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INSURANCE

THEFT POLICY — PROVISION EXCLUDING LIABILITY
WHEN INSURED PARTS WITH POSSESSION VOLUNTARILY

Arkansas. In *Galloway v. Marathon Insurance Company*¹ plaintiff sought to recover from defendant insurer the value of an automobile delivered to a third party, who gave a worthless check in payment therefor and disappeared with the automobile. The defense was that the policy excluded from its coverage thefts caused by any person to whom insured "voluntarily . . . [parted] with title and/or possession, whether or not induced so to do by any fraudulent scheme, trick, device, or false pretense". The Arkansas Supreme Court affirmed the holding of the circuit court, deciding that the policy provision expressly excluded coverage of a theft accomplished as in this case.

In the opinion it was pointed out that, when such clauses as this are construed against the insurer, it is usually because the owner of the goods has parted with custody as distinguished from possession. Thus, when the owner of an automobile lets a hotel employee have custody of the car to drive it to a garage to park, possession has not been relinquished.² In the instant case the court pointed out that the owner-insured parted with possession, receiving in return a check which was later found to be worthless.

Several earlier Arkansas decisions were distinguished, one because the fraudulent taking was larceny by statute and there was no exclusionary clause in the policy,³ and the other because the exclusion was as to conversion by one in "lawful possession", which phrase was rendered ineffective because the possession had been wrongfully obtained.⁴

¹ Ark., 248 S. W. 2d 699 (1952).

² *Bennett Chevrolet Co. v. Bankers & Shippers Insurance Co.*, 58 R. I. 16, 190 Atl. 863 (1937); see Note, 109 A. L. R. 1077 (1937).

³ *Central Surety Fire Corp. v. Williams*, 213 Ark. 600, 211 S. W. 2d 891 (1948).

⁴ *Massachusetts Fire & Marine Insurance Co. v. Cagle*, 214 Ark. 189, 214 S. W. 2d 909 (1948).

The decision seems to be sound and in line with the majority view.⁵ Likewise, the dictum regarding the distinction to be made between possession and custody is generally recognized. Texas may be an exception, since a similar exclusion in a theft policy was held to preclude recovery even though the person taking the car had been given permission only to drive it down the road and back after showing it to another person.⁶ In this decision the court distinguished an earlier case in which the policy did not expressly except theft by false pretense.⁷ In adopting the view favorable to the insurer, the Texas court applied the statutory definition of false pretext⁸ and held that the policy excluded loss to an owner resulting from a temporary parting with possession.

ESTOPPEL OF INSURER TO DENY ISSUANCE OF DOUBLE INDEMNITY

*Arkansas. Woodmen of the World Life Insurance Society v. Counts*⁹ involved an attempt to recover double indemnity proceeds after the insurer had paid the basic amount but had refused to pay for accidental death because the policy issued did not include the double indemnity provision. In deciding the case, the court held that the father of the insured acted as the agent of the insured when he paid premiums, received and read a letter from the president of the insurer, and later received the policy. The court required the insurer to pay double indemnity, holding that since the letter to the insured's father said that the application had been approved, and since the application was for a policy including the double indemnity provision, the insurer was now estopped from defending on the ground that the double indemnity was not in fact included in the policy issued.

In its opinion the court pointed out that the father had relied

⁵ See Note, 109 A. L. R. 1077 (1937).

⁶ *Stuart Motor Co. v. General Exchange Insurance Corp.*, 43 S. W. 2d 647 (Tex. Civ. App. 1931), *er. ref.*

⁷ *Security Insurance Co. v. Sellers-Sammons-Signor Motor Co.*, 235 S. W. 617 (Tex. Civ. App. 1931) *er. ref.*

⁸ TEX. PEN. CODE (Vernon, 1948) art. 1413.

⁹Ark....., 252 S. W. 2d 390 (1952).

on the letter stating that the application had been approved, and therefore had not inspected the policy. Admittedly, according to the court, holding the policy for a sufficient period of time would have amounted to ratification of the terms of the policy. But it held that two months was not a long enough period under the facts of this case, citing an earlier case in which four months was held not to be long enough, in the absence of full knowledge of the variance in the terms.¹⁰

The insurer also defended on the ground that its by-laws forbade issuance of policies with double indemnity to men of draft age, as was this insured. The court held that the president's letter waived this provision.

A dissent was registered, based on lack of a detrimental change in course of action by the father, which is a required element of estoppel.¹¹ Under the particular facts it was shown that the father had been unable to communicate with his son from the time the application for the insurance was made until he was notified that the boy had died by accident. Therefore, reasoned the dissenting judge, the father would have been unable to secure double indemnity coverage elsewhere even if he had known that the insurance policy issued by defendant did not include such coverage. Consequently, there was no detrimental reliance requiring that the insurer be estopped to deny that double indemnity was issued.

Although the result seems not entirely unfair, and admitting that the insurer was largely to blame for the predicament in which it found itself, the logic of the decision is questionable. The court apparently held that a supplementary contract providing the double indemnity protection became effective by estoppel. The creation of a contract by estoppel seems repugnant to the requirement of mutual assent for consummation of a contract. Other

¹⁰ *Inter-Southern Life Insurance Co. v. Holzhauser*, 177 Ark. 927, 9 S. W. 2d 26 (1928).

¹¹ *Nakdimen v. Baker*, 111 F. 2d 778 (8th Cir. 1940); *Gambill v. Wilson*, 211 Ark. 733, 202 S. W. 2d 185 (1947).

possible theories suggest themselves, such as holding that the double indemnity contract was effectuated when the letter purported to accept the father's offer. Since the policy represented the contract, however, reformation would be required before there could be recovery under that theory.

Although there was no reference in the opinion to the point, it would seem that a more plausible dissent could be registered on the basis that the double indemnity coverage is a supplementary contract, severable from the basic contract of insurance.¹² It might then be argued that the application for insurance could be approved in part, and approval announced to the insured, without creating an estoppel as to the supplementary coverage.

CHANGE OF BENEFICIARY IN DIVORCE SETTLEMENT AGREEMENT

*Arkansas. Mabbitt v. Wilkerson*¹³ dealt with the effectiveness of a provision in a divorce settlement agreement entered into between the insured-husband and beneficiary-former wife to change the beneficiary in a life insurance policy. The agreement provided, "In event of the death *or remarriage* of . . . [former wife and plaintiff in this action] the policies shall become the absolute property of the . . . [insured]. So long as the . . . [former wife] lives and does not remarry she shall be the beneficiary under the policies." The policy involved in this suit specified that a change of beneficiary would be effective only after written notice to the company and endorsement of the change on the policy. The insurer paid the proceeds of the policy into the registry of the court, leaving the former wife claiming as the designated beneficiary and the widow claiming as administratrix.

The Supreme Court of Arkansas reversed the decision of the trial court and remanded with instructions to enter a decree for

¹² HORNE & MANSFIELD, *THE LIFE INSURANCE CONTRACT* (2d ed. 1948) 232.

¹³ ____Ark.____, 247 S. W. 2d 201 (1952).

the administratrix. The decision was consistent in theory with two earlier Arkansas cases holding that a provision in a will changes the beneficiary in a life insurance policy despite non-compliance with the policy requirements that the change be endorsed on the policy.¹⁴ The court simply concluded that there was no reason why the same rule should not apply when a divorce settlement agreement included a provision which it interpreted to change the beneficiary when the former wife remarried about a year before the insured's death.

This decision clearly represents a minority view.¹⁵ Although there is a definite split of authority on whether the policy requirements as to a change of beneficiary are for the sole benefit of the insurer and are therefore waived when an interpleader is filed, most jurisdictions, in any event, require substantial compliance or that the insured do all he reasonably can do to complete a change of beneficiary before it is effective.¹⁶ Here, the insured did nothing.

The decision can be attacked on several grounds. The basic policy in Arkansas of permitting a will to change a beneficiary when the insured has done nothing to make the change as required by the insurance policy is, in the opinion of the writer, wrong. An extension of that theory to embrace the settlement agreement under consideration here seems to be undesirable, for it indicates that there are other still unannounced ways of changing a beneficiary. Such decisions render absolutely meaningless the designation contained in the policy, and the insurer may be forced either to delay payment of death claims or to risk double liability. Even if payment of claims is not delayed by such decisions, increased litigation is certainly assured. It is submitted that requiring the insured to take reasonable steps to have the policy properly en-

¹⁴ *Pedron v. Olds*, 193 Ark. 1026, 105 S. W. 2d 70 (1937); *Eickelkamp v. Carl*, 193 Ark. 1155, 104 S. W. 2d 814 (1937).

¹⁵ See Note, 19 A. L. R. 2d 5 (1951); VANCE, *INSURANCE* (3d ed. 1951) § 109.

¹⁶ *Ibid.*

dorsed would in no way hinder the carrying out of the insured's intent, properly evidenced by notification of the insurer.

The decision seems unsound even if it be assumed that it is correct to permit a divorce settlement agreement to change the beneficiary in an insurance policy. The provision in the agreement simply vested absolute ownership and control of the policy in the insured after the death or remarriage of his former wife. Unquestionably the insured acquired a right to change the beneficiary thereafter, a right unexercised at the time of his death. It is submitted, therefore, that the court was wrong when it held that the intent of the insured could not be considered (despite the fact that the insured had changed the beneficiary by proper means on another policy without any attempt to change the policy involved in the litigation) because the intent was expressed in the settlement agreement.

The only authority cited to support its decision other than the two cases involving wills was *Sbisa v. Lazar*,¹⁷ in which the court gave effect to a property settlement agreement involving a life insurance policy. The case is not in point, however, for there the former wife was not permitted to recover because she wrongfully refused to give up possession of the policy as required by the settlement agreement. Failure to submit the policy for endorsement, all other requirements having been met, was held not to prevent an effective change of beneficiary. This holding was therefore in line with the sound majority view that a change is complete when the insured has done all he can do under the circumstances to meet the policy requirements.

CHECK AS CONDITIONAL PAYMENT — VARIATION IN DIVIDENDS DEPENDING ON PRESENCE OF DISABILITY BENEFITS

Arkansas. In *Webb v. Manhattan Life Insurance Company*¹⁸ the beneficiary sued after the death of the insured to collect on a life

¹⁷ 78 F. 2d 77 (5th Cir. 1935).

¹⁸ ____Ark.____, 248 S. W. 2d 385 (1952).

insurance policy, the insurer having refused to pay on the ground that the policy had lapsed for nonpayment of premiums. Several years before the insured's death, a check had been submitted on the last day of the grace period to pay a premium. When the check was returned by the drawee bank because of insufficient funds, the insurer refused to accept another check after expiration of the grace period without evidence of insurability. When the evidence of insurability which was furnished was found to be unsatisfactory, the company refused to reinstate the policy. No election of a nonforfeiture option was made by the insured within the required 90 days; therefore the automatic option of temporary term insurance became effective, expiring about ten months before the insured's death.

The beneficiary first contended that since the premium was tendered prior to the end of the grace period, the insurer having issued a receipt therefor, the policy should not have been lapsed. The court held that this was not true, for the receipt furnished by the insurer provided, "if any check . . . is not paid in due course upon presentation, this receipt shall be void." Since the check was not honored upon presentation, the conditional receipt was void in accordance with its terms, and the insurer was not bound after the grace period expired to accept another check, thus waiving forfeiture.

The beneficiary also contended that the policy should have been kept in force by dividends which were not declared. To support this argument, she pointed to the fact that dividends were declared on a similar policy held by the insured, the only difference in that policy being that it did not include disability benefits. The court held that since a New York statute permitted different treatment for dividend purposes of two classes of policies when the only difference in the classes was that one had disability benefits, inferentially one class was more profitable than the other, and it was not discriminatory if all policyowners of each class were treated the same. Based on this legislation, the court found that

the insurer was not holding any funds of the insured which could have been used to keep the policy in force.

The soundness of the two principles applied in the decision seems undoubted. Clearly, the conditional receipt was void when the check was dishonored upon presentation, and this was true even though the check was tendered in good faith.¹⁹ Also, it is generally recognized that the presence or absence of disability benefits justifies different dividend treatment of otherwise identical policies, this being because dividends represent a distribution of profit which may vary or fail to materialize because of experience with disability benefits.²⁰

CHANGE OF BENEFICIARY — NECESSITY OF SUBSTANTIAL COMPLIANCE WITH POLICY PROVISIONS

Texas. In *Kotch v. Kotch*²¹ the issue was whether the widow of the deceased insured should receive the death benefit payable under a group life insurance certificate by virtue of her being named in the certificate as beneficiary, or whether the insured's son should receive the death benefit. The widow had been designated as beneficiary and the certificate endorsed to reflect the change about three years before the insured's death. The son claimed the proceeds by virtue of the insured's execution of an application for change of beneficiary in favor of the son and a request for issuance of a duplicate certificate because the original had been lost. These forms were submitted to the employer by the insured about two weeks before his death from cancer, but there was no proof as to whether they ever reached the insurer. The certificate of insurance was never received for endorsement, as required by its terms to effect a change of beneficiary. The insurer paid the proceeds into court by an interpleader.

¹⁹ HORNE & MANSFIELD, *THE LIFE INSURANCE CONTRACT* (2d ed. 1948) 44.

²⁰ *Id.* at 233.

²¹ _____Tex., 251 S. W. 2d 520 (1952).

The Supreme Court of Texas reversed the decision of the court of civil appeals and affirmed the decision of the district court, holding that there was no substantial compliance with the requirements for changing the beneficiary and that the widow was entitled to the proceeds in the absence of proof that the insured had done all he reasonably could do to comply with the change requirements.

Justice Garwood, writing for the court, reviewed briefly a number of Texas decisions on similar points and in his excellent opinion clarified the Texas law on the subject. The court already had considerable authority for the proposition that the requirements for a change in the beneficiary designation are for the benefit not only of the insurer but also for the last named beneficiary, despite the fact that such beneficiary has no vested right.²² In so holding, the court expressly overruled one case²³ and stated that the applicability of another holding was obviously quite limited.²⁴ Both of these cases treated the change of beneficiary provisions of the policy as being for the sole benefit of the insurer.

The rule adopted by the Texas court seems to be in accord with most jurisdictions,²⁵ although the application of relatively well settled rules is difficult and somewhat unpredictable results have been reached. Of great practical importance because of the frequency with which these questions arise,²⁶ the law in Texas now seems to be well settled, as further evidenced by a 1953 decision in accord with the *Kotch* case.²⁷ An insured must do all that he can do to comply with the policy requirements to complete a change of beneficiary, and failure to do so will render ineffective the

²² *Tips v. Security Life & Accident Co.*, 144 Tex. 461, 191 S. W. 2d 470 (1945); *Garabrant v. Burns*, 130 Tex. 518, 111 S. W. 2d 1100 (1938); *Wright v. Wright*, 44 S. W. 2d 1019 (Tex. Civ. App. 1932) *er. ref.*

²³ *Richardson v. Faithful*, 289 S. W. 1054 (Tex. Civ. App. 1927).

²⁴ *Splawn v. Chew*, 60 Tex. 532 (1883).

²⁵ See Note, 19 A. L. R. 2d 5 (1951).

²⁶ *Hoskins v. Hoskins*, 231 Ky. 5, 20 S. W. 2d 1029, 1031 (1929), in which it was said, "The efforts of parties holding contracts of insurance on their lives to change the beneficiaries named has been a very fruitful source of litigation...."

²⁷ *Chreighton v. Barnes*,Tex....., 257 S. W. 2d 101 (1953).

attempted change. This is not to say that strict compliance is required, for substantial compliance is sufficient when the insured has done all he can do. Filing of an interpleader does not waive the requirements so that the court may simply look to the intent of the insured and ignore lack of substantial compliance with the policy provisions. This precludes easy acceptance of purported changes, based on what the court describes as a policy to "forestall belated, informal treatment of these serious economic affairs." Perhaps the most frequently advanced argument to support the theory that filing of an interpleader does not completely waive all requirements is that the interest of a beneficiary vests at the death of the insured, and that no action by the insurer thereafter can waive these vested rights.²⁸

The strictness with which the rule was applied makes it clear that the insured must substantially comply with the change of beneficiary provisions or do all he reasonably can do to comply or else there will be no change effected. The decision in the *Kotch* case was based on failure of the insured to demand that the group certificate be delivered by the beneficiary to the insured, which demand the court felt was necessary before the insured would have done all he reasonably could do to meet the requirements.

A question could be raised as to the wisdom of requiring a demand when it is unlikely that it would be recognized. The general rule is that a change of beneficiary is treated as being complete even if the policy is not returned for endorsement, so long as there has been a demand and wrongful refusal to deliver the policy to the insured by the one holding it.²⁹ On the other hand, most states treat an attempted change as ineffective when the failure to return the policy is due to the insured's negligence, or is unexplained.³⁰ Whether the failure to make a demand is negligence, or may be excused where there is a fair inference that the

²⁸ VANCE, INSURANCE (3d ed. 1951) § 109.

²⁹ See Note, 19 A. L. R. 2d 5, 65 (1951).

³⁰ *Ibid.*

beneficiary would not surrender the policy, is debatable.³¹ Since it is much easier to establish that return of the policy to the insured has been requested and refused than to establish that such a request would be fruitless, the court was probably correct in treating the failure to make a demand as material.

If the court had not determined that it was unreasonable for the insured to treat the certificate as being lost without inquiring of his wife, to whom he had given the certificate, the request for a duplicate certificate might have been the equivalent of sending in the certificate.

The decision seems to be entirely sound, and while specific fact situations may arise which create undesirable results when the rules previously discussed are applied, it appears to be worthwhile to attempt to stabilize the law so that the outcome of disputes of this nature may be accurately predicted. This should result in a dual benefit, for the attorney can then safely advise the insured what steps he must take to complete a change of beneficiary when strict compliance is not possible, and the amount of litigation will be materially reduced.

DEATH OF AIRPLANE CRASH VICTIM — A "RESULT OF AERONAUTIC FLIGHT"?

*Texas. Aetna Life Insurance Company v. Reed*³² required an interpretation of an exception in the double indemnity provision of a life insurance policy. The double indemnity of \$25,000 was payable under certain circumstances if death "does not result . . . from an aeronautic flight." The insured died in the crash of a private airplane in which he was riding as a passenger. The insurer paid the \$25,000 as provided in the policy, but refused

³¹ In several cases courts have not required a request where it was deemed hopeless. *Alfama v. Rose*, 323 Mass. 643, 83 N. E. 2d 868 (1949); *Bowser v. Bowser*, 202 Okla. 97, 211 P. 2d 517 (1949).

³² ____Tex____, 251 S. W. 2d 150 (1952).

to pay the double indemnity because of the exception, filing suit instead for a declaratory judgment.

The Texas Supreme Court reversed the trial court and the court of civil appeals, holding that the insurer was not liable for the double indemnity. In so holding, the court rejected both theories advanced by appellee. In an entirely sound opinion Justice Brewster reasoned that the definition of "aeronautic" in *Webster's New International Dictionary* was incorrectly applied in *Clapper v. Aetna Life Insurance Company*.³³ That definition defined "aeronautic" as "pertaining to aeronautics or aeronauts", and "aeronaut" was defined as "one who operates an airship or a balloon; also *one who travels in an airship or balloon*." (Emphasis supplied.) Under these definitions, the operator and the passenger were regarded as on an aeronautic flight within the terms of the policy.

Furthermore, the decision held that the insured's death clearly *resulted* from an aeronautic flight, for unquestionably an aeronautic flight was being made, and the insured's death resulted therefrom. The intent of the parties to the contract was unmistakable, and the court refused to modify its terms under any theory of ambiguity.

A review of this decision and the decision in the *Clapper* case convinces the writer that the Texas decision is the correct one. The exception being construed was the same in both cases, but the results contrary. The opinion by Justice Brewster points out the defective reasoning in the other holding, where the definition of "aeronautic" was incorrectly applied.

Despite differing constructions of similar language in a number of cases,³⁴ it is submitted that there is no sound reason for a lack of unanimity where the exception is as to death *resulting* from aeronautic flight or activities. A closer question is presented when

³³ 181 U. S. App. D. C. 246, 157 F. 2d 76 (1946).

³⁴ See Note, 155 A. L. R. 1022, 1035 (1945).

the exception applies only to death while *participating in*, or as a consequence of *having participated in*, aeronautics. Where such a provision is construed, it may be argued that a passenger who is killed is not participating in aeronautics, since he took no active part in the operation of the aircraft. Such an argument has several times been repudiated, however, because the terms should be construed to effectuate the purpose designed, and ambiguity should not be considered to vary the terms when the language is clear.³⁵

Although the decision in the *Reed* case did not involve the question of "participation in aeronautics," the opinion indicates that possibly the same result would have been reached. The holding was that the insured died as the result of an aeronautic flight, and the opinion states that "as a passenger . . . [he] was taking part in" the flight. Clearly, this is not a holding on the point, but it is indicative of the court's practical approach in deciding such questions.³⁶

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³⁵ *Travelers' Insurance Co. v. Peake*, 82 Fla. 128, 89 So. 418 (1921); *Bew v. Travelers' Insurance Co.*, 95 N. J. L. 533, 112 Atl. 859, 14 A. L. R. 983 (1921).

³⁶ Writ of error has been granted in *Western Reserve Life Insurance Co. v. Meadows*, 256 S. W. 2d 674 (Tex. Civ. App. 1953), and one question to be decided is whether the court of civil appeals was correct in holding that a passenger was not "participating in aeronautics."