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Insurance Law

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INSURANCE LAW

by

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I. AUTOMOBILE AND LIABILITY INSURANCE

Stowers Doctrine. In determining when a cause of action arose for limitations purposes, the Texas Supreme Court removed the prepayment requirement for suits founded on the principles of *Stowers Furniture Co. v. American Indemnity Co.*[1] In *Hernandez v. Great American Insurance Co.*[2] an $81,686 judgment was recovered against Hernandez in 1958, the limits of his Great American Liability policy being $25,000. After judgment Great American paid its policy limits, and the judgment remained partially unsatisfied. In 1967 land belonging to Hernandez was sold under execution for $10,500, and that money was applied to the judgment. Hernandez then brought suit against Great American, alleging that it was negligent in failing to settle within the policy limits. He sought both recovery of the $10,500 and a declaratory judgment that all future payments on the judgment would be immediately reimburseable by Great American.

Great American contended that the cause of action arose when the judgment became final in 1958 and was, thus, barred by the statute of limitations. The courts below agreed. The supreme court, recognizing that prepayment had been the law in Texas, held that Hernandez was entitled to bring suit for *both* the $10,500 *and* the remainder of the judgment debt, even though he had paid no portion of the latter. But because prior opinions had placed Texas "firmly in the prepayment camp" so that an insured was required to pay all or a portion of an excess judgment before he could recover in a *Stowers*-type suit,[3] the court held that the statute of limitations in *Hernandez* did not begin to run until Hernandez made the partial payment in 1967. The court expressly overruled *Universal Automobile Insurance Co. v. Culbertson*,[4] thus eliminating the prepayment requirement and adopting the judgment rule. The court took a position on limitations, however, which avoids injustice in the changeover. Unpaid excess judgments that became final before February 24, 1971 (the date of the supreme court opinion in *Hernandez*), will be barred after two years from that date. The limitations period for causes of action arising after that date begin to run on the date the final excess judgment is rendered against the insured.

In *Globe Indemnity Co. v. Gen-Aero, Inc.*[5] the supreme court granted writ of error, then decided that the writ had been improvidently granted.[6] Four dissenters could find no evidence to support the judgment for plaintiff under the *Stowers* doctrine and cautioned that "coverage should not be extended by . . .

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[1] 15 S.W.2d 544 (Tex. Comm'n App. 1929), *holding approved.*

[2] 464 S.W.2d 91 (Tex. 1971).

[3] Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Jernigan, 410 F.2d 718 (5th Cir. 1969); Linkenhoger v. American Fid. & Cas. Co., 152 Tex. 534, 260 S.W.2d 884 (1953); Universal Auto. Ins. Co. v. Culberson, 126 Tex. 282, 86 S.W.2d 727 (1935).

[4] 123 Tex. 282, 86 S.W.2d 727 (1935).

[5] 459 S.W.2d 205 (Tex. Civ. App.—San Antonio 1970), *error ref. n.r.e.*

[6] 469 S.W.2d 164 (Tex. 1971).

hindsight."[7] They reasoned that the mere fact an excess judgment was rendered could not be considered sufficient proof in itself of the unreasonableness of the rejection of an offer to settle within the limits.

Uninsured Motorist Coverage. In *Allstate Insurance Co. v. Hunt*[8] suit was brought against Rose, an uninsured motorist, and Allstate, plaintiff's uninsured motorist carrier. Allstate was granted a separate trial and as to liability and damages agreed to be bound by the outcome of the suit between Hunt and Rose. Allstate waived its possible subrogation claim against Rose, and on the day Hunt and Rose went to trial Allstate's attorney appeared as lead counsel for Rose. The trial court allowed the attorney to neither represent Rose nor withdraw Allstate's consent to be bound by the outcome of that trial. Rose's personal attorney defended, and judgment was entered against Rose for over $19,000. In the separate trial against Allstate judgment was entered for the $10,000 limit of the uninsured motorist policy, based on the findings in the prior suit and Allstate's agreement to be bound by them. Allstate appealed.

The majority of the supreme court held that the trial judge did not abuse his discretion in refusing to allow Allstate's attorney to represent the uninsured motorist or in refusing to allow him to withdraw Allstate's consent to be bound. It noted that the cooperation clause of the standard automobile liability policy requires the insured to "bare his soul" to the company with regard to the accident and his injuries. If the company subsequently enters into a fiduciary relationship with the uninsured motorist by defending him, a conflict of interest might arise. The majority concluded that "it should be left to the discretion of the trial court to pass upon the disqualification or conflict of interest, with the burden being upon the insurance company to show no substantial conflict of interest."[9]

In a blistering opinion by Judge Pope four dissenters urged that the trial court's actions had prevented Allstate from defending itself and denied it due process. The dissent found no conflict in the insurer's use of a file prepared under a cooperation clause, and noted that such files are daily used in all sorts of litigation pitting insured against insurer. Further, the minority felt that the "worst feature" of the majority opinion was that it defeated judicial economy and ran counter to the spirit of *State Farm Mutual Automobile Insurance Co. v. Matlock*,[10] since no insurer will ever again agree to be bound by the findings in a suit against the uninsured motorist.

Uninsured Motorist—Quantum of Proof. The quantum of proof necessary to show that a motorist is uninsured under the *Matlock* case above[11] was discussed by the supreme court in *Members Mutual Insurance Co. v. Tapp*.[12] In *Tapp* the plaintiff had not shown that any effort had been made to determine whether

[7] *Id.* at 165 (dissenting opinion).
[8] 469 S.W.2d 151 (Tex. 1971).
[9] *Id.* at 153.
[10] 462 S.W.2d 277 (Tex. 1970).
[11] *Id.* "[A]ll reasonable efforts [must] have been made to ascertain the existence of an applicable policy and . . . such efforts [must] have proven fruitless." *Id.* at 278.
[12] 469 S.W.2d 792 (Tex. 1971).

the other motorist was available for discovery procedures to determine his insurance status. The court unanimously reversed and remanded because the plaintiff had not shown a "convincing quantum of proof" that "all reasonable efforts" had been made to determine that the other motorist was uninsured.

The courts of civil appeals also considered numerous other questions involving uninsured motorist coverage. The opinions range from a "fundamental" holding that the plaintiff must plead and prove the existence of a policy containing uninsured motorist provisions in order to recover,[13] to the rejection of an insurer's "ingenious" argument in *Continental Casualty Co. v. Thomas*.[14] In *Thomas* the insurer had argued that since a suit to recover uninsured motorist benefits is a suit on an insurance contract, the plaintiff must disprove policy exclusions pleaded as defenses, and the burden should be on the plaintiff not only to establish negligence and proximate cause on the part of the uninsured motorist, but also to establish the absence of negligence and proximate cause on the part of the insured driver.[15]

Failure To Forward Suit Papers. In *Members Mutual Insurance Co. v. Cutaia*[16] a court of civil appeals considered the effect of the insured's failure to forward suit papers to the insurer. Members Mutual insured both the defendant and the injured party. The company had actual notice of the accident, investigated it, defended under a reservation of rights when the insured failed to forward suit papers, and candidly admitted that it was in no way prejudiced by that failure. In *Cutaia*, an action against the insurer to enforce the judgment rendered against the insured, the court recognized the general rule that prejudice need not be shown in order to relieve the insurer of liability when the insured fails to give notice of the accident or forward suit papers, but held that under the special circumstances coverage could not be avoided in the absence of prejudice to the insurer. The supreme court reversed and rendered, holding that any change with respect to a showing of prejudice should be made by the legislature.[17]

Notice of Accident. Citing *Central Surety & Insurance Corp. v. Anderson*,[18] the court in *Atteberry v. Allstate Insurance Co.*[19] held that because the insureds never received the actual policy, but shortly after the accident gave oral notice of it to an associate of the agent from whom they bought the policy, a fact question was raised with respect to whether written notice 116 days after the accident was given "as soon as practicable."

However, in *Doyle v. United Services Automobile Ass'n*[20] summary judgment for the insurer was affirmed when the plaintiff failed to file a sworn statement within thirty days that she had a cause of action against a hit-and-run driver

[13] Members Mut. Ins. Co. v. Olguin, 462 S.W.2d 348 (Tex. Civ. App.—El Paso 1970).
[14] Continental Cas. Co. v. Thomas, 463 S.W.2d 501 (Tex. Civ. App.—Beaumont 1971).
[15] Instead, the court said: "We construe that portion of the insurance contract . . . to mean that defendant will pay the insured all sums the insured could recover from the uninsured motorist in a tort action." *Id.* at 504.
[16] 460 S.W.2d 493 (Tex. Civ. App.—Houston [14th Dist.] 1970), *error granted.*
[17] 14 Tex. Sup. Ct. J. 310 (1971).
[18] 446 S.W.2d 897 (Tex. Civ. App.—Fort Worth 1969).
[19] 461 S.W.2d 219 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*
[20] 466 S.W.2d 843 (Tex. Civ. App.—Houston [14th Dist.] 1971).

whose identity could not be ascertained (and who would thus be an "uninsured motorist" within the meaning of the policy). The court held that the policy provision which required such a statement was reasonable since such situations were susceptible to fraudulent claims, and that the thirty-day requirement controlled over the general policy provision that notice must be given "as soon as practicable."

In *Huddleston v. Traders & General Insurance Co.*[21] summary judgment for the insurer was affirmed on the basis of late notice. Oral notice by the injured party was held not to satisfy the policy requirement of "[w]ritten notice . . . given by or for the insured."

Notice of Cancellation. Although evidence that a cancellation notice was not received is some evidence that the notice was not mailed so as to preclude summary judgment on that basis,[22] the insured's mere failure to admit that he received the notice does not constitute affirmative evidence so as to create a fact issue on whether the notice was mailed.[23]

On the other hand, an insurer's habit of accepting late premiums may estop it from denying coverage when a premium payment is received by an agent after the due date, but before the accident.[24]

Policy Modification. Affirming the courts below, the supreme court in *Travelers Indemnity Co. v. Edwards*[25] held that a student restrictive endorsement added to an automobile liability policy after the policy was issued and the premium paid would not be enforced because there was no additional consideration to support the endorsement. Therefore, the insurer was liable for amounts paid in settlement of claims arising out of an accident that occurred while a student was driving the vehicle. However, the court reformed the holdings of the lower courts so as to relieve the insurer from liability for interest on the amount of settlement. In so doing the court distinguished *Home Indemnity Co. v. Muncy*,[26] and held that although the insured would be liable for interest under the supplementary-payments clause if the settlement had been reduced to judgment, in the absence of a judgment there was no liability under the clause.

Miscellaneous Exclusions. Queen Insurance Co. v. Creacy[27] construed the "old" automobile business exclusion, which provided that the policy did not apply to a nonowned automobile while used "in the automobile business." The accident occurred while the insured, an auto parts salesman who was not a mechanic, was trying to adjust the accelerator on a nonowned vehicle. The jury found that at the time of the accident the automobile was being used in the automobile business. Affirming a judgment n.o.v. against the insurer, the court held that as

[21] 465 S.W.2d 418 (Tex. Civ. App.—Texarkana 1971).
[22] Sudduth v. Commonwealth County Mut. Ins. Co., 454 S.W.2d 196 (Tex. 1970).
[23] Oliver v. Allstate Ins. Co., 456 S.W.2d 558 (Tex. Civ. App.—Dallas 1970), *error dismissed.*
[24] Dairyland County Mut. Ins. Co. v. Mason, 460 S.W.2d 481 (Tex. Civ. App.—Beaumont 1970), *error ref. n.r.e.*
[25] 462 S.W.2d 533 (Tex. 1970).
[26] 449 S.W.2d 312 (Tex. Civ. App.—Tyler 1969), *error ref. n.r.e.*
[27] 456 S.W.2d 538 (Tex. Civ. App.—San Antonio 1970).

a matter of law the vehicle was not being used in the automobile business within the terms of the exclusion.

Pioneer Casualty Co. v. Bush[28] held that a fact issue was raised as to the applicability of the employee exclusion of an automobile liability policy when two minors were driving dump trucks owned by their father and one collided with the other.

Cooperation Clause. In *Employers Liability Assurance Corp. v. Mosley*[29] the insurer contended that it was not liable for a judgment rendered against its insured in 1966. The accident had occurred in 1961, and the insurer had obtained a statement from its insured who then disappeared. The suit was filed, and the case remained on the docket for over four years. Letters from the insurer to the insured were returned, and he could not be located through former neighbors and employers. A retail credit check and inquiries to the Department of Public Safety failed to locate him. He failed to appear for depositions or for the trial, which was finally held without his presence, and defended by Employers.

In *Mosley* summary judgment was granted for the plaintiff. Reversing and remanding, the court of civil appeals held that a breach of the cooperation clause could provide a policy defense, and the evidence had presented a question of fact as to whether the insured "so materially breached his duty to cooperate as to relieve Employers of liability under its policy."[30]

Subrogation. In *Price v. Couch*[31] the supreme court held that an insurer seeking to enforce its subrogation rights for payments under a policy of collision insurance need not intervene in a suit filed against the insured. The court held that although the insurance company could bring suit in the name of its insured to enforce its subrogation interest, it was not a party to the original suit brought against the insured and arising out of the same incident in the suit against the insured under rule 97(a).[32] Its claim was not a compulsory counterclaim, and the insurer had no duty to intervene in that suit. The judgment in the prior suit was, thus, held not to bar the subrogation action by the insurer.

Property Damage Liability. Nortex Oil & Gas Corp. v. Harbor Insurance Co.[33] construed the property damage provisions of a liability policy. In a prior suit adjoining oil and gas leaseholders had alleged that Nortex had damaged them by the operation of "slant-hole" wells. Nortex claimed that the losses were covered by the policy issued to it by Harbor. Affirming summary judgment for the insurer, the court held that the cause of action asserted in the prior suit was for conversion of oil, not damage to the leasehold.

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[28] 457 S.W.2d 165 (Tex. Civ. App.—Tyler 1970), *error ref. n.r.e.*
[29] 460 S.W.2d 201 (Tex. Civ. App.—Houston [14th Dist.] 1970).
[30] *Id.* at 203.
[31] 462 S.W.2d 556 (Tex. 1970).
[32] TEX. R. CIV. P. 97(a).
[33] 456 S.W.2d 489 (Tex. Civ. App.—Dallas 1970).

II. LIFE, HEALTH, AND ACCIDENT INSURANCE

International Security Life Insurance Co. Developments in the health insurance field were dominated by a score of appeals instituted by International Security Life Insurance Company. Among them was *International Security Life Insurance Co. v. Spray*,[34] in which the trial court awarded attorney's fees under article 3.62 of the Texas Insurance Code,[35] and provided that the amount of attorney's fees would be reduced by automatic remittitur in the absence of various appellate steps. The insurer contended that there is no permissible manner whereby attorney's fees can be awarded for the appellate phase of litigation. The court disagreed, holding that the required certainty of the judgment was not destroyed since the figure the clerk would place in the writ of execution could be determined by ministerial act.

In numerous other cases, including *International Security Life Insurance Co. v. Howard*,[36] International Security pleaded all the exclusions in the various parts of its policy and contended on appeal that the plaintiff had failed to negative certain exclusions so pleaded. The majority recognized that under the holding of *Sherman v. Provident American Insurance Co.*[37] the burden was on the insured to negative each exclusion pleaded. The court held that the insured had met that burden because "reasonable inferences" could be drawn from the evidence that would negate all the exclusions pleaded by International Security. The late Justice Wilson concurred, and noted that the parts of the policy which contained the various exclusions constituted 128 lines of small type. He would have held that there was no duty to negative the exclusions since the insurer did not attempt to meet the very minimum prerequisites of rule 94, which requires an insurer to "specifically allege" that a loss came within a "particular" exception to liability.[38]

Change of Beneficiary. Three cases rejected attempts by persons other than the named beneficiary to collect the proceeds of life insurance policies. In *Warrior v. Warrior*[39] a serviceman designated his mother and sister as beneficiaries of his serviceman's group life policy. Thereafter, while in Viet Nam, he partially completed a form that could be used for four purposes, including cancellation of the prior designation of beneficiaries. If the beneficiary designation was cancelled, the proceeds would automatically be divided between his divorced mother and father. However, the form was not completed, and none of the listed reasons for executing it was applicable. Although the court recognized that when there has been "substantial compliance" with the terms of the policy, equitable rules will be invoked to carry out the insured's "plainly manifest intent" to change the beneficiary, it held that the mere presence of the incomplete form did not plainly manifest such intent.

Like *Warrior, Farley v. Prudential Insurance Co.*[40] also involved a service-

[34] 468 S.W.2d 347 (Tex. 1971).
[35] TEX. INS. CODE ANN. art. 3.62 (1963).
[36] 456 S.W.2d 765 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*
[37] 421 S.W.2d 652 (Tex. 1967).
[38] TEX. R. CIV. P. 94.
[39] 468 S.W.2d 471 (Tex. Civ. App.—Beaumont 1971).
[40] 468 S.W.2d 147 (Tex. Civ. App.—Tyler 1971).

man's group life policy. In *Farley* the insured had named a friend as beneficiary. He later married and wrote his wife from Viet Nam that he had made her the beneficiary of his policy. There was some evidence that the form had been completed, but after the insured was killed, it could not be found. The wife urged that there had been substantial compliance and that, therefore, the change should be given effect. However, unlike the Beaumont court, the Tyler court of civil appeals refused to recognize that substantial compliance could ever be sufficient to change a beneficiary under a serviceman's policy. Since the policy was made available to the serviceman by federal statute, the court felt its interpretation was a matter of federal law and that the issue was controlled by a federal court's interpretation requiring literal compliance.[41]

In *Navarro v. Dobbs*[42] a change of beneficiary card, which was completed, acknowledged, and filed, but not signed by the deceased, was held not to be "substantial compliance." In so holding, the court noted that in changing a beneficiary, there is no act "more basic to substantial compliance with this policy or any other than the signature of the insured."[43]

Cash Surrender Value. In *Franklin Life Insurance Co. v. Winney*[44] the insured requested the cash surrender value of his policy in a letter mailed from Mexico City on April 8, 1968. Two days later he was killed in a plane crash, but the letter was not received at the home office of the insurer until April 15. The beneficiary brought suit for the face amount of the policy, and the insurer contended that only the cash surrender value was due. The policy provided that the cash surrender value could be obtained by written request to the company "filed at its home office in Springfield, Illinois." The court held that "filing" was not satisfied by depositing the letter in the mail, and that at the time of the insured's death the policy was in full force and effect.

Accidental Death. Two opinions construed the provisions of accidental death policies in determining whether the insured's death was caused by "accident" within the meaning of the policies. In *Stroburg v. Insurance Co. of North America*[45] the insured suffered from emphysema and bleeding ulcers. According to the medical reports, the bleeding ulcers caused a brief loss of consciousness while the insured was driving his car. The car went out of control and crashed into a pole. The insured received multiple injuries and eventually died. The jury found that the automobile accident was the cause of death "directly and independently of all other causes," and that neither the ulcer nor the emphysema contributed to the insured's death. Reversing the court of civil appeals and affirming the trial court, the supreme court held that the policy exclusion for losses "caused by or resulting from . . . illness, disease . . . bodily infirmity or any bacterial infection" applied only when such excluded risks were a "proximate as distinguished from an indirect or remote cause of the

[41] Stribling v. United States, 419 F.2d 1350 (8th Cir. 1969).
[42] 456 S.W.2d 265 (Tex. Civ. App.—Houston [14th Dist.] 1970).
[43] *Id.* at 266.
[44] 469 S.W.2d 21 (Tex. Civ. App.—San Antonio 1971), *error ref. n.r.e.*
[45] 464 S.W.2d 827 (Tex. 1971).

loss."[46] Thus, the supreme court held that there was evidence to support the jury's findings and remanded to the court of civil appeals for consideration of the insufficient evidence points.

In *Great American Reserve Insurance Co. v. Sumner*[47] the policy provided for payment of accidental death benefits if the death resulted from accidental bodily injury "resulting solely, directly and independently of all other causes." The insured was allegedly shot while engaged in an act of sexual intercourse with his assailant's wife. The court noted that the question of whether death is "accidental" within the meaning of the policy is a fact question to be determined from the viewpoint of the insured, rather than that of the killer. Holding that there was sufficient evidence to support the lower court's finding that the insured died solely as a result of an accident, the court recognized that adultery is "morally reprehensible," but noted that death is not the usual or expected result of it, so as to make the insured's death nonaccidental.

Effect of Divorce. In *Partin v. de Cordova*[48] the deceased divorced his first wife who was the named beneficiary under five insurance policies on his life. A property settlement agreement at the time of the divorce gave the insured ownership of community assets including the policies. The insured later remarried, but failed to designate a new beneficiary. After his death the administrator of his estate filed suit contending that the first wife had given up all rights in the policy by executing the property settlement agreement. The court held that she did surrender her community interests, but that that did not destroy her right to be designated as a beneficiary, and although the insured had the right to change the designation, he never did.

Effect of Binder. In *Carter v. Union Bankers Insurance Co.*[49] the insurer issued a binder which stated that coverage would be effective from the date of application for life insurance, provided that the applicant was "insurable and acceptable for the policy" and the company "issues the policy exactly as applied for within thirty days from the date of this receipt." The policy was not issued within thirty days, and the company sent a "delay notice," stating that it needed additional information before a decision could be made on the application. The applicant was killed shortly thereafter, and the insurer denied coverage. The court held that the question of the applicant's insurability on the date of the application and the insurer's good faith were not material since the binder validly provided that it would not be effective unless a policy was actually issued within thirty days. The "delay notice" did not estop the company since there was no reasonable basis for the belief that the condition was no longer effective.

Medicare. An insured under a policy providing coverage for hospital and medical expenses "actually and necessarily incurred" was denied recovery for

[46] *Id.* at 831, 832.
[47] 464 S.W.2d 212 (Tex. Civ. App.—Tyler 1971), *error ref. n.r.e.*
[48] 464 S.W.2d 956 (Tex. Civ. App.—Eastland 1971), *error ref.*
[49] 461 S.W.2d 445 (Tex. Civ. App.—Waco 1970), *error ref.*

expenses paid by the federal government under the Medicare program.[50] Since the hospital had contracted with the federal government not to charge patients covered by Medicare, the court reasoned that the expenses had not been "actually incurred."

III. Fire and Casualty Insurance

Reviewing a court of civil appeals decision reported last year,[51] the supreme court in *United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp.*[52] construed the "malicious mischief" endorsement. The endorsement included "damage to the building covered hereunder caused by burglars," but provided that the insurer "shall not be liable under this endorsement for any loss . . . by pilferage, theft, burglary or larceny . . . ." Burglars had broken into the insured's building and ripped out all the copper wiring and transformers. The court of civil appeals had held that there was coverage for all the damage done in removing the wiring, although loss of the wiring itself was not covered. The majority of the supreme court decided, however, that the terms of the endorsement provided coverage for "all cost of material and labor necessary to repair the building,"[53] which apparently included the value of the wiring. Four concurring justices, however, contended that the majority interpretation of the endorsement had enlarged the contract from its intended purpose of insuring against direct damage to the building to one of insuring against theft losses.[54]

Missing Policy Provisions. In *Insurance Co. of North America v. Cash*[55] a policy that provided physical damage coverage for an amphibious airplane provided that the coverage would not apply unless "the pilot in command of the aircraft is a person named below, or a person meeting the qualifications set forth below." In the blank that followed was listed the insured's name, but no qualifications were set forth.

The plane crashed while piloted by one other than the named insured. The insured contended that summary judgment in his favor should be affirmed because the qualifications of the pilot who was flying the plane when it crashed exceeded his own. The court refused, however, to "engraft" the named insured's qualifications in the blank space. Nevertheless, the court affirmed judgment for the insured on the basis that the insurer had failed to specifically allege the particular exception relied upon when it merely denied that the pilot "was an insured pilot."

The supreme court in a five-to-four decision affirmed,[56] but on the opposite basis. It held that the summary judgment should not have been affirmed on the ground that the insurer's pleadings were insufficient under rule 94,[57] since

[50] American Bankers Ins. Co. v. Black, 466 S.W.2d 616 (Tex. Civ. App.—Tyler 1971), *error granted.*
[51] Brin, *Insurance Law, Annual Survey of Texas Law*, 25 SW. L.J. 106, 116 n.60 (1971).
[52] 464 S.W.2d 353 (Tex. 1971).
[53] *Id.* at 356.
[54] *Id.* at 358 (concurring opinion).
[55] 465 S.W.2d 846 (Tex. Civ. App.—Waco 1971), *error granted.*
[56] 15 Tex. Sup. Ct. J. 115 (1971).
[57] Tex. R. Civ. P. 94.

that would properly only be the basis for a remand. The majority instead held that the pilot endorsement did not limit coverage to the times the aircraft was piloted only by the insured. Since no qualifications were set forth, at best coverage could only be restricted to those of similar or superior qualifications to those of the insured, so that the coverage was in effect under the circumstances.

In *Indemnity Marine Assurance Co. v. Citizens National Bank*[58] the fire insurance policy covered a cotton stripper while it was located "at the premises hereinafter described or within fifty miles thereof." No premises were described in the blank that followed, and the insurer contended that the exclusions referred to the named insured's address listed in another portion of the policy. This construction would have avoided coverage, since the fire occurred while the insured equipment was located more than fifty miles from that address. The court held that the policy must be construed in favor of coverage and that the failure to fill in the blank amounted to a waiver by defendant of the geographical-limitation clause.

Pilot Qualifications. The policy before the court in *Republic Aero, Inc. v. North American Underwriters*[59] provided that there would be no coverage unless the pilot had "five hundred hours total time." Reversing a judgment for defendant, the court of civil appeals held that the flying time logged while the pilot in question manipulated the controls, but while a duly licensed pilot was in the aircraft as pilot in command could be utilized in computing "total time" within the meaning of the policy, even though those hours would not be counted towards satisfying the requirements for any Federal Aviation Administration certificate.

Notice. As a matter of law notice of an accident given the insurer of an aircraft forty-six days after the accident was not given "as soon as practicable" as required by the policy.[60] The only reason for the delay was the insured's mistaken impression that the aircraft could be repaired for an amount within his deductible.

Snowstorm Exclusions. Reversing the courts below, the supreme court in *Travelers Indemnity Co. v. McKillip*[61] considered the problem of a loss occurring through a combination of elements. There was evidence that plaintiff's barn had been damaged by windstorm, an insured risk under the policy, and by snowstorm, an excluded peril. The courts below allowed the plaintiff to recover on jury findings that the windstorm was the "dominant efficient cause of the loss." The majority of the supreme court reversed and remanded on the basis that the trial court should have submitted requested issues inquiring whether the damage was caused by a combination of wind and snow, and if so, the percentage of the damage caused by the snow. The dissent considered that the

[58] 463 S.W.2d 290 (Tex. Civ. App.—Waco 1971), *error ref. n.r.e.*
[59] 462 S.W.2d 635 (Tex. Civ. App.—Waco 1971).
[60] Edwards v. Ranger Ins. Co., 456 S.W.2d 419 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*
[61] 469 S.W.2d 160 (Tex. 1971).

damages caused by the included and excluded perils had already been separated by the jury's findings and that there was evidence to support those findings.[62]

[62] *Id.* at 163 (dissenting opinion).