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**LOUISIANA SUPREME COURT UPHOLDS THE CONSTITUTIONALITY OF "NO PAY, NO PLAY" STATUTE**

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In 1997, in order to promote better compliance with Louisiana's compulsory automobile liability insurance laws and to reduce liability insurance rates, the Legislature passed the Omnibus Premium Reduction Act (known as the "no pay, no play" statute). The "no pay, no play" and the rate reduction provisions of the Act have been subject to recent constitutional challenge. The "no pay, no play" provision reads as follows:

There shall be no recovery for the first ten thousand dollars of bodily injury and no recovery for the first ten thousand dollars of property damage based on any cause or right of action arising out of a motor vehicle accident, for such injury or damages occasioned by an owner or operator of a motor vehicle involved in such accident who fails to own or maintain compulsory motor vehicle liability security.<sup>1</sup>

Under this provision, a motorist who fails to provide the minimum, mandatory liability coverage cannot "play" in the legal system at least to the extent of his first ten thousand dollars of damages.<sup>2</sup>

Also challenged was the 10 percent rate reduction provision which mandated insurers, who provide automobile liability insurance in Louisiana, to file a plan with the Louisiana Insurance Rating Commission (LIRC) to reduce the rates they charge to their customers by a minimum of 10 percent. Section 5(A) of the Act provides in relevant part that "[e]very motor vehicle insurer authorized to transact business in the state of Louisiana shall make an automobile policy rate filing with the Louisiana Insurance Rating Commission to reduce its combined rates for bodily injury liability and property damage liability by a minimum of 10 percent in each of its respective territorial service areas, based upon the average rate in such area on the day prior to "rate reduction day. . ."

In *Progressive Security Insurance Company v. Honorable Murphy J. Foster, in his capacity as Governor of Louisiana, et al.*,<sup>3</sup> a domestic insurance company and a trade association of domestic insurers challenged the constitutionality of the above provisions which were upheld in the trial court. The Supreme Court, exercising its supervisory jurisdiction, granted application for supervisory writs of certiorari to consider the constitutionality of the contested provisions. The Plaintiffs raised five constitutional challenges in their arguments before the Supreme Court: The Act (1) excessively punishes an uninsured motorist; (2) is impermissibly vague, impairs the rights of subrogation and fails to provide adequate notice of the depth of the statute; (3) violates the equal protection clauses of the United States and Louisiana constitutions; (4) denies access to the courts and constitutes a taking without due process; and (5) effectively allows the legislature to set insurance premiums rates. The Louisiana Supreme Court, for reasons discussed below, rejected the Plaintiffs' arguments and upheld the constitutionality of the "no pay, no play" statute.

***Excessive Punishment***

The Plaintiffs argued that the Act excessively punishes an uninsured motorist pointing out that punishment already exists under the law for failing to obtain auto liability insurance and the Act unnecessarily expanded the punishment by barring the recovery of the first ten thousand dollars of property damage or bodily injury regardless of fault. As such, the additional punishment meted out by the Act was excessive, cruel and unusual under the Louisiana constitution. The Supreme Court rejected these arguments and held that the partial bar of recovery as provided in the Act did not constitute a punishment.

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The Supreme Court reiterated the firmly established rule that the right to drive a motor vehicle in Louisiana was not a constitutional right but a privilege granted by the State. As such, the State could and had enacted numerous conditions on that privilege. The partial recovery bar delineated in the Act was just such a condition imposed on the "owner or operator of a motor vehicle involved in such an accident who fails to own or maintain compulsory motor vehicle liability security." The Supreme Court also held that it was of no moment that an owner or operator may also be subject to criminal sanctions. The partial recovery bar was a separate administrative corollary to the statutes which established the driving privilege and was unrelated to potential criminal conduct which may arise from the same factual scenario.

### ***Vagueness***

Plaintiffs contended that the term "occasioned by" in the quoted language from the Act made the statute impermissibly vague, impaired the rights of subrogation, and gave inadequate notice of the depth of the statute. They argued, since "occasioned by" could mean either "suffered by" or "caused by," that

the statute was fatally flawed if the term was read to mean "caused by."

The Supreme Court held that the legislative purposes of the Act: (1) to reduce otherwise recoverable damages for failure to maintain liability insurance coverage, and (2) to encourage all persons who own or operate motor vehicles on the public streets and highways of the State of Louisiana to comply with the motor vehicle safety responsibility law,<sup>4</sup> would not be effected if "occasioned by" was interpreted to mean "caused by." Paradoxically, under the Plaintiffs' argument, an uninsured motorist who did not cause an accident would not be affected by the Act. Moreover, the Court held that the interpretation advanced by the Plaintiffs would render the Act superfluous, would result in no change in the current law, and would produce absurd consequences, since under the concept of comparative fault, the fault of persons who cause accidents was already accounted for when their recovery was proportionally reduced. The Supreme Court concluded that the contextual analysis of the Act showed that the term "occasioned by" meant "suffered by."

As regards the issue of subrogation rights, the Supreme Court rejected the Plaintiffs' argument that the Act implied impaired subrogation rights. The Court held that there was no right to subrogation for the first ten thousand dollars since no obligation to pay existed. As to damages in excess of the first ten thousand dollars, the right to subrogation was unaffected by the Act.

The Supreme Court also rejected the Plaintiffs' argument that the statute was vague to the extent that the uninsured motorist could not foretell how fault would be assessed among those found negligent. The Court held that the statute clearly provided guidance to the uninsured motorist of the implications of his failure to have liability insurance regardless of the issue of fault. Further, the Court held that the Plaintiffs had misapplied the concept of comparative fault since the amount of damages recoverable was first ascertained and then reduced in proportion to the degree of percentage of negligence attributable.

### ***Equal Protection/Due Process***

The Plaintiffs also argued that the Act violated the equal protection clauses under the Louisiana and United States constitutions. The argument was that the Act unconstitutionally classified persons on the basis of whether or not they have automobile insurance. It was contended that this established uninsured motorists as an "unpopular group" which, as such, should fall within one of the suspect classifications under either state or federal equal protection clauses. The Court carefully studied both the state equal protection clause and the federal equal protection clause and found none of the suspect classifications such as race, religion, or alienage to be at issue. The Court concluded that only the lowest level of review would be applicable to any other classification and found that the Plaintiffs were required to prove such a classification was not rationally related to any legitimate government interest. After considering the purpose of the legislation and reviewing empirical data, the Court held that the "no pay, no play" provisions promoted the state's interest in reducing the number of uninsured motorists on the highways and lowering automobile liability rates by vesting ownership of the costs of liability insurance in the insured and uninsured alike. Therefore, the Supreme Court held that the Act was rationally related to the legislature's stated public purpose of promoting compliance with the state's compulsory liability insurance law. Thus, the Act did not violate the Plaintiffs' right to equal protection under either the state or federal constitutions.

On the issue of due process, the Plaintiffs contended that the statute unconstitutionally limited the causes of action for recovery of the first ten thousand dollars in property damages and first ten thousand dollars for injury and abolished the uninsured drivers' damages if they did not exceed ten thousand dollars for each type of damage. The Supreme Court held that there was no fundamental due process right to sue in tort or to recover damages because of the tortious acts of another. As

there was no fundamental due process right to sue in tort or to recover damages because of the tortious acts of another. As such, by restricting or eliminating the causes of actions which the uninsured motorist may have had for these types of damages, the legislature had simply redefined the scope of the causes of action in tort which was constitutionally permissible. The Court further held that after examining the reasons for the legislature's actions, it could not be said that the actions were arbitrary or irrational, and the Act was not violative of the Plaintiffs' right to due process.

### ***Access to Courts***

The Plaintiffs also contended that the Act caused the uninsured motorist to forfeit property without the right to judicial review which was guaranteed by Article 1, Section 19 of the Louisiana constitution. The Plaintiffs also argued that the Act unduly restricted access to the judicial system. The Supreme Court held that in order for there to be a violation of Section 19, the Court must find that the statutory preclusion of recovery for the first ten thousand dollars constituted the loss of a property right. The Court held that the uninsured motorist did not have a property right since

the legislature had restricted their legal remedy. Accordingly, the Court held that no violation of Section 19 had occurred since the legislature had curtailed the cause of action.<sup>5</sup>

As regards the issue of access to the judicial system, the Court held that the Louisiana constitution did not prohibit legislative restriction of legal remedies. Rather, the clause only ensured that the judicial system will be open to provide remedies that the legislature had fashioned. Therefore, the Court held that the fact that certain uninsured motorists could not pursue a claim for part, or in some instances, all of their damages did not deny them access to the judicial system. Thus, the Act did not violate the Louisiana constitution.

### ***Unconstitutional Exercise of Legislative Power***

Lastly, the Plaintiffs also contended that by specifying a minimum 10 percent reduction in premium rates, the legislature had impermissibly exercised the powers granted to the Louisiana Commissioner of Insurance under the Louisiana constitution and to the Louisiana Rating Commission in R.S. 22:1401. This argument was also rejected by the Supreme Court. The Court held that a close reading of Section 5(a) of the Act showed that the Louisiana legislature did not restrict LIRC's authority to finally determine the insurance rates for Louisiana citizens. The Act had only set standards of assessment which insurers were asked to apply in proceedings to be held before the LIRC. Therefore, the LIRC remained the ultimate arbiter of rates. Further, it was also clear that the Commissioner of Insurance was intimately involved in the formulation of the recommendations which later became the Act. Therefore, the Plaintiffs' arguments were rejected as without merit.

### ***Conclusion***

The report of the Actuarial Subcommittee of the Louisiana Task Force for Reduction of Automobile Insurance Rates<sup>6</sup> estimated that the implementation of the "no pay, no play" legislation would realize a cost savings of between 4.3% and 10% on basic coverage and between 2.4% and 4.8% on insureds who have full liability coverage insurance. Now that the Act has been declared constitutional by the Supreme Court, it remains to be seen how much savings are actually realized as a result of the legislation.

### ***Endnotes***

1. La. R. S. 32:866(A)(1).
2. There are certain exceptions to this rule: If the driver of the other vehicle is cited for operating a vehicle while intoxicated as the result of the accident and is subsequently convicted of or pleads *nolo contendere* to such offense, or intentionally causes the accident, or flees from the scene of the accident, or at the time of the accident, is in furtherance of the commission of a felony offense under the law. (See, La. R.S. 32:866(A)(3)).
3. 1998 La. LEXIS 985, La. Slip Opin. Sup. Ct. 97-2985 (1998).

4. Section 1 of the Omnibus Premium Reduction Act of 1997.

5. As mentioned previously, the Court had held that such legislative action was not unconstitutional since it was reasonably related to the state's concern in obtaining more complete compliance with the compulsory liability insurance law.

6. March 5, 1997; One of the Subcommittee's proposals - the "no pay, no play" provision was legislatively implemented in the 1997 Act.