when the involved parties became aware that substantial injury had been done, or that a claim would be made; the time when the injured party discovered the existence and identity of the insurance carrier; prejudice to the insurer's defense by the

\textsuperscript{105} By this time, the courts already had begun to hold that certain personal defenses of the insured were not available to the insurer. See note 20, supra. These cases were exactly contrary to the concept expressed in the West opinion. The court's statement in West is probably dicta, since no question of defenses available to the tortfeasor was under discussion.

\textsuperscript{106} See text at notes 120-165, infra.

\textsuperscript{107} West was followed in Churchman v. Ingram, 56 So. 2d 297 (La. App. 2d Cir. 1951), a case involving a claim of failure of the insured to cooperate with the insurer. It was cited as controlling in Kimbali v. Audubon Ins. Co., 103 So. 2d 529 (La. App. 1st Cir. 1958), although the court also noted, after statement of the holding, that there was nothing in the record of the case to deprive plaintiffs of the right of direct action, suggesting again that some types of failure to notify might be sufficient to support a denial of coverage. And it was rejected in New Zealand Ins. Co. v. Holloway, 123 F. Supp. 642 (W.D. La. 1954), holding that it could apply only to breaches of the policy by the insured subsequent to the accident, not to those breaches preceding the accident.

To some extent, West may have been codified by the 1956 amendment to the statute declaring that all liability policies "within their terms and limits are executed for the benefit of all injured persons...to whom the insured is liable." 1956 La. Acts, No. 475. One of the justices who dissented in West later thought so. See Futch v. Fidelity & Cas. Co., 246 La. 688, 700, 166 So. 2d 274, 278-79 (1964).

\textsuperscript{108} 211 La. 19, 29 So. 2d 177 (1946). See note 103, supra.
delay; good faith of the insured and the injured party; and any circumstances indicating fraud or collusion. The combination of the two supreme court opinions has led the appellate courts to uphold the denial of coverage argument only when prejudice to the defense or fraud has been established, a difficult burden in most cases. There was no prejudice when the insured discovered for the first time seven months after the incident that he might have coverage and promptly notified the insurer.\textsuperscript{109} Nor was prejudice shown when there was a five-month delay in notice of the filing of suit, at least when suit was still pending and the insurer had received actual notice of the accident and had investigated it.\textsuperscript{110} Even in the extreme case of lack of notice until the insurer was named in an amended petition five years after the accident, no prejudice was established.\textsuperscript{111} Fraud or collusion also is difficult to establish, and indeed, there is no reported case in which coverage has been denied on that basis.\textsuperscript{112}

It has been suggested that prejudice might be established when the insurer can demonstrate that the failure to give notice was not of the incident but of the suit itself, so that the insurer's opportunity to defend itself was affected.\textsuperscript{113} The strength of this proposition is doubtful. Some of the cases which might support it involve actions by the insured against the insurer, usually for indemnity or attorney's

\textsuperscript{109} Reid v. Monticello, 44 So. 2d 509 (La. App. 1st Cir. 1950). The suit was still pending at the time of notice, and the insurer was not even made a party to the suit until five months after notice.

\textsuperscript{110} Miller v. Marcantel, 221 So. 2d 557 (La. App. 3d Cir. 1969) (not truly a direct action suit; ruling came on propriety of dismissal of third-party demand of insured against insurer to provide defense and indemnity; court applied reasoning earlier applied to right of injured party to proceed against insurer and not be denied coverage on the basis of a non-prejudicial breach of the contract).

\textsuperscript{111} Chennault v. Dupree, 398 So. 2d 169 (La. App. 3d Cir. 1981) (the original action was still pending). In Champion v. Panel Era Mfg. Co., 410 So. 2d 1230 (La. App. 3d Cir. 1982), the lenient Louisiana rule on failure to notify, rather than the strict Texas rule, was applied to a suit against a Texas manufacturer, a Texas primary insurer, and an excess insurer foreign to both Louisiana and Texas. Interest analysis was used.

\textsuperscript{112} O'Neal v. Southern Farm Bureau Ins. Co., 325 So. 2d 887 (La. App. 1st Cir. 1976) (denial of coverage possible on basis of conspiracy between injured party and insured to defraud insurer, but "not one scintilla of evidence" to support it); King v. King, 253 La. 270, 217 So. 2d 395 (1968) (later inconsistent statement more favorable to insured's wife, who was the claimant; no proof of fraud); Freyou v. Marquette Cas. Co., 149 So. 2d 697 (La. App. 3d Cir. 1963), and authorities there cited (altered statement did not prove fraud); American Fire & Cas. Co. v. Gresham, 195 F.2d 616 (5th Cir. 1952). See also Elba v. Thomas, 59 So. 2d 732 (La. App. Orl. 1952) (no showing of failure to cooperate because insured husband failed to testify to refute damaging testimony about his intoxication).

fees after completion of an earlier suit by the injured party against the insured. The policy reasons which support an expansive view of the Direct Action Statute are not present in such cases, and thus it is not surprising that the courts are willing to enforce the insurance contract as written between the two parties to the agreement. In other cases, the court has rejected arguments based on facts that even more directly affect the insurer's opportunity to defend itself, such as the insured's failure to appear for trial or the lack of notice to an excess insurer until after the lower court judgment has become executory.

There is one decision involving a true direct action which supports the proposition that when the failure to give notice of suit is such that the insurer is being asked to pay a claim to the injured party as to which there is no opportunity for defense, prejudice is established. In Hallman v. Marquette Casualty Co., an omnibus insured had an accident and the named insured informed the insurer. The insurer investigated and decided to deny coverage if any claim was pressed. A claim was finally brought, but only against the omnibus insured. Neither the insurer nor the named insured was named, and no notice of any kind was given to the insurer. That suit proceeded to a default judgment which became final but was never paid. A few months later, plaintiff learned of the insurance policy and brought an action directly against the company. The insurer defended on the ground that it never had been given an opportunity to defend the suit on the merits. Since the judgment against the omnibus insured was final and presumably the only request was that the insurer pay it, there would be no opportunity to litigate the question of liability on the merits.

114. Branzaru v. Millers Mut. Ins. Co., 252 So. 2d 769 (La. App. 1st Cir. 1971) (insured hired own counsel, defended suit against him, and lost; notified insurer after trial but before appeal delays had elapsed; insured could not enforce indemnity against insurer because of breach of policy requirement of notice); Payton v. St. John, 188 So. 2d 647 (La. App. 2d Cir. 1966) (insured cannot recover attorney's fees from insurer after successful defense of action if insured violated policy terms as to notice). But see Barnes v. Lumbermen's Mut. Cas. Co., 308 So. 2d 326 (La. App. 1st Cir. 1975) (notice to uninsured motorist carrier more than two years after incident did not establish prejudice sufficient to permit denial of coverage; direct action cases cited as authority).

115. Futch v. Fidelity & Casualty Co., 246 La. 688, 166 So. 2d 274 (1964) (she was beyond the subpoena power of the court).

116. Fakouri v. Insurance Co. of N. Am., 378 So. 2d 1083 (La. App. 3d Cir. 1979). The court noted that the policy in question specifically provided that "no action" would lie against the insurer until the ultimate liability of the insured was determined by final judgment. Notice came when the delay for suspensive appeal had run, but not when the delay for a devolutive appeal had run. Moreover, the excess carrier stipulated to the adequacy of the defense provided by the primary carrier at trial, but counsel for the excess carrier was the same as counsel for the primary carrier.

117. 149 So. 2d 131 (La. App. 2d Cir. 1963).

118. The opinion does not discuss an interesting possibility. Suppose that the claim-
The court agreed with the insurer, rejecting coverage. It saw the issue as res nova and cited no Louisiana cases at all, not even *West*. The decision seems eminently fair, although the troublesome fact of actual notice to the insurer of the incident itself remains. Some day, a court might seize upon such a fact to impose upon the insurer the burden of keeping watch on the involved party after the insurer's investigation, in order to determine whether a suit is actually brought. Such an extension of coverage would leave the prejudice defense available only in cases of no notice of accident or suit, actual or implied, until after trial on the merits is complete.

It is sometimes said that the reason for the rule requiring proof of actual prejudice before denial of coverage is to prevent insurers from using the notice requirement to evade the fundamental protective purpose of the contract and to assure payment of liability claims up to the policy limits for which they collected premiums. This is a reasonable position, and it is quite consistent with the public policy behind the statute. But we should not lose sight of the effect on the level of those very same premiums, payment of which is now made compulsory as to all drivers, if we do not afford the insurer an opportunity to assert a defense on the merits. If, as in *Hallman* or equivalent situations, the insurer is completely denied the opportunity to make whatever defense it might deem appropriate, this denial cannot but be reflected in increased premiums for the group which purchases liability insurance. Such an increase is justifiable when some policy violations occur but they do not seriously jeopardize the insurer's ability to defend itself and, indirectly, all of us who purchase liability insurance. It is not justifiable when that ability is completely eliminated.

DEFENSES PERSONAL TO THE INSURED

One of the most confusing but at the same time most important principles governing the application of the Direct Action Statute is that the insurer may not assert defenses which are "personal" to the insured. Since this concept is not found anywhere in the statute itself, its foundation is wholly jurisprudential. The statute contents itself with a statement, which we have encountered earlier, that in a direct action, the insurer may raise any defenses which it could raise in an ant had offered to retry the law suit on the merits against the insurer. Would that not have converted the case into one of simply a long delay in notice of the accident, but no prejudice in defending the suit?

action against it by its insured. Defenses "personal to" the insured would never play a part in a suit by the insured against the insurer, and thus the statutory provision is of no assistance whatsoever.

However, when one seeks out the parameters of this principle in the cases, he is met with a bewildering array of pronouncements which either give no rationale at all for the proposition or propose conflicting reasons for its existence. The courts were required to fashion some rule and explain it, because of the nature of the direct action itself. Once the insurer may be sued directly without the joining of the insured, it must be entitled to defend itself against the claim of the injured party. But precisely what defenses it may raise is quite another matter.

It is certain that the rule conceived by the courts is of illegitimate birth. It first appeared in a trilogy of cases in which an issue of "personal" defense was not squarely presented and probably should never have been discussed. The first of these was Edwards v. Royal Indemnity Co. The plaintiff was riding as a passenger in a vehicle driven by her fiancé. Through his alleged negligence, she was injured. Three days after the incident, she filed suit against the gentleman. On the very next day, they were married. Exceptions filed on his behalf in that suit were sustained, on the ground that a wife could not institute a suit against her husband. While that ruling was on appeal, she filed a second suit, naming the husband's insurer as a defendant. The insurer raised the immunity of the husband (its insured) as a defense and was successful in both lower courts. The intermediate appellate court, however, ruled for the insurer with the most cursory of opinions, observing erroneously that the Direct Action Statute provided that an insurer could raise in a suit by a victim whatever defenses the insured could have raised against the victim.

The supreme court reversed. Citing the Civil Code articles on sureties and solidary co-debtors and their inability to raise defenses personal to the principal debtor or the other solidary co-debtors respectively and noting earlier cases in which a plea of "coverture" was

120. See text at notes 93-119, supra, for an opinion that this statement was not completely accurate. It should be phrased as follows: The insurer can raise those defenses which it could raise in an action against it by its insured which do not defeat the public policy underlying the right of direct action in the victim.
121. 182 La. 171, 161 So. 191 (1935).
122. It ultimately was affirmed in Palmer v. Edwards, 155 So. 483 (La. App. 1st Cir. 1934).
124. LA. CIV. CODE arts. 3036 & 3060.
125. LA. CIV. CODE art. 2098.
held to be personal to the wife, the court concluded that the insurer was not entitled to raise the defense. The court easily could have reached the very same result, i.e., no defense by the insurer based on the marriage, by simply observing that the tort occurred prior to their marriage. It would follow logically that the rights of the victim became fixed at that point and the subsequent marriage of the individuals was irrelevant. Plaintiff had a cause of action against the gentleman on the day of the accident, and it should have been governed by the law in effect on that day. The law in effect on that day authorized her to sue the insurer of the driver, who was not then her husband. The defense raised by the insurer was inapplicable and should not have been considered.

The second case was *Ruiz v. Clancy*, decided by the supreme court about four months later. The surviving minor children were suing, among other defendants, the administrator of the succession of their father. They alleged that his negligence had caused the death of their mother. Their father was an omnibus insured under a policy issued by the insurer, and the insurer raised the defense of immunity of the father from suits by his unemancipated children. The court properly observed that the suit was not by the children against the father, but rather by them against the administrator of the father's succession. There was nothing in Louisiana law to prevent such a suit. Moreover, whatever rationale might support an immunity in a parent against suit by a child had disappeared, as family harmony and discipline could hardly be disrupted after his death had occurred. Thus, again, an immunity of the insured was not really an issue. But, again, the insurer and the court apparently felt that it was. Citing *Edwards*, the court concluded that an immunity of the parent was "personal" to him and was not available to the insurer.

Finally, in *Rome v. London & Lancashire Indemnity Co. of America*, the parents of a child who had drowned in a public swimming pool were proceeding against the insurer of the governmental entity which operated the pool. The entity charged a fee for entrance to the pool. When the case was first before the supreme court, it held that if the operation of the pool by the entity was in a private

126. Kennedy v. Bossiere, 16 La. Ann. 445 (1862) (contractual suretyship). The statement was dicta in the case, however, because the court held that there was no showing that the husband was a surety for the wife. Thus any discussion of what defenses might be available to a surety was inappropriate, but LA. CIV. CODE art. 3036, as it then read, did provide that a person could become a surety as to an obligation for which the principal debtor could be discharged upon a "merely personal" defense, such as minority or being a married woman.
127. 182 La. 935, 162 So. 734 (1935).
128. 181 La. 630, 160 So. 121 (1935).
or proprietary capacity for profit, the urged defense of governmental immunity would not apply. After remand, the appellate court determined that governmental immunity would nonetheless apply to the entity on other grounds but the immunity was personal to the insured and could not be urged by the insurer. Again, there were clear grounds upon which the court could have concluded that immunity was not an issue: the entity was acting in a proprietary, not governmental, capacity. But, again, the court announced the "personal to the insured" rule for certain defenses, this time governmental immunity.

In no one of these cases was the issue of the immunity of the insured squarely presented, yet in rapid succession, the courts had announced the rule that certain immunities were personal to the insured in the three fields in which immunities played a prominent role.

Despite the illegitimacy of its birth, the rule grew steadily into adulthood. Subsequent to the above decisions, immunities between spouses, between a parent and a child, and as to governmental

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130. Harvey v. New Amsterdam Casualty Co., 6 So. 2d 774 (La. App. Orl. 1942) (tort occurred after marriage, but court made no distinction); Scarborough v. St. Paul Mercury Indem. Co., 11 So. 2d 52 (La. App. 1st Cir. 1942) (same; same result); LeBlanc v. New Amsterdam Casualty Co., 202 La. 857, 13 So. 2d 245 (1943) (court simply cited Edwards and Ruiz without any further discussion on the point); McHenry v. American Employers' Ins. Co., 206 La. 70, 18 So. 2d 656 (1944) (fact that insured was wife and claimant was husband did not change result, even though insurer argued that husband's recovery would be community property in which wife would share); Chapman v. Travelers Indem. Co., 45 So. 2d 557 (La. App. 1st Cir. 1950) (LeBlanc, Edwards, and Ruiz cited without discussion); McDowell v. National Sur. Corp., 68 So. 2d 189 (La. App. 1st Cir. 1953), appeal dismissed, 347 U.S. 995 (1945), discussed in Note, Insurance—Action Against Liability Insurer by Named Insured, 14 La. L. Rev. 706 (1954), in which it is observed that the insurer might have avoided liability by specifying that its liability was to any person other than the named insured; Dowden v. Southern Farm Bureau Cas. Ins. Co., 158 So. 2d 399 (La. App. 3d Cir. 1963); see also United States v. Haynes, 445 F.2d 907 (5th Cir. 1971) (insurer of serviceman could not raise immunity against federal government, which had paid the medical expenses of serviceman's dependent wife, injured through his negligence).

131. See Deshotel v. Travelers Ins. Co., 257 La. 567, 243 So. 2d 259 (1971), in which the issue was actually imputation of negligence from the driver (son) to the passenger (father) in order to bar the father's recovery in a direct action against the son's insurer. The court observed in passing that even if there were an immunity to suit in favor of the son without a specific statutory basis, it would be personal to the son and not available to the insurer. See also Note, Torts—Louisiana Civil Code Article 2318—Parent-Child Immunity—Parent May Sue Child's Liability Insurer, 46 Tul. L. Rev. 563 (1972). For a treatment of the subject on a national scale, see Hollister, Parent-Child Immunity: A Doctrine in Search of Justification, 50 Fordham L. Rev. 489 (1982).
entities\(^{132}\) have been consistently treated as "personal" to the immune party and not available to the insurer. The rule has been extended to the defenses of insanity,\(^{133}\) charitable immunity,\(^{134}\) limitation of liability to the value of the vessel in maritime proceedings,\(^{135}\) and probably to the exclusiveness of a remedy under the Federal Tort Claims Act against a governmental employee.\(^{136}\) However, courts have refus-

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132. Musmeci v. American Auto. Ins. Co., 146 So. 2d 496 (La. App. 4th Cir. 1962), cert. denied, 146 So. 2d 496 (La. 1963) (ingenious argument advanced by defendant that although governmental immunity was personal to a governmental entity, the doctrine of respondent superior did not apply to such an entity; and if the entity thus was not liable for the act of its employee, neither was the insurer; argument rejected, largely on practical grounds that all the money paid for insurance coverage would be paid for nothing); Brooks v. Bass, 184 So. 222 (La. App. Orl. 1938) (same governmental entity and insurer as in Rome, this time sued over an errant golf shot; allegation of operation for profit sufficient to overrule exception as to entity, and in any event, such a defense not available to insurer). At the present time, the immunity itself is almost completely a dead letter in light of La. CONST. art. XII, \(S\) 10, which abolishes it as to all suits for injury to person or property and as to all suits in contract.

133. Von Dameck v. St. Paul Fire & Marine Ins. Co., 361 So. 2d 283 (La. App. 1st Cir. 1978), discussed in Note, Insanity, Intent, and Homeowner's Liability, 40 LA. L. REV. 258 (1979). The only authority cited for the proposition that insanity is a personal defense was Simmons v. Clark, 64 So. 2d 520 (La. App. 1st Cir. 1953), in which the statement is wholly dicta. Simmons involved a suit against a surety to secure a deficiency judgment after a judicial sale of the debtor's property without appraisal. The court held that the defense to such an action which could have been raised by the debtor under Louisiana law was not merely personal to him and could be raised by the surety. The reference to insanity as a personal defense was in a list for illustrative purposes, without any cited authority.

134. Lusk v. United States Fidelity & Guar. Co., 199 So. 666 (La. App. Orl. 1941) (claimant was visitor to charity hospital; court held charitable immunity inapplicable as to guests and also observed that in any event, it would not be available to the insurer as a defense; Messina v. Societe Francaise, 170 So. 801 (La. App. Orl. 1936) (insurer could not raise defense of immunity for hospital; court did not determine whether hospital was immune as governmental entity or as charitable entity). Charitable immunity itself is now also a dead letter after Garlington v. Kingsley, 289 So. 2d 88 (La. 1974).


136. Danzy v. United States Fidelity & Guar. Co., 380 So. 2d 1356 (La. 1980) (issue not reached in case in which claimant had settled with and released federal government for claim based on postal service employee's negligence; lower court had indicated that exclusivity of remedy statute under Federal Tort Claims Act would not be personal to the employee and could be raised by the insurer in a later direct action against it; supreme court held that there could be no recovery against the insurer because the settlement released it as well, but the court indicated in a lengthy footnote, 380 So. 2d at 1359-60 n.5, that it disagreed with the treatment of the defense as not personal).
ed to extend it to—and have thus preserved insurer defenses involving—prescription, contributory negligence and similar affirmative defenses, statutory immunity under the state workers' compensation act or the Longshoremen's and Harbor Workers' Compensation Act, and a "red letter clause" in a ship repair contract limiting the liability of the repairer to a designated amount. The reasons why a defense "personal" to the insured should not be available to the insurer and the distinction between those defenses "personal" to the insured and those which are "general" are sometimes difficult to discern. But to that task we must now turn before making some observations about the policies underlying the rule and its future interpretations.

The development of this rule is a fascinating judicial exercise in which the courts have wandered about from one explanation to another, finally stumbling into a rather solid position showing sensitivity to the various conflicting public policies which underlie this area of the law. All of this has occurred with minimal assistance from the legislature, which more often than not simply followed the courts' lead by codifying important aspects of the decisions.

The first rationale was offered in the Edwards opinion holding that the immunity of a spouse to suit by the other could not be pleaded by the liability insurer. The supreme court quoted article 3036 of the Civil Code to the effect that a person could become a surety "for an obligation of which the principal debtor might get a discharge by an exception merely personal to him, such as that of being a minor, or a married woman." It also quoted article 3060, specifying that

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137. Reeves v. Globe Indem. Co., 185 La. 42, 168 So. 488 (1936) (by inference, since the court held that if there had been no interruption, to be determined on remand, insurer's defense of prescription was valid); Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (La. App. 3d Cir. 1964) (wife argued that she could not sue husband in tort and that prescription could not run against one who could not act; court noted she could have sued the insurer and did not do so timely, upholding its plea of prescription).


140. Alcoa S.S. Co. v. Charles Ferran & Co., 443 F.2d 250 (5th Cir. 1971).

141. The article was amended by Act 711 of 1979 to eliminate the reference to the personal defense of being a married woman, since it would no longer exist as to a contract. La. R.S. 9:291 (Supp. 1979), the interspousal immunity statute, also was amended in the same act, but the immunity as to delictual obligations was not changed.
in such a case, the surety could not raise those defenses which were personal to the debtor; rather, it could raise only those defenses “inherent in the debt.”142 Although the court never said so explicitly, the obvious conclusion to be reached was that the insurer was either a surety or should be treated as one, and thus its defenses would be only those which a surety could raise.

The analogy was imperfect, as the court probably knew. The contracts of suretyship and liability insurance are similar, but they certainly are not identical. A surety has the right of reimbursement against the principal debtor if it is compelled to pay the debt, and an insurer does not have that right. In theory, the contract of insurance should be more expensive than a contract of suretyship as to the same potential exposure. Moreover, the contract of indemnity insurance which had been standard at the turn of the century and which was more analogous to suretyship had been replaced by contracts of liability insurance, which might be (and, in fact, would be) interpreted differently. Finally, article 3035 of the Civil Code defines suretyship as an “accessory promise by which a person binds himself for another already bound, and agrees . . . to satisfy the obligation, if the debtor does not.” The insured is not already bound when the contract is written, and the insurer’s agreement to pay is not conditioned on non-payment by the insured.

Indeed, later in the Edwards opinion, the court noted that the two contracts were different, but it never explained why its earlier use of the suretyship articles was nonetheless appropriate. Shortly after the Edwards opinion, the supreme court seemed to back away from the suretyship analogy and to focus more on the concept of the insurer and the insured as being solidarily bound to the victim by the statute. In Ruiz v. Clancy,143 the court took up this theme, mentioned in Edwards but not discussed in detail. Article 2098 of the Civil Code provides that a codebtor in solido may plead all defenses “resulting from the nature of the obligation” but not those “as are merely personal to some of the other co-debtors.”144 The court termed the insurer, although solidarily bound, “like the principal debtor.”

142. LA. CIV. CODE art. 3060: “The surety may oppose to the creditor all the exceptions belonging to the principal debtor, and which are inherent to the debt; but he can not oppose exceptions, which are personal to the debtor.”

143. 182 La. 935, 162 So. 734 (1935).

144. The court did not mention that the solidarity would be imperfect, i.e., arising for reasons other than the debtors acted as mandataries of each other. Whether this might have made any difference in the application of article 2098 thus was not discussed.

The Edwards opinion also offered another thought, presumably in support of its decision. It noted that if plaintiff’s husband had collided with another vehicle and her injuries were caused by the joint negligence of the two, the other driver could not have pleaded the negligence of the husband as a bar to plaintiff’s suit. While the state-
For good measure, the court in *Ruiz* also announced another explanation which has continued to be a popular rationale. The decision in *Edwards*, the court said, merely recognized a difference between those cases in which the victim had no cause of action against the tortfeasor (and thus none against the insurer) and those in which the victim had a cause of action against the tortfeasor but no right of action. In the latter instances, the Direct Action Statute permitted the victim to assert that cause of action against the insurer, although the victim had no right to do so against the tortfeasor for other reasons.

In the following year, in a case involving a governmental entity, the court struck upon yet another rationale. If a governmental entity purchased liability insurance and the court permitted an insurer to raise the immunity of the entity in every lawsuit against it, the entity would have paid its premiums for nothing at all. The spectre of Louisiana citizens paying hard-earned money in taxes to an entity which then paid it to an insurer but received nothing in return understandably was not pleasing to the court. The court's indignant but direct response to the argument was as follows:

[The insurer] has received from the New Orleans City Park Association a valuable consideration. If the defense of immunity from suit is available to it in this case, this insurance company is, in truth and in fact, receiving public moneys without consideration, for we cannot imagine any case sounding in tort which might successfully be prosecuted against it under the insurance contract.

This rationale has its modern-day equivalents in the cases in which

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145. Neither "right of action" nor "cause of action" is defined by the Code of Civil Procedure. In this discussion, they are used in the following manner. An exception of "no right of action" should be granted, even though the law grants a remedy against the defendant for the harm revealed by the pleadings, when the plaintiff in question is not authorized by law to assert it. An exception of "no cause of action" must be granted, even though everything alleged might eventually be proven to be true and even though the plaintiff would be the proper party to complain, in those instances in which the law does not recognize a remedy against the defendant for the harm revealed by the pleadings. Using these terms, our courts have held that while a wife does not have a right of action against her negligent spouse, she does have a cause of action; she has both against his insurer. But an injured employee has neither a right nor a cause of action against his employer for a work-related injury, because the Workers' Compensation Act "abolishes" the tort cause of action. Therefore, he has neither a right nor a cause of action against the employer's liability insurer.


147. 169 So. at 137.
the defense of charitable immunity was denied to an insurer and, probably, in the denial of the insured shipowner’s limitation of liability rights to the insurer.

Actually, the Edwards court was closer to the true rationale than it realized. The French writers state that the reason for the rule denying the surety the right to plead defenses personal to the debtor was that the surety often was obtained specifically to protect the creditor against the possibility that a debtor would plead a defense personal to him.\textsuperscript{148} The same writers indicate that the reason for the rule denying a solidary co-debtor the right to plead defenses personal to another co-debtor was that such defenses were created to protect certain individuals and not to foster general policies of the law, such as no enforcement of an obligation which had an illegal cause or was prescribed.\textsuperscript{149} These distinctions were expressed in the concept in the articles of “personal” defenses on the one hand and, on the other, those defenses “inherent in the debt” or “resulting from the nature of the obligation.”

Thus the true inquiry should be as to the public policies involved. Certainly there is a strong policy expressed in the state’s approval and regulation of liability insurance contracts and in our Direct Action Statute that where an insurance fund has been purchased, it should be used to compensate the victim. There is a policy against intra-family litigation and one that bankrupt persons are entitled to be discharged from certain debts. There is another that employers should not be liable in tort if workers’ compensation provides a remedy against them. There used to be others that charitable institutions or governmental entities should not have to divert their funds to the compensation of private claims, and there is another that persons who carelessly help produce their own injury should be denied recovery or should have it diminished.

The reconciliation of these conflicting policies came in the Direct Action Statute litigation over defenses available to insurance companies. Louisiana’s first statutory pronouncement, although written in slightly different terms, was that the policy that bankrupt persons should be discharged from certain debts need not conflict with the policy that an insurance fund should be used to compensate the victim. Louisiana simply would not enforce a clause which permitted the insurer to use the insured’s bankruptcy as a defense. This was the first statutory departure from indemnity insurance toward liability insurance.\textsuperscript{150}


\textsuperscript{149} Id., pt. 1, nos. 763-766 at 410-413.

\textsuperscript{150} Other states passed similar statutes, and insurers ultimately placed a similar
The next pronouncement was much more circumspect. It was simply that, in addition to his rights against the insured, the victim had a "right of direct action" against the insurer. Almost certainly, this was purely a matter of procedure. The victim could choose to sue the tortfeasor or the insurer or both "jointly and in solido." If there was any intent to grant substantive rights to the victim beyond those he had against the tortfeasor, the language does not reflect it. In fact, it reflects the contrary.

However, societal problems—particularly that of injuries to victims of automobile accidents—dictated an imperceptible shift in the nature of the "right of direct action" from procedural to substantive and from pure indemnity to liability in the broad sense, bordering on financial responsibility. The shift was imperceptible but irresistible. Other states accomplished the change by statute, but our changes were judicial. This accounts for the wandering and seemingly inconsistent nature of the changes. Under the rubric of the "right of direct action," the courts were answering the very basic question: why do we permit contracts of liability insurance, and what do we want them to accomplish?

Our decisions indicate that we want liability insurance to function as a mechanism to spread the costs of perils in society, although we are not prepared to jettison completely the fault system which has previously functioned as such a mechanism. We could have adopted a no-fault system to spread those costs, even without the intermediary of insurance. But we have chosen rather to use liability insurance as a sort of derivative of the fault system, relying upon its strong points and correcting its evils. To be completely logical, we simply would say that the insurer may be sued directly but it is only liable

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151. Some states provided that certain policy defenses which would be good against insureds would not be available against the victim—such as late notice or failure to cooperate in the defense. These states continued to require that the tortfeasor be sued and judgment obtained but they refused to permit the insurer to raise these defenses in the second action by the victim against the insurer. See R. Keeton, Basic Text on Insurance Law § 4.8(c) at 234. As for immunities available to the insured, some states respect the provision of the policy as to whether the immunity can or will be raised by the insurer, but others provide a direct action and make immunities such as charitable and governmental immunities unavailable to the insurer, invalidating policy provisions to the contrary. See Ark. Stat. Ann. §§ 66-3240, 66-3242(2) (1980); R. Keeton, supra note 150, § 4.8(d) at 235-37.

152. New Zealand has such a system, and it apparently functions fairly well. Medical expenses and wage replacement are available through a government fund, whether the injury is traceable to employment, crime, automobile accident, or other other sources. See T. Ison, Accident Compensation: A Commentary on the New Zealand Scheme (1980).
when the insured would be or is liable. However, this would immediately incorporate some defenses which were created only because of the identity of the tortfeasor and have nothing at all to do with an insurer. At the same time, the notion of moral blameworthiness inherent in the fault system could not be wholly discarded. Thus we were willing to say that an insurer could not be liable in the absence of objectively blameworthy conduct on the part of the insured, even though the insurer was the only named defendant.

Now the division between "personal" defenses and "general" defenses becomes much clearer. The strength of an interspousal immunity policy, if it has any at all, rests on protection of family harmony and has no real application to a dispute between an injured person and an insurance company. Thus it must yield to the policy supporting compensation of injured persons. The strength of an immunity given to a parent against suits by a child, if it has any at all, rests on protection of parental authority and discipline and has no application to a dispute between an injured person and an insurance company. It was unnecessary in Louisiana to abolish the immunities as a way to eliminate the conflict, as it might have been in a state without a direct action statute in order to give access to an insurance fund. Besides that, abolition presents difficult questions of the duty owed by one spouse to another or by a parent to a child. Where a liability insurance fund had been purchased, Louisiana could avoid the route of abolition of the immunity by calling the defense "merely personal" to the insured. It is probably not coincidental that liability insurance has now been made compulsory in a field in which those duty questions are not difficult: operation of a motor vehicle. It is not compulsory in fields where duty questions would be very difficult, such as homeowners' insurance.153 By its judicial interpretations of the Direct Action Statute, Louisiana has been able to confine most of its intra-family disputes to arenas in which duty determinations are easy.154

153. Thus, there is room for insurers to exclude intrafamily injuries if they wish to do so. There is also room for ample debate about what kinds of harm we want to spread to the insurance-buying group. If one child in the family shoots another with a B.B. gun, should all purchasers of homeowners' insurance bear this risk in dilution?

154. But some difficult problems remain unresolved. Once it is established that a parent can sue a child driver's insurer without any immunity being pleaded and without the "imputation" of the child's negligence to the parent, what expenses may be recovered? The father's personal injury recovery was not barred in Deshotel v. Travelers Indem. Co., 257 La. 567, 243 So. 2d 259 (1971). The father's recovery for damage to his own property, such as the automobile, also is not barred. Scott v. Behrman, 273 So. 2d 661 (La. App. 4th Cir. 1973). But should the father's recovery for the driving child's medical expenses be barred? If they are seen as the child's
The same process may be observed in the case of charitable and governmental entities. The policy against involuntary diversion of public funds or those held “in trust” for charitable purposes to the payment of individual claims in tort has very little to do with a suit against an insurance company. This is especially true when the entity voluntarily has expended the funds for insurance coverage. Thus the policy underlying the immunity must give way to that of compensation for injured persons. Again, the rubric is: defense “personal” to the insured, not available to the insurer. In this area, Louisiana ultimately abolished the immunities themselves, thus facing the duty-determination questions squarely. Although the duty questions in this context are not free of difficulty, they are probably easier than the intra-family issues.

The issues are less clear-cut in cases such as insanity, limitation of liability to the value of the vessel and exclusivity of remedy against a federal employee under the Federal Tort Claims Act. Probably there is a public policy that insane persons should not be personally liable for their conduct, but this policy need not conflict with the policy favoring compensation of injured persons. Such compensation may come from a curator or from a fund purchased for this purpose. If we are willing to impose liability on a parent for damage caused by his child, even when below the age of discernment, and thus on his insurer, there is no reason not to have the same treatment for persons who have no discernment because of insanity.

The policy supporting limitation of liability to the vessel in maritime cases is of uncertain strength and has been the subject of considerable dispute. Whatever the policy may be, it has very little

expenses, perhaps their recovery ought to be barred. Some appellate decisions have taken this view. Liedtke v. Allstate Ins. Co., 405 So. 2d 859 (La. App. 3d Cir.), cert. denied, 407 So. 2d 748 (La. 1981); Gaudet v. G.D.C., Inc., 383 So. 2d 1289 (La. App. 1st Cir.), cert. denied, 385 So. 2d 256 (La. 1980). On the other hand, if they are really the father’s expenses, perhaps they ought to be treated the same as damage to the car and their recovery should not be barred. This is the view taken by the court in McIntyre v. Government Employees Ins. Co., 413 So. 2d 174 (La. App. 4th Cir. 1982). The two lines of cases are in complete conflict on the point.

155. The matter was discussed at length in Yancey v. Maestri, 155 So. 509 (La. App. Orl. 1934), in which the court reached the conclusion that the estate of an uninterdicted insane person did not have liability for his acts. The decision has been questioned in subsequent opinions. See Von Dameck v. St. Paul Fire & Marine Ins., 361 So. 2d 283 (La. App. 1st Cir. 1978); Guidry v. Toups, 351 So. 2d 1280, 1284 (La. App. 1st Cir. 1977) (Ponder, J., dissenting); Note, Insanity, Intent, and Homeowner’s Liability, 40 LA. L. REV. 258 (1979).

156. LA. CIV. CODE art. 2319: “The curators of insane persons are answerable for the damage occasioned by those under their care.”


158. See Biezup & Abeel, The Limitation Fund and Its Distribution, 53 Tul. L.
to do with suits between victims and insurance companies. And there is the added factor that if a shipowner has paid for liability insurance but the insurer is able to limit its own liability to the value of the vessel, the shipowner has paid for coverage he does not need and from which he will never derive any advantage.

The policy supporting the exclusivity of a remedy against a federal employee under the Federal Tort Claims Act is even more murky and thus its position in the "personal" defense category even more uncertain. Certainly there is a policy supporting the protection of an individual employee from catastrophic losses, and the substitution of the federal government as the responsible party respects that policy. A proceeding against an insurer for excess over the amount realized in a claim against the federal government is not violative of that policy, but the scheme devised under the Federal Tort Claims Act is not unlike that of workers' compensation schemes at the state and federal level. The countervailing policy may be a determination that the remedy granted under these schemes is sufficient, and no further compensation of the victim is required. If this is so, the "exclusivity" is not aimed solely at protection of the tortfeasor. Rather, it is a statement of what society thinks are the limits of the remedy. In the classic definition, if there is no remedy, there is no "cause of action" in tort and thus no liability in the insured and none in the insurer.

When one turns to the defenses which are "general" and which can be raised by an insurer, the expressed public policies are strong and are aimed at more than protection of a single individual. There is an interest in having claims promptly litigated, so that a fair and accurate resolution of the issues may take place. This interest often wins out over the policy calling for compensation of the victim, even when an insurer is not in the picture. This policy is aimed at the integrity of the judicial process and is not limited to the individual tortfeasor. Thus prescription is a "general" defense that can be raised by the insurer, or one "inherent in the debt."  


159. The specific language of 28 U.S.C. § 2679(b) (1976) is as follows:

The remedy against the United States ... for injury ... , resulting from the operation by an employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

160. This is consistent with the early Louisiana cases involving true sureties. Gilbert v. Meriam, 2 La. Ann. 160 (1847); Michelin Tire Co. v. Delcourt, 149 So. 313 (La. App. 1st Cir. 1933).
The same is true of the defenses of contributing fault or assumption of the risk. It is the considered judgment of society that in some instances, an injured person's right to compensation should be denied or diminished because of his own conduct. We use this as a sanction to encourage persons to watch out for their own safety or to be bound by their own voluntary encountering of perils. It usually has nothing to do with the identity of the victim. Thus we permit an insurer to argue that its liability can be only found to the extent of the liability of its insured with reference to the conduct of the victim.

As indicated earlier, the policy behind the statutory immunity of an employer or a co-employee to suits in tort under workers' compensation schemes is a societal expression that these provisions are an adequate remedy for the harm suffered. If this is accurate, any further remedy should be denied and any coverage for such a potential remedy is unnecessary. Thus we permit an insurer to raise the defense and, in theory, permit the offering of policies without such coverage at a lower cost.

The policy respecting the law made between the parties by an agreement is also strong and should yield only when some more important interest must be protected. Thus if the insured and the insurer have agreed upon a policy limit or upon a particular kind of coverage, this agreement should be respected. Hence we permit insurers to raise these defenses, rather than terming them "personal" to the insured. In fact, they have very little to do with the protection of the insured; rather, they protect the insurer and others who purchase such insurance.

Thus we find that the judicial process has arrived at the undeniable conclusion that in some instances, the victim has greater rights against the insurer than he would have against the tortfeasor himself. We have determined which instances these are by reconcil-

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161. Except when the court determines that the duty of the defendant extends to the protection of the victim against his own carelessness, such as is true of certain minors. See Boyer v. Johnson, 360 So. 2d 1164 (La. 1978).

162. Such as the very existence of a direct action at all, as is evidenced by the decisions invalidating "no action" clauses in policies even though they would otherwise have been a valid part of the contract.

163. Presumably, the "red letter clause" developed in the ship repairers' insurance contracts has been permitted as an insurer's defense because it is a sort of policy limit. See Alcoa S.S. Co. v. Charles Ferran & Co., 443 F.2d 250 (5th Cir. 1971).

164. Theoretically, insurers could have avoided coverage of intrafamily harms by specifying that the policy did not extend to bodily harm to any other insured. California, for example, authorizes such an exclusion in Cal. Ins. Code § 11580.1(c)(5) (West 1972 & Supp. 1983) as to an omnibus insured, and the statute was upheld against constitutional attack in Farmers Ins. Exch. v. Cocking, 29 Cal. 3d 383, 628 P.2d 1, 173 Cal. Rptr. 846 (1981).
ing the conflicting interests and policies presented. The fact that we have chosen to do so under the rubric of "personal" and "general" defenses does not detract from the reality of what has been done. We have interpreted the Direct Action Statute in this fashion because the problems of our society required that we do so.

It is also undeniable that some of this process has caused liability insurance to be more expensive than it otherwise would have been. No one knows whether the policyholders would have opted for this course of action had they been given the opportunity to do so. The courts have made the decision, and the insurers have acquiesced. From the insurers' standpoint, the provision of additional coverage and collection therefor of an additional premium are not necessarily undesirable, so long as they can predict potential risks with some accuracy.

The ultimate result of the jurisprudence in this area is not very far removed from the point of beginning in Edwards and the French writers. We saw that the surety could not raise personal defenses because the purchase of the surety's protection was made precisely to reimburse the creditor if the personal defenses were raised. We cannot say that the creditor (the injured person) has demanded the engagement of a surety (the liability insurer) because of the possibility that the debtor (the tortfeasor) might raise a personal defense or otherwise be unable to pay. However, society, in effect, has demanded this result in many instances to avoid the alternative of having victims go uncompensated or of leaving the compensation to the family or society in general through taxes.\textsuperscript{165}

\textit{Set-Off, or Compensation}

There is an interesting problem, yet unanswered, as to the classification of the defense of set-off, or compensation.\textsuperscript{166} The Civil Code provides that a surety may set off against his own obligation any amount which is owed by the creditor to the principal debtor.\textsuperscript{167} But the code also provides that a solidary co-debtor may not assert such a defense when sued by the creditor, \textit{i.e.}, he is not entitled to reduce his own obligation by the amount owed to a co-debtor.\textsuperscript{168} Since

\begin{footnotes}
\item[165] The enactment and interpretation of the Direct Action Statute and the compulsory nature of motor vehicle liability insurance are evidence of those societal demands.
\item[166] \textit{La. Civ. Code} art. 2208: "Compensation takes place of course by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished, as soon as they exist simultaneously, to the amount of their respective sums." Compensation is an affirmative defense, which must be pleaded by the party seeking its application. \textit{La. Code Civ. P.} art. 1005.
\item[168] \textit{La. Civ. Code} art. 2211.
\end{footnotes}
insurers have at one time or another been classified as both sureties and solidary co-debtors for the purpose of asserting defenses, it is unclear which rule ought to be chosen.

This is not idle academic discussion. Under the version of comparative negligence adopted by Louisiana, it is quite possible that as between two parties in an automobile accident, the fault could be allocated 60 percent to A and 40 percent to B. Suppose that both are amply covered by liability insurance and A’s loss amounts to $100,000, while B’s amounts to $50,000. The total “loss” suffered by the two parties is $150,000. If A sues B and B’s insurer, he is entitled to a judgment of $40,000. If B should reconvene against A and A’s insurer, he is entitled to a judgment of $30,000. If no insurance were in the picture at all, the debt of A to B would be set off against the debt of B to A, resulting in a judgment in A’s favor in the amount of $10,000. If insurance is in the picture and if the insurers may raise the defense of set-off which would be available to the parties, the only amount which would leave the coffers of the insurance companies would be $10,000 and the total amount borne by the insured parties would be $140,000. Although this theoretically would result in lower premiums, it would represent a departure from the customary view that insurance should be used as a mechanism to spread the costs of risks to society.

Incantation of the “personal” versus “general” rubric alone is not likely to help analyze the problem, since some code articles suggest set-off is personal (if the insurer is a solidary co-debtor only) and others suggest it is general (if the insurer is a surety). Purists will point out that the code also resolves the conflict, by providing that where a surety is also a solidary co-debtor, the rules of solidarity are to prevail over those of suretyship.\(^\text{169}\)

However, our policy analysis will produce a surer method of reaching the same result. One very strong policy supports the use of the insurance mechanism to the greatest extent possible to spread the cost of compensating the victim. The countervailing policy supporting set-off is one of judicial economy and permitting a debtor to ease his own burden by “collecting” a debt owed to him in the same proceeding. But at least where the “debt” is within the policy limits, there is no burden on the insured. It is not really his debt any more but one for which we have permitted him to provide a financially solvent defendant. As to the financially solvent defendant (the insurer), there is no “debt” owed for which there should be compensation. Accordingly (and predictably), the policy supporting the use of the insurance mechanism to spread the cost of compensating the victim

should and will prevail. If the legislature reaches the problem first, we will have a statute to that effect. If the court reaches the problem first, compensation will be classified as a defense "personal" to the insured and not available to the insurer. The court in *Edwards* foresaw the possibility fifty years ago and suggested such an answer.

**OBLIGATION IN SOLIDO WITH THE INSURED**

When the "real" right of direct action was first enacted in 1930, the amendment included venue provisions and the specific statement that "said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido." The intention of this phrase may have been simply to make it clear that the insured need not be named as a defendant, although he could be if the victim so desired. The added phrase "jointly and in solido" would then have been superfluous or, at best, simply a restatement of what had previously been provided. But the phrase was promptly interpreted to establish the substantive concept of solidary liability between the insurer and the insured as to the victim. This was to have very important consequences for the interpretation of the insurer's responsibility under the insurance contract.

The Civil Code defines a solidary obligation as one in which the debtors are "all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor." There may be a solidary obligation even though the precise nature of the obligation of the respective debtors may differ, such as when one's obligation is conditional and the other's unconditional or when one is allowed

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171. Could it be said in the instant case, if the insured were a creditor of the injured party to the extent of $5,000, that the insurance company could interpose the defense of set-off to the present action? The obvious answer is no, because that would be a personal matter between the plaintiff and the insured, wholly unrelated or in any way connected with or growing out of the provisions of the policy and the alleged tortious acts of the insured.


174. LA. CIV. CODE art. 2091.
a term which is not allowed to the other. Ordinarily, solidarity must be explicitly provided for, but this rule is relaxed when the law is the source of the solidarity. One of the most important secondary aspects of solidarity is that a suit brought against one of the solidary debtors interrupts prescription as to all of them. Also pertinent and important is the rule that if the creditor should release one of the solidary debtors without reserving his rights against the others, they are all discharged; if he reserves rights against them, he may not recover against them without deducting “the part” of the debtor whom he has released.

The type of solidarity which exists by statute between the insured and the insurer toward the victim is an unusual one, to say the least. In the first place, it is solidarity only within the policy limits and coverages, for beyond that, the insurer is not obligated to anyone, solidarily or otherwise. Within the policy limits, for all practical purposes, the insurer is the only “debtor” who is liable for anything. Short of insolvency of the insurer, the insured will never become liable for an amount within the policy limits. If the insurer is not named in the litigation or participating in the defense of the insured, the insured will no doubt third-party the insurer demanding a defense or its costs as well as indemnity.

Thus the “solidary” debtors are the wrongdoer (who has no realistic exposure within the confines of the solidary obligation) and an innocent party (who bears all of the risk within the limits of its agreement, but only if the wrongdoer would have borne such risk). The insurer is not merely an intermediary used to pass the cost on ultimately to the wrongdoer. Unlike other solidary debtors, the insurer has no right of contribution or indemnity against the wrongdoer upon payment. The whole point of the insurance contract is to insulate the wrongdoer from such a possibility.

If the solidarity between the insurer and the insured had been subjected to the analysis attributed to the Romans and occasionally surfacing in Louisiana law, it would have been termed imperfect solidarity rather than perfect solidarity. The latter is said to arise when the solidary debtors act as mandataries of each other, as in the signing of a promissory note calling for solidary liability to the

175. LA. CIV. CODE art. 2092.
176. LA. CIV. CODE art. 2093.
177. LA. CIV. CODE art. 2097.
178. LA. CIV. CODE art. 2203.
179. LA. CIV. CODE arts. 2103, 2104, 2106, 2161, & 3052.
creditor. The former arises when two or more persons are bound for the same debt, but from different sources or at different times. Since the obligation of the tortfeasor to the victim is delictual and that of the insurer is conventional, they could only be imperfectly solidarily bound. The primary effect of solidarity would nonetheless follow for both perfect and imperfect solidarity: require each of the debtors to discharge the entire debt if called upon to do so.181 A very important secondary effect did not follow in the classical interpretation. Suit as to one solidary obligor, if only imperfectly bound to the others, did not interrupt prescription as to those others.182

This distinction between imperfect solidarity and perfect solidarity often has been ignored in Louisiana law and may have been rejected altogether.183 The difference with regard to interruption of prescription has not been respected in modern times, either generally184 or with specific reference to the solidarity between an insured and the insurer.185

Thus, generally speaking, a timely suit against either the insured or the insurer will interrupt prescription as to the other. However, even within this general rule, there are some interesting wrinkles.

The decision in Pearson v. Hartford Accident & Indemnity Co.186 is representative of the simple case of timely suit against the tortfeasor and interruption as to the insurer. Plaintiff claimed injury while employed by employer during work at the plant of third party. He timely sued third party (in tort) and the compensation carrier of employer. By a timely supplemental petition, plaintiff joined an in-

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182. One finds this actual holding only in a few early Louisiana cases in which the endorser of a note was held to be bound in imperfect solidarity with the maker and acknowledgment by the latter would not interrupt prescription as to the former. Hickman v. Stafford, 2 La. Ann. 792 (1847); McCalop v. Newcomb, 2 La. Ann. 332 (1847); Jacobs v. Williams, 12 Rob. 183 (La. 1845). The imperfect nature of their solidarity, however, was subsequently changed by the Negotiable Instruments Law and by clauses in promissory notes. See also Grigsby v. Morgan & Lindsey, 148 So. 506 (La. App. 2d Cir. 1933) (court considered and rejected argument that joint tortfeasors were imperfectly solidarily bound, but it stated that if they had been, service of process on one would not have interrupted prescription as to the other).

183. See Foster v. Hampton, 381 So. 2d 789 (La. 1980) (holding that an employer and an employee are solidarily bound to the victim of the employee’s conduct; “distinction drawn between perfect and imperfect solidarity is untenable and must be rejected.” 381 So. 2d at 791.).


186. 281 So. 2d 724 (La. 1973).
And after prescription had run, plaintiff filed a second amending petition correcting the spelling of the employee's name, dismissing third party as a defendant, and naming Travelers as the insurer of the recently-named individual employee defendant. On established principles, the court overlooked the spelling error, and held that the timely suit against the individual employee interrupted prescription as to Travelers.

After Pearson, the problem was complicated by another multiple-defendant case, *Trahan v. Liberty Mutual Insurance Co.*

The plaintiffs were the widow and children of an individual killed in a salt mine accident. Their initial suit named six executive officers of the company which owned the mine and their insurers, Liberty Mutual and INA. At trial, a jury verdict was returned absolving all defendants of liability; the judgment entered on that verdict was affirmed, and the supreme court denied writs.

Within a year of the final judgment, but well over a year after the accident, the plaintiffs filed another suit against the same two insurance companies, alleging that a seventh executive officer was liable for the death and was insured by them. The insurers' exception of prescription was sustained by the trial court, but the appellate court reversed and remanded for trial. The supreme court granted writs and ultimately upheld the plea of prescription.

The case presented the reverse situation from *Pearson*. The obligor

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187. Suppose that the amending petition had been filed more than a year from the accident. If the third party were then dismissed because it had immunity from tort liability as a principal under La. R.S. 23:1032 (1950 & Supp. 1976), would the court still hold that there had been an interruption because the insurer had notice that someone was to be held accountable for the tort, although the "wrong" tortfeasor (the third party) had been timely sued? In *Rogers v. Payne & Keller, Inc.*, 392 So. 2d 109 (La. App. 1st Cir. 1980), cert. denied, 396 So. 2d 1327 (La. 1981), and *Gibson v. Exxon Corp.*, 360 So. 2d 230 (La. App. 1st Cir. 1978), cert. denied, 362 So. 2d 575 (La. 1978), the court held that when a principal immune from tort liability was timely sued and individuals not so immune were sued after prescription had run, there was no interruption of prescription as to the latter when the principal was dismissed on a summary judgment. However, *Baker v. Payne & Keller Inc.*, 390 So. 2d 1272 (La. 1980), may be inconsistent with this result. See text at note 198, infra.


190. The suit was brought at a time when the workers' compensation statutes permitted a tort suit to be brought against co-employees, such as executive officers of the same employer. Such suits were prohibited by amendment in 1976 to La. R.S. 23:1032.


timely sued, in plaintiffs' view, was the insurer; this suit interrupted prescription as to all insureds on the cause of action sued upon. Plaintiffs argued that the claim against the seventh executive officer was the same cause of action and thus the plea of prescription should have been overruled.

The supreme court apparently was unwilling to accept such a broad view. The appellate court had rested its decision on article 2097 of the Civil Code. It believed that the two insurers were solidarily liable to plaintiffs and that the first suit against Liberty had interrupted prescription as to INA and vice versa. The supreme court properly disagreed, noting that the two insurers were not solidarily liable with regard to plaintiffs. Only the joint tortfeasors, if any, would be solidarily liable to plaintiffs. The additional fact that a tortfeasor and his insurer are liable in solido to the victim did not produce the final leg of the triangle: solidarity between the insurers as to the victim.

Since the six executive officers sued in the first suit were absolved of any liability and thus were not obligated to plaintiff in any way—solidarily or otherwise—they could not be bound in solido with the additional executive officer upon whose alleged negligence the second suit was based. Without an interruption as to that additional executive officer, there was no interruption as to his insurers.

In the Trahan decision, the court found it necessary to distinguish an earlier appellate decision on similar facts. Simmons v. Travelers Insurance Co. involved a claim timely filed against four executive officers and a liability insurer. Some time later (more than a year after the accident), a supplemental and amending petition was filed, naming a fifth executive officer and alleging coverage by the same liability insurer. This officer interposed a plea of prescription as to his personal liability. This plea was rejected by the trial court, and its decision was affirmed by the appellate court. The appellate court, citing Pearson, held that the fifth officer and the insurer were or could be solidarily liable to the plaintiff and thus the initiation of the suit against the insurer had interrupted prescription as to the officer.

The Trahan court distinguished Simmons on two grounds. First, plaintiffs original petition in Simmons had named the insurer as a defendant “as general liability insurer of all the executive officers” of the corporation which employed the injured plaintiff, whereas in

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194. 295 So. 2d 550 (La. App. 3d Cir. 1974).
195. The language is the court’s in Trahan, 303 So. 2d at 609, and is apparently based upon paragraph 10 of plaintiff’s original petition. Although the allegation does not contain the word “all,” it does broadly allege existence of a policy “in favor of [the employer] and its executive officers.”
Trahan, the original petition named Liberty Mutual and INA as insurers only of the six named executive officers. Second, the joinder of the additional executive officer in Simmons had occurred prior to trial, whereas in Trahan, the second suit followed a first trial which had absolved all six of the individual defendants in the first suit.

A third decision of about the same vintage added to the problems. In Anderson v. Sciambra, plaintiff had been injured in a fall from a rear porch at his apartment. He timely sued the man he knew as his landlord and that man's insurer. More than a year after the injury, the landlord revealed that he had donated the premises to his daughter by an act recorded more than a year prior to the injury. Plaintiff amended the petition to name the daughter as a defendant, but the trial court sustained her plea of prescription and dismissed the suit against her father and his insurer on the basis of non-liability. The appellate court, however, reversed as to the insurer and, to the extent of the policy limits, as to the plaintiff. The appellate court also held that the suit against the insurer interrupted prescription as to the daughter to the extent of the policy limits.

With the exception of Trahan, these decisions probably can be reconciled. So long as there is a factual allegation of solidarity, a timely suit against the insured will interrupt prescription against the insurer (Pearson) or against an additional insured and the same insurer (Simmons). Similarly, a timely suit against the insurer will interrupt prescription as to a potential insured (Anderson). However, when the factual allegation of solidarity is disproved and some non-liable insureds are sued, no interruption occurs as to the insurer or an additional potential insured (Trahan). This latter result does not change when there are multiple insurers, since multiple insurers are not bound solidarily to the victim.

The disturbing aspect of these cases is the possibility that a claimant could sue an insurer timely, alleging coverage as to all potential tortfeasors, and then pick through the individuals, perhaps in successive trials, until the right one is found. The court's opinion in Trahan could be taken to indicate that successive trials would not be permitted, but there is no clear statement on the point.

Later decisions do nothing to dispel this disturbing implication of the jurisprudence. In Baker v. Payne & Keller, Inc, the family of a deceased employee brought suit against his employer and the

196. 310 So. 2d 128 (La. App. 4th Cir.), cert. denied, 313 So. 2d 835 (La. 1975).
197. The policy still named the parents as insureds, but the court said the naming of the parents as the insureds was a mutual mistake in light of the donation and treated the policy "as reformed to name the daughter as the insured." 310 So. 2d at 131.
198. 390 So. 2d 1272 (La. 1980).
employer's liability insurer (Maryland Casualty). The court held that the exclusive remedy against the employer was in workers' compensation and dismissed the proceeding as to the employer. However, the insurer was retained in the lawsuit, and plaintiffs were given fifteen days to amend and state a cause of action against the insurer. The amended petition was filed more than a year from the death of the employee and it named certain executive officers of the employer as defendants. Again, the petition named Maryland Casualty, this time as liability insurer of the executive officers. The court held that the original timely petition interrupted prescription as to the second claim, presumably on the ground that although the insurer first had been named in its capacity as liability insurer of a clearly non liable person (the employer), it was nonetheless somehow also named as the ultimate liability insurer of defendants who might be liable (the executive officers). *Trahan* was distinguished, but the decisions appear inconsistent.

Like *Trahan*, *Baker* appears to be a case in which the claimant first timely sued an insured who was not liable to him and, only after prescription had run, sued one who was or could be liable to him. In *Trahan*, the court viewed the naming of the insurer in the first suit as naming it only in the capacity of insurer of a non liable person, and thus this was not a ground for interruption of prescription. The court refused to do the same thing in *Baker*. The court seemed to ignore its own statement in *Trahan* that "a cause of action in tort has no identity independent from the defendant upon whose fault it is based." If this is true, the cause of action sued upon in the second petition in *Baker* was an entirely different one from that sued upon in the timely petition.

The *Trahan* decision also was distinguished in *Langlinais v. Guillotte*. Plaintiff had timely sued an individual defendant, as owner and operator of a vehicle, and his liability insurer. A general denial was filed, but later, the policy limits were deposited in the registry of the court. Still later, the defendant moved for summary judgment on the ground that his daughter, rather than he, had been the driver of the offending vehicle. When plaintiff amended the petition to allege a cause of action against the father as the administrator of the child's estate, a plea of prescription was filed. Both lower courts sustained the plea. The supreme court overruled the plea, primarily on the ground that the amendment could relate back to the filing of the original petition because both the insurer and the father had ample notice that in some capacity, they were to be held accountable for the incident in which plaintiff was hurt.

The ground of distinction from *Trahan* was said to be that only one law suit was involved in *Langlinais* and it was against the same defendant, although in different capacities. It is true that two different law suits were involved in the *Trahan* matter, but still, they were against the same defendants (INA and Liberty Mutual) in different capacities—originally, as insurers of some executive officers and, later, as insurers of different executive officers.

These decisions and distinctions reveal a wavering but nonetheless clear course toward a treatment of interruption of prescription as primarily a matter of basic fairness and accuracy. Despite the discussion in *Trahan* about separate causes of action, prescription has very little to do with the definition of causes of action. A prescriptive statute is intended to encourage prompt resolution of disputes by giving adequate notice to the proposed defendant and by avoiding undue prejudice to his defense of the claim made against him. Since all of the decisions but *Trahan* involved the naming of additional defendants long before trial, in some instances simply in a different capacity, it is difficult to demonstrate any prejudice in the liberal interpretation of prescription statutes through the device of solidary liability between insurer and insured.

However, when, as in *Trahan*, plaintiff is asking for a second bite at the apple after choosing the wrong individual "tortfeasors" in the first suit, potential prejudice to the insurer becomes an important factor. What the court may have foreseen in *Trahan* was the possibility that an insurer which had gone to trial on the merits once would be forced to do so over and over again so long as the plaintiff could continue to uncover potential "tortfeasors." This becomes a matter of res judicata rather than prescription, but since Louisiana's notion of res judicata is so narrow, sustaining a plea of prescription was the next best alternative.²⁰¹

These decisions, then, seem to foster the public policy with which the Direct Action Statute is infused. We have written various things into the liability insurance contract by statute, and one of these is the substantive nature of the solidary liability between the insured and the insurer to the victim. Thus it is understandable that we consistently hold that when the victim timely sues the "right" tortfeasor, he interrupts prescription as to any excess liability of the tortfeasor and interrupts prescription as to an "answerable" defendant, such as the insurer. This is consistent with the rule regarding sureties, who, like insurers, agree to a contingent liability for a fee and as to whom

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²⁰¹ This had happened before. See Wooten v. Wimberly, 272 So. 2d 303 (La. 1973), in which the court dealt with the issues under the heading of prescription when prior adjudication and some form of issue preclusion were the real reasons why plaintiff's second suit was turned away.
prescription is interrupted when the principal debtor is sued.\textsuperscript{202} If, on the other hand, the plaintiff sues the "wrong" tortfeasor and one so "wrong" that the error prejudices the insurer's right to make a reasonable defense, there is no strong policy requiring us to correct plaintiff's mistake for him.\textsuperscript{203}

The interruption which flows in the other direction is less clearly supportable. If an insurer is timely sued, the interruption of prescipation as to the wrongdoer sued after the prescriptive period has expired is only as to the amount within the policy limits. Since an insurer is only liable up to the policy limits, it could hardly be a solidary obligor with the tortfeasor as to the excess over the policy limits. Presumably, the tortfeasor in this instance may plead prescription successfully as to any amount over the policy limits. This leaves us with the anomalous result that the "interruption" does not actually threaten the later-sued wrongdoer at all. But the "interruption" could threaten other "answerable" defendants, such as another insurer or a vicariously liable defendant such as a parent or an employer, unless the court abides by its position in \textit{Trahan} and other cases that these other "answerable" defendants are not solidarily bound with the timely-sued insurer.

The conclusion that suit against the insurer interrupts prescipation as to the insured within the policy limits is not consistent with the treatment of a surety, for suit against the surety does not interrupt prescription against the principal debtor. The conclusion makes it clear that while insurance shares aspects of suretyship and the rules of solidarity, the latter governs the disposition of issues of prescription.

\textit{Release of Insured and Retention of Rights}

That the rules of solidarity, rather than those of suretship, dominate the interpretation of the insurance contract is made clear in the situation of release of the insured and retention of rights against the insurer. If the liability of the insurer were truly contingent, derivative, or secondary, the release of any rights against the insured automatically would dictate the conclusion that there are no further rights against the insurer. Were the liability of the insurer identical to that of a surety or a vicariously liable defendant, this result would

\textsuperscript{202} \textit{LA. CIV. CODE} art. 3553.

\textsuperscript{203} See \textit{Osborne v. Callegan}, 384 So. 2d 567 (La. App. 4th Cir. 1980) (plaintiff timely sued Mr. Callegan and Allstate Insurance, only to discover several years later that the driver was Mrs. Callegan and the two were judicially separated; after amending to name the wife as the operator and agent of Mr. Callegan, plaintiff claimed that the first suit had interrupted prescription as to Allstate in its capacity as insurer of Mrs. Callegan; the court rejected the argument and held that the suit against Mrs Callegan and Allstate had prescribed).
have to follow. Yet the courts consistently have emphasized the solidary nature of the obligation existing between the insurer and the insured to the victim and noted that a creditor may release one of multiple solidary obligors while retaining rights against the others.

Thus it has been held that the release of the insured does not release the insurer, so long as rights are retained against the latter. This result demonstrates again how the liability insurance contract is so infused with public policy that it does not fit comfortably within the traditional principles of the Civil Code. Even though retention of rights against the insurer as a solidary obligor might be authorized by the Civil Code, the rights of the creditor would be reduced by "the part" of the debtor whom he released. But "the part" of the insured within the policy limits, as we have seen, is nothing, for all practical purposes. Beyond the policy limits, there is nothing further to collect from the retained debtor (the insurer). Thus the victim gets the benefit of solidarity as opposed to suretyship (he can release the insured and retain the insurer), but he need not suffer any reduction in the "solidary" obligation.

This is not, however, as unfair as it seems. The surety's obligation is extinguished when the principal debtor is released because the surety's right of subrogation against the debtor for any amounts paid to the creditor is destroyed. The liability insurer, on the other hand, has no such right of subrogation against the insured, and therefore it suffers no loss when its "solidary co-debtor" is released. Thus the true rationale is that no reduction of any of the insurer's liability is needed, because unlike other solidary debtors, its rights are not affected by the release of a "co-debtor." When added to the law's traditional encouragement of amicable settlements, this rationale is sufficient to override the "contingent" liability of the insurer for its insured's conduct and the "suretyship" result which would follow from such a characterization.

**Problems of Settlement**

The preceding sections have revealed the extent to which the in-

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205. See Cunningham v. Hardware Mutual Cas. Co., 228 So. 2d 700 (La. App. 1st Cir. 1969). If the victim fails to reserve his rights against the remaining solidary debtors, however, they are lost on the authority of LA. CIV. CODE art. 2203. See Danzy v. United States Fidelity & Guar. Co., 380 So. 2d 1356 (La. 1980) (settlement with and release of federal government and its employee without reserving rights against the latter's insurer released the insurer as well).
surance contract has been modified by the interpretations given to the Direct Action Statute by the courts over the years. We have seen that although a direct action by the injured party is authorized "within the terms and limits" of the policy, some of these terms and limits are nullified by the statute. The insurer cannot expect to enforce a "no action" clause contained in the policy, as that would completely frustrate the primary intent of the Direct Action Statute. The insurer cannot assert against the claimant policy violations such as failure of the insured to give notice or to co-operate in the defense of the case, absent a showing of prejudice or fraud arising from such conduct. Of course, the insurer cannot assert certain defenses deemed "personal" to the insured in our jurisprudence, even though a reasonable interpretation of the policy language might otherwise allow them to be raised. All of these results can be and have been justified in the name of enforcement of the strong public policy expressed in the Direct Action Statute that the policy exists primarily for the protection of the injured person or the public in general, rather than the insured.

Some "terms and limits" of the policy nonetheless are enforceable, especially when they are supported by interests of the insurer and the insured which must be taken into account. Generally speaking, an insurer is entitled to specify what coverages it undertakes and under what conditions, so as to exclude overlapping coverage and assist in the calculation of appropriate premiums for the risk undertaken. And generally speaking, the insurer is entitled to limit the amount which it is required to pay upon the occurrence of the insured risk, i.e., the insurer is allowed to set the "policy limits."

The insurer's right to contain its exposure within the policy limits in the case of settlement and the impact of the Direct Action Statute on this right is the topic for discussion in this section. Here one finds the clear conflict of several very strong public policies. Unlike the outcome in the instances discussed in the preceding sections, the interest of the injured party expressed in the Direct Action Statute here yields to other important interests.

Certainly the Direct Action Statute expresses the strong interest of society in making available to an injured party a fund out of which he may be compensated. Some of the language of the statute itself may be pointed to in support of this proposition. However, where

206. See text at notes 12-13, supra.
207. See text at notes 99-116, supra.
208. See text at notes 120-165, supra.
209. "It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors
there are multiple claimants to the insurance fund whose claims will more than exhaust the agreed-upon limit to the fund in the insurance contract, the interest in protecting the insured against financial catastrophe through an excess judgment becomes acute. Moreover, if the insurer is discouraged from amicably settling claims by the fear that other claimants will be entitled to judgments which will make the aggregate amount paid exceed the policy limits, it may well respond by refusing to settle any claims at all. This runs afoul of one of the strongest policies in the law: encouragement of amicable settlement of disputes.

Problems of settlement in this context do not arise until there are three or more claimants to the fund created by the available limits of a liability policy. If only one claimant is involved, there can be no question of preferential settlements or exhaustion of the fund without accounting for the injured party's claim. The same is ordinarily true of the claims of two injured persons. Most policies have a limit of claims for any one accident which is twice that of the limit for the claim of any one person. Thus two claims may be paid under the applicable limits without prejudice to either.

But when three or more claimants present claims which would carry the insurer beyond the policy limits, some adjustment of the various conflicting interests must be made. Louisiana and other states have imposed upon the insurer the duty to settle claims made against it and the insured in good faith. The insurer risks the possibility of a judgment against it for the ultimate amount awarded to the claimant, perhaps well beyond the policy limits, if its conduct in failing to settle within the policy limits is deemed to be negligent or in bad faith. This is a substantial sanction, and it exists not only for the or heirs, to whom the insured is liable . . . ." LA. R.S. 22:655 (1950 & Supp. 1958 & 1962).

210. Claims for property damage, however, usually have a single monetary limit. In this instance, two claims could present a problem if most or all of the fund is used to pay one claim in preference to the other.


212. See Ward v. State Farm Mut. Auto. Ins. Co., 539 F.2d 1044 (5th Cir. 1976) (affirmed $521,375 plus interest and costs awarded by jury for violation of duty to settle, subject to credit for $10,000 policy limit paid).

protection of the company's fisc but also for the protection of the financial interests of the insured. Thus the company is virtually required to seek out reasonable settlements, permitting it to "buy up" the claims against its insured at a good price if it is reasonable to do so.

At the same time, the purchase of these claims is gradually exhausting a limited supply of money, and this opens the possibility that an unsatisfied claimant may appear and argue that his rights under the Direct Action Statute are not being respected. The insurer's dilemma is clear. Should it follow the course of protecting its insured's interest through economical purchase of such outstanding claims as it can settle, hopeful that its policy limit will nonetheless be respected; or should it refuse to settle, on the plausible argument that it risks excess judgments beyond the policy limits against itself if it does so and leaves some claimant partially satisfied or totally unsatisfied? Is there some middle ground?

These questions have not often been presented to the Louisiana courts, but the discussion has been vigorous when they have appeared. The supreme court first faced the problem in Richard v. Southern Farm Bureau Casualty Insurance Co., which remains the jurisprudential rule at this writing. A two-car collision ultimately was judged to be the fault of only one driver, a Mrs. Richard. Her daughter and a friend were passengers in the Richard vehicle, which was insured by Southern Farm. Claims against Southern Farm were asserted by the daughter, the guest passenger, and the driver of the other vehicle. The compensation carrier of the employer of the driver of the other vehicle also asserted its right to reimbursement for the workers' compensation payments made to the other driver.

The Southern Farm policy imposed a $10,000 limit on the coverage for claims arising from any one accident. Prior to trial of any of the claims, Southern Farm settled with the guest passenger, the other driver, and the compensation carrier. These settlements totalled $6,227.39, leaving only $3,772.61 for the claim of the daughter. The trial court awarded that amount on the basis that the policy covered the negligent driving of the mother but the policy limit was applicable to the claim. There was no serious contention that the settlements were unreasonable or not made in good faith. The appellate court was urged to hold that the Direct Action Statute and prior judicial limitations on the terms of a policy in cases such as West v. Monroe Bakery

216. 217 La. 189, 46 So. 2d 122 (1950).
and *Futch v. Fidelity & Casualty Co.*217 required the conclusion that the daughter acquired a vested right to a proportionate share of the $10,000 fund immediately upon her injury. Thus the insurer's failure to initiate a concursus proceeding to permit judicial allocation of the fund according to the proportion of loss suffered by each claimant "waived" the policy limit. The court rejected this argument, noting that the strong public policy favoring compromise would be in jeopardy if insurers' ability to settle were so limited.218

The supreme court granted certiorari limited to the question of whether a liability insurer faced with multiple claims could in good faith enter into reasonable settlements with some of the claimants, even though payments to them might reduce or completely exhaust the insurance fund originally available to all claimants. Properly treating the issue as res nova, the supreme court noted that nothing in the Direct Action Statute guaranteed one of several persons injured in an accident a fixed proportional share in the proceeds of the policy.219 Again, the strong societal interest in amicable settlement of controversies and its concomitant protection of the interest of the insured to avoid catastrophic excess judgments seemed decisive:

> The [appellate] court correctly found that it should . . . follow the general rule [respecting the policy limits] when, as here, the settlements are made in good faith and are reasonable. For compromises are favored under the law and, by making such settlements, the amount for which the insured tortfeasor may be held liable is ultimately reduced where the policy limits are insufficient to cover the total damages, and this is in keeping with the responsibility of the insurer to its insured under the law.220

The court added, almost as an afterthought, that no reasonable procedural vehicle existed for the insurer to have sought judicial resolution of the conflicting claims according to proportionate shares. The existence of declaratory judgment as a means to that end was erroneously dismissed as a possibility by the court,221 and the concursus article of the Code of Civil Procedure appeared to require that

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217. 246 La. 688, 166 So. 2d 274 (1964). See text at note 107, supra.
219. 254 La. at 437, 223 So. 2d at 861.
220. 254 La. at 437-78, 223 So. 2d at 861.
221. It failed to note that Burton v. Lester, 227 La. 347, 79 So. 2d 333 (1955), which had held that a declaratory judgment was not available when any other remedy was available to the plaintiff, had been legislatively overruled by the enactment of La. Code Civ. P. art. 1871. Thus the fact that one of the claimants had filed a damage suit or could do so would no longer make any difference as to the availability of the declaratory judgment vehicle.
the insurer admit liability in order to invoke such proceedings.\textsuperscript{222} In any event, initiation of a concursus proceeding would require all parties to resort to litigation in order to collect anything.

With the court's pronouncement in \textit{Richard}, attention shifted to the question of whether settlements which reduced the fund to a claimant's detriment were unreasonable or made in bad faith and the collateral question of the burden of proof on the issue. In \textit{Jack v. Jack},\textsuperscript{223} the insurer had used all but $500.00 of the $10,000 policy limit to satisfy other claims, leaving only plaintiff's claim to be tried. Plaintiff was awarded a judgment for that amount, but he insisted that the insurer had the burden of showing that the settlements which left only that remainder were reasonable. Plaintiff wanted the insurer to produce the actual claimants and their doctors, as well as any other information which would support the reasonableness of the settlements. The court refused to place the burden of proof on the issue of reasonableness on the insurer, noting a presumption that "all men act fairly, honestly, and in good faith." The court also made the telling observation that it would be difficult to conclude in any event that "in making settlements an insurer is going to pay out more than necessary."\textsuperscript{224}

In \textit{Wright v. Romano},\textsuperscript{225} the court held that it was reasonable for the insurer to pay the medical expenses of one potential claimant and then initiate a concursus proceeding to determine the remainder of the claims. The fact that such a settlement dictated that an amount less than the total fund would be deposited in the registry of the court did not make the settlement unreasonable. In appropriate instances, the reasonableness of a settlement may be so clear that summary judgment is appropriate.\textsuperscript{226}

The insurance industry may have collectively held its breath, however, in 1977 after the supreme court overruled \textit{Richard} in the original hearing in \textit{Holtzclaw v. Falco, Inc.}\textsuperscript{227} Two vehicles collided, causing damage to both and to a nearby service station owned by

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\item \textsuperscript{222} \textit{La. Code Civ. P. art. 4652} (emphasis added):
No claimant may be impleaded in a concursus proceeding whose claim has been prosecuted to judgment. No person claiming damages for wrongful death or for physical injuries may be impleaded in a concursus proceeding, except by a casualty insurer \textit{which admits liability} for the full amount of the insurance coverage, and has deposited this sum into the registry of the court.
\item \textsuperscript{223} 240 So. 2d 435 (La. App. 3d Cir. 1970).
\item \textsuperscript{224} \textit{Id.} at 436.
\item \textsuperscript{225} 279 So. 2d 735 (La. App. 1st Cir.), \textit{cert. denied}, 281 So. 2d 757 (La. 1973).
\item \textsuperscript{227} 355 So. 2d 1279 (La. 1977).
\end{itemize}
Exxon and leased to Holtzclaw. Hartford provided liability coverage for property damage for the driver at fault, subject to limits of $5,000.00. Hartford settled with the owner of the other vehicle and with Exxon and its insurer, exhausting the policy limits completely. The lessees of the service station filed suit for damages, but the court of appeal reversed a judgment against Hartford on the authority of Richard.228

On original hearing, the supreme court majority took the road not traveled in Richard. It held that the insurer's authority to settle claims under the contract could not override the right of the claimant under the Direct Action Statute to access to the insurance fund. The court concluded that a victim's right to reimbursement became fixed at the time of the injury and, as a litigious right, was property of which the injured person could not be deprived by a settlement over which he had no control. There were three dissents.

On rehearing, the court reversed itself and reinstated the decision of the court of appeal. Restoring Richard to authority, the court held that the insurer may enter into reasonable and good faith settlements to be credited against its policy limits even though such settlements exhaust the insurance available to other claimants. The dispute then reverted to the customary question of whether the settlements were reasonable and in good faith.

The majority opinion on original hearing had not reached the question of good faith because it believed the statement made to the jury about the right to exhaust the policy limits was erroneous. However, on rehearing, the majority reached and decided the question in the insurer's favor. The accident had occurred in March, and about a month later, the insurer wrote to all the potential claimants asking that they submit the amount of their claims, together with supporting documents. Only Exxon responded. About four months after the accident, the insurer wrote the same parties again, giving them thirty days to respond. The letter noted that if there was no agreement on the claims, the policy amount would be deposited in the registry of the court for distribution.

Holtzclaw gave the second letter to his attorney, but apparently he never replied. Settlements were reached with all the others a full five months after the second letter was sent, but Holtzclaw did not participate. Under the circumstances, the court concluded that plaintiff had not shown that the insurer acted unreasonably or in bad faith in reaching these settlements.

The result in Richard and Holtzclaw thus leaves the insurer with

the right to diminish or even exhaust the insurance fund with reasonable, good faith settlements. Several of the justices in *Holtzclaw* apparently were willing to support a middle ground, guaranteeing to the unpaid claimant not his full claim but a proportionate share of the proceeds according to the ratio of his claim to the total potential claims.\(^\text{229}\) This has a certain attractiveness to it. It would still encourage settlement, since the claimant might get more of his claim paid through that route than he would through litigation and award of a proportionate share of the fund. It would give the claimant a portion of a loaf rather than none of it, if the insured should prove to be insolvent; and it would offer protection to the insured against at least a part of an excess claim which might be brought by the unpaid claimant.

However, on balance, the fixed proportionate share solution would create more problems than it would solve. A guaranteed share of the settlement proceeds would effectively eliminate in many instances the insurer's ability to negotiate the release of its insured from multiple exposures beyond the policy limits. In addition, the inability to determine the "share" of each claimant would preclude settlement with fewer than all claimants, since a mistake in evaluation would expose the insurer to judgment in excess of its policy limits. There are as many variations of this theme as there are accidents resulting in exposure beyond the policy limits. However, for one example, suppose \(A\) was the driver and \(B\) and \(C\) were guest passengers in an automobile involved in an accident with an automobile driven by \(D\) at an uncontrolled intersection. \(A\) had the statutory right of way, but there is a serious issue whether his speed and inattention were contributing causes of the accident. \(D\) has automobile liability insurance with a single limit of $25,000 applicable to the accident. \(A\)'s claim has a judgment value of $25,000, which may be defeated by his contributory negligence. \(B\)'s claim is worth $25,000. The cause of \(C\)'s disabling condition is in dispute, and his claim may have a judgment value of as little as $15,000 or as much as $30,000. Without a definitive judgment, how could the insurer determine the proportionate share of each claimant? If he were guaranteed a proportionate share, \(B\) would have little incentive to participate in a settlement with \(A\) and \(C\) unless he received the lion's share of the proceeds. However, if all claims could not be settled, it clearly would reduce the insured's excess exposure to settle any two of the claims, even if such settlements ex-

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229. If the policy limits are $10,000, there are four potential claimants, three of these claims are settled for a total of $10,000, exhausting the fund, the fair value of all four claims taken together would have been $20,000 and that of the unsatisfied claimant alone would be $4,000, then he is entitled to $2,000 (the same share of the fund as his claim was of the total claims).
hausted the policy limits. More importantly, this right to settle with fewer than all claimants usually gives the insurer the necessary leverage to negotiate settlement with all claimants.

Moreover, the insurer faces difficult procedural obstacles in carrying out the proportionate-share concept. A concursus proceeding ordinarily will not be available.\(^{230}\) A declaratory judgment proceeding might be a solution, but it is discretionary and might not be permitted where other remedies are available.\(^{231}\)

Perhaps most importantly, there is no clear authority for granting a claimant a guaranteed share of the fund. Ordinarily, the property of the debtor (the insurer) is the common pledge of all the creditors,\(^{232}\) and only a specific grant of mortgage, privilege, or other preference will permit one of the debtors a guaranteed portion of the fund.\(^{233}\)

The real problem is that the interests of the individual and collective injured parties are in substantial conflict with the interest of the insured, which the insurer is bound to protect to the extent compatible with the Direct Action Statute. Even the result reached in Richard and Holtzclaw does not completely protect the interest of the insured. His insurer is able to protect his interest by buying some claims at a cheaper price than might result through litigation and thus

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230. See LA. CODE CIV. P. art. 4652, which requires an insurer to admit liability and deposit the policy limits in order to initiate a concursus proceeding. Comment (c) to the article states that the reason for the requirement is to prevent an abuse of the proceeding by the tortfeasor or his insurer so as to deprive claimants "of their right of separate suits against the tortfeasor or his insurer, to select the jurisdiction and the venue, and to a trial by jury." One decision appears to approve the use of a concursus proceeding by an insurer despite a failure to admit liability, but its strength may be doubtful. In Wright v. Romano, 279 So. 2d 735 (La. App. 1st Cir.), cert. denied, 281 So. 2d 757 (La. 1973), the tortfeasor was the employer of an entity which was insured by Travelers and INA. The tortfeasor himself was insured by Fireman's Fund. Fireman's Fund had paid a very small portion of its $50,000 limits for the medical expenses of one claimant. After the first of multiple claims was filed, Fireman's Fund answered and deposited the remainder of the policy limits in the registry of the court to initiate a concursus proceeding. It specifically refused to admit liability of its insured, arguing that its duty to represent its insured would be violated by doing so. The court upheld the validity of the concursus proceeding. It should be noted, however, that all three potential claimants were before the court and counsel had stipulated that the matters could be consolidated. Thus the evil at which article 4652 was written was not present. Moreover, because of the presence of substantial coverage by Travelers and INA for the employer as a sort of "excess" for the tortfeasor himself, the insured had no real exposure and his interests were not compromised by the concursus proceeding by his insurer.

231. LA. CODE CIV. P. art. 1871.

232. LA. CIV. CODE art. 3183.

233. LA. CIV. CODE art. 3184. See, for example, LA. R.S. 9:4581 (1950), which explicitly provides a privilege on fire insurance proceeds for the vendor of a movable,
is able to reduce his exposure on those claims to nothing at all if the insured is released in the settlement. But the exhaustion of the fund leaves him with no protection at all on the outstanding claims. He is almost totally dependent upon the wisdom of his insurer's course of action, although his own financial interests are at stake. The insurer must consider not only the amount of the claims involved but their possibility of success. In most cases, it should work toward a reasonable settlement of those which are probably valid, so long as the amounts claimed are not extravagant. It will thus leave for litigation the ones it has a chance of winning. But of course, the "loss" of these cases after the policy limits are exhausted is not a "loss" at all to the company, but only to the insured.

The insured is a party at interest in the exhaustion-of-fund dispute and should be separately represented. The insurer has a conflict of interest here even more clearly than it does in the ordinary situation in which an excess judgment is a possibility. So long as the decisions in Richard and Holtzclaw remain the standard, the insurer can follow its own reasoned judgment in making settlements and expect to be protected against any awards beyond the policy limits. But if a future decision should arrive at the fixed-proportionate-share concept, insurers will have to re-examine their settlement practices. It might then be worthwhile to bear the cost of additional counsel for the insured and to urge the court to consider a declaratory judgment in favor of the insured and the insurer, dividing the claims within the policy limits.

It is not a good approach for the insurer to play safe as against the victims by refusing to settle any claims, leaving all matters to be determined by litigation. There is no risk of the policy limit being exceeded in favor of the claimants, but there is the serious risk of a judgment in favor of the insured against the insurer for failure to make reasonable settlements within the policy limits. So long as there is a substantial sanction against unreasonable failure to settle, the insurer must be wary of absolute no-settlement stances. And concomitantly, it must be protected against awards over the policy limits when it aggressively pursues settlements which diminish or exhaust the fund. Moreover, abject refusal to settle will contravene the strong policy favoring settlements. The decision to limit the claimants to the fund available has made an impact on other areas of insurance law. The liberal interpretation of uninsured motorist coverage and the rapid rise in the amount of coverage purchased by drivers for harm caused by uninsured or underinsured motorists can be traced in part to the limitation enforced on the liability fund. If the unsatisfied claimant

234. Unless there should be a clause providing that no settlement may be made without his consent.
will be unable to receive reimbursement through the liability coverage or the tortfeasor himself, he is entitled to provide in advance for that eventuality in his own (or someone else's) uninsured motorist coverage.\textsuperscript{235} This of course raises other interesting questions beyond the scope of this section. If the unsatisfied claimant is either dilatory or recalcitrant in pursuing a possible claim to settlement against the liability carrier, can he justifiably claim that the tortfeasor was “uninsured” or “underinsured”?\textsuperscript{236}

\textbf{AVAILABILITY IN OTHER ACTIONS AND TO OTHER CLAIMANTS}

The question has arisen from time to time whether the right of direct action granted by 22:655 is available in a proceeding other than an ordinary tort action and to a claimant other than one seeking redress for personal injury. The statute itself, referring to the “true” right of direct action, states simply that “the injured person... shall have a right of direct action against the insurer within the terms and limits of the policy.” The more limited right of direct action after insolvency or bankruptcy, on which this “true” direct action is based, speaks of “payment of damages for injuries sustained or loss occasioned during the existence of the policy” and an action after insolvency by the “injured person.” Its sanction was aimed at issuance of a contract of “liability insurance” which did not provide for these rights of action.

There is little doubt that the legislators were thinking of ordinary tort-induced injuries resulting from automobile accidents, and the great bulk of the actions brought directly against insurers are the result of automobile accidents, even today. But obviously tort remedies arise from many sources other than automobile accidents. Moreover, some causes of action may be a mixture of “tort” and “contract,” to the point that it is unclear which remedy predominates.

The first extension of the right of direct action beyond the individual physically injured by the conduct of the insured was to the category of legal persons suffering property damage.\textsuperscript{237} The next ex-

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\item \textsuperscript{235} If there are multiple claimants to that fund, the policy reasons which suggest that the liability insurer should not be bound beyond the policy limits do not necessarily apply. There may be a stronger argument for the proportionate guaranteed share where uninsured motorist claims are at issue. See Manieri v. Horace Mann Mut. Ins. Co., 350 So. 2d 1247 (La. App. 4th Cir. 1977); Wilkinson v. Fireman’s Fund Ins. Co., 298 So. 2d 915 (La. App. 3d Cir. 1974), appeal dismissed, 309 So. 2d 657 (La. 1974); McKenzie, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Insurance, 39 LA. L. REV. 825, 829-30 (1979).
\item \textsuperscript{236} See generally McKenzie, Louisiana Uninsured Motorist Coverage—After Twenty Years, 43 LA. L. REV. 691 (1983).
\item \textsuperscript{237} Department of Highways v. Lykes Bros. S.S., 209 La. 381, 24 So. 2d 623 (1945).
\end{itemize}
tension was in the automobile context. Despite earlier appellate decisions to the contrary,238 several courts of appeal239 and, finally, the supreme court240 held that an insurer which had paid its own insured the amount of his loss (such as under collision or medical payments coverage) and became subrogated to his rights241 could proceed in a direct action against the liability insurer of the alleged tortfeasor.

In each case, the rationale was similar. Subrogation to the rights of the insured as the creditor of the tortfeasor was not forbidden by the Direct Action Statute or by any pertinent Civil Code article. Absent such a prohibition, there was no reason why the insurer should not be entitled to whatever rights its own insured might have had.

This was a reasonable interpretation of the statute, and it probably permitted Louisiana to avoid the circuitous and inefficient method of "loan receipts" to accomplish the same purpose.242 If Louisiana per-


239. Motors Ins. Corp. v. Employers' Liab. Assur. Corp., 52 So. 2d 311 (La. App. 1st Cir. 1951); Fidelity Guar. Fire Corp. v. Varisco, 44 So. 2d 226 (La. App. 1st Cir. 1950) (the court hedged by noting that the tortfeasor was also a defendant and the insurer admitted that it would have to pay plaintiff if its insured were liable).

240. Home Ins. Co. v. Highway Ins. Underwriters, 222 La. 540, 62 So. 2d 828 (1952); See also Carlson v. Eckert, 73 So. 2d 638 (La. App. 2d Cir. 1954) (court recognized that its decision in World Fire & Marine Ins. Co. v. American Auto. Ins. Co., 42 So. 2d 565 (La. App. 2d Cir. 1949), had been effectively overruled and that the subrogated insurer could proceed directly against another insurer, but the court held that the claim was prescribed when the only timely action was brought against the insurer by the subrogor, who had settled his claim, and thus there was no interruption of prescription).

241. Probably conventional subrogation rather than legal subrogation under LA. CIV. CODE art. 2161, since the latter often has been denied to insurers. See Courtney v. Harris, 355 So. 2d 1039 (La. App. 4th Cir. 1978); Johnson, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Obligations, 39 LA. L. REV. 675 (1979). In support of its decision, the court in Motors Ins. Corp. v. Employers' Liab. Assur. Corp., 52 So. 2d 311 (La. App. 1st Cir. 1951), cited a statement from Corpus Juris Secundum and three Louisiana cases which would lead one to believe that legal subrogation occurred upon the payment, regardless of the policy language. The three Louisiana cases do not support the proposition, however, since they all apparently involved express language in the policy antedating the payment and calling for subrogation upon such a payment.

242. A loan receipt is a technique by which an insurer could pay its own insured by means of a "loan" collectible only if the insured ultimately won a law suit against the tortfeasor or his liability insurer. In this way, the insured could discharge its obligation to its own insured and not risk the prejudice which might befall it if it appeared as plaintiff in a subrogation case. Had Louisiana refused to permit a direct action by a subrogated insurer, the "loan receipt" device might have become more promi-
mits (as it does) an insurer to be subrogated to the rights of its insured against an individual tortfeasor (including, obviously, a right of direct action), there is no reason to deny the same right as against an equal adversary—another insurer.

The extension of the right of direct action by subrogation did not change the type of action for which such right existed; it only authorized additional persons to assert that same right. It remained to be seen whether “liability” insurance would be interpreted so broadly as to include any loss suffered by a claimant or whether it would be limited to those instances in which the loss was traceable to tortious conduct on the part of the nominal insured. In an early case, a direct action was denied to a bank depositor against the bank’s “blanket bond” surety. The depositor alleged that he had delivered certain bonds to a bank employee for safekeeping but that they were converted by the employee to his own use. The court saw the action as one wholly in contract and concluded that the plaintiff, as a non-party to the contract, had no rights under it. It characterized the Direct Action Statute as applicable to “accidents and damages for the injuries sustained or the losses occasioned thereby.” It should be noted that the plaintiff was under a significant handicap in pleading the case. If he convinced the court that his was a “tort” claim and thus possibly under the Direct Action Statute, his claim might have been prescribed. Saving the claim from prescription by arguing it was in contract probably cost him the right of direct action against the surety.

There was a similar result in another case involving a blanket bond issued to a bank, when the dispute was between the bank and its depositor over a misplaced deposit. The court concluded that no right of direct action could lie against the surety, since the matter was wholly one arising out of the contract between the bank and its depositor.

It slowly developed that the courts' view of the scope of the Direct Action Statute was that its reach was coterminous with recovery in “tort.” As we know, this may cover a multitude of sins. One court inadvertently stated that the Direct Action Statute applied only in cases of recovery under Civil Code article 2315. So long as one

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244. 184 La. at 665, 167 So. at 184.
understands this article in the broad sense as the fountainhead of all tort recovery in Louisiana, this would give it a broad field of application indeed. But if narrowly construed, the remark could lead to an exclusion of causes of action arising under articles 2317 through 2322 of the Civil Code. No one has seriously contended that the latter argument should prevail.

Understandably, the requirement that the claim sound in tort has been liberally construed. Thus a right of direct action has been recognized against the errors-and-omissions insurer of a clerk of court and an insurance agency, against a legal malpractice insurer, and in a products liability claim combining a redhibition theory with tort. In each instance, it was argued that the claim might also or might only sound in contract, but the court correctly observed that the same act might permit a remedy in contract and in tort. As to the latter, the Direct Action Statute permitted the aggrieved party to proceed directly against the insurer. Even tort claims against marine insurers may be brought by a direct action, despite a specific statutory provision to the contrary.

The only aberration in this trend of liberal interpretation of the extent of the Direct Action Statute is the treatment of contracts of re-insurance. In Fontenot v. Marquette Casualty Co., an appellate court, when first faced with the problem, construed the contract of re-insurance entered into between an insolvent liability insurer and its re-insurer as "liability" insurance rather than "indemnity" insurance. As such, the re-insurer was held subject to the right of direct action by the persons injured by the conduct of the driver insured by the now-insolvent insurer. The result was criticized, and

248. Ralston Purina Co. v. Cone, 304 So. 2d 735 (La. App. 2d Cir. 1974).
251. Champion v. Panel Era Mfg. Co., 410 So. 2d 1230 (La. App. 3d Cir. 1982); see also Davis v. Poelman, 319 So. 2d 351 (La. 1975) (direct action permitted against liability insurer of depositary, even though court seemed to base the depositary's responsibility on a non-tort basis).
254. 235 So. 2d 631 (La. App. 4th Cir. 1970).
255. This is the original direct action problem seen from another viewpoint. The shift from "indemnity" insurance to "liability" insurance as to the injured party was demonstrated by the enactment of the Direct Action Statute. Here the question is whether a reinsurer undertakes to indemnify an insurer for the loss it actually suffers or undertakes to stand ready to pay its liabilities yet unrealized.
256. Note, Insurance—Reinsurance—Direct Action Against Reinsurer on Insolvency
the supreme court reversed. In its opinion, the supreme court emphasized that most re-insurance was against actual "loss" by the insolvent insurer and not "liability" of that insurer. There is in the Louisiana statutes a prohibition against no-direct-action clauses in re-insurance contracts, but it is limited to situations in which the re-insured amount is in effect entirely removed from the financial structure of the first insurer. The supreme court agreed with the re-insurer that the pertinent statute granted the right of direct action only when the re-insurer agreed "to assume and carry out directly with the policyholder any of the policy obligations of the ceding insurer."

The wisdom of the supreme court's decision could be debated at some length, but the consequences of the result probably were blunted by the enactment at about the same time of the Insurance Guaranty Association Law. Its purpose is to protect the claimants having rights against insolvent liability insurers by establishing a fund to satisfy those claims. In theory, a claimant would find it unnecessary to attempt to reach a re-insurer, if it existed, and thus the motivation to attempt to change the decision of the supreme court in Fontenot is low. Thus we may expect that Fontenot probably will remain the law, although its importance is radically diminished by the establishment of the fund.

**Availability in Other Jurisdictions**

The fact that the Louisiana Direct Action Statute is one of a very few such statutes in the United States makes it inevitable that dif-

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of Reinsured Liability Insurer, 45 Tul. L. Rev. 648 (1971). The author's criticism was directed at the preference granted by the decision to some of the insurer's creditors (those falling with the provisions of the Direct Action Statute), when the proceeds of the reinsurance contract were probably intended for all of the creditors.


258. This is consistent with the position taken in the very early case of Egan v. Fireman's Insur. Co., 27 La. Ann. 368 (1875), in which the court held that reinsurance was for the benefit of the parties to the reinsurance contract, not third persons. However, even though the courts have been unwilling to grant injured persons access directly to the reinsurer, the public interest in the injured person's rights has not been totally ignored. In Sears v. Parkchester Apts. Inc., 338 So. 2d 753 (La. App. 4th Cir. 1976), an adjuster would not disclose the insurer until the adjuster was sued and only then disclosed an insurer which turned out to be the reinsurer. When the real insurer was finally sued, prescription had run. The court held that the suit against the reinsurer, even though it could not be sued directly under Fontenot, interrupted prescription as to the insurer.


difficult problems of conflict of laws will arise. Many of our sister states are unfamiliar with the concept of direct action against an insurer, although the degree of unfamiliarity appears to decline as the years go by. Very few states have copied Louisiana’s approach. An injured claimant ordinarily would like to be able to sue the insurer directly and compel the insurer to defend the case in front of a jury. Thus a claimant understandably seeks to emphasize whatever relationship his cause of action may have with Louisiana in an effort to induce the forum state to give the statute extra-territorial effect.

The problem which we consider here is related to, but distinct from, the problem of the scope of the statute itself. We are not here concerned with the instances in which a Louisiana court will hold that the Direct Action Statute is available to a claimant suing in a Louisiana forum. Rather, we are concerned with the degree to which a forum state other than Louisiana will apply the Direct Action Statute. To this extent, a “true” conflict of law question is presented which forums in other states must resolve.

We will discover, probably predictably, that the Direct Action Statute is a commodity which does not export well. No state has been so blunt as to state the issue in these terms, but it may be that without appellate review of fact, there would be undue prejudice to an insurer in another state, which could not be modified or corrected on appeal. To the extent that Louisiana permits the trier of fact to be aware of insurance, it opens the possibility of prejudice. But at

263. Some courts have urged their legislatures to adopt such statutes. See Zahler v. Manning, 295 N.W.2d 511, 513 n.3 (Minn. 1980).

264. Some of these problems are covered in notes 54-82, supra: injury inside Louisiana, contract issued outside Louisiana; injury outside Louisiana, but policy issued or delivered inside Louisiana. Other problems arise when the accident happened elsewhere but a Louisiana forum is the place of litigation. See Esteve v. Allstate Ins. Co., 351 So. 2d 117 (La. 1977) (Louisiana would not apply Direct Action Statute when injury to Louisiana citizen occurred out of state and policy was issued out of state); with such decisions, compare Matney v. Blue Ribbon, 202 La. 505, 12 So. 2d 253 (1943) (wife, Texas resident, injured through negligence of husband, also Texas resident, in Louisiana; Louisiana applied its substantive law to the controversy, affording wife a potential recovery when Texas would not have done so); Burke v. Massachusetts Bonding & Ins. Co., 209 La. 495, 24 So. 2d 875 (1946) (wife and husband, residents of Louisiana, traveling in Mississippi; wife, injured through negligence of husband, sued insurer in Louisiana; court held wife’s claim governed by substantive law of Mississippi, which did not provide a cause of action to wife under such circumstances; Direct Action Statute did not provide a cause of action where none existed under Mississippi law); Mock v. Maryland Casualty Co., 6 So. 2d 199 (La. App. Ori. 1942) (one Louisiana citizen was killed in Texas because of the alleged negligence of another Louisiana citizen with whom he was riding; the policy apparently was issued in Louisiana; no wrongful death action under Texas law exists for plaintiffs, but there would be one under Louisiana law; court held that Texas law must apply and Direct Action Statute made no exception to that rule).
the same time, the existence of appellate review of fact serves to temper and in some instances negate the possible unfair treatment of an insurer before that trier of fact. Thus the complete Louisiana scheme may achieve a rough balancing of the interests involved. Other jurisdictions might well fear that adopting or using only a part of the scheme would be unfair. A court in another jurisdiction might prove to be particularly sensitive to this situation when the insurer is a citizen of the forum state.

The claimant who seeks to have the forum state apply the Direct Action Statute obviously must establish sufficient connexity between his claim and Louisiana so that it is plausible to argue that the statute might be one of the possible choices open to the forum court. Very commonly, the connexity is the occurrence of the accident inside the borders of Louisiana. The claimant may well have been a tourist who returns home to sue and is able to obtain jurisdiction over the insurer in his home state. All that may be lacking is the right to sue the insurer in a direct action, rather than the insured (over whom very often the forum state does not have jurisdiction).

One of the early cases was precisely of this genre.265 The plaintiff alleged in a Mississippi court that he had been injured while riding as a guest passenger in a vehicle which had been negligently repaired by a New Orleans firm, insured by Globe Indemnity. It is not clear that the incident occurred in Louisiana, but it must have. Globe was subject to the jurisdiction of the Mississippi courts, but the New Orleans firm was not. The plaintiff asserted a right of direct action against the insurer by application of the Louisiana statute. On difficult facts and citing two workers’ compensation cases, the court held that the Louisiana statute was more than merely procedural in nature and that when a statute of another state “confers a right of action that is substantive in nature, this court will enforce it where it has the machinery with which to do so.”266 The court rejected the argument that the specific venue provisions of the statute made it procedural in nature.

Shortly thereafter, the Mississippi court returned to the problem and overruled its first effort. In McArthur v. Maryland Casualty Co.,267 the facts were essentially the same as in the earlier case. The claimant had been injured in Louisiana through the alleged negligence of the employee of a Louisiana firm. The insurer was subject to the jurisdiction of the Mississippi courts, but the firm was not. The court

266. 182 Miss. at 440, 181 So. at 319.
noted that Louisiana courts themselves had characterized the Direct Action Statute as procedural and seemed somewhat relieved to be able to overrule the earlier case and deny its application in the Mississippi courts.

At this juncture, three rules of the conflict of laws were firmly established. The first was that the substantive law of the place of the tort should govern the controversy, regardless of the forum state (lex loci delicti). 268 The second was that the forum need not apply the procedural rules of the place of the tort, although it might apply the applicable substantive rules unless they conflicted with some strong public policy of the forum state. 269 Finally, the forum could determine for itself whether a rule was substantive or procedural, but it ordinarily would be guided by the opinions of the courts in the state which had enacted the rule. With these three rules in place, most states which faced the question had very little difficulty in denying application of the Louisiana statute. The usual judicial response was simply that the Louisiana rule was procedural and would not be applied extraterritorially, a result often buttressed by reference to the restrictive venue provisions in the statute. 270

The result in the federal courts sitting in diversity jurisdiction was mixed, with some describing the statute as substantive but not offensive to the state in which the federal court sat 271 and others describing the statute as procedural and refusing to apply it because

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268. See the cases collected in note 264, supra, for a demonstration of the firmness of the rule of lex loci delicti in those days.


the state in which it sat would not do so.\textsuperscript{272}

These results probably remain the majority position at this writing. But recently, perhaps spurred on by scholarly objections to the rigidity of the rules which have produced these results,\textsuperscript{273} a few courts seem willing to depart from the past practice. Prominent among these is the Supreme Court of Minnesota, which decided \textit{Myers v. Government Employees Insurance Co.}\textsuperscript{274} in 1974. Again, the facts were commonplace. The plaintiffs were Minnesota citizens, injured in Louisiana while on a trip here. The alleged tortfeasor was a Louisiana citizen over whom the Minnesota court did not have jurisdiction, so far as the opinion reflects. However, the tortfeasor was insured by GEICO under a policy apparently issued in Louisiana, and the court had jurisdiction over GEICO. The ground of dispute between the plaintiffs and GEICO was not only whether the Louisiana Direct Action Statute could be applied by the Minnesota court but also whether the statute of limitations of Louisiana (which had expired) or that of Minnesota (which had not) should govern the case. The court held that a direct action would lie against the defendant but the Minnesota statute of limitations should apply.

Reflecting its previous adoption of a rule of “choice-influencing considerations” as determinative in choice of law matters,\textsuperscript{275} the court emphasized that the advancement of Minnesota’s own interest in the protection of its citizens required it to permit the direct action. The court noted that the public policy of Louisiana was not necessarily to limit the right of direct action to its own citizens, but rather would grant it to non-citizens as well so long as the accident occurred in Louisiana. Defendants had argued the traditional position that the Direct Action Statute was procedural, rather than substantive, but the court concluded otherwise. Having so concluded, it was forced to resolve the true conflict of law question presented, since traditional rules would have dictated application of both the Louisiana Direct Action Statute and the Louisiana statute of limitations unless Minnesota public policy was to the contrary.

The \textit{Myers} decision is clearly a departure from the earlier experiences with reference to the Louisiana Direct Action Statute when sought to be applied in other forums. Whether it will form a new point of departure remains to be seen. The resolution of this issue almost certainly depends upon a forum’s determination with


\textsuperscript{274} 302 Minn. 359, 225 N.W.2d 238 (1974), noted Annot., 83 A.L.R.3d 328 (1978); see also Fagnan v. Great Cent. Ins. Co., 577 F.2d 410 (7th Cir. 1978).

\textsuperscript{275} Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 468 (1973).
respect to the broader issue of whether rigid conflict of law rules should be replaced with those of a more flexible nature. In some instances, an imaginative court might be induced to characterize the Direct Action Statute as substantive and thus applicable under even the traditional rule of \textit{lex loci delicti}, but not in conflict with any strong public policy of the forum state. Such a rationale has been rare in the past, but it reaches the same result as would the adoption of the more flexible current conflict of law doctrines in some states. Also it is a possible solution for a state which is unwilling to reach the broader question of overall conflict of law reform.

The confusion over the procedural versus substantive nature of the Louisiana Direct Action Statute has unnecessarily clouded this area. The truth of the matter is that the Louisiana courts have at one time or another called the statute both, and in fact, it has aspects of both. But the procedural versus substantive discussion is really only an escape clause from the rigid place-of-the-tort application of the Direct Action Statute. To the extent that jurisdictions reject the rule of \textit{lex loci delicti}, perhaps the accessory baggage of procedural versus substantive also will disappear.

\textbf{MISCELLANEOUS: POLICY LIMITS BEFORE THE JURY; ISSUES OF RES JUDICATA}

\textit{Policy Limits Before the Jury}

The Direct Action Statute has had an impact on matters beyond its specific language. This is indicated by the practice of Louisiana courts with reference to the admission of policy limits before the jury, although the statute seems not to be the only reason for the position taken by our judges.

It is certainly predictable that if an insurer is permitted to be named as a defendant and brought before a trial jury, ultimately the courts will discern very little reason to hide from the jury the amount of the policy limits. This is especially true when there is a compulsory liability insurance statute. If it is clear to the jury that insurance is involved, it probably does more harm than good to refuse to provide relevant information about the insurance contract. There is always the risk that the jury will exaggerate the amount of insurance and unfairly expose the insured to an inappropriate excess judgment.

Thus we might have reached the conclusion that policy limits should be admissible in a jury trial on the basis of the Direct Action Statute

\footnote{276. If the trier of fact is a judge, there is less reason to worry about potential prejudice if policy limits are made part of the record. Presumably, the trial judge is able to reach his decisions free of considerations of the applicable policy limits.}
alone and the idea implicit in it that we are willing to deal directly with the existence of an insurance contract. But Louisiana has another unusual concept which has played a role in reaching this conclusion: admissibility of the defendant's inability to pay a judgment.

From one point of view, the ability of a tortfeasor to respond to the judgment against him is wholly irrelevant to the question of what damages would be appropriate to compensate the claimant for his loss. The only pertinent evidence should concern plaintiff's loss, whether it be of wages in the past or future, past or future medical expenses, or mental anguish. Whether or not the defendant would ever be able to pay a judgment is a matter of no consequence.

However, Louisiana consistently has subscribed to another point of view. Ever since the decisions in *Williams v. McManus*, *Loyacano v. Jurgens*, and *Daly v. Kiel*, Louisiana courts have permitted the trier of fact to take into account the impecuniosity of the defendant in reaching an appropriate damage award. These cases are in fact scant authority for the proposition, as the subject is discussed there very little at all. In the more recent cases, the rationale offered is that it is not good policy to bankrupt one citizen to pay another, even though the latter will receive an amount less than would actually compensate him for his loss.

Thus the defendant is permitted, if he wishes, to assert his own inability to respond in judgment. However, if he does so, it has been held that the plaintiff is entitled to present the contrary evidence that he is insured and that the policy limits of the insurance contract are whatever they may be. This is certainly justified on the ground that

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278. *38 La. Ann. 161 (1886)* (defendant defamed plaintiff with some scurrilous remarks while intoxicated; court reduced damages, commenting that the defamation was on only one occasion, at night, and before a small crowd; in passing, the court noted that the defendant was "a laborer of general good demeanor and of limited means").
279. *50 La. Ann. 441, 23 So. 717 (1898)* (case usually cited for the rule, but all the court actually said was that in a case involving vicarious liability for an employer, the employer's "circumstances may not improperly be considered to a reasonable extent in estimating damages . . . , where defendant personally was not at fault." 50 La. Ann. at 444, 23 So. at 718).
280. *106 La. 170, 30 So. 254 (1901)* (court remarked in passing that the evidence of inability to respond was "meager" but the "impression made by it [was] that he [was] a man of limited means, and it [was] likely the jury took this into consideration, as they could do, in arriving at the amount of the verdict").
281. See, e.g., *Davis v. Moore*, 353 So. 2d 740 (La. App. 4th Cir. 1977); *Cole v. Sherrell*, 7 So. 2d 205, 211 (La. App. 2d Cir. 1942). The rule is limited in *Daniels v. Conn*, 382 So. 2d 945 (La. 1980), which held that where one of two joint tortfeasors is solvent and the other impecunious, the inability of the one to pay may not be raised in the proceeding brought by the plaintiff, but only in the subsequent contribution or indemnity proceeding.
if the defendant chooses to open the subject of inability to pay and the trier of fact is willing to hear such evidence, it also should be willing to hear evidence of ability to pay from another source. A number of reported decisions on the admissibility of policy limits before the jury are situations in which the plaintiff brought forward the evidence in response to the defendant’s evidence of impecuniosity.\textsuperscript{283}

Such cases do not solve a related problem, however. It may be that the individual insured is not a defendant, probably because the policy limits are thought to be ample to cover the potential exposure. Impecuniosity of the defendant is not an issue, and indeed, any excess judgment over the policy limits is not even possible. But may the insurer refuse to divulge the policy limits to the jury on the understandable ground that its determination of liability and quantum might be influenced by the knowledge of the policy limits?\textsuperscript{284} Here the jurisprudential results are mixed,\textsuperscript{285} with the trend in the supreme court clearly being toward admissibility of the policy limits even when inability to pay is not an issue.\textsuperscript{286}

Actually, the insurer might outsmart itself by pursuing the strategy of concealing the policy limits. If the policy limit for a single claim is $10,000 and the insurer wants to conceal that fact because it believes the claim is probably worth about $5,000, it may take the risk that a verdict could be returned and a judgment rendered for more than the policy limits, say $15,000. There is authority for such a result in a case involving an uninsured motorist claim,\textsuperscript{287} and the argument for the same result against a liability insurer might be even stronger. The limit in a liability policy is a term of the contract between the insured and the insurer. Once the existence of the policy

\textsuperscript{283} See Davis v. Moore, 353 So. 2d 740 (La. App. 4th Cir. 1977); Adams v. Ross, 300 So. 2d 192 (La. App. 1st Cir. 1974).

\textsuperscript{284} See Adams v. Ross, 300 So. 2d 192, 200 (La. App. 1st Cir. 1974), in which the court opined that the jury probably had fixed quantum so that it would coincide with the policy limits of which it had been informed.

\textsuperscript{285} In the following cases, the courts upheld the inadmissibility of policy limits: Moffett v. Lumpkin, 382 So. 2d 278 (La. App. 4th Cir. 1980) (apparently approving refusal to tell jury of policy limits when defendant did not raise impecuniosity); Barnett v. Vanney, 360 So. 2d 617 (La. App. 4th Cir. 1978) (reluctantly approving refusal to tell jury of certain policy limits); Ashley v. Nissan Motor Corp., 321 So. 2d 868 (La. App. 1st Cir.), writ denied, 323 So. 2d 478 (La. 1975) (same, but probably subsequently overruled). However, admissibility of the policy limits was upheld in such cases as Case v. Arrow Trucking Co., 372 So. 2d 670 (La. App. 1st Cir. 1979); Davis v. Moore, 353 So. 2d 740 (La. App. 4th Cir. 1977); Domingue v. Continental Ins. Co., 348 So. 2d 209 (La. App. 3d Cir. 1977).

\textsuperscript{286} Suhor v. Gusse, 388 So. 2d 755 (La. 1980); Arceneaux v. Domingue, 365 So. 2d 1330 (La. 1979) (“In a jury trial, the jury is entitled to know all the evidence. We know of no statute or jurisprudence which, in the absence of agreement of the litigants, would permit admissible evidence to be withheld from the jury.”) \textit{Id.} at 1336.; Ashley v. Nissan Motor Corp., 323 So. 2d 478 (La. 1975) (writ denial).

\textsuperscript{287} See Williams v. Bernard, 413 So. 2d 198 (La. App. 4th Cir. 1982).
is known and its terms put at issue, it may be that the limit is an affirmative defense which must be pleaded by the insurer. Some courts apparently permit the insurer which fails to plead the policy limits to move for a new trial or to have the verdict reduced when a verdict beyond the policy limits is returned, presumably on the ground that the verdict is "contrary to law." If such a verdict is contrary to anything, it is contrary to the insurance contract, and the insurer probably ought to be required to bring the terms of that contract to the jury's attention if it wants to invoke their protection.

Certainly there is the risk of an "insurance verdict," in which either the determination of the liability issue itself or the quantum issue is skewed by the jury's knowledge of the existence of insurance. But this risk is present in today's society whether the jury is told of the existence of insurance or not. In all likelihood, the jury will assume that insurance is present in most cases. Moreover, Louisiana long ago determined to accept the risk of an "insurance verdict" by the passage of the Direct Action Statute itself, and it has made the existence of insurance discoverable through the ordinary processes.

Thus there is ample reason in the Direct Action Statute itself to permit the admission of the policy limit without reference to the question of whether defendant's impecuniosity is put at issue. Even if our courts should one day rule that defendant's impecuniosity is irrelevant to the question of quantum and thus inadmissible, there would be no reason to insist that the policy limits are necessarily inadmissible by the same reasoning. The policy limits are not evidence of the insurer's ability or inability to pay, but only of the limits of its liability to pay. It makes "better sense" to be truthful with the jury, "tell them exactly what each insurer provides, and combine with that a cautionary instruction that the amount of insurance should not be considered in assessing the award ...." To be consistent with the philosophy of the Direct Action Statute, Louisiana hardly can take the position that the existence of insurance or knowledge of the limits

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of that insurance is information that the jury cannot be told. On balance, the insurer is probably better off to reveal the policy limits voluntarily and concentrate its efforts on the admissible and relevant argument that insurance funds are derived from those persons who pay the premiums, probably including the jurors.

Res Judicata

An injured party who unsuccessfully litigates the merits of a claim against the tortfeasor may not assert that same claim against the liability insurer in another action, nor may an unsuccessful claimant assert a claim against the tortfeasor if he has lost on the merits against the tortfeasor's liability insurer. This self-evident proposition appears well established in the results of the Louisiana cases, but the precise foundation of the rule is unclear.

The earliest analogous case is probably Muntz v. Algiers & Gretna Street Railway Co.\(^{293}\) Plaintiff's minor daughter was killed, allegedly through the negligence of the operator of a railroad train owned by the Jefferson Railroad Company and being operated on track leased to it by the Algiers & Gretna Railway Company. Plaintiff sued both railroads in solido. The Jefferson Railroad Company succeeded in having the action dismissed and re-filed in a different venue, and that suit was tried on the merits. A jury determined that the operator was not negligent, and thus the Jefferson Railroad Company was not liable to the plaintiff. That judgment became final. In the meanwhile, the action in the court of original venue against the Algiers & Gretna Railway Company ultimately went to the jury, after the company's exceptions of res judicata and judicial estoppel were overruled.

The jury's verdict against the Algiers & Gretna Railway Company, however, was reversed on appeal. The supreme court held that the liability of the lessor railroad was entirely dependent upon the liability of the lessee operating railroad. Since the latter had been held without fault, the former could not possibly be liable.

The act which gave rise to the present suit was the alleged negligence . . . of the driver of a car belonging to the Jefferson Railroad Company, in the charge and custody of one of its employees. It is not claimed or pretended that as a fact the Algiers & Gretna Railway Company had anything whatever to do with the operation of the road. Its liability was purely legal, a responsibility resting upon it for the act of a person other than itself. . . . As the liability of the Algiers & Gretna Railway Company was essentially and entirely dependent upon damage having

\(^{293}\) 116 La. 236, 40 So. 688 (1906).
resulted to plaintiff or his child, or to himself, from a fault of the Jefferson Company, the moment it was finally judicially determined that the company was not at fault, the controversy necessarily ended.\(^{294}\)

The specific result was the sustaining of the exception of res judicata filed by the defendant, without any lengthy discussion on that exception.

The rationale would fit the situation of a tortfeasor and a liability insurer almost completely. The real wrongdoer is the tortfeasor, and the liability of the insurer is "purely legal" in the sense that it arises out of a conventional obligation between the tortfeasor and the insurer which the courts will enforce. But the lessor railroad would have had a right of indemnity over against the lessee railroad under ordinary circumstances. Such a right would be incompatible with the result in the earlier case that the lessee railroad was not at fault and was free of liability.\(^{295}\) No such indemnity right exists between the liability insurer and the tortfeasor.

However, there is no reason that this distinction should destroy the analogy. The only important issue is whether the injured person has had a fair opportunity to litigate his claim on the merits, whether the actual defendant was the tortfeasor or someone who would respond for him.

The Muntz opinion was cited with approval in McKnight v. State\(^{296}\) a number of years later. A widow had filed suit against three state police officers, alleging that their negligence caused her husband's death. The litigation terminated in a judgment that they were not negligent. The widow obtained legislative permission to sue the state itself and argued that the permission in effect waived any defense of res judicata. The court disagreed, sustaining the state's exception of res judicata and noting that the plaintiff should not have been permitted to litigate a case against the state on the basis of the alleged negligence of three state employees who had already been "judicially exonerated." This time, the court termed its ruling "a definite exception" to the third requisite of res judicata under Civil Code article 2286: i.e., the demand must be between the same parties. But on the authority of Muntz, it sustained the exception of res judicata.

\(^{294}\) 116 La. at 243-44, 40 So. at 690-91.

\(^{295}\) But see Sampay v. Morton Salt Co., 395 So. 2d 326 (La. 1981), holding that the release of the tortfeasor does not necessarily release his employer, despite the fact that the employer's indemnity right against the tortfeasor would appear to be unavailable.

\(^{296}\) 68 So. 2d 652 (La. App. 1st Cir. 1953). See also Bowman v. Liberty Mut. Ins. Co., 149 So. 2d 723 (La. App. 1st Cir. 1963).
At about the same juncture, the United States Supreme Court was deciding the case of Lumbermen's Mutual Casualty Co. v. Elbert.\footnote{348 U.S. 48 (1954).} The primary focus of that decision was the diversity jurisdiction of the federal courts in direct action suits, and the result later was changed by statute. Nevertheless, within the opinion, the Court made the statement that the Direct Action Statute created an “optional right” in the claimant to sue the insurer. The Court opined, without authority, that by “bringing the action against [the insurer], respondent [had] apparently abandoned her action against the tortfeasor.”\footnote{348 U.S. at 52.} This could have been taken as a shaky foundation for a rule that a second action could not be brought because of “abandonment” by plaintiff or perhaps because of a splitting of the cause of action.

However, the Court’s statement is not wholly accurate. Because the tortfeasor and the liability insurer are solidarily liable, the claimant almost certainly is entitled to proceed to judgment against either or both, even in separate actions if necessary. The claimant is only entitled to one satisfaction, but he may be entitled to multiple judgments if necessary to achieve that one satisfaction.\footnote{See LA. CIV. CODE art. 2095; Finn v. Employers' Liab. Assur. Corp., 141 So. 2d 852 (La. App. 2d Cir. 1962).}

Even so, this proposition does not answer our original question. Assuming that it is generally agreed that one opportunity to litigate on the merits is enough, what is the precise authority by which we turn away the second attempt? We have seen that res judicata was cited in early analogous cases as the reason, but later cases have so narrowed res judicata that, in its literal interpretation, it can no longer be taken to resolve the controversy.\footnote{Consider the discussions in Claitor's Realty v. Juban, 391 So. 2d 394 (La. 1980); Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976); and Wooten v. Wimberly, 272 So. 2d 303 (La. 1973), the last case effectively overruled on other grounds in Foster v. Hampton, 381 So. 2d 789 (La. 1980). See also Holley v. Royal Globe Ins. Co., 407 So. 2d 32 (La. App. 3d Cir. 1982).}

Somewhat later, the decisions seemed to emphasize “judicial estoppel” as a basis for denying a second assertion of the cause of action.\footnote{301. Williams v. Marianneaux, 240 La. 713, 124 So. 2d 919 (1960), overruled on other grounds probably, Sampay v. Morton Salt Co., 395 So. 2d 326 (La. 1981); Caufield v. Fidelity & Casualty Co., 378 F.2d 876 (5th Cir. 1967) (when merits of controversy had been determined in state court proceeding, they had exonerated actor of wrongdoing, and res judicata would not apply because parties were not identical, estoppel by judgment would bar second suit in federal court against wrongdoer by parties in identical position as parties in original state court action).}

But this doctrine recently has been abolished as a common-law interloper in the civilian arena\footnote{302. Ugulano v. Allstate Ins. Co., 367 So. 2d 6 (La. 1978), overruling California Co. v. Price, 234 La. 338, 99 So. 2d 743 (1957).} and must be considered unavailable.
as authority for precluding the plaintiff from raising the merits of the controversy a second time. 303

There are several other possibilities. In property disputes, one finds the concept that the auxants cause (successors or privies to original parties) may not relitigate issues decided in an earlier case. 304

It could be argued that the insurer is in a sense the auxant cause of the tortfeasor's liability. The fact that the court sometimes describes the insurer's liability as secondary or derivative is analogous to the status of a property successor as privy to the rights of the ancestor.

In addition, the doctrine of auxants cause is treated as an "exception" to or extension of the requisites of Civil Code article 2286, much as the McKnight opinion concluded with reference to the widow's claim against the state.

One might also argue that a plaintiff's subsequent suit against the tortfeasor after failing to fix liability on the insurer on the merits "splits" the cause of action in violation of article 425 of the Code of Civil Procedure. 305 Within the policy limits, there may be some strength in such a claim. As to claims beyond the policy limits, however, there is no cause of action at all against the insurer, and perhaps nothing is "split" in this respect.

There is some indication that our courts may be content simply to emphasize the secondary or accessory nature of the obligation of an insurer, dependent upon proof of the validity of the principal obligation which underlies it. 306 The principal obligation is that of the wrongdoer. Whether the suit is against the wrongdoer or against the insurer, the validity of the accessory contractual obligation depends upon the existence of the principal delictual obligation. If there has been a final determination that there is no principal delictual obligation, there is simply no authority to enforce the accessory contrac-

305. LA. CODE CIV. P. art. 425.

An obligee cannot divide an obligation due him for the purpose of bringing separate actions on different portions thereof. If he brings an action to enforce only a portion of the obligation, and does not amend his pleading to demand the enforcement of the full obligation, he shall lose his right to enforce the remaining portion. Cf. Holley v. Royal Globe Ins. Co., 407 So. 2d 32 (La. App. 3d Cir. 1982); Smith-Hearron v. Frazier, Inc., 368 So. 2d 768 (La. App. 2d Cir. 1979).
306. See the brief discussion, although not pertinent to the decision at hand, in Baker v. Wheless Drilling Co., 303 So. 2d 511 (La. App. 2d Cir. 1974), writ denied, 305 So. 2d 544 (La. 1975). And see, by analogy, LA. CIV. CODE art. 1771.
tual obligation. Perhaps the proper exception for an insurer to file when it is the "second" defendant is an exception of no cause of action. When the tortfeasor is the "second" defendant and the merits of the controversy have been reached in a prior suit against the insurer, perhaps a motion for summary judgment after answer is the most appropriate vehicle to dispose of the claim. This motion would be based upon the showing that the prior judgment denying enforcement of the accessory obligation of necessity determined whether the principal obligation existed. Having determined that the principal obligation did not exist and that there is no genuine issue of material fact, the court must then rule that the defendant tortfeasor is entitled to judgment as a matter of law.

All of the foregoing envisions the situation in which a determination of the controversy on the merits has occurred. If the insurer wins a first suit because of a coverage or policy defense, there is no reason to forbid the plaintiff from asserting the cause of action against the wrongdoer himself.

This discussion of issue-preclusion principles relates to an initial unsuccessful claim on the merits and a second attempt at the same claim. If the claimant should successfully sue the tortfeasor alone and later assert the claim against the insurer, other problems are presented. If there has been a failure of the tortfeasor to notify the insurer until the claim is final or a failure to cooperate to the same extreme, this might be a defense to the assertion of the claim against the insurer. This is discussed elsewhere.307

If the claimant should successfully sue the insurer alone and later sue the tortfeasor for the excess, there are other considerations. Clearly, res-judicata would not be available to the claimant, and the tortfeasor might have his own cause of action against the insurer for failure to notify him of potential excess exposure.

307. See text at notes 117-118, supra.