SMU | Dedman School of Law

SMU Law Review

Volume 9
Issue 2 *Survey of Southwestern Law for 1954*

Article 9

January 1955

Insurance

Dawson French

INSURANCE

RECENT CONSIDERATIONS OF THE AMBIGUITY RULE

WHILE insurance policies are contracts of insurance,[1] they differ from ordinary contracts in that insurance is a matter of public concern.[2] A familiar rule in the construction of contracts is that ambiguous terms therein are to be construed most strongly against the one drawing it.[3] The advantage obtainable by being able to choose the wording is thought to justify such a construction.[4] This article will consider wherein this ambiguity rule differs in its application to insurance policies as compared to ordinary contracts as illustrated by recent cases.

1. WHEN APPLICABLE

It should first be noted that there is some conflict as to when the insurer has drawn the policy. Where the policy is in standard form complying with statutory requirements, some jurisdictions hold the ambiguity rule inapplicable on the theory that the legislature, and not the insurer, has drawn the policy.[5] The majority of the jurisdictions, however, recognize that in reality the insurer still chooses the word subject only to legislative disapproval.[6]

2. AS APPLIED TO SPECIFIC TERMS

In a recent Texas case it was contended that the term "collision" is broad enough to include the impact of flying debris against the insured's car.[7] The loss was held to have been caused by the tornado propelling the debris rather than a collision. The court referred to the policy of the law to segregate and define the various types of coverage available so that the public can pick the par-

[1] International Travelers' Ass'n v. Gunther, 269 S.W. 507 (Tex. Civ. App. 1925) rev'd on other grounds 280 S.W. 172 (Tex. Comm. App. 1926).
[2] German Alliance Ins. Co. v. Lewis, 233 U. S. 389 (1914).
[3] Lauea v. Grand Fraternity, 132 Tenn. 235, 117 S.W. 914 (1909).
[4] Algoe v. Pacific Mutual L. Ins. Co., 91 Wash. 324, 157 Pac. 993 (1916).
[5] St. Landry Wholesale Co. v. New Hampshire Fire Ins. Co., 38 So. 87 (1905); MacBey v. Hartford Acc. & Ind. Co., 197 N.E. 576 (1935); Rosenthal v. Ins. Co. of North America, 158 Wis. 550, 149 N.W. 155 (1914).
[6] Gazam v. German Union Fire Ins. Co., 155 N. C. 330, 71 S.E. 434 (1911). See 29 Am. Jur. 179, #164 "Standard of Statutory Policy" for authorities cited there.
[7] U. S. Ins. Co. v. Boyer, ...Tex....., 269 S.W. 2d 340 (1954).

ticular type desired without having to include also a type not desired.[8] It was then held that, notwithstanding the ambiguity rule, terms of an insurance policy are to be given their usual and popular significance.[9]

This decision is in line with earlier cases holding that hail damage does not fall within collision coverage.[10] One case that does not seem to be in harmony with this general trend allowed recovery where the insured's car "splashed" into flood waters overflowing a bridge.[11] No damage was caused by the initial "splash" but the car was subsequently washed away by the water and totally destroyed. The court strained "collision" to the breaking point by including within that term the ebb and flow of the water against the side of the car. The result is not without merit, however, in that flood damage to a car would commonly be expected to occur while the car is stationary, and not while being driven on a highway; whereas "collision" damage would generally occur in circumstances such as those presented in this case.

This same term was before the Louisiana courts recently where the insured claimed that the impact of his truck against the highway, caused by a collapse of the rear axle, was a "collision with another object."[12] The court resolved this ambiguous phrase against the insurer by holding that a "collision" should be broadly defined as a "striking together," and an "object" as "anything tangible."[13] While this is a definition frequently given this phrase,[14] it is seldom so construed where the object of the impact is the roadbed proper.[15] The dissent expressed what is to believed to be the majority rule in this situation as follows: "A highway is not such an object as is commonly understood to be one which an automobile comes into contact with in order for a collision to result."[16] This case is to be distinguished from the Texas case above men-

[8] Glenn Falls Ins. Co. v. McCown, 149 Tex. 587, 236 S.W. 2d 108 (1951).
[9] International Travelers' Ass'n v. Yates, 29 S.W. 2d 980 (Tex. Com. App. 1930).
[10] American Auto. Ins. Co. v. Baker, 5 S.W. 2d 252 (Tex. Civ. App. 1928).
[11] Providential Washington Ins. Co. v. Proffitt, 249 Tex. 587, 236 S.W. 2d 108 (1951).
[12] Albritton v. Fireman's Fund Ins., Co., 224 La. 522, 70 So. 2d 111 (1953).
[13] St. Paul Fire & Marine Ins. Co. v. American Compounding Co., 211 Ala. 593, 100 So. 904, 35 A.L.R. 1018 (1924).
[14] See note, 23 A.L.R. 2d at 410 for collection of cases.
[15] Great Eastern Cas. Co. v Solinsky, 150 Tenn. 206, 263 S.W. 71 (1923).
[16] Brown v. Union Indem. Co., 159 La. 641, 105 So. 918 (1925).

tioned in that here there was no compulsion to construe "collision" narrowly so as to define types of coverage.

3. The Ambiguity Rule and Proximate Cause

No mention was made in the Louisiana opinion of proximate cause although its determination would logically seem to have been presented. One case directly in point denied recovery on the theory that the proximate cause of the damage was the breaking of the axle.[17] If the court's silence on this point is to be interpreted as an assumption that the rule was satisfied, the court committed error. Recovery is allowed for a loss flowing in unbroken sequence from causes set in motion by a peril insured against.[18] It would seem that the loss in this case flowed in unbroken sequence from the breaking of the axle which could hardly be considered a peril insured against under collision coverage.

A correct application of the above rule is illustrated by a recent Oklahoma case where the insured's car was blown from an icy road into an embankment.[19] The court held it immaterial that a cause expressly excluded (collision) contributed to the loss as long as the cause covered is the efficient and proximate cause.[20] The loss flowed in unbroken sequence from the action of the wind, which was a peril insured against.

There is some authority for the recognition of a distinction between proximate cause as used in insurance cases and as used in tort cases; in the former instance it is not applied to determine culpability or *why* the damage occurred, but to determine the nature of the damage or *how* it occurred.[21] Essentially the same rationale was more fully expressed in *Colley v. Pearl Assur. Co.* as follows: "The question of causation merges into the more fundamental question whether the damages to the car as they were incurred, were the result of a risk or hazard against which the insured was covered by the policy. This question is to be determined by consideration of the policy as a whole, construing any

[17] New Jersey Ins. Co. v. Young, 290 Fed. 155 (9th Cir. 1923).
[18] Cova v. Bankers & Shippers Ins. Co., 100 S.W. 2d 23 (Mo. App. 1937).
[19] Shirley v. Tri-State, ...Okla....., 274 P. 2d 386 (1954).
[20] Pennsylvania Fire Ins. Co. v. Sikes, 197 Okla. 137, 168 P. 2d 1016 (1945).
[21] Bruener v. Twin City Fire Ins. Co., 37 Wash. 2d 181, 222 P. 2d 833 (1950).

ambiguities against the company, to ascertain the intention of the parties as it is disclosed by the language used in the policy itself."[22]

4. The Ambiguity Rule and Temporary Insurance

The growing practice in applications for life, health and accident insurance is to encourage the prepayment of premiums by the use of receipts attached to the application. These so-called "binding receipts" are to be detached only if the application is accompanied by payment of the first premium due on the policy. The incentive for the earlier payment is furnished by a provision in the receipt to the effect that the policy is to revert back and take effect as of the date thereon. Some courts think that this provision for an earlier effective date leads laymen to believe that they will be covered in the interim between application for and final issuance of the policy provided the early payment is made.[23] Ordinarily the receipt does not alter the conditions precedent in the application which are to be discharged before the insurer incurs any liability thereunder;[24] where there is some change in the applicant's physical condition before a policy has been issued, a contract for temporary insurance must be found if the insurer is to be held liable.

The courts that think there is some doubt as to the parties' intention in making an early payment apply the ambiguity rule and hold that both parties intended to make a contract for temporary insurance.[25] Reference is made to the fact that to hold otherwise is to allow the insurer to collect a premium for a period in which it assumes no risk.[26] The great weight of authority, however, is to the effect that there is no element of doubt to which the ambiguity rule can be applied.[27] These courts point out that an application for insurance is merely an offer which necessarily needs an acceptance in the form of approval of the application in order to ripen into a binding contract.[28]

---

[22] 184 Tenn. 11, 195 S.W. 2d 15, 17 (1946).
[23] See note, 2 A.L.R. 2d at 955 for collection of cases.
[24] Olson v. American Cent. L. Ins. Co., 172 Minn. 511, 216 N.W. 225 (1927).
[25] Western & S. L. Ins. Co. v. Vale, 213 Ind. 601, 12 N.E. 2d 350 (1938).
[26] Starr v. Mutual L. Ins. Co., 41 Wash. 228, 83 Pac. 116 (1905).
[27] Eyring v. Kansas City L. Ins. Co., 234 Mo. App. 328, 129 S.W. 2d 1068 (1939).
[28] Hughes v. John Hancock Mut. L. Ins. Co., 163 Misc. 31, 297 N. Y. S. 116 (1937).

A recent Texas case adopted the majority rule where the applicant died before the insurer had taken any action on his application.[29] The applicant's check for the first premium had been deposited, but the receipt made acceptance of the payment conditional upon final approval of the application. An earlier case which had recognized temporary insurance was distinguished as the application in that case required no further condition other than the payment of the premium.[30] Other Texas cases had disallowed recovery where the applicant suffered a change in physical condition before delivery,[31] and before completion of a medical examination.[32]

The Oklahoma decisions are not entirely clear on this point. In a recent case the applicant died before the policy was delivered and accepted by him as required in the application.[33] He had made the first payment, and a policy had been issued and delivered to the insurer's agent for final delivery to the applicant. Five judges thought these facts constituted a delivery at law.[34] It was then held that delivery and acceptance are the same requirement.[35] The dissent pointed out that the case relied on by the majority as authority for this proposition involved "delivered to and *received*" rather than "delivered to and *accepted*." Under the dissent's view, the majority erred in not recognizing that "accepted" is a much stronger term than "received." The majority view, where delivery and acceptance are conditions precedent, is there can be no liability until they are both discharged, unless there can be found a contract of temporary insurance.[36]

CONCLUSION

It is submitted that the situations discussed establish the proposition that the ambiguity "rule" is actually more a policy of the courts than a rule of law. The irreconcilable conflict in the de-

[29] Evans v. Southwestern L. Co., 262 S.W. 2d 512 (Tex. Civ. App. 1954) *error ref.*
[30] Colorado L. Ins. v. Teague, 117 S.W. 2d 849 (Tex. Civ. App. 1938) *error ref., n.r.e.*
[31] Connecticut Mut. L. Ins. Co. v. Rudolph, 45 Tex. 454 (1876).
[32] Beaty v. Southland L. Ins. Co., 28 S.W. 2d 895 (Tex. Civ. App. 1930) *error dism.*
[33] Mid-Continent L. Ins. Co. v. Dees, ...Okla....., 269 P. 2d 322 (1954).
[34] Unterharnscheit v. State L. Ins. Co., 160 Iowa 223, 138 N.W. 459 (1912).
[35] Republic Nat'l L. Ins. Co. v. Merkley, 56 Ariz. 125, 124 P. 2d 313 (1942).
[36] Kronjaeger v. Travelers Ins. Co., 124 W. Va. 730, 22 S.E. 2d 689 (1942).

cisions on these matters is the outgrowth of a clash in fundamental principles. A motivating factor in all cases involving the construction of insurance policies is the court's viewpoint concerning the freedom of contract. This contemplates a decision as to what extent the public interest in the freedom of contract outweighs the public interest in protecting a party with little bargaining power from oppressive conditions forced upon him by a party with superior bargaining power. The attorney should consider the inequitable position of the parties on a matter of such public necessity as insurance both in advising the client as to his rights under a policy and presenting his case to the court.

Dawson French.