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## Private Law: Insurance

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used in constructing and maintaining their lines. In *Texas Eastern Transmission v. Terzia*,<sup>6</sup> the Court of Appeal for the Second Circuit held that the expropriating company failed to establish the necessity of a servitude fifty feet in width, and permitted it to expropriate only thirty feet.<sup>7</sup> The court said that "the rights of ingress and egress, which are inherent in the use of the servitude granted, would authorize plaintiff to enter upon and use additional necessary areas subject to the co-existing rights of defendant to claim damages occasioned thereby"<sup>8</sup> if the need arose to use machinery of such size that it could not be accommodated in the narrower servitude.

## INSURANCE

### *J. Denson Smith\**

The total volume of insurance litigation, as usual, was great. The cases presented a number of interesting questions. The comments that follow cover the most significant.

The Supreme Court held that an injured automobile passenger having received payment under the medical expense provisions of a liability policy on the vehicle was not entitled again to recover the same expenses in a tort action against the insurer.<sup>1</sup> To require an insurer to pay the same medical expenses twice under one policy without a definite manifestation of such an intention would seem clearly inadmissible, which, in substance, was the position taken by the court. It was observed that the ruling does not apply to a case where the injured person is paid medical expenses under a separate contract between him and his own insurer.

In similar vein the First Circuit Court of Appeal, overruling a prior decision found to be in conflict with a decision of the Supreme Court, held that recovery by a wife for personal injuries and a husband for medical expenses could not exceed the stated limit of a liability policy.<sup>2</sup>

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6. 138 So.2d 874 (La. App. 2d Cir. 1962).

7. Cf. *Texas Pipe Line Co. v. Barbe*, 229 La. 191, 85 So.2d 260 (1955).

8. *Texas Eastern Transmission Corp. v. Terzia*, 138 So.2d 874, 877 (La. App. 2d Cir. 1962).

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1. *Gunter v. Lord*, 242 La. 943, 140 So.2d 11 (1962).

2. *Guarisco v. Swindle*, 132 So.2d 643 (La. App. 1st Cir. 1961).

The Court of Appeal for the Second Circuit found in favor of the beneficiary of a group policy of life insurance although at the time the policy was issued the applicant was in critical condition because of cancer, as he and the agent knew. No physical examination was required. The application, which called merely for information concerning applicant's employment, was filled out by the agent falsely. It was not, however, attached to the policy, and, in consequence, the court refused to consider it. The holding seems clearly sound. An important advantage of group insurance is the fact that in most cases no medical examination is required; the company voluntarily assumes the risk of the applicant's physical condition. Presumably, premium payments are adjusted on the basis of experience with groups of insureds and may, therefore, be counted as reflecting the probabilities with respect to the number of applicants who may be uninsurable.<sup>3</sup> It would not seem in order, therefore, to find an applicant for such a policy guilty of vitiating fraud because of his non-disclosure of facts which he is led to believe he does not have to disclose.<sup>4</sup>

The same court distinguished two earlier cases on the basis of the language of the policy being considered, and found it unnecessary for the insured to show some reasonable possibility of theft to support a claim of mysterious disappearance.<sup>5</sup> Based on the jurisprudence, a "working" conclusion might be that where the policy treats a mysterious disappearance as a theft, the facts must reflect a reasonable possibility of theft, but where a mysterious disappearance is given independent coverage no such showing is necessary.

The troublesome distinction between hostile and friendly fires was presented in a case considered by the Third Circuit Court of Appeal.<sup>6</sup> It concerned a provision of a standard fire policy covering "direct loss by fire" which excluded loss resulting from explosion. A welder's torch ignited hydrogen gas, and the court's finding was that the loss was caused by the resulting explosion rather than fire. It was observed that the fire which caused the explosion was a friendly fire. An earlier case,<sup>7</sup> which

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3. See *MOBRAY & BLANCHARD, INSURANCE* 302 (5th ed. 1961).

4. *Covington v. Prudential Insurance Co.*, 136 So.2d 731 (La. App. 2d Cir. 1962).

5. *Englehart v. Assurance Co.*, 139 So.2d 108 (La. App. 2d Cir. 1962).

6. *Levert-St. John, Inc. v. Birmingham Fire & Casualty Co.*, 137 So.2d 494 (La. App. 3d Cir. 1961).

7. *Salmon v. Concordia Fire Ins. Co.*, 161 So. 340 (La. App. Orl. Cir. 1935).

rejected the distinction followed generally between losses resulting from friendly and hostile fires, was found unpersuasive on the ground that the issue before the court in the present case was not whether a loss by fire was caused by a hostile or a friendly fire but whether the loss was caused by fire or explosion. The distinction appears to be an appropriate one inasmuch as losses which result from explosions in the course of a hostile fire have not been considered within the exclusion.<sup>8</sup>

In a very carefully considered opinion the Third Circuit Court of Appeal also held that a death resulting from asphyxiation brought about by aspiration of the contents of the stomach was not within a policy provision covering death by external, violent, and accidental means.<sup>9</sup> The case of *Schonberg v. New York Life Ins. Co.*,<sup>10</sup> which established the view that a death by accidental means is nothing more than an accidental death, was distinguished on the ground that the blood transfusion which there resulted in death was an external means whereas the aspiration which occurred in the case before the court was internal. Presumably, if aspiration and asphyxiation occur while food is going down instead of while the contents of the stomach are coming up, the result would be different.<sup>11</sup> In both cases, however, death appears to come accidentally and one may wonder whether, in view of *Schonberg*, such a death should not be counted as within the purview of the policy provision judged by the standard of the average man.<sup>12</sup> There was medical testimony that the vomiting was brought about by sore throat and tonsillitis, and the narrow basis of the decision is indicated by the court's taking note of the fact that the evidence did not establish that death resulted from the aspiration of food and suggesting that a different result might be reached where the vomiting is brought about by trauma or the consumption of noxious substances. This seems to suggest that, if such a death may be counted as caused by an outside agency as opposed to an infirmity of the body, it should be within the policy provision. If so, considering the fact that the death was brought

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8. *But see* Note, 36 TUL. L. REV. 865 (1962).

9. *Towner v. Prudential Insurance Co.*, 137 So.2d 449 (La. App. 3d Cir. 1962).

10. 235 La. 461, 104 So.2d 171 (1958).

11. See the court's discussion of *American Acc. Co. v. Reigart*, 94 Ky. 547, 23 S.W. 191 (1894) in 137 So.2d 449, 453 (La. App. Or. Cir. 1962).

12. It should be noted, however, that (1) certiorari was denied, and (2) Judge Tate, who, as Justice of the Supreme Court ad hoc, wrote the opinion in the *Schonberg* case, was a member of the panel that rendered the instant decision.

about by vomitus entering the lungs, where it would not normally be found, might not the means be counted as an agency coming from outside the lungs and therefore external? And if a distinction is to be based on the quantity of food particles (*i.e.*, an outside agency) which may be contained in the vomitus, how nice must the weighing be?

The Third Circuit also adopted the view held generally that a creditor beneficiary of a life policy which does not exclude death by suicide is entitled to recover thereon notwithstanding the suicide of the *cestui que vie* shortly after the issuance of the policy.<sup>13</sup> The beneficiary was held to have acquired a vested right under the policy when issued. The court left open the question whether suicide may ever defeat recovery in the absence of proof of fraud or a specific policy provision. Most cases decided elsewhere appear to deny recovery in such event if the beneficiary is the insured's estate.<sup>14</sup>

In keeping with the general weight of authority, the Court of Appeal for the Fourth Circuit held that a plea of guilty to a charge of negligent homicide is admissible but not conclusive in an action brought to recover on a life policy.<sup>15</sup> The same court held also a loss resulting from a breach of contract will not support a direct action against the wrongdoer's insurer.<sup>16</sup> The language of the direct action provision was relied on as primary support for the latter decision.

The position of permittees under the omnibus clause and the opinion of the Second Circuit Court of Appeal in the interesting case of *Hurdle v. State Farm Mutual Automobile Ins. Co.*<sup>17</sup> have been considered in a comment in an earlier issue of this *Review*.<sup>18</sup>

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13. *Gulfeo Finance Co. v. Guillory's Estate*, 134 So.2d 121 (La. App. 3d Cir. 1961).

14. 29A AM. JUR. *Insurance* §§ 13-14 (1940).

15. *Smith v. Southern National Life Ins. Co.*, 134 So.2d 337 (La. App. 4th Cir. 1961).

16. *Pennsylvania Fire Insurance Co. v. Underwriters at Lloyd's London*, 140 So.2d 212 (La. App. 4th Cir. 1962).

17. 135 So.2d 63 (La. App. 2d Cir. 1961).

18. Comment, 22 LA. L. REV. 626 (1962).