

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-4503  
Summary Calendar

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COTTON BROTHERS BAKING COMPANY, INC.,

Plaintiff-Appellee,

versus

INDUSTRIAL RISK INSURERS,

Defendant/Third Party  
Plaintiff-Appellant,

versus

BAKER PERKINS FOOD MACHINERY, INC.,

Third Party Defendant-  
Appellee.

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Appeal from the United States District Court  
For the Western District of Louisiana  
(CA-83-0150 C/W 83-0578 & 83-3237)

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(December 14, 1992)

Before POLITZ, Chief Judge, WILLIAMS and JONES, Circuit Judges.

POLITZ, Chief Judge:\*

We resolve what we trust will be the final chapter in this long and tortured litigation. Industrial Risk Insurers appeals the

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

trial court order releasing certain funds from the registry of the court in satisfaction of judgment, and ordering that IRI is subrogated to the Cotton Brothers Baking Company, Inc. judgment against Baker Perkins Food Machinery, Inc. IRI claims unjust enrichment by Cotton Brothers because its judgment against Baker Perkins had been offset by the latter's judgment against Cotton Brothers. For the reasons assigned, we affirm.

### Background

This convoluted *mise-en-scene* began in 1981 when one of the Cotton Brothers bakeries was damaged by fire. IRI insured Cotton Brothers for both fire and business loss. With its insurer's approval, Cotton Brothers executed a contract with Baker Perkins for replacement of certain equipment. The Baker Perkins contract obligated Cotton Brothers to pay an acceleration premium to ensure that the work would be done on an expedited basis and by a date certain.

Shortly after execution of the contract, IRI refused to pay for the replacement costs of the equipment, insisting on repair costs only. A second dispute, about the amount of business loss, was also simmering. In the meantime, Baker Perkins failed to perform in accordance with the expedited schedule. The business loss claim included the losses incurred after the completion date originally agreed to by Baker Perkins.

Cotton Brothers sued IRI for amounts due under the policies, including claims for the differential between the repair and

replacement costs and for the acceleration premium. Cotton Brothers sued Baker Perkins for damages caused by its failure to perform timely; Baker Perkins counterclaimed for \$209,000, representing the acceleration premium and amounts due on other contracts.

Following a split jury and bench trial, judgment was entered in favor of Cotton Brothers against both IRI and Baker Perkins; the district court directed a verdict in favor of Cotton Brothers on Baker Perkins's counterclaim; the district court also found that upon payment of the judgment it owed to Cotton Brothers, IRI would be subrogated to the Cotton Brothers judgment against Baker Perkins. On appeal we modified and affirmed the judgment in favor of Cotton Brothers against IRI and Baker Perkins, but reversed and rendered judgment in favor of Baker Perkins on the counterclaim. Following attempts to delay payment and stay the issuance of the mandate, IRI paid the amounts due Cotton Brothers into the registry of the court. When the district court ordered the funds released, it ruled that IRI was subrogated to the Cotton Brothers judgment against Baker Perkins but recognized that the opposing Cotton Brothers and Baker Perkins judgments were offset by operation of law. This reduced the judgment to which IRI became subrogated by the amount of the offset -- \$209,000.

#### Analysis

We note at the threshold that although this is an appeal from a post-judgment motion we may exercise jurisdiction under 28 U.S.C.

§ 1291. "A judgment or order is final for the purposes of appealability when it ends the litigation on the merits and comprehends only execution of the court's decree."<sup>1</sup> An order directing payment of funds from the registry of the court in satisfaction of a judgment qualifies.

The district court held that the judgments of Cotton Brothers and Baker Perkins automatically offset each other by operation of law. IRI contends that it was error for the district court to allow that offset. Civil Code article 1893 provides:

Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due.

In such a case, compensation extinguishes both obligations to the extent of the lesser amount.

Delays of grace do not prevent compensation.

Compensation by operation of law occurs independent of the will of the parties.<sup>2</sup> "When it is said that compensation is made *ipso jure*, it means that it is made by the mere operation of law,

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<sup>1</sup> **Dunlop v. Ledet's Foodliner of Larose, Inc.**, 509 F.2d 1387, 1389 (5th Cir. 1975).

<sup>2</sup> Saul Litvinoff, The Law of Obligations, § 19.2, p. 641 (1992). "The automatic occurrence upon coexistence of the obligations is a distinctive feature of compensation French style, which is the version adopted by the Louisiana Civil Code." **Id.** See C. Aubry and C. Rau, IV Cours de Droit Civil Francais § 328, p. 253 (La. Law Inst. trans. 6th ed. 1965) (compensation by operation of law may take effect without knowledge of the parties so long as all necessary conditions are met).

without being pronounced by the judge, or opposed by the parties."<sup>3</sup> Compensation occurred in this case, therefore, when the mandate issued and the judgments of Cotton Brothers and Baker Perkins became fully liquidated and presently due. There can be no error in the district court's recognition of that which happened automatically by operation of law.

IRI did not become subrogated to the Cotton Brothers claim against Baker Perkins until IRI paid its judgment to Cotton Brothers.<sup>4</sup> Subrogation substitutes one party to the legal rights of another.<sup>5</sup> As a result, the subrogee can obtain no greater rights than the subrogor had.<sup>6</sup> Cotton Brothers and Baker Perkins had co-existing mutual obligations which offset each other when they became liquidated upon issuance of this court's mandate. When IRI finally paid Cotton Brothers, the legal rights to which IRI became subrogated had already been reduced by the effect of

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<sup>3</sup> **Tolbird v. Cooper**, 243 La. 306, 143 So.2d 80 (1962) (citing I Pothier, A Treatise on the Law of Obligations (Evans' tr. 1853) n. 599, p. 467)).

<sup>4</sup> La. Civ. Code art. 1829; see **Aetna Ins. Co. v. Naquin**, 488 So.2d 950 (La. 1986); **Jefferson Parish School Bd. v. Rittiner Engineering Co.**, 570 So.2d 528 (La.App. 1990) (no subrogation until insurer pays).

<sup>5</sup> La. Civil Code art. 1825.

<sup>6</sup> **Complaint of Admiral Towing & Barge Co.**, 767 F.2d 243 (5th Cir. 1985); **Boyer v. Trinity Universal Ins. Co.**, 576 So.2d 444 (La. 1991).

compensation.<sup>7</sup>

IRI cites no authority for the proposition that the district court could have and should have undone that which occurred by operation of law. Its argument distills into a cry in equity -- the result is unfair and Cotton Brothers is unjustly enriched. This plea is mooted and blunted by the realities of the Cotton Brothers decade-plus travail in securing its contractual rights from IRI.

We are a court of errors.<sup>8</sup> Finding none we AFFIRM.

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<sup>7</sup> IRI argues that there was no mutual indebtedness to support the compensation because Cotton Brothers is obligated to Baker Perkins on the counterclaim but, by virtue of the subrogation, Baker Perkins is obligated to IRI instead of Cotton Brothers. Because the subrogation did not occur until after compensation had already taken place, this argument fails.

<sup>8</sup> See **White v. Texas American bank/Galleria, N.A.**, 958 F.2d 80 (5th Cir. 1992).