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## Solidarity in Overlapping Insurance Coverage: Rethinking *Hoefly*

Alex Robertson\*

In for a penny, in for a pound—solidary obligors are treated as one. As between themselves, a payment to a creditor by one solidary obligor relieves the others toward that creditor.<sup>1</sup> Interruption of prescription as to one solidary obligor interrupts as to all.<sup>2</sup> The effects of solidarity are powerful and have always been clear, but deciding to whom solidarity applies has proven cumbersome for Louisiana courts.<sup>3</sup>

A plain reading of the Louisiana Civil Code suggests that solidarity arises only when the parties or the law clearly express an intent to bind obligors *in solido*.<sup>4</sup> The Louisiana Supreme Court in *Hoefly v. Government Employees Insurance Company*<sup>5</sup> established a three-pronged test whereby courts could more flexibly invoke the doctrine of solidarity arising from the law<sup>6</sup> to save a plaintiff's claim from prescription.<sup>7</sup> The *Hoefly* Court's holding, however—that a victim's under- or uninsured motorist ("UM") insurer and a tortfeasor were solidarily bound so that prescription was interrupted as to both<sup>8</sup>—perhaps unwittingly expanded the application of solidarity.<sup>9</sup>

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1. LA. CIV. CODE art. 1794 (2017).

2. *Id.* art. 3503.

3. See generally Bruce Schewe, *Tilting Against Windmills: A Solidary Rejoinder*, 41 LA. L. REV. 1279 (1981) [hereinafter *Tilting Against Windmills*].

4. LA. CIV. CODE art. 1796.

5. 418 So. 2d 575 (La. 1982).

6. *Id.* at 577 (“Under Civil Code Article 2091, ‘[t]here is an obligation *in solido* on the part of the debtors, when they 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.’ When an obligation fulfills this definition and contains these ingredients, the obligation is *in solido*.”).

7. See discussion *infra* Part I.B.3.a.

8. *Hoefly*, 418 So. 2d at 580.

9. See discussion *infra* Part I.C.

Although it granted future courts a certain amount of flexibility to summon the doctrine of solidarity on an ad hoc basis,<sup>10</sup> the *Hoefly* test created unanticipated and perhaps undesirable consequences. Less than a year after *Hoefly*, Justice Blanche criticized the *Hoefly* Court for attempting to “salvage[] a particular plaintiff’s claim from prescription by invoking the doctrine of solidarity” without considering what other, “less palatable effects the application of . . . solidarity would have upon future claimants.”<sup>11</sup> Blanche’s criticisms foreshadowed a line of tort cases in which an insurer’s coverage obligation overlaps with either a tortfeasor or another insurer’s liability, sparking litigation over whether parties are entitled to a credit for payments made under the policy.<sup>12</sup> A study of this line of cases reveals that the application of the *Hoefly* test suffers from circular reasoning, irreconcilably conflicts with other Civil Code principles and Louisiana Supreme Court jurisprudence, is no longer needed to serve the purposes for which Louisiana adopted solidarity, and is easily manipulated.

Part I of this Article analyzes the relevant Louisiana Civil Code articles relating to when solidarity should apply, Louisiana courts’ interpretations of those articles leading up to *Hoefly*, and the expansion of the *Hoefly* test in the insurance context. Part II articulates four possible defects in the *Hoefly* test and illustrates each defect with a discussion of post-*Hoefly* jurisprudence. Finally, Part III suggests that courts analyze solidarity arising from the law based on a plain reading of the Civil Code, requiring the legislature to decide expressly—guided by public policy—which obligors are solidarily bound.

#### I. LOUISIANA’S INTERPRETATION OF SOLIDARITY ARISING FROM THE LAW AND ITS APPLICATION IN THE INSURANCE CONTEXT

Analyzing only the text of the Civil Code articles concerning solidarity lends itself to multiple interpretations of when solidarity arises from the law—that is, situations in which parties have not contracted for a solidary relationship. Indeed, Louisiana courts vacillated over the proper interpretation until *Hoefly* established the now-operative three-pronged test. The *Hoefly* decision, however, inadvertently portended the extension of solidarity’s application in the insurance “credit cases.”

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10. See SAUL LITVINOFF, OBLIGATIONS § 7.61, in 5 LOUISIANA CIVIL LAW TREATISE 142 (2d ed. 2001).

11. *Carona v. State Farm Ins. Co.*, 458 So. 2d 1275, 1280 (La. 1984) (Blanche, J., concurring).

12. See discussion *infra* Part I.C.

### A. Basic Civil Code Principles

A plain reading of the Louisiana Civil Code suggests that solidarity arises only from a clear expression in legislation. Articles 1794 and 1796 address this issue. Of these, only article 1796 speaks directly to when solidarity arises.<sup>13</sup> Article 1796 articulates two distinct principles: first, that solidarity is never presumed; and second, that “[a] solidary obligation arises from a clear expression of the parties’ intent or from the law.”<sup>14</sup> Although no Code article delineates the strength of, or what is sufficient to overcome, the presumption against solidarity, solidarity is clearly the exception rather than the rule.<sup>15</sup> Nevertheless, the second principle of article 1796—regarding when solidarity “arises”<sup>16</sup>—suffers from at least one major ambiguity.

Whether the drafters of article 1796 intended the phrase “clear expression” to modify only the parties’ intent or both the “parties’ intent” and “the law”<sup>17</sup> is not apparent. For instance, article 3045 states that co-sureties are solidarily liable for the obligation of the principal obligor.<sup>18</sup> Such is an obvious example of an unambiguous expression of solidarity in the law. Exactly how clear the legislation has to be is uncertain, but it is apparent that an obligation may be solidary “though it derives from a different source for each obligor.”<sup>19</sup>

The Civil Code also distinguishes an obligation that is solidary for obligees from an obligation that is solidary for obligors.<sup>20</sup> Under article 1794, styled “Solidary obligations for obligors,” an obligation is solidary for obligors “when each obligor is liable for the whole performance.”<sup>21</sup> Article 1794 also states that “[a] performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.”<sup>22</sup> Thus, article 1794’s purpose may be accurately described in one of three ways: first, by describing only the difference between an obligation that is

13. LA. CIV. CODE art. 1796 (2017).

14. *Id.*

15. *See, e.g.,* *Hoefly v. Gov’t Emps. Ins. Co.*, 418 So. 2d 575, 581 (La. 1982) (Blanche, J., dissenting).

16. LA. CIV. CODE art. 1796.

17. *See* LITVINOFF, *supra* note 10, § 7.66, at 149.

18. LA. CIV. CODE art. 3045.

19. *Id.* art. 1797.

20. *Id.* arts. 1790, 1794.

21. *Id.* art. 1794.

22. *Id.*

solidary for the obligors and solidary for the obligees;<sup>23</sup> second, by describing the effects of solidarity for obligors presupposing a finding of solidarity;<sup>24</sup> or third, by setting out elements to determine when an obligation is solidary for the obligors.<sup>25</sup>

Reading both articles 1794 and 1796 *in pari materia*, it might seem that article 1796 determines when solidarity arises from the law. Not only does the presumption against solidarity buttress this conclusion, but article 1796 more specifically addresses when solidarity “arises” from the law.<sup>26</sup> This interpretation would result in fewer obligations being classified as solidary, imposing a higher standard when solidarity arises from the law.<sup>27</sup>

Another plausible *in pari materia* interpretation of these articles suggests that article 1794—not article 1796—is determinative of solidarity arising from the law. Whereas article 1796 speaks of solidarity generally, article 1794 speaks directly to obligations that are solidary for obligors.<sup>28</sup> Indeed, this interpretation of article 1794 focuses on the use of “when” in that article and interprets what follows as elements or “ingredients”<sup>29</sup> of solidarity: “An obligation is solidary . . . when . . . .”<sup>30</sup> Under this interpretation, it would seem that if the conditions are met, the obligation is solidary for the obligors.

#### *B. Louisiana Courts' Interpretations of Solidarity Arising from the Law*

Louisiana courts have wavered over what articles to apply to determine when solidarity arose from the law. As late as 1981, scholars lamented that there was no “ordered doctrine of solidarity,” and few decisions determining when solidarity arose from the law “reveal[ed] an adequate theoretical foundation.”<sup>31</sup> Generally, courts chose one of three options to make that determination: first, article 1796’s clear-expression test; second, the secondary-effects test; and third, the principal-effects test from article

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23. Compare *id.* art. 1790 (“Solidary obligations for obligees”), with *id.* art. 1794 (“Solidary obligations for obligors”).

24. See Bruce Schewe, *Prescribing Solidarity: Contributing to the Indemnity Dilemma*, 41 LA. L. REV. 659, 672–76 (1981) [hereinafter *Prescribing Solidarity*] (discussing the then-operative article 2091, the equivalent of article 1794, and the then-operative article 2093, the equivalent of article 1796).

25. See, e.g., *Hoefly v. Gov’t Emps. Ins. Company*, 418 So. 2d 575, 577 (La. 1982).

26. LA. CIV. CODE art. 1796 (“A solidary obligation arises from a clear expression of the parties’ intent or from the law.”).

27. LITVINOFF, *supra* note 10, § 7.66, at 149.

28. LA. CIV. CODE art. 1796.

29. See *Hoefly*, 418 So. 2d at 579.

30. LA. CIV. CODE art. 1794.

31. *Prescribing Solidarity*, *supra* note 24, at 679.

1794.<sup>32</sup> Ultimately, Louisiana courts settled on the principal-effects test, which is widely considered to be a liberal interpretation of solidarity.<sup>33</sup>

### 1. *The Clear-Expression Test*

When courts applied the “clear-expression” analysis, the only relevant inquiry was whether statutory authority expressly prescribed solidarity to specific obligors.<sup>34</sup> Wary of the presumption against solidarity, courts held that the law deemed obligors bound *in solido* only when a statute or Code article spoke to the issue directly.<sup>35</sup> For instance, in *Cox v. Shreveport Packing Co.*, the Louisiana Supreme Court held an employer and his tortfeasor employee were not solidarily bound, stating: “[T]here is no provision of our law which expressly renders a master solidarily liable with his servant for the latter’s wrongdoing.”<sup>36</sup> The clear-expression test resulted in fewer obligations being classified as solidary, and courts over time slowly backed away from this strict view of solidarity.<sup>37</sup>

### 2. *The Secondary-Effects Test*

The secondary-effects test established that solidarity arose from the law when the obligation appeared to resemble the secondary effects of solidarity.<sup>38</sup> This standard seems odd because it developed when the law recognized two types of solidarity: imperfect solidarity—also called *in solidum*—and perfect solidarity—also called *in solido*.<sup>39</sup> Similarly, the effects of solidarity comprised two subtypes: principal and secondary.<sup>40</sup> Perfect solidarity carried with it both principal and secondary effects, while imperfect solidarity carried only the principal effects of solidarity.<sup>41</sup> The Louisiana Civil Code recognized primarily two principal effects of solidarity: first, all obligors are “obliged to the same thing so that each may be compelled for the whole” obligation; and second, payment made

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32. *Id.* at 677.

33. *See Hoefly*, 418 So. 2d at 581 (Blanche, J., dissenting) (criticizing the principal-effects test as amounting to judicial legislation); *see also* LITVINOFF, *supra* note 10, § 7.66, at 149.

34. *See Cox v. Shreveport Packing Co.*, 35 So. 2d 373, 375 (1948).

35. *See id.* *See also Prescribing Solidarity*, *supra* note 24, at 675.

36. *Cox*, 35 So. 2d at 375.

37. *See* LITVINOFF, *supra* note 10, § 7.66, at 149.

38. *Tilting Against Windmills*, *supra* note 3, at 1284.

39. *Id.*; *see* LITVINOFF, *supra* note 10, § 7.101, at 181–82.

40. LITVINOFF, *supra* note 10, § 7.80, at 168.

41. *Tilting Against Windmills*, *supra* note 3, at 1285.

by one obligor exonerated all others toward the creditor.<sup>42</sup> This scheme recognized that the now-repealed article 2091 set out the principal effects of solidarity, and all the articles that followed “specif[ied] [the] secondary characteristics of solidarity.”<sup>43</sup> The most hotly litigated secondary effect of solidarity was that suit against one *in solido* obligor interrupted prescription as to all.<sup>44</sup> Other secondary effects of solidarity included: putting one solidary obligor in default puts them all in default and shifts the risk of loss to the debtors; permitting litigants to sue all solidary obligors in any parish that is proper for any solidary obligor; and obligors were provided a right of contribution.<sup>45</sup> The secondary-effects test, which first appeared in the highly criticized Louisiana Supreme Court case *Wooten v. Wimberly*,<sup>46</sup> vanished after the Louisiana Supreme Court overturned *Wooten* in *Foster v. Hampton*, stating, “[t]he distinction drawn between perfect and imperfect solidarity is untenable and must be rejected.”<sup>47</sup> Soon thereafter, the Louisiana Legislature followed suit, removing all references to *in solidum* liability from the Civil Code in the 1980s.<sup>48</sup>

### 3. *The Principal-Effects Test*

The principal-effects test asks whether the principal effects from Civil Code article 1796 are present. Under this test, an obligation is solidary when all three of the following elements are found: first, all obligors are obligated to the same thing; second, each obligor may be compelled for the whole; and third, payment made by one exonerates the others toward the creditor.<sup>49</sup> The Louisiana Supreme Court ultimately settled on this test,<sup>50</sup> and it continues to remain in effect.<sup>51</sup>

Scholars have suggested that this test is a liberal view of solidarity.<sup>52</sup> Despite the Civil Code’s presumption against solidarity and its clear-expression requirement, Louisiana courts have used this test to conclude that obligors are bound *in solido*, even in the absence of any mention of

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42. *Prescribing Solidarity*, *supra* note 24, at 671, n.104.

43. *Id.*

44. *Id.* at 672.

45. *Id.* at 672–73.

46. 272 So. 2d 303, 305 (La. 1972).

47. 381 So. 2d 789, 791 (La. 1980).

48. LITVINOFF, *supra* note 10, § 7.84, at 175.

49. *Id.*

50. *Hoefly v. Gov’t Emps. Ins. Co.*, 418 So. 2d 575, 577 (La. 1982).

51. *See* discussion *infra* Part I.C.

52. LITVINOFF, *supra* note 10, § 7.66, at 149.

solidarity in the contract or the legislation that bound the parties.<sup>53</sup> Put another way, “Louisiana courts have adopted a liberal view of solidarity that arises from the law, which allows them to conclude that multiple obligors are solidarily bound . . . even when the law that provides that obligation neither uses the word, nor makes reference to, solidarity.”<sup>54</sup> Perhaps the desirability of solidarity’s principal effects can best explain Louisiana courts’ loose applications of solidarity in certain instances.

*a. Liberative Prescription’s Entanglement with Solidarity:  
Interpreting the Result in Hoefly*

Courts adopted this liberal view of solidarity, at least in part, because of solidarity’s intertwined relationship with prescription. When prescription is interrupted against one solidary obligor, it is interrupted as to all solidary obligors.<sup>55</sup> This principle is true regardless of whether the plaintiff named all of the solidary obligors in the petition or served them.<sup>56</sup> Thus, sometimes courts stretched the limits of solidarity to help the plaintiff gain access to deeper pockets.<sup>57</sup> In one such case, *Hoefly v. Government Employees Insurance Co.*, the Louisiana Supreme Court adopted a new test for solidarity—utilizing the three-pronged principal-effects test—to rescue a plaintiff’s claim from prescription.<sup>58</sup> Importantly, to arrive at this conclusion, the Court had to conclude that a UM insurer and a tortfeasor were solidarily bound.<sup>59</sup> This aspect of the case unwittingly produced unforeseen consequences in tort cases in which tortfeasors or insurers had overlapping liability.<sup>60</sup>

Justice Blanche dissented in *Hoefly*, sharply criticizing the majority.<sup>61</sup> Specifically, he noted that “[i]n all other cases in which legal solidarity arises, there exists *some* relationship between the parties who are held solidarily liable.”<sup>62</sup> Reasoning that because “the law” did not create any

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53. *Id.*

54. *Id.*

55. LA. CIV. CODE art. 3503 (2017).

56. *See id.* art. 3503 cmt. b.

57. *See, e.g.,* Carona v. State Farm Ins. Co., 458 So. 2d 1275, 1280 (La. 1984) (“In *Hoefly v. GEICO*, this Court salvaged a particular plaintiff’s claim from prescription by invoking the doctrine of solidarity whereby U/M insurers were deemed solidarily liable with tortfeasors.” (citation omitted)).

58. *Hoefly v. Gov’t Emps. Ins. Co.*, 418 So. 2d 575, 576 (La. 1982).

59. *Id.* at 579.

60. *See* discussion *infra* Part II.

61. *Hoefly*, 418 So. 2d at 581 (Blanche, J., dissenting).

62. *Id.*



relationship between the tortfeasors and the UM insurer, the application of solidarity in *Hoefly* was “purely [a] creation of the majority.”<sup>63</sup> Blanche buttressed his criticisms with the presumption against solidarity, stating, “we cannot presume a solidary relationship where none is intended to exist.”<sup>64</sup> Thus, according to Blanche, there must be, at the very least, some legislative intent to bind obligors solidarily, even if the legislature did not say it outright.<sup>65</sup> Anything else, in his opinion, amounted to “judicial legislation.”<sup>66</sup>

*b. Immediate Fallout from Hoefly: Justice Blanche’s Concurrence in Carona*

The unanticipated consequences of *Hoefly* manifested almost immediately. A year after *Hoefly*, in *Carona v. State Farm Insurance Co.*,<sup>67</sup> the Louisiana Supreme Court dealt with a group of consolidated cases in which the trial court in each case either granted summary judgment or granted an exception of *res judicata* in favor of UM carriers because the tort victims settled with the tortfeasors without expressly reserving rights against the UM carriers.<sup>68</sup> The then-operative Civil Code article 2203 provided that when an obligee remitted a debt against one solidary obligor without expressly reserving rights against the other, the obligee forfeited the entire obligation.<sup>69</sup> Hence, the Court faced what was perhaps an unforeseen implication from the *Hoefly* holding, which had previously held that a UM provider and the tortfeasor were solidary obligors.<sup>70</sup> Eschewing the “technical rule” of article 2203, the Court, in a feat of interpretive acrobatics, concluded that the purpose of UM legislation precluded article 2203’s application in that case.<sup>71</sup>

The Court unanimously agreed with the result in *Carona*.<sup>72</sup> Concurring in the result only, Justice Blanche seized an opportunity to reassert and expand upon his dissent in *Hoefly*.<sup>73</sup> Specifically, he characterized the reasoning in *Hoefly* as nothing more than “salvag[ing] a particular plaintiff’s claim from

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. 458 So. 2d 1275 (La. 1984).

68. *Id.* at 1277.

69. *Id.*

70. *Hoefly*, 418 So. 2d at 580.

71. *Carona*, 458 So. 2d at 1279.

72. *Id.*

73. *Id.* at 1280.

prescription by invoking the doctrine of solidarity.”<sup>74</sup> According to Justice Blanche, *Carona* was an example of the “less palatable effects” caused by the Court’s loose interpretation in *Hoefly*.<sup>75</sup>

Blanche premised his reasoning on the notion “that no solidary relationship exists between a tortfeasor and the claimant’s U/M carrier.”<sup>76</sup> Therefore, it was the blind assertion of *Hoefly* at the root of the issues in *Carona*.<sup>77</sup> Blanche, however, did not necessarily disagree with the use of the principal-effects test per se, but rather the Court’s analysis of whether obligors are “all obliged to the same thing.”<sup>78</sup>

Blanche then set out a new method to interpret when obligors are “obliged to the same thing.”<sup>79</sup> Under Blanche’s test, solidarity would seem to arise between insurers only when expressly legislated or when the insurers had previously enjoyed a “solidary relationship” with one another.<sup>80</sup> Premising his reasoning on the assertion that solidarity is an exception to the general rule, under which debts are divided among joint obligors, Blanche noted that the UM statute “contains no provision which would allow the U/M carrier” to become solidarily liable with a tortfeasor.<sup>81</sup> The lack of legislation prescribing solidarity coupled with the presumption against solidarity, militated against the Court cobbling together a solidary obligation from different areas of the law.<sup>82</sup>

Blanche also balked at the notion that it is the coextensiveness of the obligations that makes obligors bound for the same thing.<sup>83</sup> Instead, Blanche preferred the French rule: a plaintiff may look to any solidary obligor for the whole obligation.<sup>84</sup> Expanding upon the definition of “whole obligation,” Blanche clarified that in France, obligors are solidarily bound only if the entirety of their obligation is the same amount.<sup>85</sup> Thus, under the majority approach, if two obligors are bound for “the same thing”—one for up to \$50,000 and one for \$75,000—the two are solidarily bound for the \$50,000.<sup>86</sup> Under Blanche’s rationale,

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1281.

79. *Id.*

80. *Id.* at 1282.

81. *Id.*

82. *See id.* at 1282–83.

83. *Id.*

84. *Id.*

85. *Id.*

86. *See id.*

however, the two cannot be solidarily bound at all because they are not bound for the “same thing.”<sup>87</sup> Followed to its logical conclusion, unless the amount of the plaintiff’s damages and the policy limits are the exact equivalent, the law would most likely never bind an insurer and a tortfeasor *in solido*.<sup>88</sup>

*C. The Expansion of the Three-Pronged Hoefly Test in the Context of Insurance*

Since *Hoefly*, solidarity has been a hotly litigated issue in “credit cases.”<sup>89</sup> In those cases, an accident occurs, usually during the course and scope of employment, and two or more insurers have provided coverage.<sup>90</sup> After one of the insurers pays first,<sup>91</sup> the other insurer, recognizing that the plaintiff has already received a payment, files a motion for summary judgment seeking recognition of a credit reducing its obligation by the amount the other insurer has already paid.<sup>92</sup> The operative theory is that the two insurers are solidary obligors, and payment by one exonerates the other toward the creditor.<sup>93</sup> The two Louisiana Supreme Court cases that embraced the application of solidarity in this context—*Bellard* and *Cutsinger*—have made it worthwhile for many insurers to litigate this issue. Indeed, after *Bellard* and *Cutsinger* many appellate courts have examined solidarity in similar situations, resulting in an incoherent and confused body of jurisprudence.<sup>94</sup>

*1. Bellard and Cutsinger: Expanding Solidarity in Insurance Cases*

In *Bellard v. American Central Insurance Co.*,<sup>95</sup> the Louisiana Supreme Court held that the UM insurer of a plaintiff’s employer was entitled to a credit in the amount paid by the employer’s workers’ compensation insurer because the two were solidarily bound.<sup>96</sup> In that case, an employee sustained injuries

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87. *Id.*

88. *Id.* at 1283.

89. See Musa Rahman, *Bellard & Cutsinger: A Review of the Supreme Court Cases and Their Potential Fallout in Workers’ Compensation*, 58 LA. B.J. 374, 375 (2011).

90. See, e.g., *Bellard v. Am. Cent. Ins. Co.*, 980 So. 2d 654, 660 (La. 2008).

91. See, e.g., *id.*

92. See, e.g., *id.*

93. See, e.g., *id.*

94. See discussion *infra* Part II.C.2.

95. *Bellard*, 980 So. 2d at 654.

96. *Id.* at 671.

in a moving vehicle accident during the course and scope of his employment.<sup>97</sup> The plaintiff sued the other driver's liability insurer, the other driver, and his employer's UM insurer.<sup>98</sup> The employer's UM insurer then filed a motion for summary judgment seeking a declaration that the insurer was entitled to a credit in the amount that workers' compensation paid to the plaintiff.<sup>99</sup>

In holding that the UM insurer was entitled to the credit, the Court first concluded that the UM insurer and the workers' compensation carrier were solidary obligors.<sup>100</sup> Applying the three-pronged *Hoefly* test, the Court determined that each insurer was liable for the same thing: "certain elements of tort damage."<sup>101</sup> Accordingly, it did not matter that different areas of the law created liability and that no legislation expressed an intent to bind the obligors *in solido*.<sup>102</sup> Next, the Court determined that both obligors "may be compelled for the whole of their common liability" because neither was subject to a plea of division.<sup>103</sup> Last, the Court concluded that payment from one exonerated the other because an "injured employee is not allowed to obtain double recovery on those elements of damage which are coextensive."<sup>104</sup>

Thus, the two insurers were solidary obligors.<sup>105</sup> Because solidarity existed, payment by the workers' compensation insurer exonerated the UM insurer toward the plaintiff.<sup>106</sup> After concluding that the collateral-source rule did not apply,<sup>107</sup> the Court held that the UM insurer was entitled to a credit in the amount paid by workers' compensation.<sup>108</sup>

After *Bellard* held that the employer's UM carrier could receive a credit for payments by the workers' compensation insurer, the Louisiana Supreme Court added that the same applies for the plaintiff's UM

97. *Id.* at 659–60.

98. *Id.* at 660.

99. *Id.* at 661.

100. *Id.* at 667.

101. *Id.* at 664.

102. *Id.*

103. *Id.* at 665.

104. *Id.* at 666.

105. *Id.* at 667.

106. *Id.* at 666.

107. *Id.* at 671. The collateral-source rule is a common law import. *Id.* at 667. "Basically, the rule provides that 'a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procurement or contribution.'" *Id.* (citing *Bozeman v. Louisiana*, 879 So. 2d 692, 698 (La. 2004)).

108. *Id.*

insurer.<sup>109</sup> That case—*Cutsinger v. Redfern*—had facts that were nearly identical to *Bellard*.<sup>110</sup> One major difference, however, was that the UM policy excluded coverage to the extent that coverage would benefit any workers' compensation insurer.<sup>111</sup> The Court first noted that this "Traveler's exclusion" was enforceable under previous Louisiana Supreme Court jurisprudence.<sup>112</sup> The Court then reasoned that "[t]he fact that the uninsured motorist coverage was procured by plaintiff in this case rather than her employer as was the case in *Bellard* makes no difference in the solidarity analysis."<sup>113</sup> In keeping with *Bellard*, the Court went on to analyze solidarity and concluded that the two were solidarily bound.<sup>114</sup> Thus, once again, the UM insurer was entitled to a credit.<sup>115</sup>

## 2. *Cole v. State Farm: Backing Off of Bellard and Cutsinger*

In *Cole v. State Farm Mutual Automobile Insurance Co.*,<sup>116</sup> the Third Circuit addressed facts that were similar to those in *Cutsinger* and *Bellard*, but with two major differences: first, the workers' compensation insurer sought the credit from the UM insurer;<sup>117</sup> and second, the relevant UM policy contained a *Traveler's* exclusion.<sup>118</sup> The crux of the workers' compensation insurer's argument was that because the Louisiana Supreme Court jurisprudence made clear that the two parties were solidarily bound, basic Civil Code principles of solidarity required that either party should be allowed a credit.<sup>119</sup> Ultimately, the court held that the workers' compensation insurer was not entitled to the credit.<sup>120</sup> The court arrived at that decision not through an analysis of solidarity, but rather by reasoning that the policy language excluding UM coverage to the extent it benefits the workers' compensation insurer precludes the insurer from claiming a credit.<sup>121</sup>

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109. *Cutsinger v. Redfern*, 12 So. 3d 945, 955 (La. 2009).

110. *See generally id.*

111. *Id.* at 954.

112. *Id.* (quoting *Travelers Ins. Co. v. Joseph*, 656 So. 2d 1000, 1004 (La. 1995)) ("[N]o statutory provision or policy consideration precludes a UM carrier from contracting to exclude liability for compensation reimbursement.").

113. *Id.* at 951–52.

114. *Id.* at 953.

115. *Id.* at 956.

116. 149 So. 3d 831 (La. Ct. App. 2014).

117. *Id.* at 832.

118. *Id.* at 834–35.

119. *Id.*

120. *Id.* at 836.

121. *Id.*

The *Cole* court almost entirely sidestepped the issue of solidarity, stating only that “solidarity can be affected by contract.”<sup>122</sup> Supporting its decision to decide the case on policy grounds, the court cited a slew of pre-*Bellard* cases upholding the *Traveler’s* exclusion.<sup>123</sup> After *Bellard* and *Cutsinger*, however, it is strange to see a lower court decide a “credit case” without properly analyzing solidarity.

### 3. *Olivier v. City of Eunice, Advantage Personnel, and Being “Bound for the Same Thing”*

A court’s finding of whether two obligors are bound for the same thing may be contingent on how specifically the court chooses to describe the obligation. In *Olivier v. City of Eunice*,<sup>124</sup> the Third Circuit held that an employer and an employee’s health insurer were bound *in solido* for injuries the plaintiff sustained during his employment.<sup>125</sup> In applying the first prong of the *Hoefly* test, the court determined that both obligors were bound for the same thing because they shared a similar purpose—to compensate injured and ill persons.<sup>126</sup> The court concluded that the remaining two prongs of the *Hoefly* test were met without offering any analysis.<sup>127</sup> The court also noted in its opinion that the analysis was made without having a copy of any insurance policy in the record.<sup>128</sup>

The *Olivier* court employed a high level of generality to describe the obligations between two obligors to find solidarity. In contrast, however, the First Circuit in *Advantage Personnel and Louisiana Safety Ass’n of Timbermen v. Van Cleave*<sup>129</sup> described two obligations with a high level of specificity to find that two obligors were not solidarily bound.<sup>130</sup> In deciding that a workers’ compensation insurer and UM insurer were not solidarily bound, the *Advantage Personnel* court concluded that the workers’ compensation insurer’s obligation could not include loss of consortium and pain because workers’ compensation does not compensate for those damages.<sup>131</sup>

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122. *Id.* at 835 (quoting *Watson v. Funderburk*, 720 So. 2d 808 (La. Ct. App. 1998), *writ denied*, 736 So. 2d 834 (La. 1999)).

123. *Id.* at 833.

124. 92 So. 3d 630 (La. Ct. App. 2012).

125. *Id.* at 641.

126. *Id.* at 639.

127. *Id.* at 639–40.

128. *Id.* at 638.

129. 146 So. 3d 221 (La. Ct. App. 2014).

130. *Id.*

131. *Id.* at 233.

## II. POSSIBLE DEFICIENCIES IN THE *HOEFLY* TEST

The propriety and effectiveness of the *Hoefly* test as a means of determining solidarity that “arises from the law” is questionable. In *Fertitta v. Allstate*,<sup>132</sup> Louisiana’s highest court addressed the difficulty of using a test where the elements of the test cannot be parsed from the consequences of the test:

Perhaps the most difficult problem in solidarity cases is separating conceptually the *requirements* of solidarity from the *consequences* of solidarity. [The Louisiana Civil Code] set[s] forth the requirement of solidarity that the debtors are obliged to the same thing in that each is separately bound to perform the whole of the obligation. . . . In cases in which solidarity results from a contract . . . the determination of solidarity is relatively simple . . . . The difficult cases are those in which solidarity is imposed by law on two parties with different sources of liability, and there is a tendency to determine the existence of solidarity by inquiring whether the consequences of solidarity should flow from the relationship between the parties. . . . While this may be a legitimate inquiry into whether the Legislature intended the consequences of solidarity, discussion of the consequences as part of the determination of the existence of solidarity has been confusing in judicial decisions.<sup>133</sup>

Accordingly, this Section proceeds by examining post-*Hoefly* jurisprudence as a means of evaluating the efficacy of the *Hoefly* test. A review of this line of cases reveals that the *Hoefly* test suffers from a circular analytical framework; is incompatible with previous Louisiana Supreme Court jurisprudence; fails to serve solidarity’s original purpose; and is easily manipulated.

### A. A Circular Analytical Framework

Dissecting the analytical framework of the line of “credit” cases reveals the circular nature of a consequences-based test. The application of a consequences-based test has always been troublesome for Louisiana courts, as evidenced by the dicta in *Fertitta*.<sup>134</sup> What the *Fertitta* Court

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132. 462 So. 2d 159 (La. 1985).

133. *Id.* at 163 n.5. Justice Blanche concurred in *Fertitta*. In his concurrence, he only referred the reader to his dissent in *Hoefly* and his concurrence in *Carona*. *Id.* at 165.

134. *Id.* at 163 n.5.

struggled to articulate is that the *Hoefly* test itself suffers from a circular analytical framework. Circular reasoning is defined as “a type of reasoning in which the proposition is supported by the premises, which is supported by the proposition.”<sup>135</sup> This definition makes more sense in an illustration: X is true because of Y, and Y is true because of X.<sup>136</sup> A logical statement could be similarly illustrated: X is true because of Y, and Y is true because of Z.<sup>137</sup>

The third prong of the *Hoefly* test determines solidarity in part by asking whether payment by one exonerates the others toward the creditor.<sup>138</sup> In the credit cases, the entire purpose of determining solidarity was to determine if payment by one insurer exonerated the other insurer as to the plaintiff.<sup>139</sup> For instance, in *Bellard*, the Court determined that because “payment by one exonerated the other” (X) they were solidarily bound (Y). Thus, because they were solidarily bound (Y), payment by one exonerated the other as toward the creditor (X).<sup>140</sup> This classic illustration of circular reasoning indicates that using a consequences-based test to determine the classification of an obligation is erroneous because the classification is important only because of its consequences. This flawed framework implies that the *Hoefly* Court incorrectly applied article 1796 as the basis for its solidarity test.

Thus, to cure the logical defect of the *Hoefly* test, the criteria for determining solidarity must be distinct from the consequences of solidarity. This distinction must exist because the end result is often, as illustrated in the insurance-credit cases,<sup>141</sup> an application of the consequences of solidarity. In other words, as long as there is a consequences-based test, the test will always be circular.

### *B. The Problems Presented by the Traveler’s Exclusion*

In addition to, or perhaps because of, the logical deficiencies of the *Hoefly* test, courts have exhibited confusion in applying solidarity in the

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135. *Circular Reasoning*, LOGICALLY FALLACIOUS, [https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/66/Circular\\_Reasoning](https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/66/Circular_Reasoning) [<https://perma.cc/C4D7-Q387>] (last visited Jan. 23, 2017).

136. *Id.*

137. *Id.*

138. *Hoefly v. Gov’t Emps. Ins. Co.*, 418 So. 2d 575, 576 (La. 1982).

139. *See* discussion *supra* Part I.C.

140. *Bellard v. Am. Cent. Ins. Co.*, 980 So. 2d 654, 666 (La. 2008).

141. *See* discussion *supra* Part I.C.



insurance context.<sup>142</sup> Specifically, problems arise when a UM policy contains a provision excluding coverage to the extent it benefits any workers' compensation insurance company.<sup>143</sup> Longstanding Louisiana jurisprudence upholds these exclusions under *Traveler's*, yet upholding the exclusion runs afoul of solidarity principles.

The reasoning in *Cole v. State Farm* clearly illustrates this point. Recall that this case dealt with facts similar to *Bellard* and *Cutsinger*—a tort victim sustained injuries in a car accident during the course and scope of employment.<sup>144</sup> Although *Bellard* premised its decisions on solidarity,<sup>145</sup> *Cole* anchored its decision in terms of the language of the applicable insurance policy.<sup>146</sup> Curiously, *Cole* did not apply the *Hoefly* test. Rather, the court stated only that “solidarity [can] be affected by contract” as support for deciding the issue on policy grounds.<sup>147</sup>

This statement of law—most likely because of citation error—seems to lack supporting legal authority. The court cited *Watson*, and *Watson* cited *Fertitta*, for this proposition.<sup>148</sup> The applicable portion of *Fertitta* that found its way into *Cole*, however, stood only for the proposition that one solidary obligor cannot contract with the creditor as to the effect that its payment would have concerning the exoneration of other solidary obligors toward the creditor.<sup>149</sup> No such circumstances existed in *Cole*.

Citation errors aside, perhaps the *Cole* court struggled to reconcile the operation of a *Traveler's* exclusion, which excludes UM coverage to the extent it benefits any workers' compensation insurance company, with the principles of solidarity. Under *Bellard* and *Cutsinger*, the UM insurer and the workers' compensation insurer are solidarily bound.<sup>150</sup> Therefore,

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142. See, e.g., *Cole v. State Farm Mut. Auto. Ins. Co.*, 149 So. 3d 831, 833, 836 (La. Ct. App. 2014); see also discussion *infra* Part II.B.

143. See *id.*

144. See *Bellard*, 980 So. 2d at 656; see also *Cutsinger v. Redfern*, 12 So. 3d 945, 946 (La. 2009); *Cole*, 149 So. 3d at 833, 836.

145. *Bellard*, 980 So. 2d at 672.

146. *Cole*, 149 So. 3d at 833, 836.

147. *Id.* at 835 (quoting *Watson v. Funderburk*, 720 So. 2d 808, 810 (La. Ct. App. 1998)).

148. *Id.*

149. *Fertitta v. Allstate Ins. Co.*, 462 So. 2d 159, 164 (La. 1985) (“Nevertheless, the Civil Code expressly provides that payment by one solidary obligor exonerates the other toward the creditor to the extent of that payment, and the solidary obligor who makes the payment cannot by agreement with the creditor affect the right of the other solidary obligor to exoneration to the extent of the payment.”).

150. LA. CIV. CODE art. 1796 (2017); see also *Bellard*, 980 So. 2d at 667; *Cutsinger*, 12 So. 3d at 952.

under article 1796, payment by *either* should exonerate the other toward the creditor, and the workers' compensation insurer should have been entitled to a credit.<sup>151</sup> If the *Cole* court applied the rules of solidarity, however, the application of those rules would have run afoul of *Traveler's* because it effectively renders the policy exclusion unenforceable by allowing the workers' compensation insurer to benefit from the UM insurer's payment.

It seems that the operation of the *Traveler's* exclusion precludes a finding of solidarity. Therefore, the Louisiana Supreme Court in *Cutsinger* failed to make a distinction between a UM policy that has a *Traveler's* exclusion and one that does not. The Louisiana Supreme Court has long stated that it is the coextensiveness of the obligations that bind obligors *in solido*.<sup>152</sup> And arguably, a UM policy containing a workers' compensation exclusion is not bound coextensively at all with a workers' compensation insurer. If the total liability triggering both policies never exceeds the amount paid by workers' compensation, the UM insurer owes nothing. In this light, the UM insurer is bound only to the extent that the workers' compensation insurer is not.

### C. *The Test No Longer Serves its Original Purpose*

Many scholars suggest it was misguided to adopt such a liberal view of solidarity arising from the law, and a plain reading of the Code forced the courts' hands to avoid harsh results following from a strict application of solidarity.<sup>153</sup> Thus, an expansive view of solidarity arising from the law was necessary to promote tort recovery and the free flow of credit, which are the reasons Louisiana instituted solidarity.<sup>154</sup> A liberal view of solidarity—such as the *Hoefly* test—is no longer necessary address those concerns, however.

One way that solidarity promoted tort recovery—a reason that likely influenced the Court's decision in *Hoefly*—was the entanglement of solidarity with liberative prescription. The Court in *Hoefly* needed to find solidarity to save a plaintiff's claim.<sup>155</sup> The 1988 revision to Civil Code article 2324 adding that interruption of prescription as to one joint

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151. LA. CIV. CODE art. 1796; *see also Bellard*, 980 So. 2d at 667; *Cutsinger*, 12 So. 3d at 952.

152. *Narcise v. Ill. Cent. Gulf R.R. Co.*, 427 So. 2d 1192, 1195 (La. 1983).

153. *See, e.g., Patricia Wiener, Obligations—Uninsured Motorist and Insurer as Obligors In Solido*, 58 TUL. L. REV. 642, 658–59 (1983).

154. LITVINOFF, *supra* note 10, § 7.66, at 149.

155. *Hoefly v. Gov't Emps. Ins. Co.*, 418 So. 2d 575, 576 (La. 1982).

tortfeasor interrupts as to others,<sup>156</sup> however, diminished the need for solidarity to aid in tort recovery.

Similarly, a broad interpretation of solidarity arising from the law is not needed to facilitate the free flow of credit. The law presumes that creditors are generally sophisticated and are capable of contracting for solidarity.<sup>157</sup> The lobby for creditors—such as banks—is persuasive enough that now, the most prolific source of solidarity in legislation can be found in the law of negotiable instruments.<sup>158</sup> Insurers can also avail themselves of policy exclusions such as the *Traveler's* exclusion that was dispositive in *Cole*.

*D. Prong One of the Hoefly Test is Easily Manipulated*

The first prong of the principal-effects test, which asks whether each obligor is obligated for the same thing, is also flawed. In constitutional law, ample literature discusses the concept referred to as “levels of generality.”<sup>159</sup> Simply put, the more generally a court describes two things, the more similar those two things appear.<sup>160</sup> Conversely, the more specifically two things are described, the more different they appear.<sup>161</sup> Courts, perhaps unwittingly, use this technique to manipulate the *Hoefly* test.

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156. Act No. 430, 1988 La. Acts 932.

157. See *Sec. First Nat'l Bank v. Murchison*, 739 So. 2d 803, 807 (La. Ct. App. 1999); see also GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 33.03, in 8 LOUISIANA CIVIL LAW TREATISE 104 (1999).

158. See LA. REV. STAT. §§ 10:1-101 to 10:1-103, 10:3-112, 10:3-114, 10:3-116, 10:3-413 to 10:3-415, 10:3-417 (2017); see also LITVINOFF, *supra* note 10, § 7.66, at 149 (“Be that as it may, legal solidarity does not arise only from articles in the civil code. Among the other laws that address the same subject, the most prolific source of solidarity for multiple obligors is, perhaps, the law of negotiable instruments.”).

159. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (“The question then becomes: at what level of generality should the Court describe the right previously protected and the right currently claimed? The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection. For instance, did the Court in *Griswold v. Connecticut* recognize the narrow right to use contraception or the broader right to make a variety of procreative decisions? Obviously, the descriptive choice will affect the Court’s decisions in other cases, such as those involving abortion.”).

160. *Id.*

161. *Id.*

For instance, in *Olivier v. City of Eunice*,<sup>162</sup> without having the insurance policies on record, the Third Circuit held that a workers' compensation insurer and a health insurance provider were solidarily liable.<sup>163</sup> The court, utilizing a high level of generality, concluded that the "general purpose" of both types of coverage were the same; thus both were bound for the same thing.<sup>164</sup> In *Advantage Personnel v. Van Cleave*, the First Circuit concluded that a workers' compensation insurer was not solidarily liable with a liability insurer for the plaintiff's loss of consortium and pain and suffering damages.<sup>165</sup> Utilizing a high level of specificity, the court described the workers' compensation obligation as only including compensation for medical bills and lost wages—not loss of consortium or pain and suffering.<sup>166</sup> The court concluded that the liability insurer's obligation did include compensation for loss of consortium and pain and suffering.<sup>167</sup> Therefore, the two insurers were not obligated for the same thing.<sup>168</sup> Compared to the Louisiana Supreme Court's description of a workers' compensation insurer's obligation as for "certain elements of tort damage,"<sup>169</sup> it is easy to see how the manipulation of levels of generality used to describe an obligation can influence a court's analysis of the first prong of the *Hoefly* test. A more cynical view of this technique's application might lead the reader to conclude that it allows a court to reach

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162. 92 So. 3d 630 (La. Ct. App. 2012).

163. *Id.* at 639.

164. *Id.* ("In *Bellard* and *Cutsinger*, the obligations of UM insurers and workers' compensation insurers were at issue, and to the extent that their obligations to the plaintiff employees overlapped, they were found to be obliged for the same thing. The obligations of health insurers and employers or workers' compensation insurers are similar to, but not the same as, those of UM insurers and workers' compensation insurers. The central purpose of workers' compensation insurance and health insurance is protection of an injured or ill person. The WCA protects the person when his injury or illness is related to his employment. Health insurance protects the person in all situations when he is injured or ill. For these reasons, we find the City and Blue Cross are obliged for the same thing.").

165. 146 So. 3d 221, 231 (La. Ct. App. 2014).

166. *Id.* at 233.

167. *Id.*

168. *Id.* ("The workers' compensation insurer and UM insurer are solidary obligors only to the extent that their obligations are co-extensive for lost wages and medical expenses . . . . The insurers are not solidary obligors for other damages, such as pain and suffering or loss of consortium, because the workers' compensation insurer has no liability for those damages under the exclusive remedy provision of the workers' compensation act.").

169. *Bellard v. Am. Cent. Ins. Co.*, 980 So. 2d 654, 664 (La. 2008).

any conclusion it desires. Perhaps this illustration of the *Hoefly* test's malleability is what Justice Blanche had in mind when he characterized the *Hoefly* test as "judicial legislation."<sup>170</sup>

### III. A SIMPLE SOLUTION—RETURNING TO BASIC CIVIL CODE PRINCIPLES

The doctrine surrounding the determination of solidarity arising from the law has become untenable in Louisiana. And this particular issue is not peculiar to Louisiana. In fact, the Louisiana Civil Law Treatise recognizes that, faced with analogous problems,<sup>171</sup> French courts have turned to *solidarité coutumière* or "solidarity custom."<sup>172</sup> There, the courts ask if two particular obligors have been historically treated as solidary.<sup>173</sup> Other Civil Code principles, however, may also provide guidance.

Louisiana should return to a test for solidarity that recognizes, as Justice Blanche did, that solidarity is an exception to the general rule.<sup>174</sup> The general rule should remain what the drafters of the Code intended: except where parties contract for solidarity, it should arise only from a clear expression from legislation. As Justice Blanche noted, whether solidarity has arisen from the law is an issue of legislative intent that must be viewed in light of the presumption against solidarity.<sup>175</sup>

There may be unforeseeable instances that call for an exception. In such a rare case, an exception must be applied only in light of the purposes for which France and Louisiana have adopted solidarity: tort recovery and the flow of credit.<sup>176</sup> As an additional restriction on this exception to the general rule, courts may adopt France's solution by testing for whether the two obligors have been treated as solidary.<sup>177</sup> That is, there must "exist[]

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170. See *Hoefly v. Gov't Emp. Ins. Co.*, 418 So. 2d 575, 581 (La. 1982) (Blanche, J., dissenting) ("A solidary relationship between the uninsured motorist carrier and the tortfeasor does not exist by virtue of some provision of the law; rather, it is purely the creation of the majority opinion. Such judicial legislation is beyond the bounds of our authority. By the express provisions of C.C. art. 2093, we cannot presume a solidary relationship where none is intended to exist.").

171. LITVINOFF, *supra* note 10, § 7.66, at 149.

172. 7 MARCEL PLANIOL & GEORGES RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 430–33 (2d ed. 1954).

173. *Id.*

174. See *Carona v. State Farm. Ins. Co.*, 458 So. 2d 1275, 1280 (La. 1984) (Blanche, J., concurring).

175. *Hoefly*, 418 So. 2d at 581 (Blanche, J., dissenting).

176. LITVINOFF, *supra* note 10, § 7.66, at 149.

177. PLANIOL & RIPERT, *supra* note 172, at 430–33.

some relationship between the parties who are held solidarily liable.”<sup>178</sup> In addition to comporting with an everyday common sense notion of fairness, this test aligns itself with the most basic of Civil Code principles. This notion of custom, though seldom applied, is the most basic of civilian principles derived from the Civil Code’s first article: “The sources of law are legislation and custom.”<sup>179</sup> Embedded in this inquiry of custom—which asks if the obligors have traditionally been treated as solidary—is the concept of the “relationship” that concerned Justice Blanche. Whether from contract or legislation, a solidary relationship cannot be presumed where none was intended to exist.<sup>180</sup>

#### CONCLUSION

Louisiana courts must return to a more restrained view of solidarity arising from the law. The *Hoefly* test as illustrated in the context of overlapping insurance coverage cases is simply no longer tenable. Indeed, it may be that it never was. As the *Hoefly* test has expanded, Justice Blanche’s emphatic dissent in *Hoefly* now seems prophetic: solidarity is a legal relationship best prescribed by the legislature. When legislated, the results would be predictable, and defendants in tort suits would be put on notice of the existence of their relationship to one another. In the rare instances where courts may apply an exception, the use of this exception should be restrained by the public policy goals of tort recovery and flow of credit and should only be applied where the obligors have historically been treated as solidary.

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178. *Hoefly*, 418 So. 2d at 581 (Blanche, J., dissenting).

179. LA. CIV. CODE art. 1 (2017).

180. *Hoefly*, 418 So. 2d at 581 (Blanche, J., dissenting).