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## Insurance

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after the adjournment of the Legislature and must, within sixty days after they meet, apportion the state into senatorial and representative districts. A majority of the board shall constitute a quorum. The apportionment made by the board, when signed by three members and filed with the Secretary of State, "shall have force and effect by law."<sup>35</sup> The apportionment shall become effective at the next statewide general election, and the amendment is to become effective January 1, 1951.

It is to be noted that the Supreme Court of Texas is expressly given jurisdiction to force the board to perform its duty by writ of mandamus, "or other extraordinary writs conformable to the usages of law."<sup>36</sup>

It would seem that this amendment provides a procedure which will assure that the state will be re-apportioned following the next Federal census, either by the Legislature or by the newly created redistricting board.

*Wilson Hanna.*

## INSURANCE

### AUTOMOBILE: DAMAGE BY A BAILEE AS EXCEPTED CAUSE

**W***est American Insurance Co. v. First State Bank of Rio Vista*<sup>1</sup> was concerned with an exclusion clause of an insurance policy providing as follows:

"This policy does not apply under coverage of theft, fire, or collision while the automobile is subject to any bailment lease, conditional sale, or other incumbrance not specifically declared and described in this policy."

The court held that the company could escape liability under this

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>1</sup> *West American Ins. Co. v. First State Bank of Rio Vista*, 213 S. W. (2d) 298 (Tex. Civ. App. 1948).

clause if the automobile was subject to a bailment at the time of the loss.

According to the facts of the case, A had purchased an automobile upon which the First State Bank of Rio Vista, Appellee, held a lien for \$880.00. A secured an insurance policy from the Hartford Insurance Co. for protection against fire, theft, or collision of said automobile for a period of one year, wherein the bank as lien-holder was named payee to the extent of its interest. A then sold the automobile to B who executed his note to the bank for the \$880.00. A endorsed this note. B obtained an insurance policy upon the automobile from the West American Insurance Co., Appellant, for protection against loss by fire, theft, or collision of said automobile for a period of one year wherein the bank was named payee to the extent of its interest. B later wrecked and abandoned the car, and absconded. Wherefore A, under advice from the bank, caused the automobile to be turned over to one Nelson to be repaired. While in the possession of Nelson, the automobile was stolen. It was later found overturned in a ditch where it had burned. A and the bank sought recovery from the Hartford and West American Insurance Companies. The trial court allowed the bank to recover from West American to the extent of its interest. The appellate court reversed the lower court's decision and rendered judgment for West American. The court's decision is doubtless correct because of extraneous facts not pertinent here, but issue may be taken with one of the bases which the court used in its reasoning.

The court stated in its holding:

"It was further provided among the exclusions in such policy that it did not apply to coverage of loss or damage to the insured automobile resulting from theft, fire or collision 'while the automobile is subject to any bailment, lease, conditional sale, mortgage or other incumbrance not specifically declared and described in this policy.'"<sup>2</sup>

Further that,

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<sup>2</sup> *Id.* at 301.

"[s]ince the loss and damage for which recovery is sought was sustained while the automobile was subject to such bailment, such loss and damage was expressly excluded by the terms of appellant's policy from the coverage thereby afforded."<sup>3</sup>

It is be noted that the clause upon which the court based this conclusion is clause (g) under *Exclusions* of the Texas Standard Automobile Policy.<sup>4</sup> This clause is contained in every policy of insurance written upon an automobile in Texas. There is, however, a slight distinction between the clause as it appears in the standard insurance policy and as the court quoted it. There should be no comma between *bailment* and *lease*. The policy provision refers to a *bailment lease*. That there is a distinction between these terms was entirely overlooked by the court; result, an erroneous conclusion which may, if not promptly refuted, cause automobile owners in Texas unlimited trouble.

The court based its conclusion on two authorities, neither of which support such conclusion; (1) *Couch on Insurance*,<sup>5</sup> and (2) *Royal Ins. Co. v. Wm. Cameron*.<sup>6</sup> Couch in the section cited points out two purposes of a provision for forfeiture in case of a change of interest; (1) To prevent the interest of the insured from being diminished, so as to keep the insured as much concerned in the preservation of the property during the whole life of the policy as he was when it was issued. (2) To prevent such an assignment or transfer as destroys the transferrer's insurable interest. Does an ordinary bailment, such as placing an automobile in a garage to be repaired violate either purpose? Clearly not. The insured retains the same interest in the automobile as he had when the policy was issued; and to say he no longer has an insurable interest would be absurd.

The *Cameron* case is distinguishable. The policy in question

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<sup>3</sup> *Id.* at 303.

<sup>4</sup> Texas Standard Provisions for Automobile Policies as prescribed by the Texas Board of Insurance Commissioners, p. 12 (1947).

<sup>5</sup> 5 COUCH ON INSURANCE, § 975 (1929).

<sup>6</sup> *Royal Ins. Co. v. Wm. Cameron Co.*, 184 S. W. (2d) 936 (Tex. Civ. App. 1945) writ of error refused.

there was for protection against theft (broad form) which was defined to mean loss of or damage to the automobile caused by theft, larceny, robbery, or pilferage. The insured had placed his car in a garage for storage and minor repairs and had left it overnight as was his custom. The manager of the garage and another employee had used the car and were involved in an accident which resulted in the damage for which the insured sought recovery. The court found the insurance company not liable on the following grounds: the jury in the trial court had not found that the garage manager took or used the automobile with the intent of depriving the owner of its value or of permanently appropriating the same to his use or benefit. In the absence of a felonious intent to steal, the loss complained of was not caused by theft, larceny, robbery or pilferage within the meaning of the policy sued upon. While the court did refer to a clause similar to the clause in question, it was not basic to the decision, and it is submitted that had the policy provided for protection against collision, the insured could have recovered.<sup>7</sup>

What caused the court in the principle case to fall into error was the failure to distinguish between *bailment* and *bailment lease*. The latter term is common to but one jurisdiction, Pennsylvania. There the conditional sale contract was prohibited, and the bailment lease transaction, which the courts permitted, resulted. The best definition seems to be that In *re Robinson*,<sup>8</sup> as a legal method by which one desiring to purchase an article, but unable to pay therefor at the time, may secure possession thereof with the right to use and enjoy it so long as he pays stipulated rentals, he to become absolute owner after completing such installment payments, on payment of an additional sum which may be nominal.<sup>9</sup> The similarity between a bailment lease and a conditional

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<sup>7</sup> Home Ins. Co. of New York v. Brewton, 46 S. W. (2d) 359 (Tex. Civ. App. 1942); Camden Fire Ins. Assn. v. Moore, 206 S. W. (2d) 104 (Tex. Civ. App. 1947) *writ of error refused, n.r.e.*

<sup>8</sup> *In re Robinson*, 40 F. Supp. 320 (E. D. Pa. 1941).

<sup>9</sup> See Valicenti v. Central Motors, 115 Pa. Super. Ct. 74, 174 Atl. 799 (1934).

sale is brought out in *Stern v. Paul*,<sup>10</sup> wherein it is said that, "[p]erhaps no entirely satisfactory definition of a bailment lease as distinguished from a conditional can be given."<sup>11</sup>

Therefore, it is submitted that the term *bailment lease* is included in the policy clause in order that the exclusion clause would be of equal legal import in such a jurisdiction as Pennsylvania, as in jurisdictions which recognize conditional sales. The National Underwriters Service in discussing a loss payable clause which includes substantially the same wording as the clause in question, supports this contention as follows:

"Similar to the mortgage clause in fire insurance, the loss payable clause provides that the interest of the *lien-holders* shall not be affected by a breach of policy conditions or other act of omission on the part of the insured."<sup>12</sup>

The discussion pertains to the liability of the insurer to the *lien-holders* noted upon the face of the policy where the insured has breached the terms of the policy. It is to be noted that a bailment-lessor is included as a lien-holder in the loss payable clause. A bailee, as such, has no lien on the bailed property.

The clause in question specifies that, "This policy does not apply while the automobile is subject to any bailment lease, conditional sale, mortgage, or other incumbrance not specifically declared and described in the policy." From the above it is clear that when the bailment lease, conditional sale, mortgage, or other incumbrance is specified in the policy, the holder of such incumbrance is protected to the extent of his lien. The owner's insurable interest would be diminished by the amount of the incumbrance since a payment by the insurer to the lienholder for a loss to the insured property would result in a discharge of the owner's liability on the lien. Any transfer of ownership in the insured property without the consent of the insurer changes the

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<sup>10</sup> *Stern v. Paul*, 96 Pa. Super. Ct. 112 (1928).

<sup>11</sup> *Id.* at 113; note 92 A. L. R. 330 (1934).

<sup>12</sup> National Underwriters Service, Auto-Fire, Fi. 1 (1948).

insured's insurable interest and voids the policy.<sup>13</sup> A bailment, however, is not a transfer of ownership but only a transfer of possession. Assuming continuity of thought in the clause, a bailment lease can only be construed (note the subsequent terms; conditional sale, mortgage, or *other incumbrance*) as a transfer of a portion of the ownership of the automobile as distinguished from a mere transfer of possession under a bailment. It seems irrefutable that the court was in error in this conclusion. Since the bailment lease is not common to Texas, it is probable that the court was not properly briefed as to its definition and use, and that the court failed to consider fully all aspects and characteristics of a bailment lease transaction. It is to be hoped that any confusion that might result from the court's construction of the policy may be averted and that the principle case as to this point, will not be followed.

#### MARINE CASUALTY: CONSTRUCTION OF THE POLICY

In *National Surety Marine Insurance Corp. v. Failing*,<sup>14</sup> A had insured certain drilling equipment with the National Surety Marine Insurance Co. The policy was designated as a transportation policy specifying coverage, "in any one casualty, either in case of partial or total loss, or salvage charges, or expenses, or all combined, while in transit." Immediately following was typewritten the following rider: "... or otherwise within the limits of the continental U. S. and Canada." Also typewritten were two additional riders: "this policy except as hereinafter provided, insures against direct loss or damage by . . .," followed by eleven express perils which the policy covered; and, "this policy does not insure against . . .," followed by seven express perils which the policy did not cover.

The loss for which the insured is seeking recovery occurred while he was using the equipment covered by the policy for drill-

<sup>13</sup> 5 COUCH ON INSURANCE, § 975 (1929).

<sup>14</sup> *National Surety Marine Ins. Corp. v. Failing*, ..... Tex. ...., 211 S. W. (2d) 567 (1948).

ing in Florida. Certain cavities in the earth were discovered and before the equipment could be removed, the earth caved in, cratered, and the equipment was lost. Loss in this manner was not one of the eleven express events which the policy covered, nor one of the seven which it expressly did not cover.

The majority of the court held that the policy was essentially a transportation policy and the typewritten rider merely extended the coverage during periods when the equipment was not in transit and did not have the effect of extending coverage to losses from any event. In the course of its decision the majority states:

"The language is neither ambiguous nor vague. It is a simple matter to harmonize every part of the agreement and give them all effect. The parties have plainly contracted that the scheduled property should be insured against loss in any one casualty up to the stated amount if the loss or damages result directly from any one or more of the eleven listed perils."<sup>15</sup>

A strong dissenting opinion points out that the term *casualty* as used just prior to the rider is much broader than the eleven express perils which the policy covered; that since the policy contains seven express perils which the policy does not cover, it should be construed from the use of the term *casualty* to include losses resulting from all other events which are properly included in the term *casualty*; that any doubt in the construction of the policy should be resolved against the insurer since his words are being construed; and that if the insurer intended to limit the coverage to the express perils, the intention should have been so stated in clear and unambiguous language, to the effect that the policy did not insure against risks not enumerated therein. The dissenting judges said:

"If it had [not] been the intention of the insurer to include in the rider all risks arising from a casualty, the intention could have been stated in clear and unambiguous language, to the effect that the policy did not insure against risks not enumerated therein."<sup>16</sup>

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<sup>15</sup> *Id.* at 570.

<sup>16</sup> *Id.* at 571.



**Further:**

"If it had been intended that the risks specifically listed were the only risks covered by the policy, then it would not have been necessary for the insurer to state further that other risks were not covered by the policy."<sup>17</sup>

A lengthy discussion as to the correctness of either view would be of little avail as the principal question involved is one of construction of the policy as governed by the intention of the parties at the time of entering into the contract of insurance.<sup>18</sup> That any ambiguity in the policy will be resolved against the insurer is too well settled in Texas to require sustaining authority. The majority has found the intent of the parties as shown by the words of the policy to be clear and unambiguous, said intent being that the eleven stated perils were exclusive. The dissent has found their intent as shown by the policy to be ambiguous and has properly resolved said ambiguity in favor of the insured.

The case does illustrate the necessity of stating concretely in the policy the intention of the parties.

*Tom Pennington.*

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Aird v. Aetna Life Ins. Co.*, 27 F. Supp. 141 (W. D. Tex. 1939), *affirmed* 108 F. (2d) 136 (1939); note, 125 A. L. R. 1436 (1940); *Drane v. Jefferson Standard Life Ins. Co.*, 139 Tex. 101, 161 S. W. (2d) 1057 (1942) *modifying* 146 S. W. (2d) 526 (Tex. Civ. App. 1940).