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INSURANCE LAW

by

Royal H. Brin, Jr.*

I. AUTOMOBILE AND LIABILITY INSURANCE

Uninsured Motorist Coverage. The Texas Supreme Court considered three cases dealing with uninsured motorist coverage during the reporting period of this *Survey*. Two of the three cases were commented upon at length in last year's *Survey* article, based on opinions rendered at the court of civil appeals level.¹

In *Francis v. International Service Insurance Co.*² the Texas Supreme Court upheld the validity of an insurance policy excluding government-owned vehicles from the definition of "uninsured automobile" contained in the Texas Uninsured Motorist Act.³ The plaintiff had been injured while a passenger in an automobile that was struck by a fire truck owned by the city of Grand Prairie. Neither the city nor the fireman had a policy of liability insurance or a bodily injury liability bond applicable to the fire truck at the time of collision. Plaintiff sought recovery from the insurance company under the uninsured motorist provisions of an automobile liability insurance policy issued to the driver of the car in which she was a passenger. The parties stipulated that the automobile insurance policy upon which suit was brought included a provision that "the term 'uninsured automobile' shall not include: 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."⁴ Since no other facts were contested, the case presented only one question of law: whether the exclusion from uninsured motorist coverage enumerated in the policy was valid. The trial court granted the summary judgment motion of the defendant insurance company, and upheld the policy provision. The court of civil appeals and the Texas Supreme Court agreed.

In affirming the lower courts' decisions the Texas Supreme Court noted that the policy had been expressly approved by the State Board of Insurance

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1. See, Brin, *Insurance Law, Annual Survey of Texas Law*, 31 Sw.L.J. 241, 241-43 (1977).

2. 546 S.W.2d 57 (Tex. 1976).

3. TEX. INS. CODE ANN. art. 5.06—1 (Vernon Supp. 1978). This statute provides in part:

(ii) 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. 546 S.W.2d at 59.

in accordance with its authority under the Texas Uninsured Motorist Act. The language of the Act gives the board authority to exclude from the ambit of the Act vehicles whose operators are in fact uninsured. The court viewed the purpose of the Act as providing protection for insureds from the acts of negligent financially irresponsible motorists and not from the acts of all negligent uninsured motorists. The court took the position that the Act was not designed as a system for giving relief to people who could not recover from a tortfeasor because of sovereign immunity.⁵ Thus, the exclusion by the Board of Insurance of certain government-owned vehicles from the definition of uninsured automobile was seen as a rational exercise of the board's delegated authority and was not inconsistent with the purposes of the Act.

The members of the court were sharply divided over the issue in *Francis*. Justice Johnson, joined by Justices Steakley and McGee, filed a vigorous dissent wherein he argued that the basic intent of the Act had been frustrated.⁶ Justice Daniel, while concurring with the majority opinion, nevertheless urged the legislature to amend the Uninsured Motorist Act to achieve statutorily the end argued for by the dissent.⁷ Such an amendment is appropriate if the legislature is serious about protecting citizens from the negligence of uninsured motorists. The menace such motorists present is the same whether they are driving their own vehicles for their own purposes, or those of a governmental entity for its own purpose.

In *Ford v. State Farm Mutual Automobile Insurance Co.*⁸ the Texas Supreme Court reversed the civil appeals court's opinion discussed in last year's *Survey*.⁹ The case involved a suit to recover under the uninsured motorist provisions of a Texas Standard Automobile Policy issued by State Farm. The question raised was whether State Farm's unconditional denial of liability constituted a waiver of its right to consent prior to settlement by its insured with another insurance carrier.

The facts as stipulated were that Ford was killed while riding as a passenger in a friend's automobile when it collided with a car driven by one 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, husband of the deceased, had an automobile liability policy with State Farm containing the same standard uninsured motorist coverage. Ford brought suit against State Farm and Gulf under each of the policies after the two companies denied liability. Gulf settled with Ford by an agreed judgment entered into without the consent of State Farm. The trial court then entered judgment against State Farm, which appealed. The court of civil appeals, consistent with existing authority,¹⁰ held the agreed judgment was a settlement with one

5. *Id.* at 61.

6. *Id.* at 62-63.

7. *Id.* at 62.

8. 550 S.W.2d 663 (Tex. 1977).

9. See Brin, *supra* note 1, at 241-43.

10. The court considered the case to be controlled by *Castorina 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*

“who may be legally liable” for plaintiff’s injuries, thereby discharging State Farm from any liability.¹¹ In reversing the court of civil appeals and affirming the trial court’s judgment, the Texas Supreme Court noted that State Farm’s contract with Ford was to pay up to its policy limits “all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury . . . including death . . . caused by accident and arising out of the . . . use of such uninsured automobile”¹²

The policy provided that State Farm could determine by agreement, arbitration, or judicial process any issues affecting a claimant’s entitlement to payment. State Farm, however, neither paid the insured nor pursued any of the available affirmative steps for determination of what, if anything, should be paid. It simply denied unconditionally any and all liability under the policy. Waiver is defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. The intentional conduct of State Farm was inconsistent with the assertion of the right under the policy to consent before its insured settled with a third party. Such conduct, therefore, constituted a waiver of the right to consent.¹³

In examining State Farm’s position, the court observed that had State Farm been correct in unconditionally denying coverage and liability, the insurer would have lost nothing through plaintiff’s settlement with Gulf. Although State Farm was incorrect in its denial, it lost only the right to assert the exclusionary consent clause as a ground for forfeiture of plaintiff’s entire coverage but not its right of subrogation.¹⁴ Once State Farm paid the amount awarded the plaintiff by the trial court, it would still enjoy the right to institute proceedings in the name of the plaintiff against the uninsured motorist, or any other person responsible for the accident. The court expressed no opinion as to the relative status of the subrogation rights of the two insurance companies.

The third Texas Supreme Court decision dealing with uninsured motorists was *Hollen v. State Farm Mutual Automobile Insurance Co.*¹⁵ Juan Hernandez sued State Farm individually and as next friend of Janet Hernandez, his daughter, and Donna Barclay, Janet’s mother, asserting a claim on policies which insured Janet and Donna in the event they were involved in an accident caused by an uninsured motor vehicle. State Farm filed a cross-action against the operator of the vehicle, Jack Hollen, and his father, Arthur Hollen, seeking indemnity. Hernandez then amended his petition to include the Hollens. The trial court severed the claims against the father, Arthur Hollen, and rendered a summary judgment in favor of Hernandez

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.).

11. *State Farm Mut. Auto. Ins. Co. v. Ford*, 537 S.W.2d 138, 139 (Tex. Civ. App.—Houston [14th Dist.] 1976).

12. 550 S.W.2d at 666.

13. *Id.*

14. TEX. INS. CODE ANN. art. 5.06—1(3) (Vernon 1963).

15. 551 S.W.2d 46 (Tex. 1977).

and State Farm. The court of civil appeals reversed on the ground that there existed a question of fact as to whether Arthur Hollen negligently entrusted the motor vehicle to his minor son.¹⁶

The supreme court reversed the court of civil appeals without considering the question of negligent entrustment. Arthur Hollen's motion for summary judgment had sought only a judgment that State Farm take nothing against him and referred to the Hernandez claims only in the style of the case. The order actually entered by the trial court, however, disposed of the causes of action filed by Hernandez against Arthur Hollen. The order actually entered reflects that the attorney for Hernandez approved the order as to form and substance. This approval thus made the order in reality an order entered by agreement with respect to the plaintiffs rather than a summary judgment.¹⁷ Since no appeal was perfected from the judgment it became final. When an insured settles with or releases a wrongdoer from liability for loss, before payment of the loss has been made by the insurance company, the company's right of subrogation is destroyed. The final judgment released Arthur Hollen from any liability to these plaintiffs, and destroyed any subrogation rights against him by State Farm.

Questions of law concerning uninsured motorist coverage were central in two court of civil appeals cases in 1977. In *Southern Farm Bureau Casualty Insurance Co. v. Kimball*¹⁸ the insurance company sought a declaratory judgment that it was not liable for the death of the insured's wife in an automobile accident with an uninsured motorist. The company's claim was based on the ground that the insured and his wife were not "residents of the same household," as that term was used in the policy, at the time of her death. In affirming a trial court judgment for the insured, the court of civil appeals noted that although the two were living apart, the separation was not irrevocably permanent at the time of her death and the evidence as to whether they were indeed residents of the same household was sufficient to raise a question for the jury to consider. In the court's view the test was whether the absence of the party of interest from the household of the alleged insured was intended to be permanent or only temporary, that is, whether there was physical absence coupled with an intent not to return.¹⁹

In *Lindop v. Allstate Insurance Co.*²⁰ plaintiffs appealed from a take-nothing judgment issued n.o.v. on a suit instituted to recover indemnity provided by policies for a loss occasioned by the negligence of a hit-and-run driver. The body of a truck driver was found in the middle of a two-lane interstate highway, death having resulted from a high-impact head injury. His truck was properly parked on the shoulder, the motor running, and emergency flashers operating. A grease cup had been removed and was lying near the front tandem. The court of civil appeals held these facts did not constitute evidence that a hit-and-run driver failed to keep the lookout

16. *State Farm Mut. Auto. Ins. Co. v. Hollen*, 543 S.W.2d 178 (Tex. Civ. App.—Houston [14th Dist.] 1976).

17. 551 S.W.2d at 49.

18. 552 S.W.2d 207 (Tex. Civ. App.—Waco 1977, no writ).

19. *Id.* at 208.

20. 542 S.W.2d 250 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

that an ordinary prudent person would have under the conditions shown, or constitute evidence of any other negligence.²¹

*Limitations and Exceptions. Liberty Mutual Insurance Co. v. American Employers Insurance Co.*²² involved construction of a relatively new clause now appearing in automobile "combination comprehensive" insurance policies. Such a clause limits liability for persons additionally insured under the terms of an omnibus clause.²³ Liberty Mutual had issued an insurance policy to U.S. Plywood. An employee of Plywood drove one of Plywood's trucks to the loading dock of a customer, Homette, Inc. Plywood's employee, while observing the truck as it was unloaded, was killed when the forklift operators spilled a load of wood on him. The question was whether the insurance policy issued by Liberty Mutual to U.S. Plywood covered Plywood's customer, Homette, Inc. More precisely, was Homette a "borrower" of Plywood's truck within the meaning of the policy? The court of civil appeals held the term "borrower" means someone who, with the permission of the owner, has temporary possession and use of the property of another for his own purposes. In this instance Homette came within that definition.²⁴

The supreme court reversed and rendered judgment for Liberty Mutual. The court agreed with the definition of "borrower" advanced by the court of civil appeals but held that Homette did not fall within that definition because there was no evidence that Homette had possession of the truck and trailer rig. The right to remove goods from a truck was held not to establish or to be evidence of possession. Possession in the context of a borrower requires a more complete right to exercise dominion and control over the vehicle.

*Liability Insurance. Sun Oil Co. v. Employers Casualty Co.*²⁵ involved questions of third-party beneficiary status and standing to sue on a liability insurance policy. Sun Oil had contracted with Merrill Lease Service to perform certain work on properties owned by Sun. Merrill agreed to indemnify and hold Sun harmless from any liabilities arising out of the performance of any work under the agreement and purchased insurance from Employers Casualty. Thereafter, a Merrill employee died as a result of injuries sustained on the Sun job, and his heirs and beneficiaries sued Sun.

21. *Id.* at 252.

22. 556 S.W.2d 242 (Tex. 1977).

23. The litigated portion of the insurance policy here involved provided as follows:
PERSONS INSURED . . . Such of the following is an insured under this insurance to the extent set forth below:

- (c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:
 - (1) a lessee or borrower of the automobile, or
 - (2) an employee of the named insured or of such lessee or borrower

Id. at 243 n.1.

24. 545 S.W.2d 216, 222-23 (Tex. Civ. App.—Fort Worth 1977).

25. 550 S.W.2d 348 (Tex. Civ. App.—Dallas 1977, no writ).

After entering into a settlement agreement in excess of \$500,000 with those parties, Sun sued Merrill under the indemnity clause of the contract. Sun also filed a direct action against the primary and excess liability insurers of Merrill, Employers Casualty, alleging that Sun was a third-party beneficiary of the insurance policy issued to Merrill.

The court of civil appeals disagreed with this allegation in the second action, holding that Sun was not a third-party beneficiary under the contract between Merrill and Employers Casualty because there was no *present duty* owed Sun by Merrill. The policy involved did not place primary liability on the insurer; rather, it provided indemnification against the liability of the insured. Sun would first be required to establish Merrill's liability by a final judgment before a duty would arise that would bind Employers Casualty.²⁶ The existence of that duty was being litigated in the other suit and until the obligation was established there, Sun had no standing to sue the insurers as a third party beneficiary.

Aviation Liability. The question presented to the Texas Supreme Court in *Glover v. National Insurance Underwriters*²⁷ was whether the pilot of an airplane which crashed, killing all aboard, was "properly rated for the flight" within the meaning of an aviation liability insurance policy. National brought a declaratory judgment action to determine coverage under the policy and contended that it had no liability since the pilot of the plane was not properly rated for the flight. The pilot and two business acquaintances were en route from Odessa to Eagle Pass on a fishing trip when the crash occurred. The pilot was licensed to operate under visual flight rules (VFR), but not under instrument flight rules (IFR); the latter are applicable during inclement weather where there is little or no visibility. At the time of takeoff the weather was clear at Odessa. The pilot filed no flight plan and did not request a weather briefing before taking off. An exhibit showed that weather conditions along the flight path of the plane varied from VFR over the first one-third of the flight to probable IFR over the second one-third to definite IFR conditions over the final one-third. For purposes of this action the parties stipulated that the pilot was negligent in a number of particulars.

The question of coverage turned on whether the pilot was properly rated for the flight. The court directed its inquiry to the meaning of the term "the flight" in the policy. Does insurance coverage change as a pilot encounters differing weather conditions on a flight? Is a flight looked at as a whole or in segments in determining its IFR or VFR rating? At what point in time should a flight be characterized as IFR or VFR?

The court concluded that the term, "the flight," was ambiguous as used in the policy. Where an exclusionary clause is ambiguous, the construction urged by the insured will be adopted if not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent. Thus, the court determined that a flight should be characterized as VFR or IFR at its inception, bringing this

26. *Id.* at 349.

27. 545 S.W.2d 755 (Tex. 1977).

flight within the policy coverage. The weather conditions existing at the beginning of the flight made it a VFR flight even though the crash occurred during IFR weather conditions.

The court noted that this construction of the pilot clause was necessary because National was responsible for the ambiguity. In the court's view National could have used language which would clearly and plainly exclude from coverage a non-instrument rated pilot who operated his plane in IFR conditions.²⁸ The *Glover* decision will no doubt prompt insurance companies to reevaluate the content of the pilot clauses in their aviation liability policies.

The result of the ambiguity of the pilot clause in *Glover* should be contrasted with that in *Schepps Grocers Supply, Inc. v. Ranger Insurance Co.*²⁹ Ranger had issued an aviation liability policy to Schepps on an aircraft which subsequently crashed. The pilot clause specifically named one Masterson as the pilot to be covered and required him to carry a multi-engine rating from the Federal Aviation Administration. At the time of the crash Masterson did not have such a rating. Three days before the crash his instructor had given him a three-hour check flight in preparation for the multi-engine flight test. The instructor testified that he had recommended Masterson for the multi-engine rating, that Masterson possessed the necessary skills to pass the test, and that only the inability to locate an FAA examiner to administer the test prior to the fatal flight prevented Masterson from obtaining the rating. The court construed the policy provision strictly, holding in favor of Ranger. Had the parties intended that Masterson need only have the proficiency equivalent to that required for a FAA multi-engine rating, they could have done so by choosing different language. Since they chose not to do so, Ranger was entitled to require that Masterson meet the qualifications in the policy before liability attached.³⁰ *Glover* and *Schepps* should be highly instructive to both attorneys and insurance policy writers. Both cases illustrate the fact that literal specificity in contract terms as well as ambiguity therein may produce seemingly harsh results.

II. LIFE AND HEALTH INSURANCE

Beneficiaries. *O'Neill v. Connecticut Mutual Life Insurance Co.*³¹ involved a dispute over life insurance proceeds between the second wife of an insured decedent and the children of decedent's former marriage. The testimony of decedent's former wife reflected that at the time of their divorce she agreed to sign over all of her community ownership of the policies to him in return for his promise to keep the policies in force for the three children of the marriage. Nevertheless, following their divorce and his remarriage, the decedent had the policies changed to name his second wife as primary beneficiary.

The court of civil appeals held in favor of the former wife and refused to allow the divorce agreement to be circumvented by the later action of the

28. *Id.* at 764.

29. 545 S.W.2d 13 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

30. *Id.* at 16.

31. 544 S.W.2d 741 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

decedent. The court concluded that a parol agreement, supported by consideration, whereby the owner of an insurance policy agrees to change the beneficiary of his insurance policy, is valid and will be enforced even though the owner of the policy did not change and maintain the new beneficiary.³²

Coverage. In *Mid-Western Life Insurance Co. v. Goss*³³ the plaintiff asserted that the insurer had breached an insurance contract by refusing to pay his claim for hospitalization benefits stemming from an appendectomy. The policy had an exclusionary clause which provided that it did not cover loss resulting directly or indirectly from any disease or disorder of the gastrointestinal tract, or treatment or operation of such disorders.³⁴ The trial court granted an instructed verdict for the insurer. The court of civil appeals reversed and remanded, concluding that there was sufficient evidence to require submission to the jury of the issue of whether the policy did indeed cover hospitalization for appendicitis.³⁵ The Texas Supreme Court reversed and affirmed the trial court's instructed verdict. The insurer had pled the specific policy exclusion, thus shifting the burden of proof to the plaintiff to show that the appendix was not a part of the gastrointestinal tract. Plaintiff's medical expert neither included nor excluded the appendix from the gastrointestinal tract. The insurer's medical expert specifically testified that the appendix was a part of the tract. In viewing the evidence in the light most favorable to plaintiff, the testimony of plaintiff's medical expert provided no basis for a jury reasonably to conclude that the appendix was not part of the gastrointestinal tract, and, therefore, an instructed verdict was proper.

Court's Charge. *Travelers Insurance Co. v. Stevens*³⁶ is instructive in measuring the limits of what is acceptable in a court's jury charge in an insurance case. Stevens had been killed when the car he was driving crashed head-on into a bridge abutment. The sole issue was whether the death had been an accident or a suicide, in which case the insurance policy would exclude payment. The case was tried twice before a jury, the first time ending in a mistrial. The evidence as to death or suicide was highly conflicting and the jury was deadlocked in the second trial. At this point, the court gave a modified charge,³⁷ and the jury returned to its deliberations. The jury found that the death was caused accidentally.

The court of civil appeals reversed and remanded finding the supplemental or "dynamite" charge was improper and prejudicial. It was improper for a court to advise jurors on the manner in which they are to reach a verdict, such as by reconciling differences and avoiding pride of opinion. Further, the charge that in the interest of justice the jury should end the litigation if possible, and that so ending it would meet with the court's approval, was coercive in getting members of the minority to change their views. Finally,

32. *Id.* at 744.

33. 552 S.W.2d 430 (Tex. 1977).

34. *Id.* at 431.

35. *Goss v. Mid-Western Life Ins. Co.*, 545 S.W.2d 878 (Tex. Civ. App.—Tyler 1977).

36. 553 S.W.2d 232 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ granted).

37. *Id.* at 234.

the trial court erred in emphasizing that it was a considerable expense to the taxpayers of the county to have the case tried before a jury.³⁸ Although rule 226 of the Texas Rules of Civil Procedure approves an instruction that a retrial of the case is a wasteful expense to the parties and county,³⁹ the judge here had improperly directed his charge to the minority jurors in particular.

Measure of Damages. In *Republic Bankers Life Insurance Co. v. Jaeger*⁴⁰ the Texas Supreme Court reversed the lower court's decision on adjusting the measure of damages recoverable in an action for breach of contract by repudiation. Jaeger applied for benefits under a disability insurance policy; when Republic refused to pay, Jaeger brought suit. The trial court concluded that Republic had repudiated the policy, and rendered judgment for the plaintiff, finding that the present value of all benefits under the contract of insurance was \$18,000 including unaccrued installments. The court of civil appeals affirmed and Republic appealed. The supreme court held that the total value of the policy was \$18,000. Since the recovery was to be in payments of \$300 per month for sixty months, the trier of fact was required to determine the reasonable rate of interest which was then applied as a discount. The trial court should have computed a discounted lump sum, representing the remaining months; this would include the interest earning capacity of money already paid out to equal the total policy value of \$18,000. Thus, the amount actually awarded will be less than \$18,000 because it includes a discount which approximates the earning capacity of Republic's money during the sixty-month payment period.

38. *Id.* at 235. The prepossessions and inclinations of mind must be held or surrendered without the influence of the court's instructions.

39. TEX. R. CIV. P. 226.

40. 551 S.W.2d 30 (Tex. 1976).

