




1978

Kentucky Law Survey: Insurance

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Recommended Citation

Savage, Joe C. (1978) "Kentucky Law Survey: Insurance," *Kentucky Law Journal*: Vol. 66 : Iss. 3 , Article 8.
Available at: <https://uknowledge.uky.edu/klj/vol66/iss3/8>

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Insurance

By JOE C. SAVAGE*

INTRODUCTION

The most significant cases in insurance law during the past survey year concerned uninsured motorist provisions. The courts considered such questions as whether there must be physical contact with a "hit-and-run" vehicle; whether uninsured motorist coverage may be stacked on the same policy; whether an insurance company may omit uninsured motorist coverage for motorcycles and certain other vehicles; how an insured may prove that another driver is uninsured; and whether certain exclusions are valid.

Other issues of significance included the unconstitutionality of Kentucky's compulsory medical malpractice insurance act; the question of whether a divorce terminates the rights of a spouse as a beneficiary in view of Kentucky's no-fault divorce act; and the relationship between basic reparation benefits and workmen's compensation payments.

I. UNINSURED MOTORIST CASES

A. "Hit-and-run" Vehicle

On April 22, 1977, the Supreme Court of Kentucky, in *Jett v. Doe*,¹ upheld the policy requirement that there be some physical contact between the "hit-and-run" vehicle and the vehicle in which the insured is riding. This being a case of first impression, the Court sought the guidance of authority from other jurisdictions, but found only minimal assistance because of the unique nature of Kentucky's uninsured motorist statute.² The Court felt that that statute, although requiring policies to include uninsured motorist coverage, did not restrict the insur-

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¹ 551 S.W.2d 221 (Ky. 1977). In an opinion written prior to *Jett*, the Court of Appeals reached the same result on the same grounds. *Huelsman v. National Emblem Ins. Co.*, 551 S.W.2d 579 (Ky. App. 1977).

² KY. REV. STAT. § 304.20-020 (1972) [hereinafter cited as KRS].

ance company from defining a hit-and-run vehicle as one that is in physical contact. The Court pointed out that once the insurance coverage is offered as required by statute, the company has the right to impose whatever conditions on such coverage it sees fit. Once such a condition is expressed in the policy, the courts must give it full force and effect.

The Court was careful to point out that the uninsured motorist statute, unlike comparable statutes in other states, allows the company to insert restrictions in its policy provisions defining its terms, through the language "subject to the terms and conditions of such coverage" contained in the statute.³

The policy of *Jett v. Doe*⁴ was extended in *State Farm Mutual Automobile Insurance Co. v. Mitchell*.⁵ In *Mitchell*, an automobile driven by Moran crossed a median and struck the automobile driven by Mitchell. Moran testified that a utility truck had pulled into his lane of travel causing him to lose control of his automobile and cross the median. Thus, there was physical contact between Mitchell, the insured, and Moran, but there was not physical contact between Moran and the unknown utility truck. The Court held that the requirement of physical contact had not been met.

B. *Stacking*

The court of appeals had occasion to consider whether uninsured motorist coverage could be stacked where the insured had two automobiles insured on the same policy. In *Ohio Casualty Insurance Co. v. Stanfield*⁶ the court allowed such stacking. Citing *Meridian Mutual Insurance Co. v. Siddons*,⁷ which had allowed stacking with two automobiles on separate policies, the court said that there was no reason to distinguish that situation from the one in which the insured paid separate premiums for multiple vehicles under one policy. The court pointed out that the purpose of stacking in the multiple policy situation is to give effect to the legislative intent that there be uninsured motorist coverage for each policy. These considera-

³ KRS § 304.20-020(2) (1972).

⁴ 551 S.W.2d 221 (Ky. 1977).

⁵ 553 S.W.2d 691 (Ky. 1977).

⁶ ____ S.W.2d ____ (Ky. App. 1977).

⁷ 451 S.W.2d 831 (Ky. 1970).

tions also apply, said the court, to a single policy where multiple coverage is obtained through separate premiums.

C. *Validity of Various Exclusions*

May the owner of an insured automobile, or his family, be entitled to uninsured motorist benefits if they are driving a car owned by them which is not insured? This question was answered in *Whitlock v. Redmond*⁸ and *Safeco Insurance Co. of America v. Hubbard*.⁹

Whitlock owned a Ford insured with M.F.A. At the time of his accident, Whitlock was driving an uninsured Chevrolet registered in the name of his wife. Whitlock sought the benefits of the uninsured motorist provisions of his policy with M.F.A. M.F.A. asserted the exclusion, standard in uninsured motorist policies, that coverage will not apply "to bodily injury to an insured while occupying a highway vehicle (other than an insured automobile) owned by the named insured, his spouse, or a relative, or through being struck by such a highway vehicle."¹⁰

The court held the exclusion void because it violated the uninsured motorist statute. The court felt that the policy exclusion impermissibly excluded uninsured motorist coverage when the insured was occupying a vehicle other than the insured automobile which was owned by him, his spouse or a relative, because the statute contemplated insurance against an uninsured tortfeasor operating a motor vehicle regardless of where he finds his victim.

M.F.A. argued that the case should turn on *Allen v. West American Insurance Co.*,¹¹ wherein the Kentucky Supreme Court upheld a household exclusion with respect to uninsured motorist coverage despite the statute. The court, however, distinguished *Allen* because that case involved the interpretation of subsection (2) of the uninsured motorist statute which set out the meaning of the term "uninsured motor vehicle." That section defined the term uninsured motor vehicle as "subject

⁸ ___ S.W.2d ___ (Ky. App. 1977).

⁹ ___ S.W.2d ___ (Ky. App. 1978).

¹⁰ ___ S.W.2d at ___.

¹¹ 467 S.W.2d 123 (Ky. 1971).

to the terms and conditions of such coverage"¹² and the court concluded that the legislature recognized that there would be certain terms and conditions in a policy with respect to what constituted an uninsured motor vehicle. Therefore, the household exclusion was not in violation of the statute.

Similarly, as seen above, the courts have now held that the definition of a hit-and-run vehicle, which includes only a vehicle making physical contact, is not in violation of the statute. On the other hand, the court felt that the exclusion removing uninsured motorist coverage when the insured drives an uninsured automobile owned by him, his spouse or relative was in violation of the statute, because the exclusion did not turn on the definition of an uninsured motor vehicle and so did not fall under subsection (2) of the uninsured motorist statute.

Based upon the same policy, that is, that the insurance company is entitled to define "uninsured highway vehicle" without violating the uninsured motorist statute, the Supreme Court of Kentucky upheld an exclusion that a state-owned truck was not an uninsured vehicle in *Commercial Union Insurance Co. v. Delaney*.¹³ The Supreme Court also upheld an exclusion concerning motorcycles in *Preferred Risk Mutual Insurance Co. v. Oliver*.¹⁴

D. *Uninsured Motorist Benefits and Workmen's Compensation*

In a case that changed the language of the uninsured motorist contract, *State Farm Mutual Insurance Co. v. Fireman's Fund American Insurance Co.*,¹⁵ the Supreme Court of Kentucky settled the clash between uninsured motorist benefits and workmen's compensation benefits. Under the "limits of liability" section of a "conditions" clause, the policy provided that any amount payable as uninsured motorist benefits "shall be reduced by . . . the amount paid . . . and payable on account of such bodily injury under any workmen's compensation law. . . ." ¹⁶ Referring to this as an offset condition in the pol-

¹² KRS § 304.20-020(2) (1972).

¹³ 550 S.W.2d 499 (Ky. 1977).

¹⁴ 551 S.W.2d 574 (Ky. 1977).

¹⁵ 550 S.W.2d 554 (Ky. 1977).

¹⁶ *Id.* at 556.

icy, the Supreme Court declared that the provision was in violation of the uninsured motorist statute. The statute¹⁷ requires minimum coverage limits of \$10,000 to \$20,000, and the Court felt that this could not be reduced by any condition in the policy requiring an offset for workmen's compensation.

Equally important in that case, the Court refused to allow the workmen's compensation carrier to be subrogated to the uninsured motorist insurer, upholding an exclusion in the policy that no benefits may "inure directly or indirectly to the benefit of any workmen's compensation carrier or self-insurer"¹⁸ Thus, the employee was able to collect full uninsured motorist benefits from the employer's automobile insurance company as well as full workmen's compensation benefits.

E. *Proof of Uninsurability*

In *Motorists Mutual Insurance Co. v. Hunt*,¹⁹ Hunt was involved in an automobile accident with Wheet, the alleged uninsured motorist. When a suit was filed against both Wheet and Motorists Mutual Insurance Company under the uninsured motorist provisions of Hunt's policy, Wheet could not be served, did not appear and was unavailable for trial. The only evidence with respect to whether Wheet was uninsured was found in a conversation between Hunt and Wheet after the accident, in which Wheet told Hunt that he, Wheet, was uninsured. The statement of Wheet obviously was hearsay; the court nevertheless allowed the testimony as a declaration against interest. This was so, reasoned the court, because Wheet, having no insurance, would be making this statement against his own pecuniary interest in that he would be personally liable for any tortious act.

F. *Duty to Cooperate*

In *Temple v. State Farm Mutual Insurance Co.*,²⁰ the Supreme Court affirmed a lower court decision in which Temple lost all of his rights under his uninsured motorist policy be-

¹⁷ KRS § 304.20-020 (1972).

¹⁸ *Id.*

¹⁹ 549 S.W.2d 845 (Ky. App. 1977).

²⁰ 548 S.W.2d 838 (Ky. 1977).

cause of his failure to cooperate. In particular, Temple failed to give sworn statements requested by State Farm, who thereafter claimed that such a breach in the noncooperation clause was a material and sufficient ground for denial of the coverage. The Court noted that the basis of Temple's claim against State Farm under the uninsured motorist features of the policy was contractual and that the terms and provisions of the policy required as a condition precedent to any action or right of recovery that Temple provide sworn statements to State Farm as often as reasonably required. It is true that Temple notified State Farm of the accident and provided State Farm an accident report, but the Court felt that such information was insufficient for State Farm to evaluate the claim for settlement purposes. The Court noted that information such as the nature and extent of the injury and details of the accident itself were matters within the knowledge of Temple and necessary for State Farm to have in order to fulfill its responsibility under the policy.

Temple relied on *O'Bryan v. Leibson*,²¹ *Wheeler v. Creekmore*,²² and *Barry v. Keith*,²³ in arguing that he should not be required to furnish such statements because of a conflict of interest with State Farm. The Court pointed out, however, that those three cases dealt with the duty of the insureds to cooperate where the insurance company was attempting to control both sides of the litigation in view of the fact that the uninsured motorist was a party in the case and filing a counterclaim. In *Temple*, the uninsured motorist was never served and was not a party.

II. MEDICAL MALPRACTICE

In *McGuffey v. Hall*,²⁴ the Supreme Court of Kentucky declared unconstitutional sections 9 and 10 of the compulsory medical malpractice insurance act passed by the General Assembly in 1976.²⁵ Section 9 pertained to discovery of proceed-

²¹ 446 S.W.2d 643 (Ky. 1969).

²² 469 S.W.2d 559 (Ky. 1971).

²³ 474 S.W.2d 876 (Ky. 1971).

²⁴ 557 S.W.2d 401 (Ky. 1977).

²⁵ 1976 Ky. Acts ch. 163. Section 9 amended KRS § 311.377 and § 10 was included along with other provisions in KRS Chapter 304.

ings and records of various peer review organizations and to limits of liability of its members, all of which the Court felt were not germane to the purpose of the entire act and therefore in violation of section 51 of the Kentucky Constitution.²⁶ Section 10 consisted of nine subsections, which generally required every physician to carry \$100,000 to \$300,000 malpractice insurance, created a Patients' Compensation Fund into which all physicians had to pay, and provided that judgments in excess of the physician's base coverage would be paid out of the fund, if not exhausted; if the fund was exhausted, judgments would be paid out of the general funds of the Commonwealth on a loan basis. The justification for the Act was the alleged medical malpractice insurance crisis.

The Court first held that by attempting to underwrite the Fund through recourse to the Commonwealth's general fund, section 10 created a future debt in violation of section 50²⁷ of the Kentucky Constitution and loaned credit of the Commonwealth in violation of section 177²⁸ of the Constitution. Next, the Court held that the provision for compulsory malpractice insurance was not justified as an exercise of the police power and was therefore in violation of sections 1²⁹ and 2³⁰ of the

²⁶ KY. CONST. § 51 provides:

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length.

²⁷ KY. CONST. § 50 provides:

No act of the General Assembly shall authorize any debt to be contracted on behalf of the Commonwealth except for the purposes mentioned in section 49, unless provision be made therein to levy and collect an annual tax sufficient to pay the interest stipulated, and to discharge the debt within thirty years; nor shall such act take effect until it shall have been submitted to the people at a general election, and shall have received a majority of all votes cast for and against it: Provided, The General Assembly may contract debts by borrowing money to pay any part of the debt of the state, without submission to the people, and without making provision in the act authorizing the same for a tax to discharge the debt so contracted, or the interest thereon.

²⁸ KY CONST. § 177 provides: "The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the state . . ."

²⁹ KY. CONST. § 1 provides: "All men are, by nature free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Fifth: The right of acquiring and protecting property."

³⁰ KY. CONST. § 2 provides: "Absolute and arbitrary power over the lives, liberty

Kentucky Constitution, since there was no showing that compulsory insurance helps solve any shortage of available insurance.

III. INSURANCE AND DIVORCE

In *Denton v. The Travelers Insurance Co.*,³¹ the court of appeals had occasion to reconsider *Bissell v. Gentry*.³² In *Bissell* the court had held that a divorce extinguished the rights of the spouse as a beneficiary under a life insurance policy. The rationale behind *Bissell* was Kentucky's restoration statute,³³ which, of course, was changed by the no-fault divorce act.³⁴ In *Denton*, however the court continued the same reasoning with respect to *Bissell* because it found that the no-fault divorce act did not substantially change the restoration provisions in this context. The Supreme Court, however, reversed the court of appeals, holding that the new divorce provisions do not extinguish the rights of the spouse as beneficiary. The Supreme Court did not overrule *Bissell*, however, so divorces under the old law may still extinguish such rights.

IV. NO-FAULT AUTOMOBILE INSURANCE

The case upholding the constitutionality of Kentucky's no-fault legislation came down in 1975;³⁵ the only other case to be decided on the no-fault act is *Smith v. United States Fidelity and Guaranty Co.*³⁶ This case deals with the problem of deducting workmen's compensation benefits before the insurance carrier pays basic reparation or no-fault benefits.

Peggy Smith's husband was employed by the Jefferson County Police Department and was killed in an automobile accident while on duty. She was paid benefits in the amount of \$96.00 per week by the workmen's compensation carrier from the time of her husband's death until a settlement was reached with the third party tortfeasor. As a part of her settlement,

and property of freemen exists nowhere in a republic, not even in the largest majority."

³¹ 555 S.W.2d 825 (Ky. App. 1977).

³² 403 S.W.2d 15 (Ky. 1963).

³³ KRS § 403.065 (1972)(repealed).

³⁴ KRS §§ 403.010—403.350 (Supp. 1976).

³⁵ *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975).

³⁶ ___ S.W.2d ___ (Ky. App. 1978).

Mrs. Smith agreed to subject \$16,200 of her settlement to the workmen's compensation carrier's subrogation rights at the rate of \$96.00 per week until exhausted.

Mrs. Smith also made a claim against U.S.F. & G. for basic reparation benefits. In reply U.S.F. & G. cited KRS § 304.39-120(1), which provides that "all benefits or advantages a person received or is entitled to receive because of the injury from Social Security and Workmen's Compensation are subtracted in computing net loss," and argued that because Mrs. Smith had received workmen's compensation benefits in excess of the \$10,000 no-fault obligation, U.S.F. & G. did not have to pay anything. The court did not agree.

Sections -210(3) and -120(1)³⁷ are the two sections explicitly providing the exclusive means by which the reparation obligor (U.S.F. & G. in this case) may receive credit for workmen's compensation. Under section -210(3), reparation benefits are payable on a monthly basis as they accrue, not as a lump sum. If workmen's compensation benefits have not yet been paid to the claimant, the reparation obligor must pay the claim without deduction for those benefits. If workmen's compensation benefits have been paid, the reparation obligor computes its liability in one of the following ways. First, the reparation obligor may subtract those payments actually made from the insured's total loss in computing net loss under section -120(1). Alternatively, the reparation obligor may demand reimbursement from the claimant or the party obligated to make the payments under section -210(3) to the extent that the total recovery exceeds the claimant's actual loss. However, the insurer may not do both.

Thus, reasoned the court, the lower court's error was in not calculating Mrs. Smith's gross loss. If the gross loss exceeds any recovery from collateral sources, the insured is entitled to recover from the reparation obligor such amount as will fully compensate him for the loss, up to the maximum amount available under the policy. If the gross loss does not exceed the recovery from collateral sources, the insured is not entitled to recover from the reparation obligor.

The court used as an example the fact that the workmen's

³⁷ KRS §§ 304.39-210(3), -120(1)(Supp. 1976).

compensation carrier paid \$1,500 for burial expenses. The pertinent statute³⁸ provides a maximum of \$1,000 for funeral and burial expenses under the no-fault benefits. This does not mean that because \$1,500 had already been paid by workmen's compensation, the no-fault carrier has no further responsibility. If the actual expense to the insured of the funeral exceeds the benefits he had received from this workmen's compensation, then the reparation obligor is liable for that expense up to the limits of the policy.

³⁸ KRS § 304.39-020(5)(a) (Supp. 1976).