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Private Law: Insurance

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tribution to the emergence of Louisiana mineral law;[53] and still others, though involving mineral contracts, do not turn on points of mineral law.[54]

INSURANCE

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Policies of insurance continued as a fruitful source of litigation in the appellate courts during the 1963-64 term. The Insurance Code, with a view to encouraging prompt payment of claims, contains a number of provisions permitting the recovery of penalties and attorneys' fees for delay in payment. These provisions tend to minimize litigation. On the other hand, the well-settled and justifiable rule that the insurance contract, if ambiguous, is to be construed against the insurer and liberally in favor of the insured has a tendency to encourage litigation. On the whole, the decisions rendered by the courts demonstrate a creditable restraint in the application of both of these rules. Most of the cases in this area turned on factual issues not justifying discussion, yet a fair number were sufficiently significant to bear noting.

AUTOMOBILE LIABILITY

The family combination automobile policy continues to give rise to the greatest amount of litigation. A particularly well-written opinion in this area is the case of *Smith v. Insurance Co. of the State of Pennsylvania.*[1] It contains an exhaustive review of the cases dealing with the troublesome problem of coverage for the benefit of permittees. The court held a regulation of the Department of Public Safety forbidding the use of state-

53. Scott v. Hunt Oil Co., 160 So. 2d 433 (La. App. 2d Cir. 1964), *writs denied*, 245 La. 950, 162 So. 2d 8; Scott v. Ware, 160 So. 2d 237 (La. App. 2d Cir. 1964); State *ex rel.* Bordelon v. Justice, 160 So. 2d 844 (La. App. 4th Cir. 1964), *writs denied*, 245 La. 1084, 162 So. 2d 574; Menefee v. Pipes, 159 So. 2d 439 (La. App. 2d Cir. 1964), *writs denied*, 245 La. 798, 161 So. 2d 276; Armour v. Smith, 158 So. 2d 446 (La. App. 2d Cir. 1963), *writs granted*, 245 La. 637, 160 So. 2d 227 (1964); Birdsong-Gabriel Oil Co. v. McCain, 154 So. 2d 216 (La. App. 2d Cir. 1963).

54. Martin Timber Co. v. Roy, 244 La. 1050, 156 So. 2d 435 (1963); Johnson v. Lemons, 157 So. 2d 752 (La. App. 2d Cir. 1963).

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1. 161 So. 2d 903 (La. App. 1st Cir. 1964).

owned vehicles by civilians effective as a denial of permission to the son of a lieutenant of state police who was driving a state-owned car, with the consent of his father, to take his date home.[2]

In dealing with a similar problem, the Third Circuit in *Touchet v. Firemen's Ins. Co.*[3] appears to have extended existing jurisprudence in holding that a father who gave his son the use of his car for an evening thereby clothed the son with such general discretion and control that he was impliedly authorized to permit another to drive. The resolution of this kind of problem ought to turn on what the father should reasonably anticipate and expect under the circumstances.[4] If, for example, he furnishes a car for the use of the son on an indefinite basis, as the latter's discretion may dictate according to the circumstances, it should follow that the authority granted to the son would extend to his letting others drive when this might suit his convenience since this should have been within the father's contemplation. It is by no means clear, however, that such action by the son should be anticipated and impliedly approved by a father who lends his car to the son for merely an evening of pleasure. The problem, of course, involves a matter of degree. The holding of the court seems to be more in keeping with the position of Justice Sanders, dissenting in *Rogillio v. Cazedessus*,[5] than with the majority opinion.

Under the original language of the family automobile policy, coverage was held extended to any auto owned by the named insured.[6] Current policies restrict the basic coverage to the automobile or automobiles described in the policy.[7] Hence, in *Altazin v. Reed*[8] it was held that a new automobile bought to replace a previously uninsured second car belonging to the named insured was not within the policy coverage.

In *Brouillette v. Fireman's Fund Ins. Co.*,[9] a city fireman injured while riding on the rear platform of the city's fire truck was held not entitled to recover under a policy on his own car

2. To the same effect is Jones v. Indiana Lumbermen's Mut. Ins. Co., 161 So. 2d 445 (La. App. 4th Cir. 1964).
3. 159 So. 2d 753 (La. App. 3d Cir. 1964).
4. Brooks v. Delta Fire & Cas. Co., 82 So. 2d 55 (La. App. 1st Cir. 1955).
5. 241 La. 186, 127 So. 2d 734 (1961).
6. See Pel-State Oil Co. v. Weimer, 155 So. 2d 218 (La. App. 2d Cir. 1963).
7. See Casano v. Cook, 157 So. 2d 616 (La. App. 4th Cir. 1963) .
8. 154 So. 2d 610 (La. App. 1st Cir. 1963).
9. 163 So. 2d 389 (La. App. 3d Cir. 1964).

inasmuch as the fire truck was furnished for his "regular use" within the meaning of an exclusion. Previous Louisiana cases and the weight of authority elsewhere were cited in support. The exclusion in question appears to rest on the belief that in such case the owner of the other car ought to carry the necessary insurance and that the user should not depend on his own policy to do the work of two for a single premium. In *Ellis Elec. Co. v. Allstate Ins. Co.*,[10] an automobile bought by a minor lacking in capacity to contract was counted as a non-owned automobile under his father's policy.

The clause affording coverage with respect to injuries or damage "arising out of the ownership, maintenance or use of the owned automobile" has been broadly construed.[11] However, in *Tucker v. State Farm Mut. Auto. Ins. Co.*[12] the court declined to find that an automobile was being "used" by a seven-year-old child who, apparently while playing in it, released the brake, permitting it to roll down an incline in a driveway, thereby striking and killing its mother, who was trying to stop it. The distinction between "use" and "operation" was noted, and the former was recognized as extending to cases where the particular use, considered broadly, was serving some purpose or end of the permittee. The position of the court was that the child's action could not be counted as related to any reasonably contemplated use of the vehicle.

In *Bouis v. Employers Liab. Assur. Corp.*,[13] the liability insurer of a municipality paid a loss resulting from the negligent operation by the Chief of Police of his own automobile while on city business. In support of its claim to subrogation against the Chief of Police the insurer contended that the insurance applied in favor of the city only and did not apply in favor of the official driving his own car. By the terms of the policy the Chief of Police, as an executive officer of the city, was defined in one sentence as an insured. Curiously enough, however, the next sentence undertook to deny to him the benefit of the insurance. The court considered the language of the policy sufficiently clear to exclude the Chief of Police from the protection afforded by the policy and, consequently, it felt constrained to sustain

10. 153 So. 2d 905 (La. App. 1st Cir. 1963).
11 Bolton v. North River Ins. Co., 102 So. 2d 544 (La. App. 1st Cir. 1958).
12. 154 So. 2d 226 (La. App. 2d Cir. 1963).
13. 160 So. 2d 36 (La. App. 3d Cir. 1964).

the insurer's claim to subrogation in the amount of the payment made by it on behalf of the city. This prompted a concurring opinion by Judge Tate, who observed that, although the result reached was not inconsistent with legal principles announced by the Supreme Court relating to the master-servant relationship, he nevertheless believed that the court might wish to re-examine the problem.[14] If protection to the city was the only objective, inasmuch as it could alone have been made the insured with respect to any non-owned automobile while driven by an executive officer in the business of the city, it is not clear why the officer was listed as an insured. In any event, since an insurer is not entitled to subrogation against its own insured and since the officer was clearly designated an insured, by definition, the right of subrogation might well have been denied regardless of whether or not the insurance otherwise applied in his favor.

On the basis of the present jurisprudence of the Supreme Court it appears that an insurer does not have a direct right of action, under article 2315 of the Civil Code, against a third party responsible for a loss for which it must indemnify its insured, nor is it legally subrogated to the insured's claim.[15] Two cases decided during the last term, however, contain language contrary to these views.[16]

The duty of the insurer to defend an action brought against the insured, whether groundless or not, was considered in two cases wherein the allegations of the petition were deemed controlling.[17] The *Smith* case[18] qualified this rule by holding that if the insurer is successful in proving absence of coverage, it cannot be held to have breached the duty. The court explained that under the terms of the policy the obligation of the insurer was to defend any suit against "the insured" and that the driver, operating the car in violation of applicable regulations, was not an insured.

14. A writ of certiorari was not sought.

15. See Forcum-James Co. v. Duke Transp. Co., 231 La. 953, 93 So. 2d 228 (1957); Comment, *The Role of Subrogation by Operation of Law and Related Problems in the Insurance Field*, 22 LA. L. REV. 225 (1961).

16. Liverpool, London & Globe Ins. Co. v. Wheeling Pipeline, 162 So. 2d 411 (La. App. 2d Cir. 1964); McDaniel v. Hearn, 158 So. 2d 348 (La. App. 2d Cir. 1963).

17. C. A. Collins & Son v. Pope Bros. Steam Cleaning Co., 155 So. 2d 278 (La. App. 2d Cir. 1963); Kamm v. Morgan, 157 So. 2d 118 (La. App. 4th Cir. 1963).

18. 161 So. 2d 903 (La. App. 1st Cir. 1964). See text at note 1 *supra*.

The insurer's reliance on the cooperation clause by way of defense was rejected in *Stuckey v. Fidelity & Cas. Co.*[19] on the authority of *West v. Monroe Bakery*,[20] there being no showing of collusion between the insured and the injured party. This position finds clear support in the *West* case. Perhaps *Bernard v. Hungerford*[21] is in accord, although it contained no mention of the *West* rule.

It is settled that an injured person cannot twice recover the same medical expenses under the same policy.[22] Relying on this rule, the insurer in *Gandy v. Feazel*,[23] sued by children claiming damages for the death of their mother, asserted the right to deduct from its policy limit the amounts it had paid to the father, and hospitals, for medical expenses under the medical expense provision. The court found the insurer's position untenable.

In a case of first impression,[24] it was held that under the provisions of a liability policy the insurer is liable for interest until payment of the judgment only on the maximum payment due under the policy and not on the total amount of the judgment. The court concluded that a contrary holding would lead to an absurd consequence.

FIRE

Valued Policy Law

Ever since the case of *Lighting Fixture Supply Co. v. Pacific Fire Ins. Co.*,[25] it has been generally believed that the valued policy law does not preclude an inquiry into insurable interest. During the 1962-63 term the Second Circuit held in *The Forge Inc. v. Peerless Cas. Co.*[26] that the *Lighting Fixture* case is no longer valid because of a change in the language of the valued policy provision of the Insurance Code and that the insurer

19. 158 So. 2d 454 (La. App. 2d Cir. 1963).
20. 217 La. 189, 46 So. 2d 122 (1950).
21. 157 So. 2d 246 (La. App. 3d Cir. 1963).
22. Gunter v. Lord, 242 La. 943, 140 So. 2d 11 (1962); Briley v. North River Ins. Co., 161 So. 2d 449 (La. App. 1st Cir. 1964).
23. 155 So. 2d 474 (La. App. 2d Cir. 1963).
24. James v. State, 154 So. 2d 497 (La. App. 4th Cir. 1963).
25. 176 La. 499, 146 So. 35 (1932).
26. 131 So. 2d 838 (La. App. 2d Cir. 1961). The Supreme Court denied certiorari.

must now pay the face amount of the policy even when the insured's interest is limited.[27]

During the 1963-64 term the same Circuit followed its holding in *The Forge Inc.* case[28] and, in addition, the Fourth Circuit, taking the same view, permitted a lessee to recover the face amount of a fire policy covering improvements made by him although they were to become the property of the lessor at the end of a five-year lease, only five months of which remained unexpired at the time of the loss.[29] The theory that the face amount of a policy covering a limited interest constitutes merely the agreed value may have some validity where the interest does not change during the life of the policy. The same cannot be said where the interest continues to diminish such as the interest of a lessee in improvements which are to become the property of the lessor. Better would it be to continue to recognize that, except where the valued policy law properly applies, a policy of fire insurance is a contract of indemnity and thus avoid increasing the moral hazard by holding out an undue reward for successfully contrived arson. The 1964 legislature has done this.[30]

LIFE

Misrepresentations

Section 619B of the Insurance Code[31] seems to afford the insurer a defense when a false and material representation is made in the application for a policy of life insurance. Nevertheless, present jurisprudence of the Supreme Court may be counted as requiring the presence of an intent to deceive on the part of the applicant, a position not free from question.[32] During the last term, however, the Supreme Court refused certiorari in a case wherein it was held that deceit does not have to be shown by

27. See criticism of the case in Note, 30 TUL. L. REV. 151 (1961).
28. Rigdon v. Marquette Cas. Co., 163 So. 2d 442 (La. App. 2d Cir. 1964).
29. Southern Produce Co. v. American Ins. Co., 166 So. 2d 59 (La. App. 4th Cir. 1964).
30. See La. Acts 1964, No. 464, § 2.
31. LA. R.S. 22:619B (1950).
32. Gay v. United Benefit Life Ins. Co., 233 La. 226, 96 So. 2d 497 (1957). *But see* Roche v. Metropolitan Life Ins. Co., 232 La. 168, 94 So. 2d 20 (1957), which, however, dealt with an earlier statute. These cases are examined in *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Insurance*, 18 LA. L. REV. 73 (1957).

the company to sustain a defense on the basis of false answers of a material nature.[33]

On the other hand, another court rejected, on the ground of good faith, an insured's defense based on false and material answers resulting in non-disclosure of a heart attack suffered nine or ten months before the application.[34] Some further delineation of the proper application of R.S. 22:619B would appear to be in order.

MISCELLANEOUS CASES OF INTEREST

Miscellaneous cases included problems such as when money is being "conveyed" by a messenger,[35] what constitutes a "blowout" of an oil well,[36] a "collapse" of a building,[37] and a "mysterious disappearance."[38] Likewise, a downspout from a gutter was held part of a plumbing system;[39] and a suspected criminal who was accidentally killed by a police officer when the officer fired at his leg to ward off an attack was held an aggressor, which relieved the company of responsibility.[40]

CONFLICT OF LAWS

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Stability is a resistance to change, and consistency with an earlier decision provides certainty; but where the prior case was outmoded when rendered, and was so characterized, the

33. Radosta v. Prudential Ins. Co. of America, 163 So. 2d 177 (La. App. 4th Cir. 1964).

34. LaFleur v. All Am. Ins. Co., 157 So. 2d 254 (La. App. 3d Cir. 1963).

35. Sansone v. Am. Ins. Co., 245 La. 674, 160 So. 2d 575 (1964). The messenger stopped to play dice in a social club.

36. Creole Explorations v. Underwriters at Lloyds, 245 La. 927, 161 So. 2d 768 (1964).

37. Wischan v. Brockhaus, 163 So. 2d 572 (La. App. 2d Cir. 1964), *cert. granted.*

38. Midlo v. Indiana Lumbermen's Mut. Ins. Co., 160 So. 2d 314 (La. App. 4th Cir. 1964). See Note, *Proof of Mysterious Disappearance Under Theft Policies*, 24 LA. L. REV. 930 (1964).

39. Schumacher v. Lumbermen's Mut. Cas. Co., 154 So. 2d 637 (La. App. 4th Cir. 1963).

40. Johnson v. Combined Ins. Co., 158 So. 2d 63 (La. App. 1st Cir. 1963); *cf.* Brooks v. Continental Cas Co., 128 So. 183 (La. App. 1st Cir. 1930) (where the suspect was accidentally killed by the officer when engaged in flight); Griffin v. First Nat'l Life Ins. Co., 155 So. 2d 74 (La. App. 1st Cir. 1963).

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