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## Insurance Law

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# INSURANCE LAW

by

Royal H. Brin, Jr.\*

## I. AUTOMOBILE AND LIABILITY INSURANCE

*"Excess" and "Escape" Clauses.* In a case of first impression in Texas, the question of determining liability when the provisions of a family automobile and a garage liability policy conflict was decided by *Hardware Dealers Mutual Fire Insurance Co. v. Farmers Insurance Exchange*.<sup>1</sup> A collision had occurred while Anita Kay Hyde, whose father had a family automobile liability policy with Farmers, was test driving an automobile owned by Frizzell Pontiac, Inc. and insured by Hardware. The Farmers policy provided that it would pay only the excess above any other valid and collectible insurance, while the Hardware policy provided that if there was any other insurance available it would not apply at all. In this situation other jurisdictions have reached differing results. Some have held in favor of the driver's insurer,<sup>2</sup> some in favor of the garage liability insurer,<sup>3</sup> and others have held that since the excess clause in one policy and the escape clause in the other are irreconcilable, both are disregarded and liability is apportioned pro rata.<sup>4</sup>

The Houston court of civil appeals recognized that the clauses in the two policies were irreconcilable, but on the basis of "total policy insuring intent" and in light of the primary risks of the respective policies, determined that Hardware, the garage liability insurer, would be primarily liable with Farmers liable only for the excess. However, the Texas supreme court determined that the repugnancy between the policy provisions could best be solved by ignoring both Hardware's escape clause and Farmer's excess clause, thus reaching the desirable result of furnishing the insured maximum coverage. The loss was therefore prorated between the two carriers.<sup>5</sup>

The Texas Legislature has since entered the picture by Senate Bill 35, passed by both houses and signed by the Governor on September 19, 1969.<sup>6</sup> This statute expressly authorizes the escape clause in a garage policy and further provides that "[n]otwithstanding any provision to the con-

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<sup>1</sup> 444 S.W.2d 583 (Tex. 1969).

<sup>2</sup> See, e.g., *New Amsterdam Cas. Co. v. Certain Underwriters at Lloyds, London*, 34 Ill. 2d 424, 216 N.E.2d 665 (1966); *Zurich Ins. Co. v. Continental Cas. Co.*, 239 Md. 421, 212 A.2d 96 (1965).

<sup>3</sup> See, e.g., *Continental Cas. Co. v. Sutenfield*, 236 F.2d 433 (5th Cir. 1956); *Continental Cas. Co. v. Weekes*, 74 So. 2d 367 (Fla. 1954); *Government Employees Ins. Co. v. Globe Indem. Co.*, 415 S.W.2d 581 (Ky. 1967); *Government Employees Ins. Co. v. Lumbermans Mut. Cas. Co.*, 269 N.C. 354, 152 S.E.2d 445 (1967); *Faltersack v. Vanden Boogaard*, 39 Wis. 2d 64, 158 N.W.2d 322 (1968).

<sup>4</sup> See, e.g., *Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952).

<sup>5</sup> *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange*, 437 S.W.2d 390 (Tex. Civ. App.—Houston), *rev'd*, 444 S.W.2d 583 (Tex. 1969).

<sup>6</sup> Tex. Laws 1969, ch. 35, at 137.

trary in such other policy or policies of insurance as to whether such insurance is primary, excess, or contingent insurance, or otherwise, such other valid and collectible insurance shall be primary insurance as to the garage customer."<sup>7</sup> This Act, however, by its own terms applies only to policies issued, renewed or made subject to the Act by endorsement after its effective date.

*Contribution vs. Subrogation: The Hicks Rule.* On the same day as the *Farmers* decision, the supreme court handed down another opinion dealing with conflicts between liability carriers. *Employers Casualty Co. v. Transport Insurance Co.*<sup>8</sup> appears to be of even greater importance for the future, particularly in view of the legislative action in the garage-family automobile carrier situation. Transport insured Hunsaker Truck Lease, Inc., which leased a truck to Prior Products, Inc., insured by Employers Casualty. The truck collided with a car occupied by the Siegels, who sued Prior Products. Transport was tendered the defense but denied coverage and refused to defend. Employers assumed the defense and negotiated settlement and then sued Transport for reimbursement of all or part of the amount paid. Both policies had pro rata clauses. The Waco court of civil appeals<sup>9</sup> held that since the contracts of insurance were "several and independent of each other," the insurer was liable for only a portion of the loss, but having paid the full loss, was not entitled to contribution from the other insurer under the Texas supreme court opinion of *Traders & General Insurance Co. v. Hicks Rubber Co.*<sup>10</sup>

In affirming the civil appeals judgment the Texas supreme court declined to overrule *Hicks*, but nevertheless pointed the way to a detour around it. The court said that *Hicks* remains the proper rule of decision in strictly contribution cases: if each of several insurers is liable for only a proportion of a loss, none of them has the right to pay more than its proportion and then recover *contribution* from the others. The court proceeded to hold, however, that a pro rata insurer who paid the entire loss did have a remedy for recovery of a pro rata part from another insurer by proceeding upon the theory of contractual or conventional *subrogation* to the rights of the insured. Thus, *Hicks* was theoretically preserved but practically destroyed as far as its future effect is concerned.<sup>11</sup> An insurer in the position of Employers Casualty need only remember to proceed by way of subrogation rather than contribution.

*Hicks* was also mentioned in *State Farm Mutual Automobile Insurance Co. v. Pan American Insurance Co.*<sup>12</sup> State Farm's insured and his wife were injured when their car caught fire while being filled with butane gas by a butane company employee. Pan American, the insurer of the butane

<sup>7</sup> *Id.*

<sup>8</sup> 444 S.W.2d 606 (Tex. 1969).

<sup>9</sup> *Transport Ins. Co. v. Employers Cas. Co.*, 434 S.W.2d 704 (Tex. Civ. App.—Waco 1968), *aff'd*, 444 S.W.2d 606 (Tex. 1969).

<sup>10</sup> 140 Tex. 586, 169 S.W.2d 142 (Tex. 1943).

<sup>11</sup> The dissenting opinion by Justice Steakley, joined by Justices Greenhill and Reavley, would have overruled the *Hicks* case outright. 444 S.W.2d at 611-14.

<sup>12</sup> 437 S.W.2d 542 (Tex. 1969).

company, settled with the two injured people and then sued State Farm to recover the amount paid, contending that the employee refueling the automobile became an additional insured under the State Farm policy which obligated it to pay damages "arising out of the ownership, maintenance, or use" of the vehicle. The supreme court held that although refueling constituted "maintenance" within the insuring clause, the butane company employee was not covered under the omnibus provision which covered any person "using" the vehicle with the permission of the named insured. The court held that the "conspicuous omission" of the term "maintenance" in the omnibus provision denoted an intent to exclude persons whose only connection with the vehicle was for the purpose of maintenance. The concurring opinion<sup>13</sup> considered that the court had gone out of its way to restrict the meaning of "using" in the omnibus clause and that this was a case of two pro rata insurers governed by the *Hicks* rule that "the company which pays more than its proportionate part cannot recover the excess from the other insurer."<sup>14</sup>

*Settlements.* In *McGuire v. Commercial Union Insurance Co.*<sup>15</sup> the supreme court considered the effect of a settlement in a prior wrongful death action by a widow on behalf of herself and her children for the death of her husband. In response to the widow's petition in the prior action, defendant answered and also filed a counterclaim for personal injuries. On the same day, the court severed the counterclaim from the original action and later approved a compromise settlement of the widow's wrongful death claim. This was done without the consent of the deceased driver's insurer, which then brought an action seeking a declaratory judgment that it was not required to defend the counterclaim against the estate of its insured because the widow, in settling her wrongful death action and agreeing that the counterclaim could still be maintained and would not be prejudiced thereby, had deprived the insurer of the compulsory counterclaim defense it might otherwise have had. The Amarillo court of civil appeals agreed,<sup>16</sup> but the supreme court held that the insurer did have a duty to defend against the counterclaim and that the widow's settlement and agreed judgment had neither prejudiced the deceased driver's insurer nor deprived it of an otherwise available defense.

*Declaratory Judgments.* In *Great American Insurance Co. v. Murray*<sup>17</sup> the court held that the limits of a liability policy were not discoverable under rule 167<sup>18</sup> in an insurer's declaratory judgment action as to liability coverage of underlying suits for personal injuries and death, since the damages sought in the underlying suits adequately supplied the requisite

<sup>13</sup> *Id.* at 545-46.

<sup>14</sup> *Id.* at 546.

<sup>15</sup> 431 S.W.2d 347 (Tex. 1968).

<sup>16</sup> *Commercial Union Ins. Co. v. Pryor*, 423 S.W.2d 364 (Tex. Civ. App.—Amarillo: 1967), *rev'd*, 431 S.W.2d 347 (Tex. 1968).

<sup>17</sup> 437 S.W.2d 264 (Tex. 1969).

<sup>18</sup> TEX. R. CIV. P. 167.

jurisdictional amount for district court. The *Murray* opinion also indicates that it continues to be the law in Texas that the amount of insurance coverage is not material in tort litigation. *Firemans Insurance Co. v. Burch*<sup>19</sup> put some limitations upon the role of declaratory judgment actions in determining coverage disputes. The court held that the question of the automobile liability carrier's duty to defend presented a justiciable issue, but it was further held that the district court should not attempt to declare the liability of the carrier upon various possible judgments that might be rendered in the personal injury action itself, since that would be purely advisory in nature and beyond the power and jurisdiction of the district court.

*Newly Acquired Automobiles.* Two civil appeals cases considered insurance provisions regarding a newly acquired automobile. In one<sup>20</sup> the court held that under a provision which extended coverage to newly acquired automobiles if notice was given to the insurer within thirty days of delivery, the fact that the purchaser had to enter a second installment sales contract when the credit of the co-signers of the first contract was disapproved did not extend the time for giving notice so as to provide coverage for an accident more than thirty days after delivery but less than thirty days after the signing of the second contract. In the second case<sup>21</sup> summary judgment in favor of the insurer was affirmed on the ground that coverage was not extended under the newly acquired automobile provision when the certificate of title was in the name of the insured but the beneficial ownership was actually in another.

*Uninsured Motorist Clause.* In *Allstate Insurance Co. v. Wallace*<sup>22</sup> a recent divorcee, while a guest in the automobile of another, was injured in a collision with an automobile driven by an uninsured motorist. The civil appeals court held that the former wife was not an insured under an automobile policy issued in her former husband's name so as to be protected under the uninsured motorist clause, even though the policy had been purchased with community funds before the divorce and while the couple resided in the same household.

*Carpenter v. North River Insurance Co.*<sup>23</sup> dealt with arbitration under uninsured motorist coverage. Although the Texas General Arbitration Act<sup>24</sup> by its terms does not apply to insurance policy disputes, *Carpenter* held that common law arbitration of such disputes was not foreclosed. The court decided that under common law an agreement to arbitrate may be revoked by either party at any time before the award is made, but that the record did not conclusively show that the insurer had revoked its agreement to arbitrate.

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<sup>19</sup> 442 S.W.2d 331 (Tex. 1968).

<sup>20</sup> *Pride v. State Farm Fire & Cas. Ins. Co.*, 434 S.W.2d 146 (Tex. Civ. App.—Amarillo 1968).

<sup>21</sup> *Cook v. State Farm Mut. Auto. Ins. Co.*, 436 S.W.2d 192 (Tex. Civ. App.—Waco 1968).

<sup>22</sup> 435 S.W.2d 537 (Tex. Civ. App.—Fort Worth 1968).

<sup>23</sup> 436 S.W.2d 549 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

<sup>24</sup> TEX. REV. CIV. STAT. ANN. arts. 224-38 (1959).

*Automobile Business Exclusion.* *Allstate Insurance Co. v. Universal Underwriters Insurance Co.*<sup>25</sup> affirmed a summary judgment in favor of a garage liability insurer in its action against an automobile owner's liability insurer. The action had been instituted to recover the amount the garage insurer had paid in settlement of a claim by a party injured in a collision with the owner's automobile at a time while it was being driven by a garage employee to the shop for repairs. The omnibus provision of the family automobile policy excluded coverage while the automobile was being "used in the automobile business" which, in turn, was defined as "the business or occupation of selling, repairing, servicing, storing, or parking automobiles." The court noted that this exclusion was based on the character of the use being made at the time, not on the character of the business of the person using it, and concluded that driving the car to the shop for repairs did not constitute use in the automobile business.

*Tindall Pontiac, Inc. v. Liberty Mutual Insurance Co.*<sup>26</sup> was a suit by a garage against the insurer of a family automobile serviced by the garage. The garage sought reimbursement of the sum paid in settlement of a third party claim for damages arising from a collision which occurred while the car was being driven from the service department of the garage to its new car make-ready department. The court recognized the distinction between the two kinds of clauses mentioned in the *Allstate* case and pointed out that while the Texas Standard Policy formerly was in terms of use in the excluded business, the policy form had been changed and now excluded coverage of the owned automobile while being used by any person "while such person is employed or otherwise engaged in the automobile business." It was held that the accident here occurred while the garage was servicing the car and that the exclusion therefore did apply.

*Comprehensive Automobile Liability.* In a suit for medical payments, statutory penalty, and attorney's fees<sup>27</sup> by the insured whose son had been injured in an automobile accident, the comprehensive automobile liability policy contained four insurance contracts with a limit of \$2,000 for medical payments covering each of four automobiles owned by the insured. The insured, having incurred medical expenses in the amount of \$2,612.37, claimed that he was entitled to the full \$2,000 limit under each contract, thus totalling \$8,000, plus the statutory penalty of twelve per cent of the \$8,000 sum. It was held, however, that the comprehensive policy was one of indemnity and that the insured's proper recovery was \$2,612.37, together with twelve per cent of that amount as penalty and the attorney's fees determined in the trial court.

*Homeowner's Liability.* The exclusion in homeowners' policies of liability coverage for intentional injuries was considered in *National Union Fire*

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<sup>25</sup> 439 S.W.2d 385 (Tex. Civ. App.—Houston 1969).

<sup>26</sup> 441 S.W.2d 948 (Tex. Civ. App.—San Antonio 1969), *error dismissed*.

<sup>27</sup> *Harlow v. Southern Farm Bureau Cas. Ins. Co.*, 439 S.W.2d 365 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*

*Insurance Co. v. Bourn.*<sup>28</sup> In a prior action against the insureds, the jury found that not only had each insured made an assault and battery upon plaintiff, but each also acted in concert with others in so doing and negligently failed to restrain the others from committing an assault. After obtaining judgment in the first action, plaintiff brought suit against the defendants' insurers under their homeowners' policies and urged that the findings of negligence in the first suit were conclusive, the insurers having defended under reservations of rights. The court held that the former negligence findings were not binding, since the companies could not have contested the issue with their insureds in the very case in which they were defending the insureds, and that the assaults were in fact intentional, so that there was no recovery against the insurers.

*Stowers Doctrine.* Ramifications of the *Stowers* doctrine<sup>29</sup> came into play in two federal cases arising in Texas. In the first,<sup>30</sup> Transit Casualty had refused to settle within its \$5,000 policy limits in a suit against its insured, and judgment was subsequently rendered for \$51,375. The insured executed a note for the amount of the judgment to the judgment creditor and paid \$5 as an initial payment thereon, and also executed an assignment to the judgment creditor of her cause of action against the insurer for negligent failure to settle within the policy limits. The insured and the judgment creditor then brought suit against the insurer. It was held that the insurer's negligent failure to settle within the policy limits was a proximate cause of the entry of judgment against the insured. The court recognized the Texas rule that payment by the insured is necessary for a subsequent recovery against the negligent insurer under the *Stowers* doctrine and held that the note given to the judgment creditor was not bona fide and did not constitute such necessary payment. However, it was held that the insured did have a valid cause of action not only for recovery of the \$5 which had been paid, but also for a declaratory judgment that Transit would be liable for any and all future amounts paid by the insured on the original judgment.

The question of when limitations begin to run in a *Stowers* situation was considered in *Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan*,<sup>31</sup> and it was held that the date or dates when the insured made payment controlled, rather than the date when the claim was reduced to judgment. A previous suit by the insured for the full excess had failed because the original judgment had not been paid.<sup>32</sup> Thereafter, the insured's attorney secured a loan of \$10,000 and used it to make part payment to the judgment creditor on the \$270,000 judgment, and initiated a new suit against the insurer. This was more than two years after the original judgment, but it was held that since prepayment was essential, the cause of action did not

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<sup>28</sup> 441 S.W.2d 592 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

<sup>29</sup> *Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929).

<sup>30</sup> *Transit Cas. Co. v. Smith*, 410 F.2d 210 (5th Cir. 1969).

<sup>31</sup> 410 F.2d 718 (5th Cir. 1969).

<sup>32</sup> *Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom*, 347 F.2d 168 (5th Cir. 1965).

accrue until such prepayment was made. Declaratory judgment as to future payments was likewise held proper. Consequently, *Jernigan* and *Smith*, if accepted by the state courts, virtually emasculate the requirement of prepayment.

## II. LIFE, HEALTH AND ACCIDENT INSURANCE

*Conditional Receipts.* The effect of a conditional receipt was considered in *National Life & Accident Insurance Co. v. Blagg*.<sup>33</sup> The deceased had applied for a life insurance policy and paid the first premium, receiving in return a conditional receipt, but died before any policy was issued. Upon suit by the widow, the supreme court reaffirmed its earlier holding in *United Founders Life Insurance Co. v. Carey*<sup>34</sup> that conditional receipts provide for temporary life insurance to become effective on the date of completion of the applicant's medical examination if in the opinion of the company's authorized officers he was on that date insurable and acceptable according to the terms of their receipt. The *Blagg* court went on to hold that there were therefore three different ways by which the widow could recover in this kind of situation: (1) by obtaining a fact finding that in the opinion of the officers of the company the applicant was insurable and acceptable on the date of the completion of his medical examination; (2) by obtaining a fact finding that the determination that the applicant was uninsurable was not made in good faith and that a reasonably prudent officer acting in good faith under the available evidence would find that the applicant on the date of his examination was insurable and acceptable under the company's rules and practices; or (3) by obtaining fact findings that the company arbitrarily refused to form an opinion after the applicant's death and that a reasonably prudent underwriter under similar circumstances would have formed the opinion that he was insurable.

*Insurance Agents and Employees.* Two civil appeals decisions emphasize the inability of certain agents and employees to bind an insurance company. One held that where the agent knowingly and deliberately assisted in the falsification of an application for life insurance, the company was entitled to cancellation of the policy after the death of the insured because of the false statements in the application.<sup>35</sup> In holding that there was no waiver or estoppel, it was pointed out that the policy itself provided that no agent should have the power to waive, change or alter any of the terms or conditions and that article 21.04 of the Texas Insurance Code<sup>36</sup> provides that a soliciting agent "shall not have the power to waive, change or alter any of the terms or conditions of the application or policy." The other case held that an employee had no authority to sign a form letter

<sup>33</sup> 438 S.W.2d 905 (Tex. 1969).

<sup>34</sup> 363 S.W.2d 236 (Tex. 1962).

<sup>35</sup> *Bennett v. Nat'l Life & Accident Ins. Co.*, 438 S.W.2d 438 (Tex. Civ. App.—Dallas 1969), error dismissed.

<sup>36</sup> TEX. INS. CODE ANN. art. 21.04 (1963).



on the insurer's letterhead extending the grace period.<sup>37</sup> The employee was in the accounting department, which the parties stipulated was authorized to handle only billing, collection and receipt of premium payments, recording of these payments, deposit of premium payment checks and clearing of returned checks, and correspondence concerning those matters. The court found that this stipulation negated authority of this employee to extend the grace period or to waive forfeiture for nonpayment. It was also noted that the policy provided that only specified officers could waive any condition or extend the time for premium payment or change or modify the policy, and that the accounting employee was not such an officer.

*Group Policies.* A number of cases dealt with group policies, but most of the results appear not particularly affected by the group nature of the insurance. In *General American Life Insurance Co. v. Williams*<sup>38</sup> the named beneficiary could not recover under a group life policy although the insured had become totally disabled prior to death, because he had failed to give notice of such disability to the insurer to bring about a waiver of premium payment, and the policy had lapsed for nonpayment. The court held that the insured was not relieved from giving such notice because of temporary periods of mental incompetence and that the beneficiary was barred by failure to file proof of loss within one year as required by the policy.

Another case<sup>39</sup> concerned a group accident policy covering loss which "resulted directly, and independently of all other causes, from bodily injuries . . . sustained solely through accidental means."<sup>40</sup> The insured died as the result of asphyxiation due to aspiration of vomituous material. The court held that the beneficiary was entitled to recover and that the aspiration resulting in death was an accidental injury within the meaning of the policy, although it indicated that the result might have been different if the insuring clause had been in terms of "external means" rather than accidental bodily injury.

*Oliver v. Life & Casualty Insurance Co.*<sup>41</sup> was a suit to recover medical expenses under a group policy which excluded coverage for "accidental injury arising out of employment for compensation or profit or disease entitling the insured to benefits under Workmen's Compensation, or any similar law."<sup>42</sup> Plaintiff, a plastering contractor, was injured when he fell from a scaffold at a job site. It was held that the injury had occurred while he was actively at work in his own employment for compensation and therefore was not covered.

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<sup>37</sup> *Ford v. Petroleum Life Ins. Co.*, 435 S.W.2d 164 (Tex. Civ. App.—Waco 1968), *error ref. n.r.e.*

<sup>38</sup> 433 S.W.2d 802 (Tex. Civ. App.—Texarkana 1968), *error dismissed*.

<sup>39</sup> *Jones v. Aetna Life Ins. Co.*, 439 S.W.2d 721 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

<sup>40</sup> *Id.* at 722.

<sup>41</sup> 440 S.W.2d 398 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

<sup>42</sup> *Id.* at 399.

In a case involving a group policy which had been converted into an individual policy,<sup>43</sup> summary judgment in favor of the insurer was affirmed. Plaintiff's husband procured health insurance on himself and his family through a group policy at his place of employment. Upon his death plaintiff obtained a converted individual family health policy on herself and her children, arrangements being made by the former employer who told plaintiff that the benefits would be the same as under the group policy. However, the individual policy actually issued did not contain major medical coverage which had been included in the group policy. Plaintiff's daughter was injured in an automobile accident and the insurer refused to pay major medical benefits. Plaintiff urged that the employer should be considered the insurer's agent, with the insurer being bound by his representations. The court noted that authorities in other jurisdictions are divided on the question of whether an employer acts as agent of the insurer or of the employees in connection with a group insurance policy, but found it unnecessary to pass on that point since the court was persuaded that if the employer were acting as the insurer's agent, "he could at most be considered only a limited or special agent, analogous to soliciting agent. As such he would not have authority to bind appellee as to risk, coverage or waiver of conditions."<sup>44</sup>

*Determining Proper Beneficiaries.* In *Jackson v. Gibraltar Life Insurance Co. of America*<sup>45</sup> the insured's mother was named a primary beneficiary, but the wife claimed that the insured had intended that she be the primary beneficiary with the mother as contingent beneficiary in the event the wife did not survive her husband. The court held that there could not be a mutual mistake, since the insurance company was not a party to the mistake, and affirmed the summary judgment against the wife. Another case<sup>46</sup> dealt with a widow's claim that her husband's attempts to change the beneficiary in eight policies were ineffective. It was held that even though the insured, prior to his death, mailed forms to his attorney to pass on to the insurers, requesting change of the beneficiary in his life policies, the attorney's agency and power to act had terminated with the insured's death. Since the forms had not been sent to the insurers for the required endorsement prior to the insured's death, there had not been substantial compliance with the stated method for changing beneficiaries, and the attempted changes were therefore ineffective.

*Construing Policy Provisions.* In construing a policy a number of cases followed the approach of resolving any doubts against the insurer. A rider amending a health insurance policy by providing indemnity for all waiting periods for surgery was held to have also covered the waiting period for hospital, medical and anesthesia expenses "because they were

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<sup>43</sup> *Harrison v. Travelers Ins. Co.*, 442 S.W.2d 400 (Tex. Civ. App.—Dallas 1969).

<sup>44</sup> *Id.* at 404.

<sup>45</sup> 435 S.W.2d 618 (Tex. Civ. App.—Waco 1968).

<sup>46</sup> *Witt v. Citizens Nat'l Bank*, 440 S.W.2d 112 (Tex. Civ. App.—Waco 1969).

reasonably necessary incidents of the surgery."<sup>47</sup> Under a policy covering "hospital expense actually incurred," it was held that expenses actually had been incurred so as to make the insurer liable, even though the hospital had not been paid at the time of trial and it appeared that the workmen's compensation of the insured's employer would probably be liable for such expense.<sup>48</sup> The reductions clause which limited benefits of an accident policy was held to apply only to a pre-existing condition involving the back, the court stating that degenerative changes due to the aging process did not constitute such a pre-existing condition, so that the insured was entitled to full disability benefits.<sup>49</sup>

A federal case dealing with a Texas accidental death policy held that lay evidence was sufficient to support a finding that the insured's death in a collision was caused by accidental means, and further held that the refusal of the beneficiary to allow an autopsy after interment was not a defense, the policy provision being construed to mean that autopsy must be demanded by the insurer and performed prior to interment or within a reasonable time after notice of the death.<sup>50</sup>

However, where the plain and unambiguous language of the policy favored the insurer, it was enforced. Thus, in *Fruhman v. Nawcas Benevolent Auxiliary*,<sup>51</sup> where the policy provided that retirement benefits paid the policy holder during his lifetime should be deducted from the death benefits and the total amount of retirement benefits paid exceeded the amount of the death benefits, it was held that the beneficiary under the policy was entitled to no recovery.

### III. FIRE AND CASUALTY INSURANCE

*Liquidated Demand.* In *Houston Fire & Casualty Insurance Co. v. Nichols*<sup>52</sup> the supreme court reversed both lower courts and held that complete destruction by fire of two piles of insured cotton burrs did not automatically entitle the insured to the face amount of the policy regardless of the actual loss sustained. It was noted that article 6.13 of the Texas Insurance Code<sup>53</sup> makes the full amount of a fire policy a liquidated demand against the insurer where there is a total loss by fire, but this provision expressly does not apply to personal property. It was therefore held that when personal property is totally destroyed by fire, the face amount of the policy does not constitute a liquidated demand unless the parties have so contracted, which they had not done in this instance.

*Construing Policy Provisions.* In construing policy terms doubts were resolved in favor of the insured and against the insurer. In one case<sup>54</sup> the

<sup>47</sup> *Community Life & Health Ins. Co. v. Mitchell*, 434 S.W.2d 371 (Tex. Civ. App.—Eastland 1968).

<sup>48</sup> *Republic Bankers Life Ins. Co. v. Anglin*, 433 S.W.2d 795 (Tex. Civ. App.—Texarkana 1968).

<sup>49</sup> *American Exchange Life Ins. Co. v. Willis*, 433 S.W.2d 945 (Tex. Civ. App.—Tyler 1968).

<sup>50</sup> *Brunson v. Beneficial Fire & Cas. Ins. Co.*, 407 F.2d 841 (5th Cir. 1969).

<sup>51</sup> 436 S.W.2d 912 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*

<sup>52</sup> 435 S.W.2d 140 (Tex. 1968).

<sup>53</sup> TEX. INS. CODE ANN. art. 6.13 (1963).

<sup>54</sup> *Employers' Fire Ins. Co. v. Howsley*, 432 S.W.2d 578 (Tex. Civ. App.—Amarillo 1968).

insured testified that camping, fishing, and camera equipment were lost when his rubber raft became lodged on a large rock in the middle of the Rio Grande River and then was overturned by the wind. The policy excluded loss caused by "flood, surface water, waves, title [*sic*] water or title [*sic*] wave, overflow of streams or other bodies of water . . . all whether driven by wind or not."<sup>55</sup> The court found coverage, holding that the question was not "what caused the goods to be lost?," but rather "what was the cause of the boat capsizing?"<sup>56</sup> and that the answer was the wind. The court said that the waters of the Rio Grande were not the kind referred to in the exclusion and stated, "water was involved only as a recipient of the goods when the raft capsized."<sup>57</sup> In a case involving the loss of a boat<sup>58</sup> the court held that policy language covering loss in transit from "collision and/or overturn of transporting land conveyance"<sup>59</sup> was broad enough to include damages sustained when the boat trailer tipped, but did not overturn, and spilled the boat onto the highway.

However, where unambiguous language provided a policy defense, it was enforced under a theft insurance policy. In *Vanguard Insurance Co. v. Stanfield*<sup>60</sup> there was an exclusion of losses of personal property stolen from premises owned, rented or occupied by the insured, unless stolen while the insured was temporarily residing on such premises. It was held that under such exclusion there was no coverage for property stolen from premises which the insured owned, but on which he did not reside.

*Accord and Satisfaction.* A question of accord and satisfaction was resolved against the insured in *Lloyds v. Burtner*,<sup>61</sup> where fire destroyed the contents of the insured's garage, including a boat, motor, and trailer. Under the household goods extension of the policy, the insurance company was liable for a maximum of ten per cent of the face value of the policy, or \$400; the household goods stored in the garage and destroyed had a value of \$1,113.75. The insurer admitted liability for \$75 damage to drapery in the dwelling under basic coverage, and \$400 for the goods destroyed in the garage under extension coverage, but it denied coverage on the boat, motor, and trailer, and tendered a draft in the sum of \$475, which had a printed statement on the back that endorsement would constitute an acknowledgment of full settlement, satisfaction, and compromise. Plaintiff endorsed and cashed the draft and then brought suit for loss of the boat, motor, and trailer. It was held that the draft was merely in the amount of an undisputed and liquidated claim, so that the release was without consideration insofar as the boat, motor, and trailer were concerned, and the defense of accord and satisfaction failed.

<sup>55</sup> *Id.* at 579.

<sup>56</sup> *Id.* at 580.

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

<sup>58</sup> *Washington Gen. Ins. Corp. v. King*, 434 S.W.2d 921 (Tex. Civ. App.—Eastland 1968), error dismissed.

<sup>59</sup> *Id.* at 922.

<sup>60</sup> 442 S.W.2d 488 (Tex. Civ. App.—Dallas 1969).

<sup>61</sup> 436 S.W.2d 611 (Tex. Civ. App.—Fort Worth 1968), error ref. *n.r.e.*

*Mortgagee's Interest.* Article 6.15 of the Texas Insurance Code<sup>62</sup> was construed by the Fifth Circuit in *Standard Fire Insurance Co. v. United States*.<sup>63</sup> The article provides that the interest of a mortgagee under a fire policy cannot be invalidated by any act or neglect of the mortgagor or owner, or the happening of any condition beyond his control. In this case the policy was cancelled because of the mortgagor's failure to make premium payments, with oral notice of this action given to the Small Business Administration, the mortgagee. Thereafter, a fire occurred and the SBA sued on the policy. It was held that article 6.15 required reasonable notice to the mortgagee of impending cancellation, even though written notice was given to the named insured, and that under the circumstances oral notice was not reasonable notice.

#### IV. SURETY BONDS

In *Aetna Casualty & Surety Co. v. Southern Brokerage Co.*<sup>64</sup> suit was brought against the surety on a broker's blanket bond for the expense of successful defense of a suit. The supreme court determined that if a loss had been sustained it would not have fallen under the terms of the bond and therefore summary judgment for the surety was held to be proper. In another complex surety bond situation, it was held that the surety company had as a matter of law clothed its agent with sufficient apparent authority to execute surety bonds as to make the company liable, although the agent did not have actual authority.<sup>65</sup>

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<sup>62</sup> TEX. INS. CODE ANN. art. 6.15 (1963).

<sup>63</sup> 407 F.2d 1295 (5th Cir. 1969).

<sup>64</sup> 443 S.W.2d 45 (Tex. 1969).

<sup>65</sup> *Sharpstown State Bank v. Great Am. Ins. Co.*, 441 S.W.2d 548 (Tex. Civ. App.—Austin 1969), *error granted*.