SUPREME COURT OF LOUISIANA

95-C-1200

RICHARD A. RIZER AND CHERICE R. BALDWIN

versus

AMERICAN SURETY AND FIDELITY INSURANCE COMPANY, ET AL

Calogero, C. J., dissenting.

I disagree with the majority's conclusion that a tortfeasor's motor vehicle liability insurance carrier is not solidarily obligated with an accident victim's uninsured motorist insurer, and thus the timely filing of suit against the liability insurer does not interrupt prescription against the uninsured motorist insurer. The majority bases their conclusion on the premise that the obligations of the liability insurer and the uninsured motorist insurer are separate and are not coextensive.

I do not agree. The uninsured motorist ("UM") insurer is in my view conditionally solidarily obligated with the liability insurer. At such subsequent time as the liability insurer may become insolvent, the UM insurer will be liable under the policy and thereupon solidarily liable with the defunct, possibly later to be resurrected, insurance company in liquidation. La. R.S. 22:1386 specifically provides that prior to proceeding against the Louisiana Insurance Guaranty Association Fund in the event of an insurer's insolvency or liquidation, the claimant must first exhaust his rights under any other policy including uninsured or underinsured motorist liability coverage.[1] Hence, the UM insurer

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[1] La. RS 22:1386 was amended in 1992 to specifically require exhaustion of uninsured or underinsured motorist liability coverage before proceeding against the Louisiana Insurance Guaranty Fund. The amendment was effective June 10, 1992. The jurisprudence has consistently held that this amendment applies

is conditionally liable to the victim for the amount of the liability insurer's policy limits in the event of the insolvency or liquidation of the liability insurer.

We have recognized this concept of conditional obligations in previous cases. In Hoefly v. Government Employees Ins. Co., 418 So.2d 575, 579 (La. 1982), in considering the relationship of the uninsured motorist insurer and the tortfeasor, we noted: "[t]he uninsured motorist carrier is obliged differently from the tortfeasor because its liability is **conditioned** by the tortfeasor's total or partial lack of liability insurance, the type of damage he has caused and any limits in the insurer's policy that are permitted by law." (emphasis added). We then cited Civil Code article 2092 as it read in 1982:

> "The obligations may be in solido, although one of the debtors be obliged differently from the other to the payment of one and the same thing; for instance, **if the one be but conditionally bound,** whilst the engagement of the other is pure and simple, or if the one is allowed a term which is not granted to the other."

Former Civil Code article 2092 was reenacted as Civil Code article 1798 which reads: "[a]n obligation may be solidary though for one of the obligors, it is subject to a condition or term." In this case, the obligation of the UM insurer to the victim is solidary with the tortfeasor and the liability insurer, although it is subject to the condition that the UM insurer is only responsible to pay the amount of the liability insurer's policy limits in the event the liability insurer is unable to pay, such as in insolvency.

Further, in Egros v. Pempton, 606 So.2d 780, 785 (La. 1992), in discussing the subrogation rights of the uninsured motorist carrier against a non-motorist tortfeasor, the trial court found that the tortfeasor, its insurer and the uninsured motorist carrier were liable in solido for plaintiff's damages, and were thus

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retroactively to cases pending at the time the amendment became effective. As this case was pending on June 10, 1992, the amendment to La. RS 22:1386 clearly applies in this case.

obliged to do the same thing, "that is, to facilitate the recovery of the insured victim." We affirmed, finding that the uninsured motorist carrier was conditionally bound, "as its obligation is conditioned on a tortfeasor's total or partial lack of liability insurance, the type of damage caused, and the policy limitations allowed by law." 606 So.2d at 786. We concluded that "[s]tate Farm [UM insurer] is solidarily liable with them [non-motorist tortfeasor and liability insurer] up to its policy limits of $100,000." Id.

In this case, the uninsured motorist insurer remains potentially obligated to pay the full amount of damages until such time as the liability insurer fulfills its obligation to pay its policy limits. If, for some reason, the liability insurer cannot pay its policy limits, such as insolvency, the uninsured motorist insurer is so bound to pay. In light of this potential or conditional liability, I believe the uninsured motorist insurer and the liability insurer are indeed at least conditionally solidarily bound and were so at the time the timely lawsuit was filed against the tortfeasor's insurer. Thus, prescription was interrupted against the uninsured motorist insurer when suit was timely filed against the tortfeasor's liability insurer on July 27, 1990, which was within one year of the March 20, 1990 accident, or at the latest on June 10, 1992, the date of the amendment to La. RS 22:1386.