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Private Law: Insurance

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law, to which the doctrine of collateral estoppel was not applicable. This contention was sustained, and the case was remanded for proceedings consistent with the court's decision. As the litigation is not terminated, comment on the merits of the question would be inappropriate. The procedural determination, however, appears to be correct.⁶²

Parol Evidence

The stream of recent jurisprudence regarding suits on oral contracts involving mineral leases was at least negatively involved in *Fontenot v. Fontenot*.⁶³ Plaintiffs sued to enforce an alleged oral contract under which defendants, mineral lease brokers, induced plaintiffs to lease to defendant's principal for \$5.00 an acre by promising that if more was paid to any other lessor "in the block," defendants would personally pay plaintiffs the difference. Counsel for defendants urged that under *Hayes v. Muller*⁶⁴ and other similar cases, parol evidence was inadmissible in proof of the claim. However, the court held that this suit did not involve a claim of an interest in a mineral lease disputed among parties thereto. The case was analyzed as one involving a disclosed agent who exceeded his authority and thereby became personally bound. Thus, it was held that parol evidence was admissible in proof of the claim. However, the triumph on the legal issue proved to be a Pyrrhic victory for plaintiffs as the court held that the evidence did not support the alleged oral agreements. Thus the judgment rendered by the lower court in favor of defendants was affirmed.

Considering the facts of the case as recited by the court, there seems little question as to the correctness of the result.

INSURANCE

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In the case of *Gunter v. Lord*,¹ the Supreme Court denied double recovery to a passenger in an insured vehicle, claimed

62. This decision is noted with approval in 40 TUL. L. REV. 934 (1966).

63. 175 So.2d 910 (La. App. 3d Cir. 1965).

64. 245 La. 356, 158 So.2d 191 (1963).

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1. 242 La. 943, 140 So.2d 11 (1962), noted in 23 LA. L. REV. 353.

under the medical expense provision of the policy and also under the liability coverage for the injuries sustained. This decision was distinguished in *Sonnier v. State Farm Mutual*,² and it was held that an insured who had received payment from his insurer under the medical payments provision of his policy was entitled to recover also against the insurer of the car operated by the tortfeasor notwithstanding that the same insurer wrote the policies on both cars. The holding appears to be in keeping with the view of the Supreme Court as expressed in the *Gunter* case although the expression had reference to different insurers. Three possible choices are available in this kind of situation: (1) the injured person can be allowed recovery against his medical expense insurer and also against the tortfeasor; (2) subrogation of the medical expense insurer for the payment made to its insured could be allowed; or (3) the amount recoverable against the tortfeasor could be reduced by the amount received from the medical expense insurer, thus giving the tortfeasor the benefit of this payment. The court chose the first alternative. Considering the second alternative, it is interesting to notice that the family combination automobile policy does not provide for subrogation covering expenses for medical services. On the other hand, certain special policies of the National and Mutual Bureaus do contain stipulations of this kind, as do also many policies issued by independent companies. Subrogation has traditionally not been considered applicable to insurance against personal injury any more than to life insurance. It has been suggested that the theories underlying this rule are, in the main, that insurance against personal injury cannot be considered a contract of indemnity; that the insured should be entitled to the benefit of the premiums he has paid as a reward for his own thrift; and that tort damages may fall short of complete indemnification for personal injuries, having especially in mind the necessity of paying the fees of an attorney.³ Although the inclusion of medical expense coverage in an automobile liability policy may be attributable to accident rather than thrift or foresight on the part of the insured, perhaps the same arguments may have some degree of validity when applied to medical expense payments.⁴ The third alternative involves relieving the

2. 179 So.2d 467 (La. App. 3d Cir. 1965).

3. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966); Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841 (1962).

4. Subrogation is, of course, allowed in favor of a collision insurer paying its insured to cover a loss occasioned by a tortfeasor. It is not entirely clear that

tortfeasor of a burden it would be advisable for him to bear and would also give him the benefit of insurance for which he has not paid. Of the three possibilities, the better view would seem to be to permit double recovery by the insured. Having reached this point, it would be rather difficult to make an exception on the sheer basis that the insurer of the tortfeasor happened to be the same as the insurer of the medical expense beneficiary.

Subrogation accompanies payment. In theory, the claim that is paid and thus extinguished is maintained fictitiously in favor of the subrogee.⁵ Where the amount paid to the subrogor is less than the entire amount due, the subrogee can claim from the debtor only what he has paid, and a partially paid subrogor may exercise his right for the balance due in preference to the subrogee. In *Broadview Seafoods, Inc. v. Pierre*,⁶ a collision insurer paid its insured for damage to the latter's car and was conventionally subrogated. Inasmuch as the car was being driven at the time of the accident by a third person for whom the insured was not responsible but who was a joint tortfeasor with the driver of the other car, the court of appeal concluded that the collision insurer could not acquire by subrogation a claim against the other driver and his insurer. This view was taken on the basis of policy language which made the operator of insured's vehicle an insured covered by the subrogation provisions. The Supreme Court properly reversed. The payment to cover the damage to the vehicle was made to the owner of the vehicle as the insured with respect to the collision loss. Consequently, the right of the owner receiving the payment against the other driver subsisted fictitiously in favor of the insurer. The owner was, of course, not a joint tortfeasor.

such a difference exists between collision coverage and medical expense coverage that subrogation, allowed in the former case, should be denied in the latter. This statement is made with conventional subrogation in mind. There are cases both for and against allowing legal subrogation to an insurer. In 1842 Judge Martin recognized that legal subrogation may take place not only when one person binds himself with another or binds himself for another, but also when he is bound for the same debt as another. *Howe v. Frazer*, 2 Rob. 424 (La. 1842). It is true that the Civil Code denies the benefit of subrogation to a mere volunteer who pays another's debt although he is "no way concerned in it." LA. CIVIL CODE art. 2134 (1870). But an insurer paying its insured under the medical expense provisions of its policy has "an interest in discharging" the debt brought about by the tortfeasor's wrongful conduct and might for this reason be counted as within the reach of Civil Code art. 2161.

5. 6 AUBRY & RAU, *DROIT CIVIL FRANÇAIS, OBLIGATIONS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* § 321 (1965). LA. CIVIL CODE art. 2160 (1870) provides that the subrogation must be made at the same time as the payment. Since when a claim is paid it no longer exists, the creditor cannot thereafter grant the right of subrogation.

6. 248 La. 533, 180 So.2d 694 (1965).

Consistent with the foregoing is the fact that where an accident is caused by the joint negligence of both drivers the amount paid to one under an uninsured motorist provision cannot be recovered by his insurer from the other.⁷

In *McConnell v. Travelers Indemnity Co.*,⁸ the argument was made that, since no permission was given to a repairman to use the car delivered to him for repairs other than to road test it, which use fell within an exclusion of the owner's policy, the repairman could not be counted as an omnibus insured so as to render the owner's insurer responsible within the rule of *Parks v. Hall*⁹ while the car was being operated at night on a personal mission. In its original opinion the court rejected this argument, saying: "This theory, as we view it, changes the rule from initial permission to initial coverage." At the same time, it found that implied permission to use the car for social purposes had been given subsequent to the initial delivery. In a per curiam issued on rehearing, the court found it unnecessary to dispose of the mentioned argument because of the permission subsequently given. As filed, the suit was against the garage insurer as well as the insurer of the car. The judgment of the court of appeal denied recovery against both. The writ granted by the Supreme Court did not disturb the denial of recovery against the garage insurer, which was based on a finding that the accident did not occur during a use in connection with the business. It is, however, not necessarily more logical to find coverage through operation with permission under an owner's policy although the only permission given is to use the car under circumstances that would exclude coverage, than to find coverage based on road testing although the driver had shifted from road testing to a purely personal use. Consonant with the spirit of *Parks v. Hall*, it might be said that, since there is coverage under the garage liability policy when the car is taken out for road testing, this coverage cannot be destroyed by a change from testing to personal use on the part of the repairman any more than initial permission to use for a given purpose can be converted into use without permission by a change of purpose on the part of the user. Under the *Parks* doctrine, permission establishes coverage

7. *State Farm Mut. Auto Ins. Co. v. Brown*, 181 So.2d 799 (La. App. 1st Cir. 1965).

8. 248 La. 509, 180 So.2d 406 (1965).

9. 189 La. 849, 181 So. 191 (1938).

of the permittee which will not terminate by a change from authorized to unauthorized use. Under the garage liability policy, use for road testing establishes coverage. There seems to be, therefore, merit for the view that once coverage attaches, *e.g.*, by a grant of permission for a particular use or by use for road testing, it will not terminate by a change from the authorized to an unauthorized use. It is also true that the giving of permission by the owner to the repairman to road test the car does not institute coverage under the owner's policy whereas coverage under the garage liability policy is instituted by operation for road testing. In the final analysis, it may be justifiable to ask which insurer, if either, *should* bear the risk on such facts.

In the case of *Dumas v. Hartford Acc. & Indem. Co.*,¹⁰ while returning the owner's car to his home after its servicing had been completed, the service station attendant was involved in an accident. The owner's liability policy contained a clause designed to exclude coverage "while [the owned automobile] is used by any person while such person is employed or otherwise engaged in the automobile business." As defined in the policy, the automobile business included the servicing of automobiles. It was held that the exclusionary clause was not applicable because the servicing had been completed at the time the accident occurred. In consequence, of course, judgment was rendered against the owner's insurer. The opinion leaves some questions unanswered. In the first place, it seems clear that at the time of the accident the attendant was "employed" in the automobile business although he was not engaged in servicing the car at the time. There is also the more serious question of whether the decision is consonant with the purpose of the exclusion. Presumably the service station did not carry a garage liability policy. If it had and the insurer had also been sued, the court would have had a choice between finding coverage under the garage liability policy or under the owner's policy. The former presumably would have turned on whether the accident occurred during a use in connection with the business. If the act of returning the owner's car to him as agreed was such a use, then the garage liability policy would have been applicable. As between the garage or the individual, the cost of protection under the facts in question ought to be allocated to the garage, both

10. 181 So.2d 841 (La. App. 2d Cir. 1966). This case is discussed 27 LA. L. REV. 113 (1966), where other similar decisions are considered.

on the ground that the expense should be borne by the business and the fact that the service station operator rather than the individual selects the operator and should be responsible for him.

In a well-reasoned opinion in *Peterson v. Armstrong*,¹¹ it was held that a son who had the use of the family car for a period of time while away in school had implied authority to give permission to another to use the car so as to constitute the latter an omnibus insured despite the father's suggestion that the "best thing to do" was not to let others drive. The court's opinion was supported by the fact that the parents were aware of other instances when the son had permitted others to drive. The case also took the view that a policy provision for a proportional division of the loss on the basis of policy limits was applicable only to the primary coverage, not to the excess. In consequence, two excess insurers were held solidarily liable up to the applicable limits of their coverage. This view is followed by the better-reasoned cases from other jurisdictions.

The family combination automobile policy contains provisions for the payment of medical and funeral services of anyone injured or killed while occupying the owned automobile and of the named insured and relatives of the named insured while occupying a non-owned automobile. A generally recognized principle applicable to such policies is that the insurance on the car is primary and that on the driver or occupants under another policy of insurance is excess. Pursuant to the stated principle, it was held in *Rancatore v. Employers Liab. Assur. Corp.*¹² that the liability of the defendant insurer with respect to its named insured and relatives while occupying a non-owned automobile was excess over that of the insurer whose policy covered the car in which they were riding as guests.

An insured is required to do what he reasonably and prudently can to prevent the destruction of or damage to property covered by a policy of insurance and is entitled to be indemnified for losses sustained in undertaking to do so. Some policies so provide. In any event, the principle of indemnification is particularly applicable when the policy excludes loss or damage caused by the insured's neglect to use all reasonable means to

11. 176 So. 2d 453 (La. App. 3d Cir. 1965).

12. 177 So. 2d 391 (La. App. 4th Cir. 1965).

save and preserve property imperilled by a risk insured against. Policies containing provisions of both types were involved in *Harper v. Pelican Trucking Co.*¹³ In a well-reasoned and carefully documented opinion, the cost of salvage operations was held chargeable against the insurers of a vehicle and its cargo where there was imminent danger of further loss or damage because of a collapsed bridge.

Under La. R.S. 22:692, a fire insurer may not rely on a breach of a warranty, representation, or condition if the breach existed at the time of the loss and was then "known to the insurer or to any of its . . . agents" except where there is fraud or collusion between the agent and the insured. In *McCoy v. Pacific Coast Fire Ins. Co.*,¹⁴ this provision was held a bar to the insured's defense based on the ground that the insured had begun the operation of a restaurant on the premises whereas they were described in the policy as "apartments." It was shown that seventeen months before the loss occurred the agent had received from the Louisiana Rating and Fire Prevention Bureau a new rate card covering the premises in question which reflected the presence of a restaurant but the agent had not compared the rate card with the policy. The holding avoids the difficulty of the insured's proving actual knowledge by the insurer of the breach which might be very great. At the same time, however, it does operate to protect an insured whose position may not be so clearly equitable.

The *McCoy* case was followed in *Bailey v. American Marine & Gen. Ins. Co.*,¹⁵ and the court expressed the view that notice of facts which ought to excite inquiry and which if pursued would lead to knowledge of other facts operates as notice thereof.

In an interesting case of first impression, the court, in *Olinde Hardware & Supply Co. v. Rogers*,¹⁶ held that the rights of the debtor under a group life insurance certificate became fixed with respect to total disability at the time the disability began notwithstanding that the policy may have been automatically cancelled during a six-months' waiting period. The opinion gives to the insured the protection contemplated by the policy.

13. 176 So. 2d 767 (La. App. 2d Cir. 1965).

14. 248 La. 389, 178 So. 2d 761 (1965).

15. 249 La. 98, 185 So. 2d 214 (1966).

16. 185 So. 2d 626 (La. App. 1st Cir. 1966).