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# INSURANCE LAW

by

Royal H. Brin, Jr.\*

## I. AUTOMOBILE AND LIABILITY INSURANCE

*Uninsured Motorist Coverage.* Highlighting automobile and liability insurance law developments during this reporting period were several opinions in the still-formative area of uninsured motorist insurance.

*Fidelity & Casualty Co. v. Gatlin*<sup>1</sup> was the first of three cases which dealt with efforts to "stack" or "pyramid" available coverages under multiple policies providing uninsured motorist benefits. Mrs. Gatlin was killed when an automobile in which she was a passenger collided with a car driven by an uninsured motorist. The vehicle in which she was riding was covered by Republic Insurance Company's policy containing uninsured motorist limits of \$10,000 per person and \$20,000 per occurrence. Mrs. Gatlin was one of five occupants in the vehicle, and her beneficiaries under the Wrongful Death Act accepted \$4,000 as their pro rata share of Republic's policy limits. Thereafter, the beneficiaries brought suit to recover \$10,000 more from Fidelity & Casualty, the insurer of the Gatlin family automobile, whose policy had similar limits of uninsured motorist coverage. The damages were stipulated to be in excess of \$14,000. Fidelity & Casualty defended on the basis of the "other insurance" clause in its policy, and plaintiffs countered that such a clause was contrary to the policy embodied in the Uninsured Motorist Statute<sup>2</sup> and, therefore, invalid. The Dallas court of civil appeals affirmed judgment for plaintiffs, holding: (1) that the Uninsured Motorist Statute sets a minimum amount of coverage, but no maximum so long as that amount does not exceed the amount of actual loss; (2) that where the loss exceeds the limit of one policy, the insured may proceed under other available policies; and (3) a liability-limiting clause inconsistent with the statutory policy is unenforceable.

Writ of error was not sought in *Gatlin*, but within a few months *Gatlin* was followed in *Northwestern Mutual Insurance Co. v. Lawson*,<sup>3</sup> a venue case, and expressly approved by the Texas Supreme Court in *American Liberty Insurance Co. v. Ranzau*.<sup>4</sup> *Ranzau*, however, involved an additional twist in that plaintiff not only sought to stack the coverage on the automobile in which she was riding with her own coverage, but also to collect \$20,000 as the sum of the policy limits on two vehicles owned by her family and insured under one

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<sup>1</sup> 470 S.W.2d 924 (Tex. Civ. App.—Dallas 1971).

<sup>2</sup> (1) No automobile liability insurance . . . covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state unless coverage is provided therein or supplemental thereto, in the limits described in the Texas Motor Vehicle Safety-Responsibility Act, under provisions prescribed by the board, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

TEX. INS. CODE ANN. art. 5.06-1 (Supp. 1972).

<sup>3</sup> 476 S.W.2d 931 (Tex. Civ. App.—Tyler 1972).

<sup>4</sup> 481 S.W.2d 793 (Tex. 1972).

policy issued by American Liberty. In the absence of proof that an additional premium had been charged and paid with respect to the second automobile owned by the plaintiff, for additional uninsured motorist coverage while riding in a non-owned vehicle, the court limited Mrs. Ranzau to the recovery of only an additional \$10,000 from her own carrier.

Other provisions inserted in policies in an attempt to limit liability with respect to uninsured motorists were also subjected to attack as being in violation of the Uninsured Motorist Statute, and thus unenforceable. In *Grissom v. Southern Farm Bureau Insurance Co.*<sup>5</sup> Mrs. Grissom had been injured while in a vehicle which was struck by an uninsured motorist. She received \$2,500 as her share of a policy-limits settlement with Westchester Fire Insurance Company, the insurer of the vehicle in which she was riding. She then sued her own uninsured motorist carrier, Southern Farm Bureau. Its policy, as a condition of uninsured motorist coverage, required Southern Farm Bureau's written approval of any settlement with anyone liable for the injuries in question. Southern Farm Bureau had not been requested to, and did not, approve in writing the prior settlement with Westchester. In a non-jury trial on stipulated facts, the written-consent clause was upheld and judgment entered that plaintiff take nothing. The Waco court of civil appeals affirmed, holding that the statute required the State Board of Insurance to prescribe the policy provisions for uninsured motorist coverage, that the Board approved the policy language, and that the policy would be enforced as unambiguously written. Similarly, the requirement that a judgment obtained against the uninsured motorist will not be binding on the uninsured motorist carrier unless the carrier gives its written consent to be so bound was held valid.<sup>6</sup>

Recoupment rights provided uninsured motorist carriers by various policy provisions were also enforced despite claims that they violated the Uninsured Motorist Statute. In *Jobe v. International Service Insurance Co.*<sup>7</sup> and *Traders & General Insurance Co. v. Reynolds*<sup>8</sup> plaintiffs alleged damages from the negligence of two motorists, one insured and one uninsured. Plaintiffs in each case were paid \$10,000 on behalf of the insured motorist, and then sought additional recovery of uninsured motorist benefits. The uninsured motorist carriers asserted that under the relevant policy provisions the settlement with the insured motorist barred additional recovery from them. Plaintiffs urged that policy provisions giving the uninsured motorist carriers the benefit of any settlement or making it a defense were void and could not be enforced. The court of civil appeals noted that the Uninsured Motorist Statute specifically authorizes an insurer to recoup uninsured motorist benefits paid to any person from "the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person legally responsible for the bodily injury . . . for which such payment is made . . ." Thus, the

<sup>5</sup> 476 S.W.2d 448 (Tex. Civ. App.—Waco 1972), *error ref. n.r.e.*

<sup>6</sup> *Criterion Ins. Co. v. Brown*, 469 S.W.2d 484 (Tex. Civ. App.—Austin 1971), *error ref. n.r.e.* The court also pointed out that, in Texas, an insurer consenting to be bound by judgment against the uninsured motorist cannot defend him because of the rule of *Allstate Ins. Co. v. Hunt*, 469 S.W.2d 151 (Tex. 1971).

<sup>7</sup> 474 S.W.2d 11 (Tex. Civ. App.—Waco 1971), *error ref. n.r.e.*

<sup>8</sup> 477 S.W.2d 937 (Tex. Civ. App.—Texarkana 1972), *error ref. n.r.e.*

<sup>9</sup> TEX. INS. CODE ANN. art. 5.06-1(3) (Supp. 1972).

courts held that the recoupment and credit provisions were not in derogation of the Code and must be enforced according to their terms.<sup>10</sup>

*Hit-and-Run.* The hit-and-run provisions of the standard uninsured motorist coverage require one asserting a claim for damages allegedly caused by a hit-and-run automobile to file with the insurer, within thirty days after the accident in question, a sworn statement setting forth the facts in support of any alleged cause of action against the hit-and-run driver. In *Latham v. Mountain States Mutual Casualty Co.*<sup>11</sup> such a provision was held to be void. The supreme court in *Doyle v. United Services Automobile Ass'n*<sup>12</sup> alluded to the holding in *Latham*, but reserved opinion on the issue involved there. On the other hand, the requirement that there be actual physical contact between a hit-and-run vehicle and an insured vehicle was expressly approved in *Phelps v. Twin City Fire Insurance Co.*<sup>13</sup>

*Failure To Forward Suit Papers.* Reviewing a court of civil appeals opinion reported last year,<sup>14</sup> the supreme court, in *Members Mutual Insurance Co. v. Cutaia*,<sup>15</sup> held that a judgment rendered against the insured could not be enforced against the insurance company, because the insured had failed to forward suit papers to the insurer. The court of civil appeals had recognized the general rule that suit papers must be timely forwarded to the company as a condition precedent for coverage, but held it inapplicable since the insurance company admitted that it had not actually been prejudiced by the failure. Reversing that decision, the supreme court noted that the policy itself required no showing of prejudice in order to avoid coverage because of a violation of a condition precedent, and stated that no such requirement would be added by the court.

*Notice.* In *Carroll v. Employers Casualty Co.*<sup>16</sup> it was similarly held that prejudice to the insurer need not be shown in order for the insurer to avoid coverage on the basis of the insured's failure to give notice of an accident as soon as practicable. Further, the court held that an insured's own determination that he has no liability for an accident does not excuse his failure to give notice of the accident as soon as practicable.

In *Employers Casualty Co. v. Glen Falls Insurance Co.*<sup>17</sup> Employers had insured Tobin & Rooney Plastering Company. Glen Falls issued an automobile liability policy to Shelton W. Greer Company, covering a truck which hauled material to a Tobin & Rooney job site. Tobin & Rooney employees took sacks

<sup>10</sup> *Allstate Ins. Co. v. Clarke*, 471 S.W.2d 901 (Tex. Civ. App.—Houston [1st Dist.] 1971), *error ref. n.r.e.*, also implies that such recoupment provisions are valid, although arising before the effective date of the statute.

<sup>11</sup> 482 S.W.2d 655 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*

<sup>12</sup> 482 S.W.2d 849 (Tex. 1972).

<sup>13</sup> 476 S.W.2d 419 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.*

<sup>14</sup> *Members Mut. Ins. Co. v. Cutaia*, 460 S.W.2d 493 (Tex. Civ. App.—Houston [14th Dist.] 1970), reported in Brin, *Insurance Law, Annual Survey of Texas Law*, 26 Sw. L.J. 166, 168 n.16 (1972).

<sup>15</sup> 476 S.W.2d 278 (Tex. 1972).

<sup>16</sup> 475 S.W.2d 390 (Tex. Civ. App.—Beaumont 1971), *error ref. n.r.e.*

<sup>17</sup> 484 S.W.2d 570 (Tex. 1972).

of material from the Greer truck and placed them on an elevator which lifted them to the nineteenth floor of a building under construction. One of the sacks fell from the elevator, striking and injuring Murphy. Employers satisfied a judgment entered in favor of Murphy against Tobin & Rooney and then brought this action alleging that Glen Falls was liable for the claim since the Tobin & Rooney employees, while unloading the truck, were omnibus insureds under the Glen Falls policy. By the time the matter reached the supreme court, the issues had been narrowed to the question of whether proper notice had been given Glen Falls on behalf of the Tobin & Rooney employees to entitle them to coverage under the Glen Falls policy. It was undisputed that Glen Falls had been given timely notice by its named insured, Greer. Noting that it was a case of first impression in Texas, the court held that the notice of the accident given by the named insured insured "to the benefit of any additional or omnibus insureds . . . [since it was] sufficient to place the insurer on inquiry as to the extent of its possible liability and omnibus coverage . . . ."<sup>18</sup>

*Punitive Damages.* Whether the standard automobile liability policy provides coverage for punitive damages awarded as the result of gross negligence on the part of an insured was decided in *Dairyland County Mutual Insurance Co. v. Wallgren*.<sup>19</sup> The pertinent portions of Dairyland's policy obligated it to pay on behalf of its insured:

all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury, sickness or disease, including death resulting therefrom . . . sustained by any person . . . arising out of the ownership, maintenance or use of the owned automobile . . . .<sup>20</sup>

The court held that the quoted language itself obligated Dairyland to pay punitive, as well as actual, damages assessed against its insured and that the insurance contract did not contravene public policy in so providing since its terms were prescribed and approved by the Insurance Commission and thus represented public policy of the state.

*Stowers Doctrine.* Bolstered by the recent abolition of the prepayment rule<sup>21</sup> in suits based upon the famous holding in *G. A. Stowers Furniture Co. v. American Indemnity Co.*,<sup>22</sup> the claimant in *Cook v. Superior Insurance Co.*<sup>23</sup> attempted to enforce a *Stowers*-type liability by garnishment. In 1963, Cook had secured a judgment against Sallie, Superior's insured, for \$15,465.46. Prior to obtaining the judgment, Cook had offered to settle with Superior for \$5,000, but Superior had refused the offer. Superior paid its \$5,000 policy limits, and the remainder of the judgment was uncollected. Cook then brought a garnishment action alleging that under the *Stowers* doctrine the garnishee, Superior, was indebted to Sallie in an amount equal to the unpaid portion of

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<sup>18</sup> *Id.* at 575.

<sup>19</sup> 477 S.W.2d 341 (Tex. Civ. App.—Fort Worth 1972), *error ref. n.r.e.*

<sup>20</sup> *Id.* at 343.

<sup>21</sup> *Hernandez v. Great Am. Ins. Co.*, 464 S.W.2d 91 (Tex. 1971).

<sup>22</sup> 15 S.W.2d 544 (Tex. Comm'n App. 1929), *holding approved.*

<sup>23</sup> 476 S.W.2d 363 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.*

the judgment plus interest. The court noted that the doctrine of *Stowers* required a negligent failure to settle a suit within the policy limits, and that such a demand arising in tort was not subject to garnishment.

*Insurance and the Jury.* Two courts of civil appeals, in separate opinions, held that a deliberate mention of insurance during *voir dire* examination by plaintiff's counsel intended to convey the impression that the defendant was covered by insurance was reversible error,<sup>24</sup> but that an inadvertent mention of insurance by plaintiff was properly cured by the trial court's instruction for the jury to disregard that testimony.<sup>25</sup>

*Vehicular Definition.* A motorcycle is not an automobile within the meaning of the medical payments provisions of the standard automobile insurance policy;<sup>26</sup> nor is it an "uninsured automobile" within the meaning of the uninsured motorist provisions of the standard policy.<sup>27</sup> However, in *State Farm Automobile Insurance Co. v. Durrett*,<sup>28</sup> a non-owned half-ton pickup truck was held to be a "private passenger automobile" within the meaning of State Farm's policy providing property damage coverage for non-owned automobiles while driven by State Farm's insured.

## II. LIFE, HEALTH, AND ACCIDENT INSURANCE

*Social Security Benefits.* Reversing a court of civil appeals opinion reported last year,<sup>29</sup> the supreme court held that medical expenses paid for by the Social Security Administration under the Medicare program, are "actually incurred" by the patient. In *Black v. American Bankers Insurance Co.*<sup>30</sup> the insurer agreed to pay for "usual and customary expenses actually and necessarily incurred."<sup>31</sup> Since the hospital in which Black was confined had contracted with the Social Security Administration "not to charge . . . any individual or any other person for items or services for which such individual is entitled to have payment made under [Medicare],"<sup>32</sup> the insurer contended that the expenses paid by Medicare had not been actually incurred by Black and, thus, were not covered by the policy. The court disagreed, holding that the Medicare Act made it quite clear that a patient must incur the hospital expenses and have a legal obligation to pay them before they can be paid by the Social Security Administration. The court further noted that should the expenses not be paid by Social Security, they would remain a legal obligation of the patient, and thus were actually incurred within the meaning of the policy.

<sup>24</sup> *A.J. Miller Trucking Co. v. Wood*, 474 S.W.2d 763 (Tex. Civ. App.—Tyler 1971), *error ref. n.r.e.*

<sup>25</sup> *Brewer v. Scarborough*, 483 S.W.2d 562 (Tex. Civ. App.—Eastland 1972).

<sup>26</sup> *Futrell v. Indiana Lumberman's Mut. Ins. Co.*, 471 S.W.2d 926 (Tex. Civ. App.—Houston [1st Dist.] 1971).

<sup>27</sup> *Members Mut. Ins. Co. v. Randolph*, 477 S.W.2d 315 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*

<sup>28</sup> 472 S.W.2d 214 (Tex. Civ. App.—Fort Worth 1971).

<sup>29</sup> *American Bankers Ins. Co. v. Black*, 466 S.W.2d 616 (Tex. Civ. App.—Tyler 1971), *reported in Brin, supra* note 14, at 174 n.50.

<sup>30</sup> 478 S.W.2d 434 (Tex. 1972).

<sup>31</sup> *Id.* at 436.

<sup>32</sup> *Id.*

However, in *Voss v. Mutual of Omaha Insurance Co.*<sup>33</sup> a group disability policy provision which effectively nullified an insurer's obligation to make disability payments because of the availability of Social Security benefits was enforced. There the insurer had agreed to pay Voss a bi-weekly income benefit equal to sixty percent of his basic bi-weekly earnings at the time he became disabled. The policy further provided, however, that the income benefit would be reduced by the amount of any available Social Security benefits. Since such benefits exceeded sixty percent of his bi-weekly earnings, the court held that Voss was entitled to nothing under the policy. In so doing, it rejected the argument that the reduction clause was contrary to public policy. The insured had insisted that the provision should not be enforced for public policy reasons, since by the very nature of the earnings of the group members the insurer must have known when it issued the policy that Social Security benefits would normally exceed sixty percent of an employee's bi-weekly earnings and make recovery under the policy highly unlikely.

*Change of Beneficiary.* In an opinion reported last year,<sup>34</sup> a court of civil appeals held in *Farley v. Prudential Insurance Co.*<sup>35</sup> that substantial compliance with policy requirements was not sufficient to change the beneficiary of a serviceman's group life insurance policy. Reversing that decision,<sup>36</sup> the supreme court discussed deposition testimony that prior to Farley's death a cavalry officer fitting Lt. Farley's description had executed an instrument changing the beneficiary at Farley's base in Dong Tam, Vietnam; that mail service in the area was poor at times; and that sometimes the entire records in an office would be destroyed. Thus, the court held that summary judgment for the named beneficiary was improper since she had not met her summary judgment burden of proving the nonexistence of fact issues by merely establishing herself as the beneficiary presently named in the Army's file.

*Accidental Death.* The question of the characterization of an insured's death as accidental within the meaning of a life insurance policy, continued to spawn bizarre litigation during this reporting period. In *Holstine v. Connecticut General Life Insurance Co.* the policy provided death benefits upon proof that the insured died as a result of an accidental injury "directly and independently of all other causes."<sup>37</sup> The insured, while afflicted with lymphoma, a disease of the bone marrow, stuck a pencil point in his hand and subsequently died. The medical witnesses disagreed as to the exact cause of death, but agreed that if the insured had not been afflicted with the disease he probably would not have died. Recognizing the rule that an insured may have a pre-existing disorder and still recover if the accidental injury is severe enough to cause the entire damage and death, the court nevertheless held that the beneficiary had failed to meet her burden of proving accidental death directly and independently of all other causes.

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<sup>33</sup> 469 S.W.2d 602 (Tex. Civ. App.—San Antonio 1971), *error ref.*

<sup>34</sup> Brin, *supra* note 14, at 171 n.40.

<sup>35</sup> 468 S.W.2d 147 (Tex. Civ. App.—Tyler 1971).

<sup>36</sup> *Farley v. Prudential Ins. Co.*, 480 S.W.2d 176 (Tex. 1972).

<sup>37</sup> 338 F. Supp. 817, 818 (E.D. Tex. 1972).

In *McGowen v. Travelers Insurance Co.*<sup>38</sup> the enraged insured approached his wife, the beneficiary under an accidental death policy, wielding a knife. In response to her pleas for help, the insured's brother shot the insured in the stomach. After a brief retreat the insured returned, knife in hand. The insured's brother then shot a second time, killing him. Chief Judge Brown, writing for the Fifth Circuit, noted that the Texas test for determining whether a shooting is accidental within the meaning of an accidental death policy is to be applied from the viewpoint of the insured. If the insured should have realized that he would probably be killed, his death is not accidental. Applying this test, the court determined that the insured, during his second foray, should have expected that his intended victims would defend themselves and that "[a] bullet in the stomach was fair warning that the defense would be more than token."<sup>39</sup> Thus, a directed verdict for the insurer was affirmed.

The rather common accident insurance policy provision providing coverage to an insured "while driving or riding in an automobile" was construed in *First Continental Life & Accident Insurance Co. v. Hankins*.<sup>40</sup> It was held that such a provision does not extend coverage to one killed while working beneath an automobile, replacing its drive shaft.

*Penalty and Attorney's Fees.* By virtue of the Texas Insurance Code,<sup>41</sup> life, health, and accident insurance companies are liable for a twelve percent penalty and reasonable attorney's fees for the failure to pay a loss within thirty days after "demand therefor." In *International Security Life Insurance Co. v. Redwine* the supreme court pointed out that "the making of a demand is an essential element of the insured's cause of action for the recovery of statutory penalty, and attorney's fees,"<sup>42</sup> and that the filing of the suit is not in itself a demand. Similarly, it has been held that the filing of proof of death forms and a death certificate with a life insurance company does not constitute a statutory demand.<sup>43</sup>

*Amount of Attorney's Fees.* In *Union National Life Insurance Co. v. Reese*<sup>44</sup> plaintiff recovered a \$500 accidental death benefit plus \$60 for the statutory penalty and \$2,702.50 for attorney's fees. In oral argument before the court of civil appeals, counsel for the insurer abandoned all of his previously alleged defenses, calling them "garbage." The insurer then complained only that the award of attorney's fees was excessive, characterizing the entire matter as a "career case," in which the amount involved did not warrant the fee necessary to compensate fully for the legal services rendered. Affirming the award, the court in effect said that if the matter was a "career case," it had been made such by the insurer's numerous alleged but subsequently abandoned defenses, and that the insurer had not justified a reduction in the award. In a

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<sup>38</sup> 448 F.2d 1315 (5th Cir. 1971).

<sup>39</sup> *Id.* at 1317.

<sup>40</sup> 480 S.W.2d 244 (Tex. Civ. App.—Amarillo 1972), *error ref. n.r.e.*

<sup>41</sup> TEX. INS. CODE ANN. art. 3.62 (1963).

<sup>42</sup> 481 S.W.2d 792, 793 (Tex. 1972).

<sup>43</sup> *Compton v. Travelers Ins. Co.*, 483 S.W.2d 383 (Tex. Civ. App.—El Paso 1972).

<sup>44</sup> 476 S.W.2d 928 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.*

comparable situation the Fort Worth court of civil appeals affirmed an award of \$900 attorney's fees on a \$179.90 hospitalization claim.<sup>45</sup>

*Exemplary Damages.* In *United Savings Life Insurance Co. v. Glenn*<sup>46</sup> plaintiffs alleged that the insurer's agent induced them to purchase a life insurance policy with the misrepresentation that they were investing in defendant's stock through a revenue producing agreement called the "Sign 600 Contract." Affirming a judgment based upon jury findings, the court ordered the insurance contract rescinded with a refund of all premiums, and plaintiffs were allowed to recover \$4,500 in punitive damages.

Punitive damages in the amount of \$2,500 were also allowed in *International Security Life Insurance Co. v. Finck*.<sup>47</sup> The jury there found, *inter alia*, that plaintiff relied upon a false and material representation of International Security's agent that the company had the reputation of promptly paying claims. Appellant contended that the agent had no duty to inform the purchaser of the company's claim policy. The court of civil appeals held, however, that once the agent had undertaken to describe the insurer's claim policy, "it became his duty to speak the truth."<sup>48</sup> With two justices dissenting, the supreme court affirmed as to exemplary damages, but reversed and remanded because of a further award of attorney's fees of \$2,500. The evidence indicated that \$2,500 was a reasonable fee for prosecution of the entire cause, but attorney's fees were properly recoverable only with respect to the amounts due under the policy and not for services in connection with the cause of action for fraud.

*Interpleader.* That a life insurer subjected to conflicting claims by the named beneficiary and another for policy proceeds may tender the proceeds into the court, interplead the claimants, and recover its attorney's fees was reaffirmed in *Givens v. Girard Life Insurance Co. of America*.<sup>49</sup> It was further held that because of the conflicting claims, the insurer's failure to pay within thirty days of demand did not render it liable for the statutory penalty and attorney's fees.

*Disability Benefits.* In *Continental Casualty Co. v. Loville* the insurer paid Loville monthly disability benefits from 1959 through 1968 under a policy defining disability as accidental injury "which should immediately, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation."<sup>50</sup> A doctor testified that by 1969 Loville's injury had sufficiently healed so that he had the physical capacity to resume his former work as a railroad switchman, but could not do so because at seventy-three years of age the railroad would not want him. However, the trier of fact accepted the insured's testimony that he was still unable

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<sup>45</sup> *Bankers Commercial Life Ins. Co. v. Ramey*, 476 S.W.2d 715 (Tex. Civ. App.—Fort Worth 1972).

<sup>46</sup> 473 S.W.2d 629 (Tex. Civ. App.—Waco 1971), *error ref. n.r.e.*

<sup>47</sup> 475 S.W.2d 363 (Tex. Civ. App.—Amarillo 1971), *error granted.*

<sup>48</sup> *Id.* at 370.

<sup>49</sup> 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

<sup>50</sup> 476 S.W.2d 924, 927 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*

to work because of the injury, apart from his age, and the court of civil appeals affirmed.

Under an industrial accident policy defining the loss of an eye as the complete and irrevocable loss of sight in that eye, a court of civil appeals affirmed its prior holding<sup>51</sup> that loss of sight is not irrevocable when sight probably could be recovered through proper surgical treatment, unless such treatment would not be undergone by a person of ordinary prudence under the same or similar circumstances. On the second appeal<sup>52</sup> the court additionally held that plaintiff's testimony that he was "not figuring on" having a cataract operation was not evidence of whether an ordinarily prudent man would undergo such an operation in order to recover his sight.

*Insurable Interest.* In *North River Insurance Co. v. Fisher*<sup>53</sup> the named beneficiary in an accidental death policy testified that he obtained the policy for the benefit of the insured's family. After the insured's death, his family, joined by the named beneficiary, filed suit to recover the proceeds. The court held that the lack of insurable interest in the person who procured the insurance for the benefit of the insured's family, who did have such an interest, did not void the policy.

*Hospitalization Benefits.* Affirming summary judgment for the insurer, the court in *Presbyterian Hospital v. National Life & Accident Insurance Co.* held that an assignment of benefits executed by a patient authorizing his insurer to pay directly to the hospital "all benefits due me . . . as provided for in the . . . policy contract"<sup>54</sup> did not give the hospital an independent right of recovery in a suit against the insurer.

*Good Health Requirement.* Applying Texas law, the Court of Appeals for the Fifth Circuit in *Beck v. Connecticut General Life Insurance Co.*<sup>55</sup> considered the good health clause of a life insurance policy, which provided that the policy was void if the insured was not in good health at the time it was delivered to him. The court noted that the clause made good health a condition precedent to coverage, and held that an insurer could not waive the good health clause or be estopped to assert it.

### III. FIRE AND CASUALTY INSURANCE

*Other Insurance.* In *Insurance Co. of North America v. Fireman's Fund Insurance Co.*<sup>56</sup> both Fireman's Fund and INA had issued policies to Dresser Industries covering a compressor package designed for use in offshore oil drilling operations. The compressor package was damaged when it slipped from a barge into the waters of the Houston ship channel. The two insurers jointly satisfied Dresser's claim, and then litigated the coverage question. Each policy

<sup>51</sup> *Reliable Life Ins. Co. v. Steptoe*, 435 S.W.2d 630 (Tex. Civ. App.—Tyler 1968).

<sup>52</sup> *Reliable Life Ins. Co. v. Steptoe*, 471 S.W.2d 430 (Tex. Civ. App.—Tyler 1971).

<sup>53</sup> 481 S.W.2d 443 (Tex. Civ. App.—Amarillo 1972), *error ref. n.r.e.*

<sup>54</sup> 480 S.W.2d 497, 498 (Tex. Civ. App.—Dallas 1972).

<sup>55</sup> 456 F.2d 1040 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972).

<sup>56</sup> 471 S.W.2d 878 (Tex. Civ. App.—Houston [1st Dist.] 1971), *error ref. n.r.e.*

contained an "other insurance" clause making its coverage excess insurance over other available coverage. However, the specific language of the Fireman's Fund policy made it excess against any loss covered by other insurance, while the INA policy provided that it would be excess insurance "where any specific insurance exists in the name of the Assured on property insured hereunder."<sup>57</sup> It was clear that the INA policy constituted other insurance which invoked the excess provisions of the Fireman's Fund policy. The court held that the Fireman's Fund policy which provided coverage of \$1,000,000 "on property while waterborne within Jacintoport, Houston Ship Channel, Texas"<sup>58</sup> did not constitute specific insurance on the compressor which invoked the excess provisions of the INA policy, and thus INA was held liable for the entire loss.

*Change of Ownership.* A fire insurance policy provision providing that the insurer would not be liable following a change in ownership of the insured property was enforced by a court of civil appeals in *Home Insurance Co. v. Brownlee*.<sup>59</sup> Brownlee, the new owner, obtained an assignment of the former owner's rights against the insurer, and testified that although a warranty deed conveying the property to him had been filed three days prior to the fire, he had an oral agreement with the former owner that the deed would not be effective until January 1, 1970, more than two months after the fire. The court held that such parol evidence was not admissible and that neither the former owner nor Brownlee could recover under the policy.

In *Hanover Insurance Co. v. Hoch*,<sup>60</sup> however, two recoveries for the destruction by fire of one house were obtained. Mrs. Hoch had made payments on the house for her aunt. After the aunt died, ownership of the house passed to the aunt's daughter, who obtained a fire insurance policy on it with Farmer's Insurance Group. Mrs. Hoch then obtained a fire insurance policy from Hanover's agent. The agent understood that there was a possibility of other insurance on the property, but, after finding none, issued a policy in Mrs. Hoch's name. After the fire, the owners recovered \$5,500 on their policy. The court also allowed Mrs. Hoch to recover on her policy, holding that there was no mutual mistake in the issuance of the second policy and that the insurer, through its agent, assumed the risk of an outstanding policy.

*Lessor's Lien.* In *Farmers Insurance Exchange v. Nelson*<sup>61</sup> Nelson had leased a building and its furnishings to Twomey for use as a restaurant. The lease provided that Twomey would "carry fire . . . insurance in an amount satisfactory to Lessor, with loss payable clause to both Lessor and Lessee as interest appears."<sup>62</sup> Instead, the lessee, without Nelson's knowledge, secured a policy from Farmers issued to Tommy T. Twomey d/b/a Golden Nugget Restaurant. Twomey was shown as owner of the premises, and Nelson's interest in the premises was unknown to the insurance company. Thereafter, Nelson's equip-

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<sup>57</sup> *Id.* at 880.

<sup>58</sup> *Id.* at 881.

<sup>59</sup> 480 S.W.2d 491 (Tex. Civ. App.—Eastland 1972).

<sup>60</sup> 469 S.W.2d 717 (Tex. Civ. App.—Corpus Christi 1971), *error ref. n.r.e.*

<sup>61</sup> 479 S.W.2d 717 (Tex. Civ. App.—Waco 1972).

<sup>62</sup> *Id.* at 718.

ment in the building was destroyed by fire, and he made a claim on the policy issued to Twomey. The insurer denied liability, saying that its policy covered only the contents belonging to Twomey. Affirming the court below, the court of civil appeals held that the breach by the lessee of the contract to insure the leased property for the benefit of the lessor charged the "benefits of any insurance taken out by the lessee on the leased property with a lien in favor of the lessor" and that the lessor could "proceed directly against the insurer to recover his pro rata share of any funds payable under the policy."<sup>63</sup>

*Bailor's Interest.* In a similar case, *Cumis Insurance Society, Inc. v. Republic National Bank*, it was held that a policy insuring a bailee for loss of property within its premises "held by the Insured in any capacity and whether or not the Insured is liable therefor,"<sup>64</sup> insured the property for its full value (not just the bailee's interest). The court also held that the owner of the property had the right to proceed directly against the insurer as a third party beneficiary of the policy.

*Mistaken Payment.* An insurer who makes payment under the mistaken belief that a loss is covered under a policy may recoup such payment from the insured. Distinguishing a recent opinion,<sup>65</sup> the court in *Singer v. St. Paul Mercury Insurance Co.*<sup>66</sup> indicated that the most important factors to be considered in determining whether such a recovery should be allowed are whether the payment was relied on by the insured to his detriment and whether recovery of the payment would alter the status quo between the parties.

*Estoppel.* At this writing, writ of error had been granted in *Republic Insurance Co. v. Silvertown Elevators, Inc.*<sup>67</sup> in which a court of civil appeals held that an insurance agent's knowledge that the insured property was not owned by the named insured constituted a waiver by the insurance company of the requirement that the named insured be the owner of the property, and that the insurer was estopped from denying liability on that ground.

*Cancellation.* In *Harris v. Glen Falls Group*<sup>68</sup> the insurer contended that its fire insurance policy was suspended prior to the fire in question because of the insured's failure to pay an installment premium payment. The court disagreed on the basis that the premium note was not attached to the policy itself nor incorporated in the policy by reference, and because there was "nothing in either the policy or the note that expressly provides for a suspension . . . because of the failure to pay an installment on the premium when due."<sup>69</sup>

*Subrogation.* A fire insurer's subrogation rights are no greater than those of

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<sup>63</sup> *Id.* at 721.

<sup>64</sup> 480 S.W.2d 762, 763 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

<sup>65</sup> *Bailey v. Polster*, 468 S.W.2d 105 (Tex. Civ. App.—Dallas 1971), *error ref. n.r.e.*

<sup>66</sup> 478 S.W.2d 579 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*

<sup>67</sup> 477 S.W.2d 336 (Tex. Civ. App.—Amarillo 1972), *error granted.*

<sup>68</sup> 478 S.W.2d 561 (Tex. Civ. App.—Corpus Christi 1972), *error ref. n.r.e.*

<sup>69</sup> *Id.* at 564.

its insured. Thus, a subrogation suit filed by a fire insurer more than two years after the fire in question was barred by the statute of limitations, even though the suit was filed within two years of the date the insurer acquired subrogation rights by settling with its insured.<sup>70</sup>

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<sup>70</sup> *Fishel's Fine Furniture v. Rice Food Mkt.*, 474 S.W.2d 539 (Tex. Civ. App.—Houston [14th Dist.] 1971), *error dismissed*.