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Royal H. Brin Jr.

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INSURANCE LAW

by
Royal H. Brin, Jr. *

I. AUTOMOBILE AND LIABILITY INSURANCE

Uninsured Motorist Coverage. Uninsured motorist coverage was an area of comparatively little judicial activity during this reporting period. In *Francis v. International Service Insurance Co.*¹ the court of civil appeals upheld a policy definition of "uninsured automobile" which excluded from coverage vehicles owned by governmental agencies. Francis was seriously injured in a collision between an uninsured fire truck owned by the City of Grand Prairie, Texas, and the automobile in which she was a passenger. She sought coverage for her injuries under the uninsured automobile portion of the Family Automobile Policy issued to the owner of the vehicle in which she was riding when the accident occurred. International, the insurer of the automobile she was occupying, denied coverage on the ground that the fire truck was not an "uninsured automobile" within the language of the policy.² The trial court granted the insurer's motion for summary judgment, and Francis appealed on the ground that the insurance policy's definition of "uninsured automobile" was contrary to public policy and violated the terms of the Texas Uninsured Motorist Statute.³ The policy language in question, which expressly excluded

* B.A., J.D., University of Texas. Attorney at Law, Dallas, Texas. The author gratefully acknowledges the very considerable assistance of Duncan L. Clore in the preparation of this Article.

1. 533 S.W.2d 408 (Tex. Civ. App.—Texarkana 1976, writ granted).

2. The policy defined "uninsured automobile," in part, as follows:

(a) an automobile or trailer with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law of the state in which the insured automobile is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such automobile, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder, . . . but the term 'uninsured automobile' shall not include:

(3) an automobile or trailer owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing.

Id. at 409-10.

3. TEX. INS. CODE ANN. art 5.06-1 (Vernon Supp. 1976-77). This statute provides in part:

(1) No automobile liability insurance (including insurance issued pursuant to an Assigned Risk Plan established under authority of Section 35 of the Texas Motor Vehicle Safety-Responsibility Act), covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state unless coverage is provided therein or supplemental thereto, in the limits described in the Texas Motor Vehicle Safety-Responsibility Act, under provisions prescribed by the Board, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. The coverage required under this Article shall not be applicable where any insured named in the policy shall reject the coverage; and provided further, that unless the named insured requests such

governmental vehicles from uninsured motorist coverage, had been approved by the State Board of Insurance in accordance with its authority under the Texas uninsured motorist statute, article 5.06-1 of the Insurance Code. Francis contended that the policy definition frustrated the intent and purpose of the statute which was to benefit the victim of financially irresponsible motorists.

The Texarkana court of civil appeals affirmed the judgment of the trial court, noting that the statute is unequivocal, empowers the Board to formulate a definition of uninsured automobile, and expressly authorizes the Board to exclude from such definition vehicles whose operators are, in fact, uninsured. The court applied the clear language of the statute, commenting that the constitutionality of the Board's authority to promulgate forms and to define uninsured motor vehicles was settled.⁴ The definition in question was found to be consistent with the recognized purpose of the statute, although the court noted that by approving such language the State Board of Insurance had clearly restricted the statute's possible scope. Nevertheless, since the language of the statute was clear and the definition did not go beyond statutory limits, the court held that the definition was valid. As of this writing, writ has been granted by the supreme court to decide whether a policy definition of uninsured automobile which excludes vehicles belonging to governmental agencies is valid.⁵

A standard provision in many policies which excludes uninsured motorist coverage if the insured "shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor" was again upheld in *State Farm Mutual Automobile Insurance Co. v. Ford*.⁶ The stipulated facts of the case followed the same basic scenario established in recent cases interpreting this policy provision as reported in the last *Survey*.⁷ Joan Ford was killed while a passenger in Harvey's automobile in a collision with Whitten, an uninsured motorist whose negligence caused the accident. The Harvey automobile was insured by Gulf Insurance Company under a policy that included uninsured motorist coverage. Robert Ford, the legal guardian of the three surviving children of Joan Ford, was insured by State Farm under an automobile liability policy containing the same standard uninsured motorist coverage. Robert Ford, in his individual capacity and as guardian of the minor children, brought suit against State Farm and Gulf for

coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer.

(2) For the purpose of this coverage, the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. The State Board of Insurance is hereby authorized to promulgate the forms of the uninsured motorist coverage. The Board may also, in such forms, define 'uninsured motor vehicle' to exclude certain motor vehicles whose operators are in fact uninsured.

4. 533 S.W.2d at 410. The court cited *Hamaker v. American States Ins. Co.*, 493 S.W.2d 893 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

5. 19 Tex. Sup. Ct. J. 310 (May 15, 1976).

6. 537 S.W.2d 138, 139 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ granted).

7. Brin, *Insurance Law, Annual Survey of Texas Law*, 30 Sw. L.J. 195, 196-97 (1976).

the benefits of each of the policies. Gulf subsequently settled with Ford by an agreed judgment entered into without the consent of State Farm. The trial court then entered judgment against State Farm, who appealed. The court of civil appeals was of the opinion that the case was controlled by prior Texas decisions on the subject⁸ and held that the agreed judgment was a settlement with one "who may be legally liable" for plaintiff's injuries, thereby discharging State Farm from any liability. On October 16, 1976, the Texas Supreme Court granted writ of error in the case on the sole point of whether or not plaintiff's settlement with Gulf under a release/trust agreement released any organization or person who may have been legally liable to Ford.⁹ The court of civil appeals opinion made no mention of the particulars of Ford's settlement with Gulf, apparently on the assumption that the settlement was a complete release of Gulf without State Farm's consent. It would appear, however, that if Gulf was, in fact, not released by Ford's settlement, as assumed by the court, the policy provision would be inapplicable and would not have barred Ford's recovery against State Farm.

The effectiveness of a written rejection by the insured of uninsured motorist coverage where an original policy was assumed by a second insurer and a renewal policy was subsequently issued without uninsured motorist coverage was treated in *Guarantee Insurance Co. v. Boggs*.¹⁰ Boggs had been issued an automobile liability insurance policy by First National in which he had specifically rejected uninsured motorist coverage. During the term of the policy in question the policies of First National were assumed by Guarantee. At the expiration of the policy term Boggs requested renewal of the policy without requesting the addition of uninsured motorist coverage or mentioning any other change in policy coverage. The Texas uninsured motorist statute requires a written request for uninsured motorist coverage from the insured where such coverage has been rejected in connection with a policy previously issued to him *by the same insurer*.¹¹ In a case of first impression the court of civil appeals held that the words "policy previously issued to him by the same insurer" must be accorded their literal meaning and referred only to a policy previously issued by the same business entity. Because First National and Guarantee were separate business entities, the court reasoned that the insurance policy renewed by Guarantee, although identical with the original policy, was not a renewal by the same insurer within the meaning of the statute. Therefore, by operation of law, uninsured motorist coverage was included in the renewal policy.¹²

8. The court considered the case to be controlled by *Castorena v. Employers Cas. Co.*, 526 S.W.2d 680 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.); *McClelland v. United Serv. Auto. Ass'n*, 525 S.W.2d 271 (Tex. Civ. App.—Beaumont 1975, writ ref'd); *Jessie v. Security Mut. Cas. Co.*, 488 S.W.2d 140 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.); *Grissom v. Southern Farm Bureau Cas. Ins. Co.*, 476 S.W.2d 448 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.). For a discussion of these cases see Brin, *supra* note 7, at 196-97.

9. 20 Tex. Sup. Ct. J. 9 (Oct. 16, 1976).

10. 527 S.W.2d 265 (Tex. Civ. App.—Amarillo 1975, writ dism'd).

11. TEX. INS. CODE ANN. art. 5.06-1(1) (Vernon Supp. 1976-77); see note 3 *supra*.

12. Article 5.06-1 provides that uninsured motorist coverage shall be provided in all automobile liability policies unless the insured expressly rejects such coverage.

*Allen v. Avery*¹³ reaffirmed the right of the insurer to settle with its insured for uninsured motorist coverage under its policy and then to defend him against a damage action instituted by the heirs of the uninsured motorist. In a suit filed against the insured plaintiffs, heirs of the uninsured motorist, contended that the insurer could not both settle with its insured and defend him in an action involving the same accident, for to do so involved a conflict of interest on the part of the insurer. Following the decision approved by the supreme court in *Allstate Insurance Co. v. Hunt*,¹⁴ the court of civil appeals held that no conflict of interest was presented since such action did not constitute dual representation of both the insured and the uninsured motorist and, in fact, merely reflected the insurer's duty to defend the interest of its insured.

Persons Insured. *Republic Insurance Co. v. Luna*¹⁵ dealt with the term "permission of the owner" in an automobile liability policy. The policy provided coverage to the insured and his family while driving a non-owned vehicle if permission of the owner was obtained or the responsible driver reasonably believed he had the permission of the owner to operate the automobile. Nowhere in the policy was "owner" defined. Luna, the insured's son, was involved in a collision while driving a car borrowed from Stacha, a college friend. Stacha, Sr., the owner, had bought the car as a graduation present for young Stacha to use at college with instructions not to allow others to use the car. Luna had driven the car previously with young Stacha's permission and was unaware that the car actually belonged to Stacha, Sr. The insurer brought a declaratory judgment action seeking to be excused from defending Luna on the ground Luna did not have permission, nor could he reasonably have believed he had the permission of the owner. The trial court held against the insurer, who appealed. The court of civil appeals affirmed the judgment, holding that the term "owner" was synonymous with "holder" or "possessor" and construed the policy language against the insurer, stating that to hold otherwise would place an unrealistic burden on the insured to ascertain the true owner of the insured vehicle.

Exclusions. *Travelers Indemnity Co. v. Cen-Texas Vending Co.*¹⁶ involved the interpretation of an employee exclusion clause in a policy of automobile insurance. Under the stipulated facts Angerstein, an employee of Cen-Tex, was injured in the course of his employment in an automobile accident while driving a vehicle owned by Cen-Tex. Angerstein was an "additional driver" under the policy issued by Travelers and was not covered by workmen's compensation. Cen-Tex and Angerstein sued Travelers for Angerstein's medical expenses under the medical payments portion of the policy. The policy, however, excluded recovery for "bodily injury to . . . any employee

13. 537 S.W.2d 789 (Tex. Civ. App.—Texarkana 1976, no writ).

14. 450 S.W.2d 668 (Tex. Civ. App.—Houston [14th Dist.] 1970), *aff'd*, 469 S.W.2d 151 (Tex. 1971).

15. 539 S.W.2d 69 (Tex. Civ. App.—Beaumont 1975, no writ).

16. 530 S.W.2d 354 (Tex. Civ. App.—Eastland 1975, writ *ref'd n.r.e.*).

of the named insured . . . arising out of and in the course of (1) domestic employment by the named insured . . . if benefits therefore are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the named insured"¹⁷ The trial court entered judgment for the plaintiffs. The court of civil appeals reversed and rendered judgment for the insurer, holding that Angerstein's medical expenses were expressly excluded by the clear language of the policy. Since Angerstein was not a domestic employee he fell within the category of "other employment by the named insured," and was expressly excluded from recovering for the injuries he sustained in the course of his employment.

The judgment of the court of civil appeals in *Ramsay v. Maryland American General Insurance Co.*,¹⁸ discussed in the last *Survey*,¹⁹ was reversed by the supreme court. As will be recalled, *Ramsay* involved the interesting question of whether a United States Navy-owned truck, used exclusively for non-profit activities of the United States Government, was a "commercial automobile." *Ramsay*, a civilian employed by the Navy as an air conditioning mechanic, was killed while operating a Navy-owned pickup truck on a public highway. Mrs. Ramsay sued Maryland American for death benefits under a combination automobile policy endorsement which excluded coverage for "bodily injury or death sustained in the course of his occupation by any person while engaged (1) in duties incident to the operation, loading or unloading of, or as an assistant on, a public or livery conveyance or commercial automobile. . . ."²⁰ The trial court found for the plaintiff, which judgment was reversed and rendered for the insurer by the court of civil appeals. In so holding, the court of civil appeals was of the opinion that *Ramsay*, whose duty it was to install, repair, and service air conditioning equipment for the Navy, was engaged in commerce, though his employer was not; therefore, the pickup was a commercial automobile within the terms of the policy exclusion. The supreme court, unpersuaded by this analysis, reversed the court of civil appeals and affirmed the judgment of the trial court. Acknowledging that the term "commercial automobile" would under ordinary circumstances be unambiguous, the supreme court reasoned that, when applied to a Navy-owned truck used exclusively for non-profit activities of the United States Government, the term was no longer certain and, therefore, under well-established principles such ambiguity must be construed against the insurer.

*Shillings v. Michigan Millers Mutual Insurance Co.*²¹ involved the terms "collision" and "incidental loss or damage due to operation of the equipment" in an inland marine policy. A caterpillar tractor used for clearing land was damaged when a tree being cut by driving the tractor blade into the side of the tree accidentally fell on the tractor. Plaintiffs brought suit against the insurer for damage to the tractor under an endorsement entitled "Contractors

17. *Id.* at 355.

18. 533 S.W.2d 344 (Tex. 1976).

19. Brin, *supra* note 7, at 199.

20. 533 S.W.2d at 346.

21. 536 S.W.2d 627 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

Equipment Form" which provided coverage for loss or damage by collision, landslide, or upset but which excluded "incidental loss or damage due to operation of equipment."²² The terms "collision" and "incidental loss or damage due to operation of equipment" were not defined in the policy. Plaintiffs recovered at trial but the court of civil appeals reversed and rendered judgment for the insured. Finding no Texas authority directly in point, the court examined analogous cases in other jurisdictions and concluded that the term "collision," when broadly construed, included impact of the tractor with the tree. The policy exclusion for "incidental loss or damage due to operation of the equipment" was considered ambiguous; therefore, by operation of law the ambiguity was resolved in favor of the insured.

Notice. The court of civil appeals upheld as sufficient a policy term providing for cancellation of an automobile liability policy by proper mailing of notice in *Rhymes v. Fidelity & Casualty Co.*²³ Acknowledging the supreme court's opinion in *Sudduth v. Commonwealth County Mutual Insurance Co.*²⁴ which upheld an identical provision in another policy, the court reaffirmed the majority rule that a policy can be cancelled by the proper mailing of notice in accordance with policy terms even though the notice is never actually received by the policyholder.

Aircraft Hull & Liability Insurance. Two cases dealt with the coverage provisions of aircraft hull and liability policies. *Vanguard Insurance Co. v. Plains Helicopter, Inc.*²⁵ was a declaratory judgment action brought by the insurer to determine whether its aircraft hull and liability policy provided coverage for a helicopter crash which occurred after completion of crop spraying operations. The policy in question insured the helicopter except "while . . . used for crop dusting or spraying operations."²⁶ The helicopter crashed while attempting to land on the back of a nurse truck for refueling upon completion of the day's potato crop spraying. The insurer contended that an integral part of the spraying operations was being conducted at the time of the crash and, thereby, excluded the loss from coverage. The policy did not define the term "operations" or otherwise prescribe criteria for determining when operations ceased. The trial court found coverage, and the court of civil appeals affirmed, holding that the word "operations," in the absence of a policy definition, must be accorded its ordinary meaning of work; and since no further work remained to be done once the potato crop spraying had been completed, the helicopter was not engaged in crop dusting or spraying operations at the time of the crash. In the court's view the fact that the crash occurred while the helicopter was attempting to land on the nurse truck which had been used as an integral part of the spraying operations did not justify a holding that crop spraying operations had not ceased.

In *National Insurance Underwriters v. Glover*²⁷ a declaratory judgment

22. *Id.* at 628.

23. 533 S.W.2d 379 (Tex. Civ. App.—Texarkana 1975, no writ).

24. 454 S.W.2d 196 (Tex. 1970).

25. 529 S.W.2d 277 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

26. *Id.* at 278.

27. 535 S.W.2d 662 (Tex. Civ. App.—El Paso 1976, writ granted).

action was brought by National to determine coverage under its aviation liability policy following a suit by survivors of the deceased passengers of an airplane crash. The plane had crashed in inclement weather conditions for which the insured pilot was not properly rated to fly the aircraft. Rogers, the insured pilot, had a private pilot's license which permitted him to fly only under visual flight rules (VFR) and did not authorize flight under instrument flight rules (IFR). On the day in question Rogers had contacted the appropriate FAA Flight Service Station for a weather briefing prior to the planned flight from Odessa to Eagle Pass. IFR weather conditions existed at Odessa and along the proposed route at the time of the weather briefing. By take-off, weather conditions had sufficiently improved at Odessa to permit a VFR take-off, although weather conditions along the proposed route remained IFR. Under the agreed statement of facts, approximately the first one-third of the flight was in VFR conditions, the next one-third was in probable IFR conditions, while the last one-third was in definite IFR conditions. The parties stipulated that Rogers was negligent in flying into known weather conditions which required an instrument pilot rating. The policy excluded coverage whenever the pilot operating the aircraft was not "properly rated" for the flight in question. The trial court held that as a matter of law there was coverage. The court of civil appeals reversed and rendered judgment for the insurer, holding that where the pilot commenced his flight *knowing* that the weather conditions enroute to his destination did not permit VFR flight he was not "properly rated" for the flight and thereby was precluded from policy coverage. Chief Justice Preslar, writing a vigorous dissent, would have upheld coverage on the premise that Rogers was not in violation of his pilot rating at the time of the crash. Although Rogers knowingly flew the aircraft into IFR weather the evidence indicated that he was attempting to fly visually by hugging the ground. Although he was clearly in violation of visual flight regulations he was not in violation of his pilot rating since he was not attempting instrument flight; thus, the dissent reasoned, there was coverage. On July 3, 1976, the Texas Supreme Court granted writ of error on the single point that the court of civil appeals erred in holding that Rogers was not "properly rated for the flight" in question.²⁸ On January 12, 1977, the supreme court reversed the court of civil appeals and affirmed the judgment of the trial court.²⁹ The court found that the words "in flight" in the pilot clause were ambiguous and could be construed as either visual or instrument flight as Justice Preslar had argued in his dissent.³⁰ The court then applied the rule that exceptions and rules of limitation are to be strictly construed against the insurer³¹ and held that there was coverage.³²

28. 19 Tex. Sup. Ct. J. 367 (July 3, 1976).

29. *Glover v. National Ins. Underwriters*, 20 Tex. Sup. Ct. J. 150 (Jan. 12, 1977).

30. *Id.* at 154.

31. The rule was set forth in *Continental Cas. Co. v. Warren*, 52 Tex. 164, 254 S.W.2d 762 (Tex. 1953).

32. The court noted:

Our holding may seem harsh to the insurer because we have held this insurance policy applicable even though it is undisputed that the non-instrument rated pilot was flying in IFR conditions when the crash occurred. We note that our construction of this pilot clause was necessary, however, only because National

An insurer was held bound by a consent judgment entered against its insured after it had been offered the defense of the suit in *Ranger Insurance Co. v. Rogers*.³³ Plaintiff had filed actions against the estate of Rogers, the insured pilot, for the death of her husband in the crash of a light plane in a west Texas dust storm. The insurer was offered the defense of the suit by the administrator of Rogers' estate, but it asserted a policy defense and refused to defend the suit without a "reservation of rights" agreement which the administrator refused to grant. A consent judgment was subsequently entered by a federal district court in the death action, approving a settlement made by the parties. Thereafter, plaintiff and the administrator of Rogers' estate filed suit against the insurer, alleging coverage under the aviation liability policy. Affirming the judgment of the trial court, the court of civil appeals held that having refused defense of the suit, the insurer could not be regarded as a stranger to the consent judgment and was bound by its terms. Thus, relitigation of the liability and damage questions previously decided in the action against the pilot's estate was precluded.

*Personal Injury Protection Coverage. Berry v. Dairyland County Mutual Insurance Co.*³⁴ dealt with the question of whether an injury received by an insured while alighting from an automobile was covered by "personal injury protection" coverage contained in an automobile liability policy. Plaintiff sued Dairyland, seeking to recover upon the "personal injury protection" coverage of his insurance policy for injuries sustained when he twisted his right knee while getting out of his parked car. As a result of the injury plaintiff was hospitalized, underwent knee surgery, and suffered lost wages. The insurer argued that plaintiff's injury was not a "bodily injury caused by accident, in a motor vehicle accident" within the terms of personal injury protection coverage in Dairyland's policy. On appeal the court of civil appeals reversed and rendered judgment for the insured, holding that article 5.06-3 of the Texas Insurance Code³⁵ did not purport to restrict the type of accident to which personal injury protection applied to injuries sustained in a "motor vehicle accident." Since the statute simply states that coverage shall be afforded for losses "arising from the accident," or "as a result of the accident," any provision of the insurance policy contrary to the statute is void. The court reasoned that since the accident sustained by the insured occurred while he was "occupying" the vehicle, it was an accident within the meaning of the statute and was covered by "personal injury protection." If the policy language in question was contrary to article 5.06-3, it would be read to conform to the statute.

chose to phrase the insurance policy in the ambiguous manner heretofore discussed. Language was available to, and known to, National which would have clearly and plainly excluded from coverage a non-instrument rated pilot who operated his aircraft in IFR conditions.

20 Tex. Sup. Ct. J. at 155-56.

33. 530 S.W.2d 162 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

34. 534 S.W.2d 428 (Tex. Civ. App.—Fort Worth 1976, no writ).

35. TEX. INS. CODE ANN. art. 5.06-3 (Vernon Supp. 1976-77).

Stowers Doctrine. An interesting twist to the *Stowers*³⁶ doctrine occurred in *Samford v. Allstate Insurance Co.*³⁷ Plaintiffs, judgment creditors of the insured, sued Allstate in an attempt to proceed directly against the insurance carrier for the excess judgment granted as a result of the insurer's alleged negligence in failing to exercise ordinary care in the settlement of the plaintiffs' suit against the insured. Plaintiffs contended that the insured had failed to assert his cause of action against the insurer and that they were third-party beneficiaries of such a cause of action. The trial court granted the insurer's motion for summary judgment. The court of civil appeals affirmed, holding that judgment creditors were not third-party beneficiaries of the insured's cause of action against the insurer, that there could be no cause of action against the insurer based on strict liability, and that the failure of the insured to bring an action against the insurer was not actionable.

II. LIFE, HEALTH, AND ACCIDENT INSURANCE

Beneficiaries. As in the previous *Survey*, several cases dealt with beneficiary designations and the procedural requirements for change of beneficiaries. The vested, equitable interest in policy proceeds of "irrevocable" beneficiaries designated under a court-approved property settlement, recognized last year in *Box v. Southern Farm Bureau Life Insurance Co.*,³⁸ was reaffirmed by the Fifth Circuit in *Murphy v. Travelers Insurance Co.*³⁹ *Murphy* presents a fact situation practically identical to that in *Box*. *Murphy* was divorced in 1968. In the property settlement agreement incorporated in a California divorce decree, he agreed to name his children as "irrevocable" beneficiaries of up to one-half of his group life insurance policy. *Murphy* did not comply with those terms of the property settlement but instead, following his remarriage, named his new wife as sole beneficiary of the policy proceeds. The trial court in an interpleader action awarded the children the amount specified in the divorce decree and property settlement. The Fifth Circuit affirmed, finding the applicable Texas and California law in agreement in recognizing a vested equitable interest in the policy proceeds on behalf of the minor beneficiaries.

*Dreesen v. Coleman*⁴⁰ involved the interest of an ex-wife in the proceeds of her former husband's life insurance policies in which she was the named beneficiary. Rebecca Dreesen and Coleman were married in 1973. In 1974 Coleman took out two policies insuring his life and naming his wife as beneficiary. Rebecca and Coleman were divorced in 1974, but the cash value of the two insurance policies was not partitioned in the divorce decree. Eight days later Coleman died in an automobile accident. The trial court awarded one-half of the proceeds to Rebecca and one-half to Coleman's estate. The

36. *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved), states the rule that an insurer must exercise ordinary care and prudence in deciding whether to accept an offer for settlement within policy limits.

37. 529 S.W.2d 84 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

38. 526 S.W.2d 787 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.), discussed in *Brin*, *supra* note 7, at 204.

39. 534 F.2d 1155 (5th Cir. 1976).

40. 531 S.W.2d 201 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.).

Texarkana court of civil appeals reversed and awarded Rebecca the entire proceeds of the policies, noting that although the marriage was dissolved she had an insurable interest in her ex-husband's life and no change of beneficiary had been executed.

In *Deveroex v. Nelson*⁴¹ Nelson died intestate, leaving four life insurance policies naming his wife as primary beneficiary. The wife, who had murdered the insured, was precluded by article 21.23 of the Texas Insurance Code⁴² from sharing the proceeds. Nelson left two children: Zan, his wife's unadopted son born out of wedlock, and Edwin, his natural son. Two of the policies named Zan Nelson and all children born of the marriage as contingent beneficiaries, a third policy named the child or children of the insured as contingent beneficiaries, and the fourth policy named Zan as "son" and the sole contingent beneficiary. Zan instituted a proceeding in heirship alleging adoption by estoppel and obtained a favorable jury verdict. The trial court awarded all proceeds of the four policies to be divided equally between Zan and Edwin. The court of civil appeals reformed the judgment to award all the proceeds of the fourth policy to Zan as sole contingent beneficiary. The Texas Supreme Court granted writ of error to decide the effect of article 21.23 on the disposition of insurance proceeds when a contingent beneficiary has been named. Article 21.23 provides that upon the forfeiture of the wrongdoing beneficiary of his interest in the life insurance proceeds, "the nearest relative of the insured shall receive such insurance." Edwin, Nelson's natural child, contended that the court of civil appeals erred in failing to distribute the proceeds of the fourth policy to Nelson's nearest relative as the statute directs. The supreme court, however, persuaded by the convincing logic of the court of civil appeals that the language of article 21.23 does not suggest the intention of the legislature to forfeit the rights of the guiltless beneficiary, affirmed the judgment of the court of civil appeals, holding that the insurance proceeds would be distributed to the nearest relative under article 21.23 only if *all* of the beneficiaries, primary and contingent, were disqualified.

In *Pena v. Salinas*⁴³ the decedent executed a will shortly before his death which purported to change the named beneficiaries in three life insurance policies owned by him. The proceeds of the policies were paid by the insurer directly to the named beneficiaries. Pena's executor sued to require the named beneficiaries to surrender all funds received by them under the insurance policies, alleging that the deceased had changed the beneficiaries in his will. Each of the policies required written notice to the insurer in order to designate a new beneficiary. All parties moved for summary judgment. The trial court granted defendants' motion and plaintiff appealed. The court of civil appeals affirmed, holding that the insured had not "substantially complied" with insurance company requirements for designation of a new beneficiary under the policies by executing a new will.⁴⁴ Therefore, the

41. 529 S.W.2d 510 (Tex. 1975).

42. TEX. INS. CODE ANN. art. 21.23 (Vernon 1963).

43. 536 S.W.2d 671 (Tex. Civ. App.—Corpus Christi 1976, no writ).

44. The court noted that this same question had been decided by the supreme court in *Creighton v. Barnes*, 152 Tex. 309, 257 S.W.2d 101 (1953).

designation of new beneficiaries of the life insurance policies was of no effect.

*Accidental Death. Republic National Life Insurance Co. v. Heyward*⁴⁵ involved a claim for accidental death benefits under a group life policy. The insured died of multiple gunshot wounds inflicted by unknown assailants. At the time of his death the decedent was insured under a group life policy with an accidental death rider naming his wife Velma as beneficiary. The accidental death rider provided coverage for death "effected solely through external, violent and accidental means" and excluded coverage where death resulted from self-inflicted injury or from "participation in or as the result of the commission of a felonious act."⁴⁶ Plaintiff, as named beneficiary under the policy issued by Republic, sued to recover accidental death benefits payable under the policy. At trial plaintiff introduced evidence of the insured's death at the hands of unknown assailants and of the insured's good moral character. The trial court instructed verdict for Republic at the close of plaintiff's evidence. Plaintiff appealed, contending that she had introduced sufficient evidence coupled with presumptions recognized by law to support her claim. Republic contended that plaintiff had failed to raise a fact issue as to death solely by "accidental means" and further, that the policy exclusion precluding coverage where a contributing cause of the loss is "participation in or as a result of the commission of a felonious act" applied because the insured's death was the result of a felonious assault. The court of civil appeals agreed with plaintiff and reversed and remanded, holding that plaintiff, by showing that the insured was killed by another, had raised a presumption that death was accidental, making out a case under the policy. The court further held that the fact that the insured was murdered by another did not bar recovery since there was no evidence that at the time of his death the insured was himself participating in or committing a felonious act. The court found that whether a killing is accidental within the terms of an insurance policy is properly determined from the viewpoint of the insured and not from the viewpoint of the one who did the killing.⁴⁷ The Texas Supreme Court affirmed the court of civil appeals, examining in a lengthy opinion the insurer's contention that the above test was inapplicable where the policy covers death "by accidental means" rather than "accidental death." The court concluded that no meaningful distinction existed between the two terms and, therefore, injuries are "accidental" if "the injury could not reasonably be anticipated by the insured, or would not ordinarily follow from the action or occurrence which caused the injury."⁴⁸ Applying this test, the court concluded that the plaintiff had raised a fact issue as to whether the insured's death was accidental. Therefore, the trial court's instructed verdict was improper.

45. 536 S.W.2d 549 (Tex. 1976).

46. *Id.* at 551.

47. This test for accidental death was approved by the Texas Supreme Court in *Releford v. Reserve Life Ins. Co.*, 154 Tex. 228, 276 S.W.2d 517 (1955).

48. 536 S.W.2d at 557.

Two cases dealt with the distinction between drowning and suffocation in accidental death policies. In *De La Cruz v. Combined American Insurance Co.*,⁴⁹ an insured infant suffocated when dirt thrown by other children got into her nose and mouth. The accidental death policy insured against accidental death resulting solely from accidents listed in the insurance policy and listed "drowning" but did not mention suffocation. The father-beneficiary brought suit contending that his child had died by "drowning" within the meaning of the policy. The trial court granted summary judgment for the insurer and the court of civil appeals affirmed, holding that the words "drowning" and "suffocation" are not defined or understood by the public to have the same general meaning and that drowning is generally accepted as meaning to deprive of life by immersion in water or other liquid. In *Investors Life Insurance Co. v. Utrecht*⁵⁰ the Dallas court of civil appeals agreed with the court in *De La Cruz* and held that a policy exclusion for "suffocation, strangulation, or smothering" in an accidental death rider did not exclude death by drowning.

Persons Insured. *Zepeda v. American National Insurance Co.*⁵¹ involved the term "covered child" under a family life insurance policy. In 1968 plaintiff Gregorio Zepeda purchased a family life policy from American National naming himself as the "insured" and his wife Maria Elena as "insured spouse." The policy was payable on his death, the death of the "insured spouse," and on the death of "each covered child." Two children were born of the marriage and were covered under the policy. In 1969 plaintiff divorced Maria Elena and remarried. Two children were born of the second marriage and in 1972 one of the children of this second marriage died. The policy had never been changed to substitute plaintiff's second wife, Consuelo, as "insured spouse." "Covered child," with respect to coverage of children born after the policy date, was defined as "a child born to the Insured and Insured Spouse after the effective date of this Policy" or a "child legally adopted by the Insured after the effective date of this Policy." Plaintiff argued that this definition of covered child merely described the outer limits of coverage and that "covered child" necessarily included any child of the insured since it expressly included adopted children. The court of civil appeals, affirming the trial court's judgment for the insurer, held that the term "covered child" was not ambiguous and plainly limited coverage of children born after the policy date to children of the insured *and* insured spouse or adopted children of the insured. Since the deceased child was not within one of these express categories, it was not a covered child under the policy.

Group Health Insurance. Two cases dealt with coverage questions under group health policies. *Coker v. Travelers Insurance Co.*⁵² was concerned with the term "eligible under Medicare." Plaintiff was insured under "Plan C" of

49. 527 S.W.2d 820 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

50. 536 S.W.2d 397 (Tex. Civ. App.—Dallas 1976, no writ).

51. 527 S.W.2d 467 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

52. 533 S.W.2d 400 (Tex. Civ. App.—Dallas 1976, no writ).

a group health policy, which was available only to persons under sixty-five years of age. "Plan D" of the policy provided substantially reduced benefits and was designed specifically for persons over sixty-five. While plaintiff's policy was in force, the master policy was amended to limit persons "eligible under Medicare" to Plan D benefits. Plaintiff, while still under sixty-five, asserted a claim under Plan C of the policy for medical expenses incurred as the result of a total hip displacement. Ten days prior to her operation for the injury plaintiff became eligible for Social Security health benefits for the disabled. The insurer denied coverage, contending that plaintiff was a person "eligible under Medicare" and thus limited to Plan D benefits. Plaintiff contended that she was covered under Plan C because the definition in the master policy limited "Medicare" to benefits payable to persons over sixty-five. In entering judgment for the insurer the trial court construed plaintiff as a person "eligible under Medicare" and therefore restricted to Plan D benefits. The court of civil appeals reversed and rendered on the issue of liability, holding that the term "persons eligible under Medicare" was ambiguous in that it was unclear whether the term referred exclusively to persons over sixty-five or included disabled persons under sixty-five who were eligible for Social Security health benefits.

In *Stanush v. Aetna Life Insurance Co.*⁵³ the insured made a claim for the cost of an artificial leg under a group health policy which had terminated. The court of civil appeals held that the claim was within the coverage of the policy since the injury and amputation of the insured's leg occurred while the group health policy was still in effect.

Article 21.23. Article 21.23 of the Texas Insurance Code⁵⁴ was applied in two cases during the reporting period. In *Deveroex v. Nelson*,⁵⁵ previously discussed, the statute was held not to extend to the innocent beneficiary, thus bringing the statutory distribution of the life insurance proceeds to the nearest relative of the insured into play only if *all* of the beneficiaries, primary and contingent, are first disqualified. In *Hair v. Pennsylvania Life Insurance Co.*⁵⁶ the court of civil appeals held that an adjudication of the insanity of the murdering spouse in a criminal proceeding did not bar as a matter of law the application of the forfeiture provisions of article 21.23 in a later civil proceeding.

III. FIRE AND CASUALTY INSURANCE

Insured Risks. Several cases during the reporting period examined fire and casualty policy terms to determine which risks were included and which were excluded from policy coverage. *Lambros v. Standard Fire Insurance Co.*⁵⁷ involved the coverage of a standard "all risks" homeowner's policy which included for an additional premium the deletion of a policy exception for loss

53. 538 S.W.2d 648 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

54. TEX. INS. CODE ANN. art. 21.23 (Vernon 1963).

55. 529 S.W.2d 510 (Tex. 1975); see note 41 *supra* and accompanying text.

56. 533 S.W.2d 387 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

57. 530 S.W.2d 138 (Tex. Civ. App.—San Antonio 1975, writ granted).

caused by underground water. Plaintiff's home was damaged by underground water which caused the foundation of the home to settle and crack. Exclusion K of the policy, different from the deleted exception, excepted coverage for loss caused by "settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings, roof structures," except for "ensuing loss caused by collapse of building, . . . water damage."⁵⁸ Plaintiff contended that exclusion K was inapplicable to loss caused by underground water in view of the deletion of the policy exception and, alternatively, that this was an "ensuing loss" caused by partial collapse of the building or water damage. The trial court rendered judgment n.o.v. for the insurer and the court of civil appeals affirmed, holding that the deleted policy exception did not render exclusion K ineffective and that "ensuing loss caused by water damage" pertained to water damage which was the *result*, not the cause, of the settling of the home's foundation and that as a matter of law there was insufficient evidence of a partial collapse where there had been no finding that the building was unfit for habitation.⁵⁹

Jackson v. National Flood Insurers Association involved the construction of certain terms in a flood insurance policy issued under the National Flood Insurance Act of 1968. The policy insured against flood damage to the "dwelling" including "additions in contact therewith." Plaintiff's elevated beach house was insured under the policy and suffered damage when flood waters from Hurricane Fern washed away much of the earth fill supporting a concrete slab underneath the beach house. The slab extended a few feet beyond the house and surrounded the concrete pylons on which the house was built and functioned as a ground floor. The federal district court held that the terms "dwelling" and "addition" necessarily included the concrete slab beneath and adjacent to the beach house in light of the nature of the structure; thus, the insured could recover.

*Garfield Mutual Fire & Storm Insurance Association v. Calhoun*⁶¹ involved the proof of a "hostile fire" in a standard fire policy. Plaintiff's house was partially damaged by a fire and resulting explosion. The fire policy covering the dwelling insured against fire, but not explosion. Accordingly, plaintiff was required to show that the explosion was a direct result of an antecedent "hostile fire" on the premises.⁶² At trial plaintiff introduced no direct evidence of the cause of the fire but did introduce evidence of charred and burned wood under the house. Following denial of the insurer's motion for instructed verdict, the trial court entered judgment for plaintiff and the insurer appealed. The court of civil appeals affirmed, holding that although

58. *Id.* at 139.

59. *Id.* at 142. The court considered determinative the supreme court's definition of partial collapse as stated in *Employers Mut. Cas. Co. v. Nelson*, 361 S.W.2d 704, 709 (Tex. 1962).

60. 398 F. Supp. 1383 (S.D. Tex. 1974).

61. 532 S.W.2d 663 (Tex. Civ. App.—Corpus Christi 1975, no writ).

62. The court noted the general rule of insurance law that the insurer is not liable for the consequences of a fire which burns in a place where it ought to be "friendly fire"; where a friendly fire escapes from a place where it ought to be, however, and damage results, such fire becomes a "hostile fire" for which the insurer is liable. *Id.* at 666.

the burden was on the insured to show that a "hostile fire" was the cause of the explosion in order to recover, sufficient evidence had been introduced to raise a fact issue, thereby precluding an instructed verdict.

*Atlantic Richfield Co. v. Underwriters at Lloyd's London*⁶³ involved the question of when an oil well was "brought under control" under the terms of an "all-risk" policy insuring against oil well blow-outs. Atlantic Richfield sued the underwriters of a policy protecting the oil company against oil well blow-outs for losses incurred in bringing under control a blow-out which occurred in 1970 on "Stormdrill III," an offshore drilling platform off the Texas coast. The insurer admitted coverage as to losses incurred in regaining control of the well-head, but denied coverage as to damage and expenses incurred in combatting the blow-out, which, by policy definition lasted only as long as normal activities could not be conducted at the hole. Essentially the insurers contended that the well was "brought under control" when blow-out-fed fires were extinguished through a fortuitous "down-hole bridging over" of pressure. Atlantic Richfield contended that the well was not "brought under control" until measures were completed that prevented recurrent blow-outs and permitted the resumption of normal operation at the well-head. In interpreting the relevant policy provisions, the federal district court considered the terms "out of control" and "blowout" as terms of art within the oil industry and, influenced by other decisions⁶⁴ in the Fifth Circuit considering the same question, granted summary judgment for the insured. The court held that as a matter of law the blow-out was not "brought under control" within the meaning of the policy until the well was finally plugged.

Policy Exclusions. In *Casey v. Employers National Insurance Co.*⁶⁵ plaintiff, a plumbing subcontractor, sought to recover under a construction liability policy for losses suffered when a waterpipe broke in a building under construction. The policy contained an endorsement excepting coverage for "Completed Operations Hazards." At the time of the loss the area of the building in which the loss occurred had already been accepted and was being used by the lessee although the building was only seventy-five percent completed. The trial court granted judgment for the insurer and the court of civil appeals affirmed, holding that since the damaged portion of the building had been accepted by the owner, the loss was clearly excluded by the language of the exclusionary clause.

Duty to Defend. In *Fort Worth Lloyds v. Garza*⁶⁶ the insurer brought a declaratory judgment seeking to determine whether it had the duty to defend under a standard homeowner's policy. The insured had been sued by a third party for injuries sustained while starting an irrigation pump on land owned by

63. 398 F. Supp. 708 (S.D. Tex. 1975).

64. The court noted that this precise issue was considered by the Fifth Circuit in *Sutton Drilling Co. v. Universal Ins. Co.*, 335 F.2d 820 (5th Cir. 1964); *Fidelity-Phenix Fire Ins. Co. v. Dyer*, 220 F.2d 697 (5th Cir. 1955); *Georgia Home Ins. Co. v. Means*, 186 F.2d 783 (5th Cir. 1951). No Texas court had dealt with this issue. 398 F. Supp. at 709 n.1.

65. 538 S.W.2d 181 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

66. 527 S.W.2d 195 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

the insured. Under the policy the insurer was contractually bound to defend the insured in any lawsuit brought against the insured alleging bodily injury or property damage in connection with the premises. "Premises" was defined to include vacant land other than farm land. The insurer contended that as a matter of law the land in question was not vacant because of the presence of an irrigation pump on it; therefore, there was no possible coverage and no duty to defend. The court of civil appeals affirmed the judgment of the trial court for the insured, holding that although there was some question whether the land was "vacant land" for which coverage was provided, under the rule that in determining whether a duty to defend exists all doubts regarding coverage are to be resolved in favor of the insured, such doubt would be resolved in the insured's favor.

Waiver. The issue of waiver by the insurer of an asserted policy defense was involved in several cases. In *Fort Worth Lloyds v. Purcell*⁶⁷ the failure of the insurer to plead policy exceptions affirmatively prior to trial was held to be a waiver of its right to rely on such exceptions. In *Hanover Insurance Co. v. Hagler*,⁶⁸ involving a claim under a policy insuring against "vandalism and malicious mischief," the insurer's payment of an uncontroverted claim for damage to the insured's building, standing alone, was held to be insufficient evidence of waiver by the insurer of a policy requirement for filing proof of personal property loss within ninety-one days.

The actions of the insurer were held sufficient to waive the proof of loss requirement in *Jackson v. National Flood Insurers Association*⁶⁹ where the insured had made a conscious effort to file his claim, requesting that he be informed if any additional information was needed. Although the court held that mere silence on the insurer's part would not constitute a waiver of the proof of loss requirement, the actions of the insurer's agent in telling the insured what information to provide in connection with his claim and his representation that the claim would be considered were held to constitute a waiver of the proof of loss requirement.

Venue. In *Houston General Lloyds Insurance Co. v. Stricklin*⁷⁰ the mortgagee of property damaged by fire asserted that venue was proper in the county in which the property was situated. The insurer contended that since plaintiff was not the policyholder or a beneficiary under the policy, venue under subdivision 28⁷¹ was improper. The trial court overruled the defendant's plea of privilege and the court of civil appeals affirmed, holding that under subdivision 28 the plaintiff has only a two-point burden: (1) it must show that the company is a fire, marine, or inland marine insurance company, and (2) it must show that the insured property is located in the county where suit was filed. There is no requirement that plaintiff prove that it was the policyholder or beneficiary under the policy. In *Southern County Mutual Insurance Co. v.*

67. 529 S.W.2d 644 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

68. 532 S.W.2d 136 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

69. 398 F. Supp. 1383 (S.D. Tex. 1974); see note 60 *supra* and accompanying text.

70. 538 S.W.2d 178 (Tex. Civ. App.—Dallas 1976, writ dismissed).

71. TEX. REV. CIV. STAT. ANN. art. 1995, § 28 (Vernon 1964).

*Smith*⁷² the insured under a fire policy sought to maintain venue in the county of the policyholder's residence. The court of civil appeals, in granting the insurer's plea of privilege, held that venue against a fire insurance company is limited to the county of the defendant's residence or the county where the property is situated.

72. 529 S.W.2d 618 (Tex. Civ. App.—Tyler 1975, no writ).

