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Limitations-Filing of Personal Injury Action by the Insurer-Subrogee, In an Uninsured Motorist Case, after the One Year Limitation Period has Expired Will Not Preclude the Filing of a Cross-Complaint for Personal Injury , Arising Out of the Same Facts, by the Uninsured Motorist

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LIMITATIONS—FILING OF PERSONAL INJURY ACTION BY THE INSURER-SUBROGEE, IN AN UNINSURED MOTORIST CASE, AFTER THE ONE YEAR LIMITATION PERIOD HAS EXPIRED WILL NOT PRECLUDE THE FILING OF A CROSS-COMPLAINT FOR PERSONAL INJURY, ARISING OUT OF THE SAME FACTS, BY THE UNINSURED MOTORIST—*Liberty Mutual Insurance Co. v. Fales*, 8 Cal. 3d 712, 505 P.2d 213, 106 Cal. Rptr. 21 (1973).

On February 6, 1969, Jun Maeyama was involved in an automobile accident with Edward Fales, an uninsured motorist. Ten months after the accident, on December 19, 1969, Maeyama and his passenger were indemnified for their personal injuries pursuant to the uninsured motorist coverage[1] of Maeyama's automobile insurance policy with Liberty Mutual Insurance Company. Fourteen months after the accident, in April, 1970, Liberty Mutual filed suit against Fales, seeking reimbursement for the amounts it had paid to Maeyama and his passenger.[2] Such action is permitted by Insurance Code section 11580.2(g)[3] to the extent of payments made by the insurer for personal injuries; however, the suit must be brought within three years from the date of payment to the insured.[4]

1. Uninsured motorist coverage is required in California. CAL. INS. CODE ANN. § 11580.2 (West 1972). This section was designed to provide "monetary protection to . . . persons who while lawfully using highways themselves suffer grave injury through the negligent use of those highways by others [the financially irresponsible]." Katz v. American Motorist Ins. Co., 244 Cal. App. 2d 886, 891, 53 Cal. Rptr. 669, 672 (1966), *quoting* Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 434, 296 P.2d 801, 808 (1956). To achieve this purpose, section 11580.2 "is part of every policy of insurance to which it is applicable to the same effect as if it were written out in full in the policy itself." Kincer v. Reserve Ins. Co., 11 Cal. App. 3d 714, 719, 90 Cal. Rptr. 94, 96 (1970) (citations omitted). Uninsured motorist coverage to reimburse the insured for losses of bodily injury or wrongful death may only be deleted from a policy by an agreement in writing between the insured and the insurer. CAL. INS. CODE ANN. § 11580.2(a) (West 1972).

2. Liberty Mutual Ins. Co. v. Fales, 8 Cal. 3d 712, 505 P.2d 213, 106 Cal. Rptr. 21 (1973).

3. CAL. INS. CODE ANN. § 11580.2(g) (West 1972).

4. Section 11580.2(g) provides:

Subrogation.

> The insurer paying a claim under an uninsured motorist endorsement or coverage shall be entitled to be subrogated to the rights of the insured to whom such claim was paid against any person causing such injury or death to the extent that payment was made. Such action may be brought within three years from the date that payment was made hereunder. *Id.*

The section is a variant from the common law; "[i]n effect, though not in specific language, it accomplished a limited change in the common law rule that a cause of action for personal injuries, unlike one for property damage, is not assignable." In-

Judgment was rendered for Liberty Mutual in the trial court, despite Fales' contention that section 11580.2(g) violated the equal protection provisions of the United States and California Constitutions.[5] The violation allegedly arose in that the uninsured motorist was prohibited from seeking affirmative relief by cross-complaint under the one-year statute of limitations for negligence,[6] but the insurer-subrogee was permitted to bring an action three years from the time it paid the claim. Fales did not attempt to seek affirmative relief in the trial court; rather he unsuccessfully claimed that since he was barred by statute from suing, Liberty Mutual should be similarly barred.

Fales appealed and Liberty Mutual responded with a document stating that the judgment had been satisfied and requested that the appeal be dismissed because of mootness. Actually, Liberty Mutual had not been paid, but it did not wish to defend the appeal because, as it explained, there was no possibility of collection on the judgment.[7] The court of appeal granted Liberty Mutual's motion and dismissed Fales' appeal. Despite the contention of mootness, the supreme court considered the merits of the action on the theory that when

> an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occuring during its pendency would normally render the matter moot.[8]

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terinsurance Exchange v. Harmon, 266 Cal. App. 2d 758, 761, 72 Cal. Rptr. 352, 353 (1968). Subrogation arises automatically upon payment of the insured's claim and does not require formal assignment. *Id.* at 761, 72 Cal. Rptr. at 353. Section 11580.2(g) does not provide for automatic subrogation to the property damage claim of the insured. Such subrogation was not barred at common law and is therefore generally explicitly provided for in the insurance agreement.

5. Appellant had contended in the trial court that the violations were specifically those involving the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 21 and article IV, section 16 of the California Constitution. The trial court held that none of the provisions of either the United States or California Constitutions had been violated. Liberty Mut. Ins. Co. v. Fales, 8 Cal. 3d 712, 719 n.1, 505 P.2d 213, 218 n.1, 106 Cal. Rptr. 21, 26 n.1 (1973).

6. CAL. CODE CIV. PROC. § 340.3 (West Supp. 1973).

7. Before the supreme court, Fales contended that insurance companies had prevented judicial scrutiny of issues raised on appeal by devices such as the declaration of satisfaction. Fales presented the court with the declarations of two attorneys who had represented uninsured motorists in suits brought by insurer-subrogees, such as Liberty Mutual. In both instances the suits were dismissed when the uninsured motorist challenged the constitutionality of § 11580.2(g). 8 Cal. 3d at 715 n.5, 505 P.2d at 215 n.5, 106 Cal. Rptr. at 23 n.5.

8. *Id.* at 715-16, 505 P.2d at 215, 106 Cal. Rptr. at 23, *citing In re* William M., 3 Cal. 3d 16, 23-24, 473 P.2d 737, 741-42, 89 Cal. Rptr. 33, 37-38 (1970); Di Gior-

The intent of the Legislature, as well as the policy behind statutes of limitations, formed the basis of the court's opinion on the merits. The court refused to pass on the constitutional issue, but instead held that the enactment of section 11580.2(g) by the Legislature was not intended to give an insurer-subrogee an advantage over the uninsured motorist, "i.e., the power, by delayed filing, to preclude the uninsured motorist from seeking affirmative relief for personal injuries by cross-claim."[9] The section was also not intended "to grant the insurer immunities in defense that would not have been enjoyed had the action been brought by its insured."[10] Though the insurer retains the three-year limitation period, the defendant is permitted to cross-claim for affirmative relief, despite the general one-year statute of limitations for personal injuries.

Thus, the court reached a conclusion which was unlikely to draw the unqualified acclaim of either party. Fales had contended that because he had no right to file a cross-claim, Liberty Mutual should have no right to sue. The court countered that position by stating that Fales had in fact possessed a right to file a cross-claim, but had failed to exercise that right, and the court, therefore, affirmed the judgment of the trial court. On the other hand, Liberty Mutual had "won" its apparently uncollectable judgment but faced the prospect of potentially damaging cross-claims in future cases.

The history of section 11580.2 illuminates the necessity for an extended period of limitation in favor of the insurer. Subrogation of the insurer was part of the original 1961 statute.[11] Subsection (h) of that enactment, presently subsection (i) of section 11580.2, required that in order for the insured to recover from the insurer he must within one year of the accident either file suit against the uninsured motorist, reach agreement as to his claim with the insurer, or begin arbitration proceedings.[12] If arbitration was the course of action pursued by the

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gio Fruit Corp. v. Dep't of Employment, 56 Cal. 2d 54, 58, 362 P.2d 487, 489, 13 Cal. Rptr. 663, 665 (1961); American Civil Liberties Union v. Bd. of Educ., 55 Cal. 2d 167, 181-82, 359 P.2d 45, 53, 10 Cal. Rptr. 647, 655 (1961). The California "public interest exception" to the general rule that mootness precludes appellate review is not recognized by the federal courts. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125, 138 (1946); Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772, 787 (1955).

9. 8 Cal. 3d at 717, 505 P.2d at 216, 106 Cal. Rptr. at 24.

10. *Id.* at 719, 505 P.2d at 217-18, 106 Cal. Rptr. at 25-26.

11. Ch. 1189, § 1, [1961] Cal. Stat. 2921.

12. CAL. INS. CODE ANN. § 11580.2(h) (West 1962), *as amended*, CAL. INS. CODE ANN. § 11580.2(i) (West 1972).

insured, the insurer was somewhat constricted. It could not compel the insured to institute a suit against the uninsured motorist since the statute clearly provided for arbitration in lieu of filing suit, should the insured so elect. Thus, if the insured elected the path of arbitration, the insurer could succeed to a valueless claim because of the running of the one-year statute of limitations on personal injury actions. It may have been argued, however, as Fales argued on appeal,[13] that the insurance company, having been notified of the insured's claim by the formal demand for arbitration, had been put on notice of the claim and, therefore, could have instituted an action in the insured's name against the uninsured motorist. There is dictum substantiating that contention in *Travelers Indemnity Co. v. Bell.*[14] The insured in *Travelers* filed a formal arbitration demand ten months after the accident. Since the proceeding and award came more than a year after the accident, the statute of limitations had run on the cause of action against the uninsured motorist, and the insurer-subrogee had succeeded to a valueless claim. The court in *Travelers* suggested that the insurance company could have preserved its rights by filing an action upon the receipt of the demand for arbitration. Fales, therefore, cited *Travelers* to argue that an extended statute of limitations is not required to preserve the subrogation rights of the insurer beyond the year subsequent to the accident.[15] The supreme court, however, summarily dismissed this argument by distinguishing *Travelers* on the basis of the insurance contract there involved and by saying that the subsequent passage of section 11580.2(g) superceded the dictum of that case.[16] Thus, the three year period of section 11580.2(g) preserves the insurer's right to assert the claim after having succeeded to it by payment, even though payment is made subsequent to the one-year statute of limitations on personal injury actions.[17]

13. *See* 8 Cal. 3d at 717 n.7, 505 P.2d at 216 n.7, 106 Cal. Rptr. at 24 n.7.

14. 213 Cal. App. 2d 541, 548-49, 29 Cal. Rptr. 67, 71 (1963).

15. 8 Cal. 3d at 717 n.7, 505 P.2d at 216 n.7, 106 Cal. Rptr. at 24 n.7.

16. *Id.* Fales' argument and the dictum in *Travelers*, though advanced as an alternative method of disposing of the conflict between the two statutes of limitations, are really untenable as payment is required for an insurer to succeed to any right of subrogation:

> The doctrine of subrogation requires that the person seeking its benefit must have paid a debt due to a third person before he can be substituted to that person's rights and it is not the liability to pay but an actual payment to the creditor which raises the equitable right. Arp v. Blake, 63 Cal. App. 362, 367, 218 P. 773, 775 (1923) (citations omitted).

Thus, though the insurer would be given notice of the claim by the initiation of arbitration proceedings, he would have no claim upon which to initiate suit.

17. 8 Cal. 3d at 716, 505 P.2d at 215-16, 106 Cal. Rptr. at 23-24, *citing* Interinsurance Exchange v. Harmon, 266 Cal. App. 2d 758, 762, 72 Cal. Rptr. 352, 354 (1968).

Though section 11580.2 has been the subject and source of much litigation, subsection (g) had been considered by the appellate courts only once prior to the *Liberty Mutual* case. In *Interinsurance Exchange v. Harmon*,[18] the uninsured motorist contended that section 340(3) of the Code of Civil Procedure[19] barred the insurer from bringing an action more than a year subsequent to the accident. The court of appeals concluded that:

> The special period of limitation applicable solely to the subrogation claims of an insurer under the Uninsured Motorist Law takes precedence over a statute of limitations applicable generally to personal injury claims.[20]

It is significant that the uninsured motorist did not raise any contentions regarding affirmative relief or equal protection, as did Fales. *Liberty Mutual* is thus the first case to directly consider the conflicts and ramifications of the two statutes of limitations.[21]

The court in *Liberty Mutual* determined that statutes of limitations are enacted as a matter of public policy "to promote justice by preventing the revival of hoary claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[22]

> The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[23]

But if the subrogated personal injury action initiated by the insurance company is not stale, then it would be difficult to suggest that a cross-claim relating to the same transaction somehow was. Indeed, since the defendant would not be barred from presenting a defense of contributory negligence, it would be even more difficult to understand why the same facts, vital and alive as a shield, should suddenly become stale when used as a sword. Consequently, the public policy considerations supporting statutes of limitations were not violated by the court's holding. The insurer would have notice of a potential cross-complaint when it asserted the subrogated claim. As the court noted,

18. 266 Cal. App. 2d 758, 72 Cal. Rptr. 352 (1968).

19. CAL. CODE CIV. PROC. § 340(3) (West Supp. 1973).

20. 266 Cal. App. 2d at 761-62, 72 Cal. Rptr. at 354.

21. The lack of cases on this point is apparently attributable to the insurance industry's evasion of appellate consideration. See note 7 *supra*.

22. 8 Cal. 3d at 718, 505 P.2d at 217, 106 Cal. Rptr. at 25.

23. *Id., quoting* Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).

notice is a more imperative requirement for the defendant in such a case, as he may be unaware of any negotiations between the insurer and the insured which, when coupled with the three-year limitation period, could place the filing of the insurer-subrogee's action several years after the accident.[24]

Justice Sullivan's dissent took a dim view of the majority's treatment of statutes of limitations and vigorously criticized the majority's skirting of the constitutional issues:

> [S]tatutes of limitation are intended to vary; they reflect the legislative policy of differing the periods of limitation according to the degree of permanence of the evidence and the relative favor with which the Legislature views the type of claim or class of litigants.[25]

In order to avoid basing its decision on constitutional issues, he said, the court had fashioned an entirely new rule of procedure in contravention of long-standing statutes and postulated without a single reference to supporting authority.[26] When it is considered that a "statute of limitations is purely a matter of legislative creation"[27] there would appear to be some merit to Justice Sullivan's criticism. It could be argued that the court has authorized barred cross-complaints by judicial fiat, without legislative action or consent. However, statutes of

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24. 8 Cal. 3d at 718, 505 P.2d at 217, 106 Cal. Rptr. at 25. Justice Sullivan, in his dissent, argued that the uninsured motorist was not precluded from bringing suit on his claim within the one-year limitation period. *Id.* at 721, 505 P.2d at 219, 106 Cal. Rptr. at 27. Thus, such a possibility as posed by the majority opinion would be vitiated by timely suit on behalf of the uninsured motorist. The majority opinion dismissed this solution by saying:

> Where the damage is relatively minor, the uninsured motorist might refrain from seeking damages for his own injuries within a year of the accident upon the assumption that mutual forbearance would be a reasonable compromise of the conflicting claims arising out of the mishap and that each party would bear his own losses. *Id.* at 718, 505 P.2d at 217, 106 Cal. Rptr. at 25.

25. *Id.* at 721, 505 P.2d at 219, 106 Cal. Rptr. at 27 (citations omitted).

26. *Id.* at 720, 505 P.2d at 218, 106 Cal. Rptr. at 26. However, Justice Sullivan recognized judicial reluctance to consider constitutional issues. *Id.* at 721-22, 505 P.2d at 219, 106 Cal. Rptr. at 27, *citing* Palermo v. Stockton Theatres, Inc., 32 Cal. 2d 53, 65, 195 P.2d 1, 8-9 (1948).

27. *E.g.*, Glashoff v. Glashoff, 57 Cal. App. 2d 108, 113, 134 P.2d 316, 319 (1943); Black v. Vermont Marble Co., 1 Cal. App. 718, 720, 82 P. 1060, 1061 (1905). In Bakersfield Home Bldg. Co. v. J.K. McAlpine Land and Dev. Co., 26 Cal. App. 2d 444, 448-49, 79 P.2d 410, 412-13 (1938), the court stated:

> Clearly, however, the courts are not at liberty to refuse to apply unambiguous language in a statute which involves no absurdity nor any necessary inconsistency with its general purpose; nor may they indulge in mere speculation to the effect that the legislature meant something other or less than what it said. They may not depart from the literal construction of the statute unless they can be reasonably assured that the legislature meant to say something different from what it appears to have said.

limitations are to be "liberally constructed [in order] to effect [their] objects and to promote justice."[28] Moreover, a fraudulent use of the statute of limitations is most definitely viewed with disfavor by the courts: "[A plaintiff] will not be allowed to thus lull his adversary into repose until his claim is barred by the statute, and then raise a point which is lethal."[29] The insurance company's action of bringing delayed suit arguably may be described as an attempt to lull the uninsured party into repose until his claim is barred.[30] Thus, though the court permits the defendant to assert affirmative relief, and does so without supporting precedent, the policy behind liberal construction of statutes of limitations appears to support the majority's opinion.[31]

That the decision in *Liberty Mutual* portends ramifications for conflicts between other statutes of limitations is apparent. Suppose, for example, a situation in which the defendant is possessed of a personal injury cause of action, but the plaintiff, a minor at the time of the accident, brings suit for personal injuries upon attaining majority and more than one year after the accident, pursuant to Code of Civil Procedure section 352(a)(1).[32] Here, the reasoning of the court in *Liberty Mutual* would appear to strongly support the assertion of a cross-complaint by the defendant for personal injuries; the plaintiff having been given an extension in the time permitted to initiate suit because of his minority, should not be allowed to preclude the defendant from seeking similar affirmative relief based on the same event. As in *Liberty Mutual*, the losses each party would allege are similar in their requirements of evidence, and they arise from the same event.

Thus *Liberty Mutual* would appear to stand for the principle that if a defendant is possessed of a cause of action to which a short statute of limitations applies, he should be able to assert that cause of action against the complaining party by means of a cross-complaint in any suit brought pursuant to a longer statute of limitations and involving the same event or transaction, despite the running of the shorter period of limitation. However, there may exist a limitation on the application of this principle. *Liberty Mutual* involved a defendant seeking a

28. Paige v. Carroll, 61 Cal. 211, 214 (1882).

29. McDougald v. Hulet, 132 Cal. 154, 160, 64 P. 278, 280 (1901).

30. One might question if the past use of section 11580.2(g) by the insurance companies, by filing after this one-year period, did not approximate fraud. That this is possible is shown by their fear of appellate adjudication of the section. See note 7 *supra.*

31. See notes 22-24 *supra* and accompanying text.

32. CAL. CODE CIV. PROC. § 352(a)(1) (West 1972).

cross-complaint for personal injuries in answer to a complaint for personal injuries. Thus, the principle would be most applicable to cross-claims for personal injury where both claims arise out of the same occurrence. Application of the principle may be limited in other factual contexts.

For example, a claim for property damage may be asserted anytime within three years from the date of injury.[33] To what extent would *Liberty Mutual* permit a defendant's expired cross-complaint for personal injuries against a plaintiff's complaint for property damage in a situation where the claims arise out of the same transaction? Though the event which caused both complaints would be the same and though the evidence from both parties would be of equal age, the different character of the damages involved *might* distinguish the situation from *Liberty Mutual.*

Thus, the underlying principle of *Liberty Mutual* could be used to significantly alter the range of situations in which the defense of the statute of limitations may appropriately be invoked. The ultimate reach of *Liberty Mutual* must await litigation, but one thing is settled in California: Insurance companies can no longer bring actions more than one year from the time of accidents and expect to defend against cross-complaints by resort to the statute of limitations.

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33. CAL. CODE CIV. PROC. § 338(3) (West 1972).