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## Commercial Law: Insurance

J. Denson Smith

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## Commercial Law

### INSURANCE

J. Denson Smith\*

Although there is early authority in support of the holding in *Kelmell v. Atlas Life Ins. Co.*<sup>1</sup> that a want of insurable interest in a life insurance policy is a defense that must be specially pleaded,<sup>2</sup> such a view seems open to serious question. The basic purpose of the requirement that a person who insures the life of another have an insurable interest in the other's life is to prevent a particularly vicious practice which became so flagrant in eighteenth century England that the English parliament enacted the Statute of 14 George III, Chapter 48, in 1774, to put a stop to such "mischievous kind of gaming."<sup>3</sup> The present Louisiana statute is couched in prohibitory terms and rightly so because this is a matter of grave public policy.<sup>4</sup> In recognition of these facts the United States Supreme Court has said: "The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim *Ex dolo malo non oritur actio* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."<sup>5</sup> It has also been said that the court itself may raise the point *sua sponte*.<sup>6</sup> Consistent with the language of the Supreme Court, although there are decisions to the contrary, the majority view is that the in-

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1. 113 So.2d 609 (La. 1959).

2. *Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809 (1855).

3. See WRIGHT AND FOYLES, HISTORY OF LLOYDS 93-94 (1928).

4. LA. R.S. 22:613A (1950).

5. *Hall v. Coppel*, 74 U.S. (7 Wall.) 542, 558-59 (1868).

6. *Midland Nat. Bank v. Dakota Life Ins. Co.*, 277 U.S. 346, 349 (1928).

surer cannot be precluded by estoppel or waiver from raising the defense. Likewise the prevailing view is that the incontestable clause does not preclude the defense of lack of insurable interest.<sup>7</sup> In the instant case the testimony of the plaintiff who had procured the policy strongly indicated that he was simply engaged as a vocational wagerer on the lives of others.<sup>8</sup> Granting that a full presentation of evidence on the point might possibly have shown otherwise, it appears that, at least, the case should have been remanded. In a recent Alabama case judgment was rendered against an insurer who issued a policy on the life of a child to one who had no insurable interest and who later murdered the child in an effort to collect on the policy.<sup>9</sup> A clearer demonstration of the public interest could hardly be discovered. Finally the case relied on principally by the court<sup>10</sup> presented only the question of the extent of recovery by a creditor insuring his debtor's life and two of the other cases<sup>11</sup> involved insurance on property where there is really no opportunity to gamble, since recovery should always be limited to the extent of the insured's interest in the property inasmuch as such a policy is a policy of indemnification. Finally, the public interest in discouraging arson is hardly equal to that in discouraging murder.

Louisiana's jurisprudence accords with the rule uniformly followed that resolves ambiguities in insurance policies against the insurer. In *Toler v. All American Assurance Co.*<sup>12</sup> an ambiguity was found respecting a double indemnity provision in a policy attached to which was a rider covering the payment of an additional premium because of the aviation activities of the insured. However, by applying Article 1949 of the Louisiana Civil Code the court found an adequate explanation of the meaning of the rider in other policies issued previously to the deceased, including one issued at the same time as the policy in question. It seems manifest that the decision would have gone

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7. See PATTERSON, *CASES ON INSURANCE* 326 (3d ed. 1955).

8. "Q. How did you get to [be] beneficiary under this policy if you had no interest in her?"

"A. The insurance agent who sold the policy said it made no difference. If you will look at the records of the Atlas Insurance Company, I insured other people, too." 113 So.2d 609, 610 (La. 1959).

9. *Liberty National Life Ins. Co. v. Weldon*, 267 Ala. 171, 100 So.2d 696 (1957), noted in 19 LOUISIANA LAW REVIEW 555 (1959).

10. 113 So.2d 609 (La. 1959).

11. *Katheman v. General Mutual Ins. Co.*, 12 La. Ann. 35 (1857); *Roos v. Merchants' Mutual Ins. Co.*, 27 La. Ann. 409 (1875).

12. 237 La. 815, 112 So.2d 623 (1959).

against the insurer but for the fact that it had issued other policies to the insured which contained provisions that had the effect of destroying the existing ambiguity. Insurers issuing similar policies should take note of this decision and frame the wording of any endorsement of the kind here involved so as to make it clear that the death from aviation provision applicable to the payment of double indemnity is not waived in return for the additional premium charged for the life coverage because of aviation activity.

Under the broadened coverage that has become customary in automobile liability policies whereby the insured is covered with respect to his operation of substitute automobiles and with respect to his operation of automobiles belonging to others, conflicts between insurers are inevitable. In *Cameron v. Reserve Ins. Co.*<sup>13</sup> the insured was seeking judgment against his insurer and the insurer of the person to whom he had loaned his vehicle to recover for its loss resulting from a collision or upset. Each insurer claimed that the coverage afforded by its policy was not operative in consequence of the coverage afforded by the other. On the basis of a careful interpretation of the pertinent policy provisions the court concluded that the owner's policy was operative to the exclusion of the policy which extended protection to the driver. In so doing it reversed the trial court's holding that the defendant companies were co-insurers. The decision seems to be in keeping with the apparent underlying purpose of the "Use of Other Automobiles" clause of the driver's policy.

A congenital malformation in the lower structure of plaintiff's spinal column which resulted in his total and permanent disability when, in trying to remove a heavy drum full of fuel oil from a truck the bed broke and plaintiff fell to the ground with the drum, injuring his back, was held in *Thibodeaux v. Pacific Mutual Life Ins. Co.*<sup>14</sup> not to constitute a bodily infirmity which contributed to the loss within the "Reductions" clause of a combination policy. The court found no direct Louisiana authority in point, but considerable authority in the case law of other jurisdictions. The holding is in keeping with the view generally taken concerning the meaning of like provisions.

The case of *Roach-Strayhan-Holland Post No. 20, American Legion Club, Inc. v. Continental Ins. Co.*<sup>15</sup> involved the question

13. 237 La. 433, 111 So.2d 336 (1959).

14. 237 La. 722, 112 So.2d 423 (1959).

15. 237 La. 973, 112 So.2d 680 (1959).

of the degree of evidence required to establish a loss by windstorm. The defense was based on the claim that the collapse of a roof was due to structural weakness. The court concluded that the plaintiff had succeeded in showing that the windstorm was the proximate or efficient cause of the loss, although structural weakness may have been a contributing factor. Perhaps in most such cases the latter would be true, but as the trial court remarked, a building can be insured even if it is improperly constructed. This addresses itself to the matter of inspection when the taking of the risk is under consideration.

## CORPORATIONS

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In the 1958-1959 term the Louisiana Supreme Court handed down several decisions involving problems of corporation law, such as authority of corporate officers, validity of sale of entire corporate assets, illegal reduction of capital, and taxation of foreign corporations doing business in Louisiana.

### *Authority of Corporate Officers*

*Friedman v. Noel Estate, Inc.*,<sup>1</sup> involved the frequently debated issue of authority vested in the president to bind his corporation in contractual matters. The general rule is that the president has very little authority by virtue of his office alone.<sup>2</sup> Corporate affairs are ordinarily managed by the board of directors and the president is merely the presiding officer of the board.<sup>3</sup> However, trying to cope with modern business practices, the courts in several states have held that the president has, at least prima facie, authority of a general manager to conduct the ordinary business of the corporation.<sup>4</sup> In other states, where the strict rule prevails, the courts have held that the president may bind the corporation by reason of acquiescence of the directors in a known exercise or assumption of power.<sup>5</sup> This result

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1. 236 La. 862, 109 So.2d 447 (1959).

2. See *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Business and Commercial Law*, 7 LOUISIANA LAW REVIEW 165, 257 (1947).

3. See LATTIN, CORPORATIONS 228 (1959).

4. *Id.* at 228 *et seq.*

5. See 2 FLETCHER, CORPORATIONS § 509 (1938).