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## Insurance

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## INSURANCE

INSURER'S OPTION TO REPAIR INSURED PROPERTY—  
REASONABLENESS AS TO TIME AND PLACE

*Arkansas.* In *Resolute Ins. Co. v. Mize*<sup>1</sup> defendant insurance company sought to avoid liability under a policy insuring a truck against damages on the ground that it had offered to make repairs to the damaged truck and the insured owner had refused to permit the repairs to be made. The policy provided: "The company may pay for the loss in money or may repair or replace the automobile." Several estimates were made of the cost of repairing the truck. Three companies in the neighborhood of Little Rock, Arkansas, submitted estimates in the amounts of \$4,219.07, \$4,910.34, and \$2,395.95, respectively. A fourth firm in Tulsa, Oklahoma, submitted an estimate of \$1,849.61. The insurance company offered to have the truck repaired by the Tulsa concern, which offer the insured owner refused, and the insurance company made no offer to have the truck repaired elsewhere.

The Supreme Court of Arkansas pointed out that the weight of authority holds that an option to repair must be exercised within a reasonable time.<sup>2</sup> On the basis of this principle it held that a similar rule of reason should govern as to the designation of a place in which to make the repairs. Going on to say that each case depends largely upon its own particular facts in connection with the application of rules of reason, the court pointed out that it was obviously not unreasonable to remove a car a short distance for repairs, or perhaps to remove a car to another state as from Texarkana, Arkansas, to Texarkana, Texas. However, to require the removal of the vehicle to a distant point in another state, when there exist ample facilities locally to make the repairs, would be wholly unreasonable. The court held that there was substantial

<sup>1</sup> \_\_\_\_\_ Ark., 255 S. W. 2d 682 (1953).

<sup>2</sup> 29 AM. JUR., *Insurance*, § 1267.

evidence to sustain the finding of the trial court, sitting as a jury, that the request was unreasonable.

Having decided in this manner, the court brushed aside the insurance company's next contention that the amount of recovery should be limited to that of the lowest estimate. It held that since the insured was justified in not taking the truck to Tulsa for repairs and there having been no offer to repair the truck elsewhere, the measure of damages should be the difference in the market value of the truck immediately before and after the accident.

The court's extension of the rule of reason to cover place of repair operates, as does the analogous rule relative to time, to limit the means by which an insurer may obstruct a fair and reasonable settlement of the claim by virtue of the option to repair clause. The protection thus afforded the insured against unscrupulous delaying tactics on the part of insurance companies in reaching settlements is desirable and justifies the judicial limitation of the clause in question.

DISPOSITION OF PROCEEDS OF LIFE INSURANCE CERTIFICATE  
WHERE INSURER AND BENEFICIARY PERISH IN  
COMMON DISASTER

*Texas.* In *Sherman v. Roe*<sup>3</sup> one of the basic issues was centered around the construction placed by the court of civil appeals on a clause contained in a certificate of insurance framed in the following words:

Indemnity for loss of life of the Employee is payable to the beneficiary if surviving the Employee, and otherwise to the estate of the Employee.

The suit was instituted by bill of interpleader filed by the insurer asking that the administrators of the estates of Edna Roe and James Roe set up their respective claims. James Roe was the

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<sup>3</sup> .....Tex....., 262 S. W. 2d 393 (1953).

insured, and Edna was his wife. Both perished in a common disaster, and no evidence was introduced which pointed to survivorship by either party or to simultaneous death. The certificate in question had been in effect for several years prior to the marriage of James and Edna Roe and provided for coverage in the amount of \$2,000 in the event of James Roe's death. During the year following the marriage, Edna Roe was designated as beneficiary, and some three years later the amount payable under the certificate was changed to \$9,000.

The court of civil appeals had held that under the provisions of the clause set out above, the burden rested on the plaintiffs to prove that the wife had survived the husband in order to recover the proceeds. Conversely, it held that in the absence of such proof, the estate of the husband should recover. The supreme court rejected this view, however, and pointed out that it would be just as reasonable to place the burden of proof on the defendant in connection with establishing simultaneous death or survival by the husband. The court observed that under the common law there was no presumption either of survivorship or of simultaneous death, and pointed to the undesirability of deciding the case on the basis of this principle when there was no proof as to the existence of either.

It was decided that the administrator of the wife's estate could base no claim to the proceeds on the ground that the wife had a vested interest in the certificate as beneficiary. The court affirmed the rule announced in *Volunteer Life Insurance Co. v. Hardin*<sup>4</sup> to the effect that a wife has no vested interest in a policy prior to the husband's death even though she is named as beneficiary and the premiums thereon are paid from community funds. The court did state, however, that in the absence of evidence to the contrary, it would be presumed that premiums after marriage were paid from community funds, and that any separate property

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<sup>4</sup> 145 Tex. 245, 197 S. W. 2d 105 (1946).

rights to proceeds accruing to the husband by virtue of his premium payments before marriage passed to the community.

Noting that the proceeds of the certificate had been paid into the registry of the court where they were held for one or the other or both of the estates, and reiterating the fact that neither survivorship nor simultaneous death could be proved, the court declared that the proceeds should, by reason of the community property statutes,<sup>5</sup> be deemed community effects, and awarded one-half to the estate of the insured and one-half to the estate of the wife.

Existing law prior to the decision announced here appears to support the holding of the court of civil appeals. The rule has been stated as follows:

Where the insured and the beneficiary die in a common disaster, the rule against presumption of survivorship applies, and, as between claimants to the proceeds of insurance, if there is no proof of actual survivorship the claimant upon whom the law casts the burden of proving survivorship fails and cannot take.<sup>6</sup>

This rule is drawn from the case of *Hildenbrandt v. Ames*,<sup>7</sup> where a life policy provided that it should be payable to a certain beneficiary if living, otherwise to the executors of the insured. The insured and the beneficiary were husband and wife respectively, and both perished in the Galveston flood at the turn of the century. There, the burden of proof was placed upon the administrator of the estate of the beneficiary to show that his decedent had survived the insured. No proof could be established as to survivorship by the wife. In the resulting judgment for the estate of the insured, the court held that there should be no prejudice to the rights of the heirs of the beneficiary to assert in the adminis-

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<sup>5</sup> TEX. REV. CIV. STAT. (Vernon, 1948) art. 4619, § 1. After defining community property the section provides, "... all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains unless the contrary be satisfactorily proved."

<sup>6</sup> 24 TEX. JUR., *Insurance*, § 73.

<sup>7</sup> 66 S. W. 128 (Tex. Civ. App. 1901) *er. ref.*

tration of the insured's estate, any interest in the proceeds as the community effects of the deceased couple.

The supreme court's decision in the present case is to be lauded insofar as it disposes of the community property question and eliminates the possible necessity of an additional lawsuit. This observation rests on the assumption that it is necessary to consider the disposition of the proceeds of this policy in the light of applicable provisions of Texas' community property laws. Logically, it would seem that if such laws are applicable to the fact situation here, they should also apply to a situation where a brief period of survivorship is proven by the administrators of the estate of the beneficiary. However, in such an instance the right to the proceeds would have vested in the wife during such interval, and since the marriage would have been dissolved by the husband's death, such right would not have accrued during coverture and could not be said to have been a part of the community effects. Such reasoning would constitute a legal basis for awarding the whole of the proceeds to the wife's estate, if she had been shown to survive. It is difficult, then, to understand how the issue could be settled on the basis of community property laws, since the administrator of the wife's estate failed to establish the proof required by the policy and the existing law to enable him to recover. In *Martin v. McAllister*<sup>8</sup> the court said:

The right to the proceeds of the policy, whether upon the life of the wife in favor of the husband or upon the life of the husband in favor of the wife, rests upon the same principle, which is that the proceeds of the policy belong to the person named as payee, and it becomes property upon the contingency of the death of the insured in the lifetime of the payee. Therefore, as it could not become the property of the husband or the wife during the lifetime of both of them, it can not be held to be community property, and is therefore the separate property of the one to whom it is made payable.

In the absence of proof of survivorship by the wife, the certificate in the present case was clearly made payable to the administrator

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<sup>8</sup> 94 Tex. 567, 570, 63 S. W. 624, 625 (1901).

of the insured's estate. The *McAllister* case held that by virtue of the husband's right to control the community funds, he was legally justified in taking out a policy of insurance on his wife's life, payable to himself at her death, where such act was not fraudulent towards the wife. There was clearly no fraud in the present case in connection with the payee clause, and a decision resting on the legal import of the payee clause would appear to rest on a more logical foundation.

Had the deaths occurred after the effective date of the Simultaneous Death Act,<sup>9</sup> the husband's estate would have received the proceeds of the policy.

#### STRICT CONSTRUCTION AGAINST INSURER PLACED ON EXCEPTIONS AND WORDS OF LIMITATION

*Texas.* A host of decisions have established as a settled principal of insurance law that language of a policy which is susceptible to more than one construction should be interpreted strictly against the insurer and liberally in favor of the insured. The Texas courts are in accord with this principle.<sup>10</sup> The difficulty in the application of this rule arises when there is a borderline question as to whether the language is subject to dual construction. All of the provisions in a policy of insurance may, at first blush, appear to be clear in their context and legal import, whereas a closer scrutiny may reveal an inconsistency between certain clauses which give rise to an open issue when rights are being asserted under the contract. Ambiguity sometimes results from the use of one word in a clause. In such cases a serious legal controversy usually ultimately centers around the connotation to be given the word involved. The courts will apply the rule of strict construction against the insurer if they find the meaning not to be clear insofar as its import favoring the insurer is concerned.

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<sup>9</sup> TEX. REV. CIV. STAT. (Vernon, 1952 Supp.) art. 2583, § 5, reads: "When the insured and the beneficiary in a policy of life or accident insurance have died and there is no direct evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary."

<sup>10</sup> 24 TEX. JUR., *Insurance*, § 29, p. 705.

The Supreme Court of Texas was presented with an issue of this nature in *Continental Casualty Co. v. Warren*.<sup>11</sup> In the case an employer had assigned the rights arising under an airplane accident insurance policy to the widow of an employee who was pilot of the airplane on the occasion when it crashed and who lost his life in the mishap. The policy in question contained, among others, two paragraphs which gave rise to the lawsuit. The court designated these clauses as the "insured persons" paragraph and the "injury" paragraph. The "insured persons" paragraph provided for indemnity to the employer for loss resulting from injury sustained by any officer, employee or guest of the employer. The "injury" paragraph provided that the injury must have been sustained by the insured person as a consequence of riding as a passenger in the airplane, boarding or alighting therefrom, or being struck by the airplane. The issue for consideration by the court was whether the trial court had properly sustained a special exception to the assignee's pleadings on the ground that the word "passenger" in the "injury" paragraph operated to exclude the pilot, since he was killed while piloting the aircraft, as distinguished from being merely transported therein.

The supreme court held that the "insured persons" paragraph clearly made the pilot an insured person by the use of the word "employee" therein. It also held that the "injury" paragraph did not clearly operate to exclude the pilot from coverage by the use of the word "passenger." It was pointed out that common usage often places the operator of a vehicle in the category of a passenger, especially when the vehicle is private and not being used in connection with transporting for hire. The court reasoned that there would have been no doubt as to coverage under the "injury" paragraph had the pilot been injured in the act of boarding, alighting from, or being subjected to any of the other risks enumerated except riding, as was the actual situation. On the basis of the apparent inconsistency in these two clauses, and in the absence of

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<sup>11</sup> \_\_\_\_\_ Tex. \_\_\_\_\_, 254 S. W. 2d 762 (1953).



any other clause which categorically denied coverage to the pilot, the majority of the court held that the ambiguity as to intent should be resolved in favor of the insured. Thus, the decision of the court of civil appeals reversing the trial court was affirmed.

As an illustration of the difficulties encountered by the courts in deciding this type of issue, it appears pertinent to point out that four justices joined in registering a strong dissenting view. They found a clear intent to exclude the pilot from coverage. They found that the word "passenger" clearly operated as an exclusion.

The majority opinion appears to the writer to be better supported by the authorities. Considering the fact that the aircraft was a private airplane as distinguished from a public passenger type, and keeping in mind the owner's logical purpose in obtaining the insurance, it is difficult to suppose that the owner was made aware of the fact that the pilot was to be excluded. The insurer could easily have excluded the pilot by a clear, positive limitation clause, had such been its manifest intent, and all parties to the contract of insurance would have had a more definite idea as to their rights thereunder. That such an intent should be manifested is forcefully expounded by the court in *American Indemnity Co. v. Mexia Independent School District*:<sup>12</sup>

Insurance companies cannot couch their contracts in doubtful language and allow their salesmen to employ the construction most favorable to the insured to catch the unwary and then, when the company is hailed into court, claim the benefit of the construction most favorable to it.

It appears most likely that the owner of the airplane would have been led to believe that any employee, including the pilot, who was injured in a manner consistent with the provisions of the "injury" paragraph would have been covered by the policy. In any event, the exact meaning of the clauses is so uncertain as to bring the case under the rule as applied by the majority of the court.

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<sup>12</sup> 47 S. W. 2d 682, 685 (Tex. Civ. App. 1952).

Another case in which the outcome centered around the judicial interpretation of one word was decided by the supreme court in 1953. The word involved was "war," and the issue turned on the treatment of the Korean conflict as such in connection with a war clause in an accidental death benefit policy. Double indemnity was denied the widow of a reserve army officer killed in the crash of a military aircraft in which he was being transported under orders in *Western Reserve Life Ins. Co. v. Meadows*.<sup>13</sup> The policies under which recovery was sought were restricted as to the double indemnity feature by the existence of a clause which provided that such accidental death benefits would be void if the insured were in the military, naval or allied service in time of war at the date of the accident. The widow contended that the war clause should not operate to exclude the insurer from double indemnity because of the fact that the Korean conflict had arisen without an official declaration of war and had continued to be conducted on such basis.

The court held that the terms used in a contract of insurance are to be given their plain, ordinary and generally accepted meaning unless the instrument itself shows them to have been used in a different or technical sense. It stated that the word "war" when used in connection with such a clause as that under consideration should be interpreted in the practical and realistic sense in which it is commonly used and understood rather than in a formal or technical sense. Finding that the plain, ordinary and generally accepted meaning of the word "war" is war in fact, the court reversed the judgment of the court of civil appeals which had allowed recovery to the widow.

The court indulged in a lengthy, excellent discussion of elements which, from the viewpoint of constitutional law, would tend to establish the Korean conflict as a war *de jure* independently of a declaration by Congress. It chose to deal squarely with the issue,

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<sup>13</sup> .....Tex....., 261 S. W. 2d 554 (1953).

however, and to decide whether the very question presented would not dispose of the case. That question was whether the word "war" as used in the policy meant war in fact or war declared by Congress.

It will be noted that in the two cases discussed, the court considered the words "passenger" and "war" in their common, ordinary and generally accepted meanings and decided for the insurer in one case and against the insurer in the other. In the one case the word "passenger," when so considered under all the circumstances, left the intention of the parties shadowed with doubt and rendered the meaning of the policy ambiguous. In the other case the use of the word "war" when considered in its literal sense, indicated a clear limitation of coverage, and should have been contemplated by the parties as a limitation of coverage under the facts of the present case. It is submitted that the related issues posed by these two cases have been consistently resolved on the basis of a sound principle.

*Feagin W. Windham.*