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INSURANCE LAW

by

Royal H. Brin, Jr.*

I. AUTOMOBILE AND LIABILITY INSURANCE

Employee Exclusion. Overruling an opinion¹ of ten years' standing, the Texas supreme court held in *Commercial Standard Insurance Co. v. American General Insurance Co.*² that the "employee" exclusion of an automobile liability policy did not apply where employees of one additional insured brought suit against other employees and their employer, who were also additional insureds. American General had an automobile policy on Harris Concrete, and Commercial Standard was the liability carrier for Berry Contracting, Inc. Berry employees operated a crane and bucket which carried concrete from a Harris truck to building forms where the bucket was emptied by the employees of the general contractor, Fuller. The Fuller employees were injured when a portion of the crane slipped, and they sued Berry and its employees. Upon American General's refusal to defend, Commercial Standard settled the claims. American General sought a declaration that it had no coverage, and Commercial Standard counter-claimed for the amount of the settlement.

The court found that Berry and its employees, as well as the Fuller employees, were engaged in unloading the truck and were thus additional insureds under the American General policy. Then, reversing the courts below, it held that the policy extended coverage to Berry and its employees for the claims of the Fuller employees, although all of them were additional insureds. The court indicated that the purpose of the employee exclusion providing that the policy was inapplicable to injury to "any employee of the insured arising out of and in the course of . . . employment by the insured" was to avoid duplication of coverage with respect to workmen's compensation insurance, and that it was not applicable to claims of employees made against additional insureds other than their own employer.

In reversing its prior holding, the court relied on the "severability of interests" provision of the policy, which states: "The term 'the insured' is used severally and not collectively . . ." Applying the "severally" test to the employee exclusion, the court concluded that the American General policy extended protection to Berry and its employees with respect to the claims of the Fuller employees.

Content and Time of Application. In *Odom v. Insurance Co.*³ the Texas supreme court considered the question of whether an insurer was entitled to void a policy of automobile liability insurance *ab initio* because of

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¹ *Transport Ins. Co. v. Standard Oil Co.*, 161 Tex. 94, 337 S.W.2d 284 (1960).

² 455 S.W.2d 714 (Tex. 1970).

³ 455 S.W.2d 195 (Tex. 1970).

material misrepresentations of fact in the application, even though the insurer's agent prepared the falsified application with knowledge of its misstatements. The insured was held bound by the false statements, since the application was attached to the policy delivered to him and he had the opportunity to examine it. In affirming summary judgment for the insurer, the court did not reach the additional question of whether as a matter of law the agent ceased to act for his principal when he knowingly prepared a falsified application for the insured.

In *Burch v. Commonwealth County Mutual Insurance Co.*⁴ Burch applied for automobile insurance on July 18. The policy was issued on July 19 for a period of one year beginning at 12:01 a.m., July 18. The automobile was damaged on July 18 after the application had been signed but before the policy had been written through Commonwealth. The insurer contended that "an insurance company can never assume the risk of a loss that has already occurred" In reversing the court of civil appeals and affirming summary judgment for the insured, the supreme court rejected this contention, and held that where the person arranging for the insurance did not know of the loss and there had been no conscious or negligent failure to inform him of the loss, the policy could protect against loss occurring prior to the issuance of the policy if the parties so intended.

Cancellation: Quantum of Proof. In two cases Texas courts modified the quantum of proof necessary to establish cancellation of an automobile insurance policy. In *Sudduth v. Commonwealth County Mutual Insurance Co.*⁵ the Texas supreme court reversed a summary judgment, holding that the insurer had failed to establish conclusively that the cancellation notice had been mailed when it presented an affidavit of its employee stating that she mailed the notice and a post office department "statement of mailing" form. The supreme court stated that the insured's testimony to the effect that she failed to receive the notice was some evidence that it had not been mailed, and therefore the motion for summary judgment should have been denied. Similarly, in *Beacon National Insurance Co. v. Young*⁷ the court of civil appeals held that testimony of the insureds to the effect that they had not received the notice of cancellation was sufficient evidence to support a jury finding that the notice of cancellation had not been mailed.

Uninsured Motorist Coverage. The Texas supreme court originally held in *State Farm Mutual Automobile Insurance Co. v. Matlock*⁸ that a person with uninsured motorist coverage could sue the insurer directly without first bringing suit against the uninsured motorist, and that a statement by the insurance company's local recording agent would support a finding

⁴ 450 S.W.2d 838 (Tex. 1970).

⁵ *Id.* at 841.

⁶ 454 S.W.2d 196 (Tex. 1970).

⁷ 448 S.W.2d 812 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*

⁸ 13 Tex. Sup. Ct. J. 289 (1970).

that the other motorist was uninsured. However, upon rehearing,⁹ the court concluded that the Matlocks had failed to prove that the other operator was an uninsured motorist, withdrew its original opinion, reversed the judgments of the lower courts, and rendered a take-nothing judgment against the plaintiffs.

In *Pioneer Casualty Co. v. Johnson*,¹⁰ a venue case involving uninsured motorist coverage, a majority of the supreme court dismissed the application for writ of error on the basis that there was no conflict with prior decisions, and thus no jurisdiction. The dissenters complained that the lower courts had not required the Johnsons to make out a prima facie case of negligence and proximate cause against the uninsured motorist in order to establish venue against the insurer in the county where the accident occurred.

In a case of first impression in Texas, the court of civil appeals in *Allstate Insurance Co. v. Hunt*¹¹ decided that because of the potential "conflict of interest" which is present in every case, insurance companies cannot hire attorneys to represent an uninsured motorist or intervene in an action brought against an uninsured motorist by its insureds. As of this writing, the supreme court has granted a writ of error but has not handed down its opinion.

Stacking Policy Limits. In *Allstate Insurance Co. v. Zellars*¹² the court of civil appeals had allowed property damage liability limits in a policy covering two automobiles owned by Zellars to be "stacked," or "pyramided," with respect to an accident which occurred while Zellars was driving a non-owned vehicle. The grounds stated for such a holding were that the policy was ambiguous, that a separate premium charge had been made with respect to property damage liability as to each of the automobiles, and that it was impossible to relate the property damage liability coverage as to a non-owned automobile to either of the owned automobiles. However, the Texas supreme court reformed the judgment so as to limit liability to \$5,000 instead of \$10,000, pointing out that the limitation-of-liability clause in the policy states that the company's total liability for each occurrence is that sum stated in the declarations, which in this case was \$5,000. A distinction was made between medical payments coverage and non-owned automobile coverage, as the court noted that the insured pays no additional premium for non-owned vehicles coverage if an additional car is added to the policy.

Policy Modification. A recent case in which writ of error has been granted is *Travelers Indemnity Co. v. Edwards*.¹³ There, after the policy was already in force, McVean, the named insured, executed a "student restrictive endorsement," which provided that the policy did not extend

⁹ 13 Tex. Sup. Ct. J. 439 (1970).

¹⁰ 450 S.W.2d 64 (Tex. 1970).

¹¹ 450 S.W.2d 668 (Tex. Civ. App.—Houston 1970), error granted.

¹² 452 S.W.2d 539 (Tex. Civ. App.—El Paso), modified, 14 Tex. Sup. Ct. J. 28 (1970).

¹³ 451 S.W.2d 313 (Tex. Civ. App.—El Paso 1970), error granted.

coverage to any student other than the named insured. The insured vehicle was involved in a collision while being driven by Edwards, a student. The claims against Edwards were settled, and suit was brought for reimbursement from McVean's insurers. The court of civil appeals refused to enforce the student restrictive endorsement, finding no consideration to support the modification of the existing policy. Although agreeing that forbearance from exercising a right of cancellation which is communicated to the insured can be consideration for a modification of the policy, the court found that no intent to cancel, either communicated or uncommunicated, had been shown in this case.

Duty To Investigate Claim. Whether an insurer must investigate facts surrounding a claim against the insured which on its face is not covered was considered in *Amundsen v. Great Central Insurance Co.*¹⁴ Amundsen, the owner of a bar and lounge, was sued for personal injuries by one Dunnigan. Dunnigan and a female drinking companion "engaged in certain pleasantries"¹⁵ at plaintiff's bar which eventually led to the female's shooting Dunnigan. Dunnigan alleged that the employees of the bar allowed him and his companion to become inebriated to such an extent that neither of them could control themselves, and that they continued to serve alcoholic beverages to them in violation of state law.¹⁶ The petition fell squarely within an exclusion in the barkeeper's liability policy. The insurer refused to defend, and Amundsen brought suit, alleging that the insurer was at least required to investigate the facts and circumstances surrounding an incident before refusing to defend. The court held that "such is not our law,"¹⁷ and that the insurer was free to base its decision on whether or not to defend on the pleadings themselves.¹⁸

Failure To Give Notice. Three opinions by courts of civil appeals dealt with the insurer's right to avoid liability because of failure to give notice of the accident to the insurer "as soon as practicable." In *Continental Insurance Co. v. Jackson*¹⁹ the insured's agent reported to him that he had been involved in an accident but that there was only minor property damage. The insured, an automobile dealer, did not want to notify his insurer about the accident and said he would repair the claimant's car himself. Then, thirty-five days after the accident, the insured received a demand letter for \$1,000, and he notified the company. The court of civil appeals held that as a matter of law the insured did not give notice as soon as practicable, and that recovery was therefore precluded.

Similarly, *Brown v. State Farm Mutual Automobile Insurance Co.*²⁰

¹⁴ 451 S.W.2d 277 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*

¹⁵ *Id.* at 278.

¹⁶ TEX. PEN. CODE ANN. art. 666-26(b) (Supp. 1969).

¹⁷ 451 S.W.2d at 278.

¹⁸ See also *Consolidated Underwriters v. Richardson Constr. Corp.*, 444 S.W.2d 781 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*, where the court held that only the pleadings could be considered in determining whether or not the claim asserted was within the coverage of the policy.

¹⁹ 446 S.W.2d 125 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*

²⁰ 449 S.W.2d 93 (Tex. Civ. App.—Fort Worth 1969).

held that the notice provision of the policy applied to an omnibus insured who was the seventeen-year-old stepdaughter of the named insured. The court held that as a matter of law notice given 150 days after the accident was not as soon as practicable where the omnibus insured knew of the existence of the policy, even though she was not familiar with its terms.

However, in *Central Surety & Insurance Corp. v. Anderson*²¹ the court found that under all of the circumstances notice was given as soon as practicable where the insurance company was notified on November 7, 1965, of an accident occurring January 13, 1963. There, suit was brought against the beneficiary of a trust for an accident on premises covered by the trust. Approximately six weeks after the accident, the beneficiary asked an officer of the trustee bank if there was any insurance coverage available to her, and was told there was none. Two years later the beneficiary and her husband consulted an attorney, and the "owners, landlords, and tenants" liability policy issued by Central Surety covering the premises was discovered. Notice was given shortly thereafter, and the court held that under all of the circumstances notice had been given as soon as practicable in accordance with the terms of the policy.

Supplementary Payments Provision. The construction of the "supplementary payments" provision of an automobile policy was involved in *Home Indemnity Co. v. Muncy*.²² The policy provided that Home would pay, in addition to the limits of its liability, "all interest on the entire amount of any judgment . . . which accrues after entry of the judgment and before the Company has paid or tendered or deposited in Court that part of the judgment which does not exceed the limit of the Company's liability thereon" In 1964, Muncy obtained a judgment against General Motors and a Home insured for \$225,000. Four days after judgment was entered, Home deposited with the court its \$5,000 policy limit, but it did not deposit any interest on the judgment for the four-day period. General Motors, alone, appealed and was exonerated from liability. Muncy then brought the present suit, seeking to recover the \$5,000 limit of Home's policy plus six per cent interest on the \$225,000 judgment from the date of entry in 1964 until the date of payment. Since Home had not tendered the four days' interest, the court found that it was liable for interest to the date of payment on the entire \$225,000.

Other Significant Decisions. In *Allstate Insurance Co. v. Martin*²³ the insurer sought a declaratory judgment that it was under no duty to defend an action against its insured. At the time the personal injury action went to trial, the insurer's counsel sought to participate but was refused. At that point, he purchased the claimant's cause of action against the in-

²¹ 446 S.W.2d 897 (Tex. Civ. App.—Fort Worth 1969).

²² 449 S.W.2d 312 (Tex. Civ. App.—Tyler 1969), *error ref. n.r.e.*

²³ 454 S.W.2d 275 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

sured. The court of civil appeals dismissed Allstate's appeal in the declaratory judgment action, stating that the appeal had become moot since the insurer had acquired the cause of action against its own insured and could obviate the necessity of defending him by simply dismissing the cause.

The insured in *Madden v. Indiana Lumbermen's Mutual Insurance Co.*²⁴ brought suit alleging that the insurer had arbitrarily refused to renew his automobile policy. The court, in sustaining summary judgment, held that the insurer could refuse to renew "for any reason whatever, or for no reason at all."²⁵

II. LIFE, HEALTH, AND ACCIDENT INSURANCE

Misrepresentations in Applications. The only Texas supreme court decision in the life, health, and accident area is *Praetorian Mutual Life Insurance Co. v. Sberman*.²⁶ There, the insured, in his application for insurance, answered "no" to a question inquiring whether he had been attended to or examined by any doctor within the past five years. In fact, he had visited a doctor forty-three times in the four and one-half years immediately preceding the date of application. The jury found the admittedly false answer was made by the insured "for the purpose of wrongfully inducing" the company to issue the policy and that the answer was "material to the risk."²⁷ The trial court entered judgment for Praetorian. The court of civil appeals reversed and rendered, because Praetorian had failed to obtain a jury finding that it relied upon the truth of the answer in issuing its policy. The supreme court agreed that reliance was not established as a matter of law and that the jury's finding that the answer was material to the company's risk did not constitute a finding of reliance. However, the court was of the opinion that a new trial was necessary.

Likewise, *Industrial Life Insurance Co. v. First National Bank*²⁸ held that even if the insured debtor under a credit life policy made an untrue statement about his health in the application, the insurer could not escape liability without proving that the false statement was made knowingly, with intent to deceive the insurer, and that the policy was issued in reliance upon the representation.

In *Prudential Insurance Co. of America v. Levinson*²⁹ it was held that where a wife signed an amended health insurance application incorporating an original application signed by her husband, the wife was bound by the material misrepresentations in the original application.

Determining Owner of Policy Benefits. In a case of first impression in

²⁴ 451 S.W.2d 764 (Tex. Civ. App.—Dallas 1970), *error ref. n.r.e.*

²⁵ *Id.* at 765.

²⁶ 455 S.W.2d 201 (Tex. 1970).

²⁷ *Id.* at 203.

²⁸ 449 S.W.2d 129 (Tex. Civ. App.—Tyler 1969).

²⁹ 444 S.W.2d 811 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

Texas, *Green v. American National Insurance Co.*,³⁰ the insured surrendered a policy on his life to the company and requested in writing the cash surrender value. However, the policy had previously been assigned to a bank as collateral, and before the company would tender the cash surrender value, they required a release of the assignment. Although the loan had already been repaid, there was some delay in getting the release from the bank. Meanwhile, the insured died. The beneficiary of the policy made demand for its face value, contending that the insured had no authority to cancel the policy because of the collateral assignment to the bank. The court disagreed and held that the bank's interest was extinguished by payment of the debt, which was before the insured elected to surrender the policy, and thus the insurer was obligated only to make payment of the cash surrender value.

*Van Deventer v. Dallas Brush Manufacturing Co.*³¹ was a contest between the corporate beneficiary and the insured, a retired executive of the company, for the cash surrender value of a life insurance policy. The court of civil appeals upheld the lower court's ruling that the policy was intended as a substitute for an original term policy in which all payments were to be made to the company, and it reformed the second policy so as to make the cash surrender value payable to the company and not to the insured.

*United Benefit Life Insurance Co. v. Boyd*³² construed article 3.49 of the Texas Insurance Code.³³ United Benefit insured the life of an eighteen-year-old killed in Vietnam. The company paid the proceeds to the insured's estate, and the named beneficiary brought suit. The court held that article 3.49-1 confers the necessary insurable interest upon any person designated as beneficiary by an insured of legal age. Since the statute is phrased in terms of "any person of legal age,"³⁴ the Texas law requiring insurable interest still applies to an insured who is not of legal age. Since the named beneficiary was only a friend of the minor insured, the court of civil appeals reversed and remanded the case to the trial court for full development of the insurable interest on the part of the named beneficiary.

Double Indemnity. In *Sivley v. American National Insurance Co.*³⁵ the beneficiary brought suit to collect double indemnity benefits under a life insurance policy covering his son, who was killed in an auto accident which resulted in the deaths of two other persons. The trial court granted an instructed verdict for the defendant on the grounds that the insured's death was non-accidental because he intentionally traveled the wrong way on a divided expressway, and because his intoxication at the time of the accident caused him to commit a felony. The court of civil appeals reversed and remanded, holding that the fact that the insured voluntarily

³⁰ 452 S.W.2d 1 (Tex. Civ. App.—San Antonio 1970).

³¹ 443 S.W.2d 426 (Tex. Civ. App.—Eastland 1969), *error ref. n.r.e.*

³² 453 S.W.2d 332 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*

³³ TEX. INS. CODE ANN. art. 3.49 (1963).

³⁴ *Id.*

³⁵ 454 S.W.2d 799 (Tex. Civ. App.—Amarillo 1970), *error ref. n.r.e.*

exposed himself to the risk of a collision did not make his death non-accidental, and that the issue of the insured's intoxication should have been presented to the jury.

In an apparently contrary opinion, the Eastland court of civil appeals in *Wright v. Western & Southern Life Insurance Co.*³⁶ in effect held that a voluntary exposure to risk does make a loss non-accidental. The insured brought suit on an accident policy to recover \$5,000 for the loss of his foot solely as a result of accidental bodily injury or disease, as the coverage was defined in the policy. The insured contracted gangrene and lost his foot after being shot in an attempt to rob the Brook Hollow Country Club. The court held that the loss was not the result of an accidental injury, stating that "when one should in all reasonable probability, expect an event to result from his voluntary conduct, the happening of that event is not an accident."³⁷

However, double indemnity benefits for death by accidental means were held to be payable in *Great National Insurance Co. v. Legg*.³⁸ There, the wife of the insured threatened to kill him and armed herself, and the husband expressed the view that she should be "stopped" before she killed "somebody."³⁹ Later, the wife found the husband with a female companion and started shooting at her. The husband tried to take the pistol away from his wife and was himself shot and killed. The court of civil appeals held that there was sufficient evidence to support the jury findings that the insured did not know he would be shot in the struggle, that he should not have known he would be shot, and that he was not committing an assault upon his wife at the time he was shot. Thus, the wife was allowed to recover the accidental death benefits in the policy insuring her husband's life.

Construing Policy Provisions. *Traveler's Insurance Co. v. Solomon*,⁴⁰ involving disability insurance, held that there was no basis for the lower court's finding of anticipatory breach of contract, where the insurer had denied further payments based upon its construction of the disability clause. The court further held that the insurer was entitled to have the issue of total disability submitted in terms of the policy language defining total disability after a two-year period following the accident as being the inability to engage in *any* occupation or employment. Thus, the trial court's submission in terms of the insured's inability to perform "every essential operation necessary to the performance of his occupation . . ." ⁴¹ was erroneous.

In *Aetna Life Insurance Co. v. Adams*⁴² the issue was whether or not the Beaumont Remedial Clinic was a "hospital" as defined by a group

³⁶ 443 S.W.2d 790 (Tex. Civ. App.—Eastland 1969).

³⁷ *Id.* at 792.

³⁸ 444 S.W.2d 324 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*

³⁹ *Id.* at 327.

⁴⁰ 454 S.W.2d 765 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*

⁴¹ *Id.* at 768.

⁴² 447 S.W.2d 453 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

hospitalization policy. Reversing judgment for the insured, the court of civil appeals held that the clinic was not a hospital as defined in the policy, since it was not primarily engaged in providing "diagnostic and therapeutic facilities for the surgical and medical . . . treatment . . . of sick persons." The testimony had been that the clinic had such facilities but did not use them except in an emergency. The dissent would have affirmed on the basis that the clinic *provided* such facilities, and there was no policy requirement that the facilities be used.

*National Central Life Insurance Co. v. Anderson*⁴³ held that policy language providing for the payment of hospital benefits when the insured was "continuously confine[d]" to a hospital as a result of an injury, did not defeat recovery where the insured occasionally left the hospital for therapeutic reasons and upon the advice of her physician.

In *American National Insurance Co. v. Alejandro*⁴⁴ the insured brought suit on a "conditional receipt" for "family" life insurance coverage. The receipt provided that there would be coverage from the date of issue "if each person to be insured is in good health and acceptable for insurance" on that date. The insured's daughter died, and he sued to collect under the terms of the receipt. The insurer defended on the ground that the plaintiff's wife was not acceptable for insurance on the date the receipt was issued, and therefore there was no coverage. Affirming judgment for plaintiff, the court of civil appeals held that only the health of the deceased could be considered in determining coverage.

Possible Validity of a Returned Policy. *International Security Life Insurance Co. v. Short*⁴⁵ construed article 3.90-2(8) of the Texas Insurance Code,⁴⁶ which provides that a person dissatisfied with a policy of accident or sickness insurance "shall be permitted to return the policy within ten (10) days of its delivery to such person and the premium paid refunded . . ." and that a policy so returned is void from the beginning. In response to an advertisement, Short obtained such a policy from International. Three or four days later Short returned the policy and asked that he be issued another policy which complied with the representations in the advertisement. He heard nothing further from the company, and the premium was not refunded until it was paid into the registry of the court after this suit had been filed to collect medical expenses incurred by Short's wife. The insurer contended that under article 3.90-2(8) the policy had become void, but the court held that the policy is void only if it is returned within ten days *and* a refund of premium is made. Since the insurer failed to return the premium upon receipt of the policy, it remained in effect.

Attorneys' Fees. In *International Life Insurance Co. v. Ramage*⁴⁷ the

⁴³ 443 S.W.2d 786 (Tex. Civ. App.—Texarkana 1969).

⁴⁴ 449 S.W.2d 151 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

⁴⁵ 443 S.W.2d 949 (Tex. Civ. App.—Amarillo 1969), *error dismissed.*

⁴⁶ TEX. INS. CODE ANN. art. 3.90-2(8) (1963).

⁴⁷ 446 S.W.2d 944 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

insurer contended that it could not be held liable for attorneys' fees where suit was filed before the expiration of sixty days after demand in violation of article 3.70-3(A)(11).⁴⁸ The court disagreed, since the insurer had not offered to pay any amount in settlement during the sixty-day period, and there was no showing that the insurer had been prejudiced by the premature filing of the suit.

Support for Instructed Verdict. In *Reliable Insurance Co. v. Reaves*⁴⁹ plaintiff brought suit on a "specific dismemberment" provision of an industrial accident policy. The insurer contended that the loss was due to a pre-existing condition and therefore excluded. Reversing an instructed verdict for the insured, the court of civil appeals held that the uncontradicted testimony of the plaintiff concerning the condition would not support an instructed verdict.

III. FIRE AND CASUALTY INSURANCE

Time of Suit, Notice. In *Harris v. Hanover Fire Insurance Co.*⁵⁰ the Fifth Circuit considered the question of when the statute of limitations commences to run for a suit on a contract of property insurance. Harris, a grain dealer, brought suit for water damage to grain stored in a warehouse. The storm which caused the seepage of water into the warehouse occurred on April 14, 1960. The loss was not reported until October 1964. The insured contended that since the damaged grain was stored at a depth of thirty-five to forty feet, the loss was concealed and could not have been discovered through the exercise of due diligence, and that limitations therefore did not begin to run against him until actual discovery. The court disagreed and held that the action was barred both by the four-year statute of limitations,⁵¹ and by the limitation in the policy requiring suit to be commenced within two years and one day "next after discovery by the assured of the occurrence which gives rise to the claim." The opinion stated that the authorities relied on by the insured were "based on tort concepts or fraud perpetrated against the injured party and, therefore, are inapposite."⁵²

Circle 4 Stables, Inc. v. National Surety Corp.,⁵³ a suit to recover for the loss of an insured quarter-horse, held that there was no coverage where the policy provided that in the event of sickness or injury to an insured animal, the assured warranted "to at once give notice of such sickness or injury by telephone or telegram to this company." The court held that the "at once" requirement was a material condition of the policy and was

⁴⁸ TEX. INS. CODE ANN. art. 3.70-3(A)(11) (1963): "Legal Actions: No actions at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this [accident and sickness] policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished."

⁴⁹ 447 S.W.2d 440 (Tex. Civ. App.—Texarkana 1969).

⁵⁰ 425 F.2d 1168 (5th Cir. 1970).

⁵¹ TEX. REV. CIV. STAT. ANN. art. 5527 (1958).

⁵² 425 F.2d at 1169.

⁵³ 451 S.W.2d 564 (Tex. Civ. App.—Amarillo 1970), *error ref. n.r.e.*

not unreasonable. Since the insured gave no notice until approximately two months after the animal became ill and then only to the local recording agent, the court held that the insurer was relieved of liability.

Construing Policy Provisions. In *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Insurance Co.*⁵⁴ the insured Ford dealer brought suit on a policy protecting his premises from theft. A vehicle had been "surreptitiously repossessed"⁵⁵ from the dealer's lot by an agent of an Oklahoma lienholder. The court held that under section 9.103 of the Texas Business and Commerce Code,⁵⁶ the foreign security interest was valid since the vehicle had not been in Texas for a period of four months. Therefore, the Oklahoma lienholder had the right to take the vehicle, and its taking did not constitute theft under the policy.

The fact that an insured's wristwatch disappeared while she was shopping and taking her daughter to school was held to be "mysterious disappearance" of unscheduled personal property within the meaning of a homeowners policy issued by the insurer.⁵⁷

The policy in *Brown v. International Service Insurance Co.*⁵⁸ covered "scheduled jewelry," including one "Gents' Diamond Ring Center diamond 1.57 carat." The policy limit for this item was stated to be \$2,000. The limit of liability for unscheduled jewelry was \$250. After the policy was issued, the diamond in the man's ring was removed and reset in a lady's mounting, and was subsequently damaged. Reversing the court below, a majority of the court of civil appeals held that the policy schedule referred to this particular diamond, and that removing the stone and resetting it in the lady's mounting neither increased the risk nor altered the fact that it was still insured for \$2,000. The dissent complained that the majority had rewritten an unambiguous contract so as to list "One Ladies Diamond Ring" as scheduled jewelry.

In *Associated Indemnity Corp. v. Bur-Tex Constructors, Inc.*⁵⁹ it was held that an underground, cement-enclosed electrical conduit was not a "building or structure" within the meaning of a policy exclusion.

The "malicious mischief" endorsement was construed for the first time in *United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp.*⁶⁰ The court found that a clause which included "damage to the building covered hereunder caused by burglars" was in conflict with a provision that the insurer "shall not be liable under this endorsement for any loss . . . by pilferage, theft, burglary or larceny . . ." Therefore, the endorsement was held to be ambiguous, and coverage was available for all damage done to the building by the burglars in removing copper electrical

⁵⁴ 454 S.W.2d 465 (Tex. Civ. App.—San Antonio 1970), *error granted*.

⁵⁵ *Id.* at 467.

⁵⁶ TEX. BUS. & COMM. CODE ANN. § 9.103 (1968).

⁵⁷ *Johnson v. General Accident, Fire & Life Assur. Corp.*, 454 S.W.2d 837 (Tex. Civ. App.—Waco 1970).

⁵⁸ 449 S.W.2d 491 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

⁵⁹ 444 S.W.2d 338 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

⁶⁰ 455 S.W.2d 828 (Tex. Civ. App.—Houston 1970), *error granted*.

wiring from the building, although the loss of the wiring itself was not covered.

*Zurich Insurance Co. v. Bass*⁶¹ was a suit on a fire policy for damage to a barn. The "dwelling extension" provision of the policy stated that coverage could be extended to outbuildings on the premises of the dwelling if the outbuildings were "used solely in connection with the occupancy" of the dwelling. Since the barn and the dwelling were rented separately to different tenants, the policy terms did not provide coverage for the barn. The trial court reformed the contract so as to extend coverage to the barn. In reversing and rendering, the court of civil appeals held that there was no basis for reformation because of mutual mistake, since the insured knew the buildings were leased to different tenants, although the recording agent did not.

Waiver of Policy Defenses. The *Zurich* court further held that the doctrines of waiver and estoppel did not apply, noting that "[a]n insurance company may waive a forfeiture provision in a policy, or be estopped to assert it; but neither waiver nor estoppel may operate to enlarge the risk covered by the policy . . ."⁶²

The question of waiver of a policy defense was also treated in *United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp.*⁶³ There was evidence that the insurer had denied liability after the time allowed for filing a proof of loss. The court held that testimony could not support a jury finding of waiver, and reversed the lower court's judgment. However, the court also found that the trial court had erred in suppressing testimony concerning a possible waiver which occurred after a non-waiver agreement had been executed. It noted that the insurer's conduct in admitting partial liability on a claim after expiration of the time for filing proof of loss was inconsistent with an intention to rely upon the failure to file as a defense.

*Texas Farm Bureau Underwriters v. Hasting*⁶⁴ was an action to recover for hail damage to a cotton crop. After plaintiff testified that he had never signed proof-of-loss forms, the insurer was permitted to file a trial amendment placing in issue for the first time the failure to comply with the proof-of-loss requirements in the policy. Plaintiff did not request issues on the insurer's waiver of the proof-of-loss requirements. The question, therefore, was whether or not the insurer waived the filing of the proof of loss or was estopped to assert the failure to file the proof of loss as a matter of law.

Shortly after the hailstorm, the insurer's adjusters had filled out proof-of-loss forms showing the loss to be seventeen per cent of the crop and asked plaintiff to sign them, thus agreeing to that percentage. The insured refused and the proof-of-loss forms were never signed. After the

⁶¹ 443 S.W.2d 371 (Tex. Civ. App.—Dallas 1969).

⁶² *Id.* at 375.

⁶³ 455 S.W.2d 828 (Tex. Civ. App.—Houston 1970), *error granted*. See note 52 *supra*, and accompanying text.

⁶⁴ 449 S.W.2d 283 (Tex. Civ. App.—El Paso 1969).

crop was harvested, the adjusters again offered to pay seventeen per cent in settlement. There were further settlement negotiations before trial. During all of these negotiations, the adjusters never gave plaintiff proof-of-loss forms other than those which would have constituted a settlement and release had he signed them. Therefore, the court held that as a matter of law the insurer had waived filing of the proof of loss within ninety-one days, so that submission of the issue of waiver to the jury was not required.

Water Damage. Two cases last year dealt with attempts to recover for damages caused by water under homeowner policies. In *Park v. Hanover Insurance Co.*,⁶⁵ a water pipe broke beneath plaintiff's house discharging thousands of gallons of water into the subsoil. As a result, the foundation was weakened and the house settled, causing cracks in the walls and sidewalks. The court held that the loss fell within exclusions for losses resulting from "water below the surface of the ground including that which exerts pressure on (or flows, seeps, or breaks through) sidewalks . . . foundations, walls . . ." and losses "caused by settling." The court refused to accept plaintiff's contention that the exclusion should be limited to losses resulting from underground water of natural origin. Plaintiff further contended that the loss was covered by an exception which provided that the exclusion did not apply to "ensuing loss caused by . . . water damage provided such loss would otherwise be covered under this policy." The court held that the loss was not "otherwise covered," and that this was not a case of "ensuing water damage."

However, *Allstate Insurance Co. v. Smith*⁶⁶ held that the insureds could recover the cost of replacing wooden beams rotted from a discharge of water from a broken pipe. The court held that this was "ensuing loss" within the meaning of the exception and thus rescued coverage from the general exclusion that loss "caused by inherent vice, wear and tear, deterioration [and] rust" was not covered. The court did not allow recovery for the replacement cost of the broken pipe which was held to be the "inherent vice," but did allow the cost of tearing out the floor and wall to find the source of the leak and the cost of replacing them.

IV. SURETY BONDS

Construing Policy Provisions. *Maryland Casualty Co. v. State Bank & Trust Co.*⁶⁷ was a suit on a banker's blanket bond. The bank loaned \$50,000 to San Marcos Compress, a licensed and bonded warehouse. As security, the partnership pledged 700 bales of cotton represented by negotiable warehouse receipts in bearer form issued by the Compress. However, when the loan was negotiated, 697 of the bales had already been sold without the warehouse receipts having been cancelled as required by law. When

⁶⁵ 443 S.W.2d 940 (Tex. Civ. App.—Amarillo 1969).

⁶⁶ 450 S.W.2d 957 (Tex. Civ. App.—Waco 1970).

⁶⁷ 425 F.2d 979 (5th Cir. 1970).

the bank learned the cotton was out of the warehouse, it made demand on the note. The partnership defaulted and was adjudged bankrupt. The partner who negotiated the loan was charged with, and pleaded guilty to, theft by false pretense.

The surety sought a declaratory judgment that there was no liability under the bond for the bank's loss. The bank counter-claimed, seeking to recover its loss, and relied upon a clause in the bond in which the surety agreed to indemnify the bank against any loss through "robbery . . . larceny, theft, false pretenses . . ." Maryland relied upon an exclusion providing that it would not be liable for any loss resulting from "the complete or partial non-payment of or default upon any loan made by or obtained from the insured whether procured in good faith or through trick, artifice, fraud or false pretenses . . ." The trial court concluded that the transaction was a theft, not a loan, and that Maryland was liable. The Fifth Circuit reversed and rendered, noting that the exclusionary clause of the bond could not be nullified by the "subjective fraudulent intent of the borrower"⁶⁸ when from all appearances the transaction was a loan by the bank to the partnership.

The bank also argued that the provision excluding coverage was ambiguous, and that it should be construed to mean that the surety would be liable when a loan was obtained through circumstances giving rise to criminal liability, but not liable for a loss occurring under circumstances giving rise to only civil liability. The court held that the provision was unambiguous, and that the subjective intent of the borrower did not turn the bona fide transaction into a theft.

Finally, the bank argued that Maryland was liable under a provision covering losses through the good-faith acceptance of "counterfeited or forged" documents. Aligning itself with the Second Circuit,⁶⁹ the court disagreed. It held that the fraudulent quality of the documents arose not from an effort to falsify documents, but from the falsity of representations of fact concerning the goods which the documents represented.

Employee Fidelity Bonds. Two cases in the past year dealt with employee fidelity bonds. *Federal Deposit Insurance Corp. v. Aetna Casualty & Surety Co.*⁷⁰ held that fidelity bonds issued to a national bank covered acts of a director who was not an officer or employee in connection with the purchase of real estate notes, where the acts were "within the scope of the usual duties of an employee." As to the notice requirements of the bonds, it was held that it was the nature of the director's participation in the purchase of the real estate notes, rather than the purchase of the notes in itself, which constituted "dishonest and fraudulent" conduct, and that the discovery of the loss did not occur when it was learned that the real estate notes were non-conforming, but rather when the fraudulent con-

⁶⁸ *Id.* at 981.

⁶⁹ *Exchange Nat'l Bank v. Insurance Co. of N. America*, 341 F.2d 673 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

⁷⁰ 426 F.2d 729 (5th Cir. 1970).

duct of the director in connection with the purchase came to light. The director had acted in the interest of the secret beneficial owners of the bank, in conflict with the bank's own interests, and had concealed the true facts from the officers and other directors.

The other case, *Commercial Standard Insurance Co. v. Hufstедler Truck Co.*,⁷¹ held that the public policy requiring prosecution of embezzlers does not make the failure to file criminal charges against the employee a defense to liability under employee fidelity bonds.

Agent's Authority. Reference was made in last year's Article⁷² to *Sharps-town State Bank v. Great American Insurance Co.*,⁷³ it being noted that writ of error had been granted. The supreme court has now reversed and remanded the cause to the court of civil appeals on the ground that the evidence did not establish conclusively the apparent authority of the agent in this surety bond situation, and that there was some evidence to support the jury's negative conclusion.⁷⁴ Therefore, it was error for the court of civil appeals to reverse and render, but remand was necessary for that court to exercise its conclusive jurisdiction as to the sufficiency of the evidence to support the finding of authority.

V. TITLE INSURANCE

Reversing the court of civil appeals and affirming summary judgment for the insurer, the Texas supreme court in *Southwest Title Insurance Co. v. Woods*⁷⁵ held that the insurer was not liable for damage to the insured's land caused by timber cutters claiming under conveyances not in the insured's chain of title. The court held that since plaintiff purchased the land for value without actual or constructive knowledge of the conveyances to the timber cutters, they were trespassers and did not prevent the plaintiff from having "good and indefeasible title" as guaranteed by the policy. The insurer had not failed to institute or defend any legal proceeding, and the policy did not purport to insure against damage by trespassers. The court noted that if the plaintiff had a remedy, it was against the trespassers themselves.

*Prendergast v. Southern Title Guaranty Co.*⁷⁶ held that the insureds could sue under a title insurance policy even though no suit had been filed by an adverse claimant and no adverse claimant was in possession of the property. Reversing the court below, the court of civil appeals held that where another party was apparently the valid owner of a fractional interest in the property and the insureds were asserting that the market value of the property was thereby diminished, the case should have gone to the jury on questions of breach of the insurance contract and damages.

⁷¹ 443 S.W.2d 54 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

⁷² Brin, *Insurance Law, Annual Survey of Texas Law*, 24 Sw. L.J. 129, 140 n.65 (1970).

⁷³ 441 S.W.2d 548 (Tex. Civ. App.—Austin 1969), *error granted.*

⁷⁴ 14 Tex. Sup. Ct. J. 12 (1970).

⁷⁵ 449 S.W.2d 773 (Tex. 1970).

⁷⁶ 454 S.W.2d 803 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

In *Dallas Title & Guaranty Co. v. Valdes*⁷⁷ the insurer appealed from a judgment awarding the plaintiff \$12,000 for breach of a title policy. The insurer had guaranteed the plaintiff's title to a certain lot, approximately seven-eighths of which was subsequently found to be occupied by a highway right-of-way. The insurer defended on the basis that its policy stated that it was subject to "any discrepancies [*sic*], conflicts or shortages in area of boundary lines . . . which a correct survey would show." The court concluded that a correct survey of the property would show the boundaries of the lot to be just as described in the public records, which did not reveal the highway right-of-way. Thus, the correct survey exclusion was held not to be a defense. In addition, the court found that under the policy, Mrs. Valdes was entitled to recover her actual monetary loss and was not required to establish first that the price she originally paid for the lot was its fair market value.

⁷⁷ 445 S.W.2d 26 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*