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Private Law: Insurance

J. Denson Smith

INSURANCE

*J. Denson Smith**

It is well settled here and elsewhere that the principle of estoppel will deprive the insurer of a defense based on false answers by the insured contained in an application if the answers are inserted in the application by one acting for the insurer without the knowledge or consent of the applicant. The latter's failure to read the application before signing it is not considered sufficient to deprive him of the right to claim an estoppel if he is otherwise in good faith. This principle was applied in two decisions by courts of appeal during the last term.[1] In the *Frugé* case[2] the argument was made that since the insured had had the application in his possession for several months before the loss, he was chargeable with knowledge of the answers inserted therein and could not claim estoppel against the company. This argument was rejected in an opinion by Judge Hood on the ground that since the agent had led the applicant to believe the crucial facts were already known to the insurer he would have been justified in remaining silent even if he had seen the answers. In *Stugest v. Metropolitan Life Ins. Co.*,[3] the Fourth Circuit held that since the application had been in the possession of the insured for two months prior to his death, the beneficiary could not rely on the theory of estoppel. The Supreme Court, citing the *Fruge* case,[4] has granted certiorari. The problem is a delicate and important one, and it is good that the Supreme Court will consider it.

The view that it is not against the public policy of this state for a policy of automobile liability insurance to exclude from coverage guests riding in an automobile covered by the policy was reaffirmed in *McCoy v. Royal Indemnity Co.*[5]

In the case of *Lincombe v. State Farm Mutual*,[6] excess cov-

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*Professor of Law, Louisiana State University.

1. Frugé v. Woodmen of the World Life Ins. Soc., 170 So. 2d 539 (La. App. 3d Cir. 1965). (The court also found no intent to deceive, which it considered necessary in view of Gay v. United Benefit Life Ins. Co., 233 La. 226, 96 So. 2d 497 (1957)); Chaffin v. Wabash Life Ins. Co., 166 So. 2d 50 (La. App. 3d Cir. 1964).

2. 170 So. 2d 539 (La. App. 3d Cir. 1965).

3. 170 So. 2d 903 (La. App. 4th Cir. 1965).

4. 170 So. 2d 539 (La. App. 3d Cir. 1965).

5. 174 So. 2d 260 (La. App. 3d Cir. 1965).

6. 166 So. 2d 920 (La. App. 3d Cir. 1964).

erage provisions in two policies of liability insurance were found repugnant and both companies were held primarily liable. One of the policies undertook through its definition of an insured to deny coverage if other valid and collectible insurance, whether primary or excess, was available. Such a provision has been called an "escape" clause, as opposed to an "excess" clause.[7] The court found no difference between the two types.

In another case involving excess coverage,[8] the court found Civil Code article 3073 authority for the view that a settlement with a primary insurer which did not exhaust the liability of the primary did not operate to release the excess insurer. The release was found not to relate to the cause of action against the excess insurer. The case also held that, by virtue of the decision in *West v. Monroe Bakery*,[9] a failure to cooperate by way of defense cannot be relied on by the insurer.

The Supreme Court has reversed on a writ of review the case of *Broadview Seafoods v. Pierre*,[10] which denied to a collision insurer subrogation to the right of the owner of the insured vehicle which had been damaged in collision with another through negligence on the part of both drivers. Under the facts the owner of the vehicle in question was not legally responsible for the conduct of the driver of its car. The opinion of the Supreme Court is subject to later review.

The right of an insurer to recover from the tortfeasor the amount paid to its insured under an uninsured motorist provision was recognized in *Gerald v. Hartford Acc. & Indem. Co.*[11]

The case of *Younger v. Lumbermens Mut. Cas. Co.*[12] contains an excellent discussion of the right of an insured to recover against his liability insurer because of the failure of the latter to avail itself of an opportunity to settle the claim prior to suit. The judgment rendered against the insured was, of course, in excess of the policy limits. The facts showed that the insured had consistently insisted from the time of the accident through the trial that she was not at fault, which position was sustained

7. See the interesting and informative discussion of these types of provisions and the problem of apportionment between primary as well as excess insurers in Peterson v. Armstrong, 176 So. 2d 453 (La. App. 3d Cir. 1965).
8. Futch v. Fidelity & Cas. Co., 246 La. 688, 166 So. 2d 274 (1964).
9. 217 La. 189, 46 So. 2d 122 (1950).
10. 173 So. 2d 37 (La. App. 4th Cir. 1965).
11. 173 So. 2d 258 (La. App. 1st Cir. 1965).
12. 174 So. 2d 672 (La. App. 3d Cir. 1965).

by her version of the accident. Unfortunately, the court did not accept this version. The court recognized that the insurer should keep the insured informed of compromise offers and of the possibility of recovery beyond the policy limits but said that these responsibilities were merely factors to be considered in determining whether there had been a breach of duty by the insurer. It also expressed the view that the greater the probability of recovery beyond the policy limits, the greater is the duty to protect the interest of the insured.

In disposing of a similar problem, the court held in *Wooten v. Central Mut. Ins. Co.*[13] that the action of the insurer, if wrongful, can be treated as a tort or as the breach of an implied duty not to use the settlement control provisions of the policy unnecessarily to the detriment of the insured where the interest of the insurer is not substantially involved.

The view was taken in *Rivers v. Brown*[14] that a policy provision defining an assault and battery as an accident unless committed by or at the direction of the "insured" refers to the named insured. It was held, therefore, that an assault and battery committed by the president of the insured corporation was not excluded. A similar provision was correctly applied in *Wigginton v. Lumbermens Mut. Cas. Co.*[15]

Joint tortfeasors are liable in solido and so are their liability insurers, within the policy limits, according to *Burch v. Hartford Acc. & Indem. Co.*[16] In consequence, the filing of suit against one interrupts prescription as to the others.

In this state and others, cases presenting the question of what constitutes a "collision or upset," as a basis of recovery, reflect a liberal approach. The shoe was on the other foot in *Manard Molasses Co. v. Sun Ins. Office, Ltd.*,[17] where claim was being made for the loss of a truck under a policy which excluded damage by collision or upset. The truck was destroyed when it was pulled down an embankment by the movement of a ship into which it was feeding molasses by means of a hose. After reviewing a number of other cases involving similar facts but in which the insured was claiming that the loss

13. 166 So. 2d 747 (La. App. 3d Cir. 1964).
14. 168 So. 2d 400 (La. App. 3d Cir. 1964).
15. 169 So. 2d 170 (La. App. 1st Cir. 1964).
16. 172 So. 2d 165 (La. App. 1st Cir. 1964).
17. 170 So. 2d 691 (La. App. 4th Cir. 1965)

occurred by collision or upset, the court concluded that the problem could not be dealt with differently depending on the party to be benefited by the holding and found that the loss was excluded.

An interesting but romantic effort by a household employee to recover workmen's compensation benefits under a homeowners policy was dismissed by way of summary judgment in *Boudreaux v. Heymann.*[18] As the court observed, the plaintiff's argument was novel.

By Act 464 of 1964, R.S. 22:695 was amended so as to expressly provide that the liability of the insurer under a valued policy shall not exceed the insurable interest of the insured. In *Roberts v. Houston Fire & Cas. Co.*,[19] this amendment was held not applicable to a loss occurring before its effectiveness. The court expressly followed a prior appellate holding which the Supreme Court refused to review.[20]

In *Wilkins v. Allstate Ins. Co.*,[21] a demand for payment upon an insurer for the purpose of establishing a right to penalties and attorney fees was recognized as not necessary when the insurer is informed of the claim and enters into negotiations for its settlement. Inasmuch as the facts before the court disclosed that after the submission of the claim the insurer took no action whatsoever, it was held that a demand was necessary to establish the asserted right.

In *Harmon v. Lumbermens Mut. Cas. Co.*,[22] the Supreme Court was confronted with a claim for a penalty in the amount of $50,000, representing double the amount due for loss of the use of a hand. In rejecting the claim for the penalty the court took the understandable position that R.S. 22:657 is applicable to small claims and monthly disability payments and not to a lump sum obligation such as that before it. Although the evidence left the validity of the claim for loss of the use of the hand in doubt, certiorari was limited to consideration of the award of the penalty. In another case, an insurer was held liable for the penalties provided in R.S. 22:658 for failure to

18. 175 So. 2d 12 (La. App. 4th Cir. 1965).
19. 168 So. 2d 457 (La. App. 3d Cir. 1964).
20. The Forge, Inc. v. Peerless Cas. Co., 131 So. 2d 838 (La. App. 2d Cir. 1961). See review of this case in 25 LA. L. REV. 385 (1965).
21. 173 So. 2d 199 (La. App. 1st Cir. 1965).
22. 247 La. 263, 170 So. 2d 646 (1965).

pay within sixty days inasmuch as payment was not tendered until the sixty-first day after the furnishing of proofs of loss.[23]

The theory of estoppel was applied in *Travelers Ins. Co. v. United States Fid. & Guar. Co.*[24] so as to permit recovery by a workmen's compensation insurer, as subrogee of a principal contractor, against the insurer of a subcontractor. The latter had issued a policy of workmen's compensation insurance to the subcontractor and had given notice of issuance of the policy to the principal contractor. Subsequently, in compliance with R.S. 22:636, the policy was cancelled, but notice of the cancellation was not given to the principal contractor. The court concluded that the failure to give such notice operated to the detriment of the principal contractor, in that he could have required the subcontractor to stop work or secure other insurance. Judge Hood dissented on the ground that there was no showing of a change of position by the principal contractor on the basis of representations made by the defendant insurer.

The principle that an insurer is responsible for negligent delay in passing on an application for a health policy was relied on in *Locke v. Prudence Mut. Cas. Co.*[25] The court found in favor of the insurer since the evidence showed that the applicant was admitted to a hospital within five days of the application, and since the application contained a provision requiring delivery in good health as a condition to the effectiveness of the policy.

In *Mutual Life Ins. Co. v. Thomas*,[26] the court refused to draw a distinction between the rights of a beneficiary to the proceeds of a group policy and those of an ordinary life policy.

The Supreme Court has taken up for review the case of *Loubat v. Audubon Life Ins. Co.*,[27] wherein a certificate of credit life insurance was erroneously sent by the creditor to the husband of the debtor as the insured. The court of appeal held that the husband was not covered.

In *Soirez v. Great American Ins. Co.*,[28] the court adhered to the view that the action of an injured person against a lia-

23. Steadman v. Pearl Assurance Co., 167 So. 2d 527 (La. App. 4th Cir. 1964).
24. 168 So. 2d 439 (La. App. 3d Cir. 1964).
25. 172 So. 2d 351 (La. App. 4th Cir. 1965).
26. 170 So. 2d 895 (La. App. 4th Cir. 1965).
27. 170 So. 2d 745 (La. App. 1st Cir. 1964).
28. 168 So. 2d 418 (La. App. 3d Cir. 1964).

bility insurer under the direct action statute is in tort and prescribes in one year. At the same time, it was recognized that if a claimant first gets judgment against an insured who, after paying, then sues his insurer, the action is in contract. The principal holding was based on *Reeves v. Globe Indem. Co.*,[29] which was decided in 1930. It does not appear that subsequent amendments to the direct action statute require a change in this view.

A holding that seems to be not in keeping with the intention of the insurer but that is supportable on the principle of ambiguity was made in *Collins v. Government Employees Ins. Co.*[30] An insured had two automobiles covered under one policy. One of them had collision coverage but not the other. The latter was traded for a new car, which was damaged in collision over a month thereafter. The court sustained insured's claim of collision coverage on the new car. This seems to result in giving the insured the benefit of collision coverage on both cars after the trade was made. And for this he had not paid.

CONFLICT OF LAWS

*Joseph Dainow**

Succession of King[1] centered on an exception of no cause of action to a petition for annulment of a will, but the real issue was the validity of an olographic will which had been made while the testator was domiciled in Louisiana and disposed of movable property located in Louisiana; but at the time of his death the testator was domiciled in Florida. In Louisiana, an olographic will is valid; in Florida, it is not. The petition for annulment urged the applicability of the Florida law; the court applied Civil Code article 10[2] and followed a prior Supreme

29. 185 La. 42, 168 So. 488 (1930).

30. 168 So. 2d 415 (La. App. 3d Cir. 1964).

*Professor of Law, Louisiana State University.

1. 170 So. 2d 129 (La. App. 4th Cir. 1965).

2. LA. CIVIL CODE art. 10 (1870): "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

"But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.

"The exception made in the second paragraph of this article does not hold,