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INSURANCE LAW

by

Royal H. Brin, Jr.*

I. AUTOMOBILE AND LIABILITY INSURANCE

Uninsured Motorist Coverage. Development of the Texas law in this field continued apace during this reporting period. As anticipated in the immediately preceding *Survey*,¹ an answer has now been provided to the question whether stacking of uninsured motorist coverage in Texas is permissible. In two cases consolidated for consideration because of their presentation of a common question of law, *Westchester Fire Insurance Co. v. Tucker and Dhane v. Trinity Universal Insurance Co.*,² the Texas Supreme Court reversed and remanded a decision by the Houston court of civil appeals which held stacking the policy limits of uninsured motorist coverage permissible where necessary to satisfy the insured's damages and, in the companion case, affirmed a contrary holding on the same issue by the Waco court of civil appeals. The stipulated facts in *Tucker* were as follows: the insurer issued an automobile insurance policy on two vehicles owned by the insured; the policy limits were \$10,000 for each person injured and \$20,000 for each accident; a four-dollar premium was assessed for the vehicle designated as car one and a three-dollar premium was assessed for the vehicle designated as car two. The insured's damages arising out of a collision proximately caused by the negligence of an uninsured motorist were \$15,000. Judgment for the insured in that amount less amounts previously paid by the insurer was rendered by the trial court and affirmed by the court of civil appeals. The facts stipulated in *Dhane* involved a single automobile insurance policy on three cars owned by the insured. The policy provided both for medical payments coverage with a stated limit of \$2,000 for each injured person and uninsured motorist coverage, styled in the policy as "family protection coverage," with stated limits of \$10,000 for each injured person and \$20,000 for each accident. Damages in *Dhane* exclusive of medical expenses were stipulated to exceed \$36,000.

The insureds in *Tucker* argued that the three-dollar premium provided consideration for the additional risk exposure created by stacking. Responding to this contention, the court stated that this additional premium provided consideration for protection afforded the named insured and relatives while riding in or being struck by the additional insured vehicle and also to third parties while occupying the additional insured vehicle. So interpreted, the stack-

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1. Brin, *Insurance Law, Annual Survey of Texas Law*, 28 Sw. L.J. 121 (1974).

2. 512 S.W.2d 679 (Tex. 1974).

ing of coverages on a single, multi-car automobile liability policy, absent additional consideration specifically intended to provide such coverage, is not permissible.

The court, however, denied the insurer's contention in *Dhane* that the medical payments coverage should not be stacked. Instead it agreed with the authorities holding stacking to be permissible with respect to this kind of insurance protection where necessary to compensate the insured's medical expenses. The insurer's argument that amounts payable under the medical payments coverage of the policy should be credited against the amount recoverable under the uninsured motorist coverage was likewise rejected on the ground that the Texas Uninsured Motorist Statute³ provided irreducible minimum coverage, so that the policy provision for such reduction was ineffective.

Whether an underinsured motorist constitutes an uninsured motorist within the meaning of the Texas Safety Responsibility Act⁴ was settled during this reporting period. In *Kemp v. Fidelity & Casualty Co.*⁵ the Texas Supreme Court faced a fact situation involving a number of persons who were injured and killed through the negligence of a motorist who carried the minimum liability coverage required by the Texas Safety Responsibility Act. In a severed non-jury case, the trial court awarded each plaintiff damages in excess of \$10,000. The insurer tendered the \$20,000 policy limit to the court registry where that sum was divided and disbursed to the injured parties. Each individual plaintiff received less than \$10,000. As a result, plaintiffs sought recovery for the difference between the amount recovered and the \$10,000 coverage provided by the uninsured motorist provisions of their own policies. Since the tortfeasor's liability insurance coverage was apportioned among several claimants, plaintiffs argued that the tortfeasor was an uninsured motorist as defined by the Texas Uninsured Motorist Statute. Plaintiffs bolstered this argument by contending that the Uninsured Motorist Statute constituted an integral part of their policies and that any judicial definition of uninsured motorist limiting its protection would be in derogation of the statute. The court of civil appeals affirmed the summary judgment granted the insurer by the trial court, holding that the statutory definition of uninsured motorist was unambiguous and that "uninsured" did not mean "underinsured."⁶ In a per curiam opinion, the Texas Supreme Court affirmed the court of civil appeals ruling.

3. TEX. INS. CODE ANN. art. 5.06-1(1) (Supp. 1974). This statute provides in part: (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.

4. TEX. REV. CIV. STAT. ANN. art. 6701h (Supp. 1974).

5. 512 S.W.2d 688 (Tex. 1974).

6. 504 S.W.2d 633 (Tex. Civ. App.—Eastland 1973), *aff'd per curiam*, 512 S.W.2d 688 (Tex. 1974).

A growing body of decisions further settled the law applicable to uninsured motorist coverage. Where suit was brought under the uninsured motorist provision of plaintiff's policy, the Texas Supreme Court, in a case of first impression, held that the four-year statute of limitations applied both to a claim for personal injuries sustained by the plaintiff and to a claim for the death of the plaintiff's daughter arising out of the same accident.⁷ In a separate case the court affirmed the decision of the Beaumont court of civil appeals that the "other insurance" clause does not bar recovery from one's own insurance carrier for damages sustained while driving his employer's vehicle, despite prior settlement with the employer's insurance carrier of an uninsured motorist claim arising out of the same accident.⁸

Further definition of the term "uninsured motorist" issued from the Houston (Fourteenth District) court of civil appeals in the case of *Garcia v. Travelers Insurance Co.*⁹ There, the plaintiff requested a rather novel definition for uninsured motorist, asking the court to include a tortfeasor within the definition of "uninsured motorist" when the tortfeasor fails to cooperate with his insurance company after a collision and his insurance company, as a result thereof, refuses to negotiate the injured party's claim. In *Garcia* the tortfeasor disappeared after the accident. Since his insurance company was unable to determine if it had a policy defense, it refused to negotiate plaintiff's claim. After reviewing two New York cases,¹⁰ the court refused to hold that an insurer has an absolute right to avoid deciding whether a policyholder has coverage after an accident. Under the facts before it, however, the court held that coverage was not denied because of mere inactivity of the insurer.

Policy provisions requiring immediate notice by an insured and forwarding of suit papers of an uninsured motorist claim were sustained in *Milton v. Preferred Risk Insurance Co.*¹¹ The court held that strict compliance with all conditions precedent of an insurance policy is necessary for imposition of liability upon the insurer and that this applies with respect to uninsured motorist coverage. The policy here specifically provided with respect to uninsured motorist coverage that if the insured should bring action against the uninsured motorist, a copy of the papers should be forwarded "immediately" to the insurer. It was recognized that neither the required notice of the accident nor the forwarding of the suit papers need take place until the insured has a reasonable basis for belief that the offending motorist is or has become uninsured. However, the jury here had found that plaintiff failed to forward suit papers immediately after she realized she had a claim under the uninsured motorist coverage, and the court held that this finding was supported by the evidence and barred recovery. The record indicated that in January 1972 the insured had reason to suspect that the driver of the other vehicle was

7. *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789 (Tex. 1974).

8. *American Motorists Ins. Co. v. Briggs*, 514 S.W.2d 633 (Tex. 1974).

9. 501 S.W.2d 754 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

10. These cases were *Gonzales v. Motor Vehicle Accident Indem. Corp.*, 48 Misc. 2d 958, 266 N.Y.S.2d 640 (Sup. Ct. 1966), and *Application of DiStefano*, 34 Misc. 2d 68, 228 N.Y.S.2d 404 (Sup. Ct. 1962).

11. 511 S.W.2d 83 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

an uninsured motorist but did not forward the suit papers to her insurers until March 23, and April 3, 1972.

Causation. *Gallup v. St. Paul Insurance Co.*¹² extended the holding in *Houston Fire & Casualty Insurance Co. v. Kahn*¹³ that the policy phrase "being struck by" did not include riding a bike into the back of a legally parked vehicle. In *Gallup* a majority of the Texas Supreme Court affirmed a court of civil appeal's assessment that *Kahn* provided controlling precedent in a case where a motorcyclist ran into the rear of a stopped vehicle waiting to turn left. Interpreting the language "being struck by" to require an actor and a recipient of that action, recovery was denied. The court refused to treat "being struck by" as the equivalent of "collide." Three members of the court vigorously dissented, arguing that the rule adopted in *Gallup* mandated consideration of the relative positions and vectors of the vehicles involved in an accident. Deploring the majority's restrictive interpretation of the policy phrase, the dissenters would have extended coverage.

"No Action" Clause. In *First National Indemnity Co. v. Mercado*¹⁴ an insurer issued an automobile liability policy to one Richard Evilsizer, who thereafter collided with a car in which plaintiff was a passenger. The insurer denied coverage and refused defense of the insured. Plaintiff obtained a \$4,000 judgment against Evilsizer and then sought to enforce the judgment against the insurer. Sitting without a jury, the trial court rendered judgment, affirmed by the court of civil appeals, for Mercado.

The insurer contended that the prior judgment against its insured had not been determined by "actual trial" as required by the "no action" clause in its policy but rather had been the result of a collusive suit. The stipulated facts relied upon by appellant were: (1) Mercado's claim arose when a car in which he was riding backed out of a private driveway into the side of Evilsizer's truck; (2) Mercado was the only witness at the prior trial; (3) by agreement medical records were read into evidence; (4) Evilsizer's attorney would testify, if called upon to do so, that he put no defense witness on, agreed to introduction into evidence of the medical records and conducted the defense of Evilsizer in the manner stipulated because of a prior agreement with Mercado that Evilsizer would not suffer levy of execution for any judgment rendered therein. Responding to the insurer's contention that the prior suit had been collusive, the court affirmed on the basis that the "no action" clause was waived by its refusal to defend its insured. The court, however, failed to rule whether the earlier suit had been an "actual trial."

Estoppel. Estoppel figured prominently in two cases rendered during this reporting period, *Green v. Helmcamp Insurance Agency*¹⁵ and *Radoff v. Utica*

12. 515 S.W.2d 249 (Tex. 1974).

13. 359 S.W.2d 892 (Tex. 1962).

14. 511 S.W.2d 354 (Tex. Civ. App.—Austin 1974, no writ).

15. 499 S.W.2d 730 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

*Mutual Insurance Co.*¹⁶ In *Green*, plaintiffs obtained a default judgment against a Mr. Prudhomme for personal injuries received in a vehicular collision. Prudhomme assigned to plaintiffs any cause of action he had against his insurance agent and they subsequently brought suit against the agent for failure to provide insurance coverage to Prudhomme. The trial court entered judgment for the agent on the basis of the two-year statute of limitation, but on appeal judgment was reversed and rendered in favor of the plaintiffs. The suit against the insurance agent was brought more than four years after the accident but less than two years after the default judgment against Prudhomme. It was held that since Prudhomme suffered no damage until the entry of judgment against him, his cause of action for the negligent failure of the insurance agent to provide coverage arose only when that judgment was taken, and consequently, the action was not barred by the statute of limitations. The court further held that the agent was liable on the basis of promissory estoppel, because the jury had found that prior to the expiration of Prudhomme's insurance policy on April 17, 1967, the agent represented to him that his truck would be covered through May 13, 1966, that Prudhomme relied on such representation and therefore did not obtain liability from another source and was not negligent in doing so, and that these facts were the proximate cause for Prudhomme's not having coverage on his truck on the date of the accident. While there was no contract between Prudhomme and the agent to obtain insurance, promissory estoppel prevented the agent from denying the enforceability of his promise to provide it.¹⁷

In *Radoff*, since the agent's representation was not false, estoppel proved unavailing. The insurance policy examined in *Radoff* contained an exclusionary clause which limited coverage to accidents occurring while the named insured, a driver under twenty-five with a learner's permit, was accompanied by one of his parents. A transmittal letter sent by the agent to the insured's father contained the following statement: "He [insured's son] still will have coverage only if you are or Mrs. Radoff are in the car with him while he is driving with a learner's permit."¹⁸ Shortly after the insured's son obtained his regular driver's license, he was involved in an accident caused by his negligence.

Plaintiff argued that the insurance company was estopped from relying upon the exclusionary endorsement attached to the policy by the representation of their agent contained in the transmittal letter. The trial court found that there was no misrepresentation of the limits of coverage either by the insurer or its agent, but rather that the plaintiffs misinterpreted the import of the statement in the transmittal letter. The appellate court agreed with the trial court's judgment, adding that the transmittal letter constituted nothing more than an unsolicited comment concerning the policy.

16. 510 S.W.2d 151 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

17. The opinion noted in this connection that the Texas Supreme Court in *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965), cited with approval the RESTATEMENT OF CONTRACTS § 90 (1932) setting forth the basis for promissory estoppel.

18. 510 S.W.2d 151, 153 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

Effect of Insurance Binder. In *Ranger County Mutual Insurance Co. v. Chrysler Credit Corp.*¹⁹ the Texas Supreme Court reiterated the rule that the burden rests upon the insured to plead and prove the existence and terms of an insurance contract. Stating that this rule applied equally to insurance binders, the court recognized that binders may expire by their own terms and held that where an alleged insured fails to plead or prove that the binder was in effect at the time of loss, judgment for the insured is erroneous.

Vehicular Definition. While the court's statements in *Hardware Mutual Casualty Co. v. Buck's Tri-State Irrigation Engine Co.*²⁰ may not have been absolutely required by the facts presented, the court held that a dragster was not an automobile within the terms of an exclusionary provision in a property insurance policy. The test applied by the court required inquiry into whether the vehicle was designed for use on a public street or highway. The facts that the vehicle had no radiator or reverse gear, used a parachute for a brake, required a special type of fuel, and could travel only about a quarter of a mile, proved decisive in the determination that it was not an automobile.

Medical Malpractice. The perils of voluntarily submitting to treatment for alcoholism were presented in a recent Fifth Circuit opinion, *Big Town Nursing Homes, Inc. v. Reserve Insurance Co.*²¹ In this case, the patient voluntarily entered the nursing home for treatment. For undisclosed reasons, he then attempted to leave the premises six times during the following two months. On five occasions, the staff at the nursing home observed and restrained him, but on the sixth try he succeeded. The patient, annoyed by the nursing home's enthusiastic restraints, filed suit for false imprisonment. Nursing Homes' insurer denied coverage and refused to defend the insured. Nursing Homes undertook its own defense, ultimately suffering a \$13,000 judgment.

Thereafter, Nursing Homes sued its insurer, alleging that the basis for the prior suit involved a risk covered by its malpractice insurance. The professional liability endorsement in its policy provided in pertinent part:

It is agreed that such insurance as is afforded by the policy under the liability coverages also applies to damages because of injury, including death, sustained by any person and arising out of malpractice as defined herein committed during the policy period . . . I. 'malpractice' means malpractice, error or mistake (a) in rendering or failing to render to such person, or to the person inflicting the injury, medical, surgical, dental or nursing care²²

Nursing Homes contended that its treatment of the patient amounted to "error or mistake" in the rendition of nursing care in that it had mistaken the patient's irritation for irrationality and that its action was therefore within the policy's coverage. The federal district court rejected this contention, characterizing the restraints imposed on the patient by Nursing Homes as the

19. 501 S.W.2d 295 (Tex. 1973).

20. 500 S.W.2d 897 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

21. 492 F.2d 523 (5th Cir. 1974).

22. *Id.* at 524-25.

result of an administrative decision and mechanical action on the part of its employees rather than the product of the professional judgment covered by the malpractice policy. In reversing this decision the Fifth Circuit applied a test inquiring whether the treatment and restraint involved the exercise of trained nursing judgment in response to established medical policy. The court noted that there was some confusion as to who ordered the patient restrained. However, the court decided that the fact that the hospital had a general policy requiring nurses to restrain irrational patients, coupled with the findings of the trial court, indicated that the nurse's action in restraining the patient was the result of trained nursing judgment. The court concluded that the nurse had simply misinterpreted the patient's condition and that such error was of the kind covered by a malpractice endorsement.

II. LIFE, HEALTH AND ACCIDENT INSURANCE

Credit Life Insurance. Widows fared poorly in two suits brought upon credit life insurance policies. In *Hocutt v. Prudential Insurance Co.*²³ the appellant's late husband had incurred indebtedness exceeding \$10,000 in purchasing farm equipment from two separate dealers. Two credit life insurance policies had been issued to the husband by the same insurer and each policy contained a \$10,000 limitation clause. Affirming judgment *non obstante veredicto* for the insurer, the court of civil appeals held that the limitation clause applied to all indebtedness incurred by the insured irrespective of the number of dealers involved. In *Gideon v. Service Life & Casualty Insurance Co.*²⁴ the court of civil appeals ruled that the pilot of a private plane was "riding in" an aircraft at the time of his death within the meaning of an exclusionary clause in his credit life policy.

Accidental Death. In *National Life & Accident Insurance Co. v. Franklin*²⁵ the basic benefits under the life insurance policies had been paid and the suit concerned only the additional accidental death benefits. The insured had been known to be subject to mild epileptic seizures. He was found dead in his apartment lying over the edge of the bathtub with his head and one arm within the tub, with the water running. The autopsy revealed that his lungs and cranial cavity were filled with water, and the examiner's report concluded that he had died by drowning. The report also indicated that the insured may have suffered a seizure at or near the time of death, since his tongue was protruding and had been bitten, the veins in his neck were distended, and his head was in a contorted position.

23. 501 S.W.2d 347 (Tex. Civ. App.—Texarkana 1973, no writ).

24. 510 S.W.2d 631 (Tex. Civ. App.—Corpus Christi 1974, no writ).

25. 506 S.W.2d 765 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.). See also *Key Life Ins. Co. v. Murray*, 502 S.W.2d 833 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.). In the latter case it was held that uncontradicted evidence that the insured's body was found with his eyes open, lying on his back, with no marks on him and his clothes not torn, and in view of his admittedly diseased heart and the absence of visible bodily injury as distinguished from the inference of over-exertion, the life insurer was not liable for accidental death benefits. The dissent took the position that while the evidence was sufficient to support a judgment for the plaintiff, there was some evidence of accidental death and the case should be remanded rather than rendered.

The policy provided for accidental death benefits if death were to result "directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means . . . ; and provided further that no such death benefit shall be payable if death (i) results from or is contributed to by any disease or mental infirmity"26 The jury found the death to be accidental and on appeal it was held that the verdict that the insured died solely by accidental means was supported by the evidence. The court reasoned that although an epileptic seizure may have caused the decedent to fall into the tub, the seizure was at most a remote cause rather than a proximate cause of death so that the policy exclusion was inapplicable.

Occasionally problems arise in determining whether an insured's death resulted from a compensable accident or suicide. In one such case, *Reliable Life Insurance Co. v. Torres*,²⁷ a trial court judgment of accidental death from participation in a game of Russian roulette was reversed and remanded for submission upon proper special issues. The evidence at trial had shown that the deceased was drunk and immediately before the shooting had announced that he wanted to play Russian roulette. The witnesses testified that they heard the fatal gunshot but that none of them saw the deceased at the moment of the shooting. The jury had found that the deceased did not shoot himself while playing Russian roulette, but the court had not submitted the plaintiff's requested issue as to whether the death was from accidental injury. On appeal the Austin court of civil appeals stated that while this finding established that the insured's death did not come within the policy exclusion for suicide, it did not discharge plaintiff's burden of establishing defendant's liability by showing that the death resulted from accidental bodily injury. Consequently, a new trial was ordered in which the tendered special issue would be submitted. One justice dissented on the ground that if suicide were eliminated only the possibility of accidental death remained, and that the one issue submitted in that connection was sufficient for determination of the case.

Insolvency Proceedings. In this reporting period it was held that payments made under a reinsurance agreement between one insurance company and a second insolvent insurance company placed in permanent receivership must be paid to the receiver for distribution and not directly to the injured party.²⁸ Additionally, a law firm which had incurred unpaid legal expenses prior to the placement into permanent receivership of the insurance company it represented must be placed in the class of general unsecured creditors.²⁹ The

26. 506 S.W.2d 765, 766 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

27. 509 S.W.2d 409 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).

28. *McFarling v. Mayfield*, 510 S.W.2d 108 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.). Justice Keith, concurring, noted that plaintiff's preferential rights were limited to those enumerated in TEX. INS. CODE ANN. art. 21.28-B, § 5 (Supp. 1975). 510 S.W.2d at 111.

29. *Kelly, Walker & Liles v. McFarling*, 509 S.W.2d 659 (Tex. Civ. App.—Austin 1974, no writ).

fact that the law firm had been employed to defend suits under the terms of automobile liability policies issued by the insolvent insurance company did not justify extension of the protection of the Loss Claimants' Priorities Act.³⁰

Causation. Whether pre-existing conditions vitiate the "direct causation" clause of life, health, and accident insurance policies continues to create troublesome evidentiary issues. In *Lord v. Insurance Co. of North America*³¹ the insurer successfully maintained that its insured's disability from a compression fracture of the lumbar vertebra was due in whole or in part to various pre-existing afflictions, including heart failure, cirrhosis of the liver, diabetes, and arteriosclerosis. In *Bohon v. Travelers Insurance Co.*³² the insured secured a reversal and remand from a take-nothing judgment *non obstante veredicto* rendered by the trial court upon facts similar to *Lord Bohon*, however, raised the question of whether an insurer's check tendered to the insured constituted an admission of liability under the policy. The appellate court indicated that, in the absence of this additional factor, it would have affirmed the trial court judgment. The *Bohon* court interpreted the policy words "directly and independently of all other causes" to require proof that the accident was the "sole" or "only" cause.³³

Hospital Definition. In *Mertes v. California-Western States Life Insurance Co.*³⁴ the insured sought recovery under a group hospitalization policy for psychiatric treatment administered to his daughter. The insurer denied coverage on the ground that the policy provided compensation only for hospital treatment and the center where the daughter was treated did not constitute a hospital within the policy definition. The policy defined "hospital" as

an institution which (1) is primarily engaged in providing—for compensation from its patients and on an inpatient basis—diagnostic and therapeutic facilities for the surgical and medical diagnosis, treatment, and care of injured and sick individuals by or under the supervision of a staff of doctors, (2) continuously provides 24 hours a day service by Registered Nurses, and (3) is not a place for rest, a place for the aged, a place for drug addicts, a place for alcoholics, a nursing home, or convalescent hospital.³⁵

Interpreting this policy definition to require facilities for surgical treatment at the hospital itself, the Waco court of civil appeals rejected plaintiff's argument that a contractual arrangement between the treatment center and a

30. TEX. INS. CODE ANN. art. 21.28-B (Supp. 1975). Section 3 of the Act provides:

As used in this Article, loss claim is the claim of an insured, a third party beneficiary, or any other person entitled thereto, under a contract of insurance or indemnification, for a loss arising within the terms of coverage provided in a contract of insurance or indemnification for an amount within the express limits of such insurance policy, but excluding a claim for unearned premium.

31. 513 S.W.2d 96 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

32. 509 S.W.2d 905 (Tex. Civ. App.—Tyler 1974, no writ).

33. *Id.* at 907.

34. 511 S.W.2d 609 (Tex. Civ. App.—Waco 1974, no writ).

35. *Id.* at 610.

nearby general hospital satisfied this requirement. The court thus sustained insurer's denial of coverage.

Fraudulent Representations. Denial of liability by insurers on the basis of fraudulent representations by policyholders occurred frequently during this reporting period. Of the four reported cases, the insurer avoided liability in three; the fourth case reversed and remanded a summary judgment for the insurer.

As of this writing, writ has been granted in *Johnson v. Prudential Insurance Co. of America*,³⁶ in which suit was brought for recovery pursuant to insurance policies issued on the life of the plaintiff's deceased wife. A jury found that in applying for her policy the insured had willfully omitted information of her treatment for cancer. Plaintiff raised the policy's "incontestability" clause in an effort to avoid the effect of this finding. This argument failed as the court held that a contractual distinction existed between the incontestability clause applicable to the group policy under which plaintiff's policy was issued and that applicable to the individual policies.

In *Haney v. Minnesota Mutual Life Insurance Co.*³⁷ the court stated that jury findings of intent to deceive remain important elements of the material misrepresentation defense. Finding the distinction between representations and warranties unavailing, the federal courts likewise recognized the importance of a finding of intent to deceive.³⁸ The only insured enjoying any success persuaded the appellate court that a fact issue, whether notice of refusal to be bound by the policy was given within ninety days of discovery of a material misrepresentation, precluded summary judgment.³⁹

III. FIRE AND CASUALTY INSURANCE

Land and Buildings. There were only three noteworthy decisions in this area during the survey period. The first concerned the effect of a title failure on the provision for proportionate payment in a title insurance policy. In *Commercial Standard Insurance Co. v. Fondren*⁴⁰ the Beaumont court of civil appeals reiterated a principle established by the Texas Supreme Court in 1962,⁴¹ that where title to an undivided interest in land fails, the title insurance policy provision for proportionate payment is inapplicable.

*Eulich v. Home Indemnity Co.*⁴² involved a judicial interpretation of an insurance policy's exclusionary clause. Plaintiff's building had collapsed because the contractor had installed a steel member whose strength was less than that required by contract. In a suit by the building owner against the contractor's insurer, the Dallas court of civil appeals held that a provision in the insurance contract excluding liability coverage for the building when the

36. 506 S.W.2d 238 (Tex. Civ. App.—San Antonio 1974, writ granted).

37. 505 S.W.2d 325 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

38. *Guardian Life Ins. Co. of America v. Eagle*, 484 F.2d 382 (5th Cir. 1973).

39. *Sanders v. Jefferson Nat'l Life Ins. Co.*, 510 S.W.2d 407 (Tex. Civ. App.—Dallas 1974, no writ).

40. 509 S.W.2d 728 (Tex. Civ. App.—Beaumont 1974, no writ).

41. *Shaver v. National Title & Abstract Co.*, 361 S.W.2d 867 (Tex. 1962).

42. 503 S.W.2d 846 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

building contractor fails to follow specifications precludes judgment against the contractor's insurer.⁴³ Further, an exclusionary clause may not be disregarded unless the alleged resulting duplication of coverage, accompanied by payment of added premium, is certain and complete.

Finally, in a Waco court of civil appeals case, *Texas Pacific Indemnity Co. v. Building Materials Distributors, Inc.*,⁴⁴ the lessee-occupant of a building suffered damage to his property stored therein following a windstorm. The lessee originally sued the owner, then added the insurer as a party defendant, later dismissing suit as to the owner. Defendant insurance company asserted as a defense the impairment of its subrogation rights, due to the dismissal of suit against the owner. The court held that the defense fails where the jury findings support the claim that the windstorm was the sole proximate cause of the damage.

43. The pertinent provision excluded liability for "property damage to work performed by or on behalf of the named insured arising out of the work, or out of any materials, parts or equipment furnished in connection therewith." *Id.* at 848.

44. 508 S.W.2d 488 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).