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NOTES

EFFECT OF VALUED POLICY STATUTE UPON THE PRO RATA CLAUSE OF THE STANDARD FIRE INSURANCE POLICY IN LOUISIANA

Plaintiff, in order to protect the first and second mortgages of his home, secured two fire insurance policies in the amounts of \$3,000 and \$5,000. Subsequently, a fire occurred which rendered the home a total loss. Although the evidence indicated that the total value of the house was less than the \$8,000 total of the policies, plaintiff attempted to recover the full amount of each policy, relying on the Valued Policy Statute.¹ The defendant insurer who wrote the \$5,000 policy argued that under its pro rata clause² its liability should be limited to $\frac{5}{8}$ of the total actual loss. The trial court held that under the Valued Policy Statute both insurers were liable for the full amount of their policies despite the actual amount of loss or their respective pro rata clauses. *Held*, affirmed. Plaintiff can recover \$5,000 from his insurer, the face amount of the policy. *Harvey v. General Guaranty Ins. Co.*, 201 So.2d 689 (La. App. 3d Cir. 1967).

This case of first impression presents an opportunity to reconcile two seemingly contradictory statutory provisions applicable to fire insurance policies in Louisiana—R.S. 22:691 (F) which provides for a pro rata payment of a loss based upon the proportion that the amount of the insurance written by a given policy bears to the whole insurance covering the property and R.S. 22:695(A) which provides that the insurer, in case of total loss to an insured immovable shall pay to the insured the total amount of the policy even if the actual monetary loss is less than the amount of the policy. The pro rata payment provision is incorporated within the New York Standard Fire Insurance Policy, adopted in Louisiana by Act 105 of 1898, and now included in the Insurance Code as R.S. 22:691. Although the Valued Policy Statute is included in the Insurance Code as R.S. 22:695, it is not within the body of the Standard Policy.

1. LA. R.S. 22:695(A) (1950) provides: "Under any fire insurance policy . . . on any inanimate property, immovable by nature or destination . . . the insurer shall pay to the insured, in case of total destruction without criminal fault on the part of the insured or the insured's assigns the total amount for which the property is insured, at the time of such total destruction, in the policy of such insurer."

2. *Id.* 22:691(F) provides: "Pro rata liability—This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

The court in the instant case reasoned that the purpose of the Valued Policy Statute was to protect the insured by relieving him of the burden of proving the full value of his property after its total destruction, and to prevent insurance companies from receiving premiums on overvaluations but thereafter repudiating their contracts when it was in their interest to do so.³ Citing *Hart v. North British & Mercantile Co.*⁴ the court indicated that any policy provision attempting to limit the insurer's liability is invalid when in conflict with the provisions of the valued policy law.

The defendant relied upon decisions of the Wisconsin court⁵ and of the federal courts⁶ interpreting Wisconsin law seemingly to the contrary. The court noted, however, that the Wisconsin statute⁷ expressly provided that no fire insurer should be liable for more than its proportionate share of the damage when there is concurrent insurance covering the loss. Wisconsin's statute is written to provide specifically for the situation where two or more policies are written with different companies. The Louisiana statute⁸ does not so provide.

The court's views seem well reasoned. As stated by the court, the majority of other jurisdictions accord in its interpretation.

3. 201 So.2d 689, 692 (La. App. 3d Cir. 1967) citing *Horn v. Atlas Assur. Soc.*, 241 Ky. 225, 43 S.W.2d 675 (1931); 45 C.J.S. INSURANCE § 916 (1946).

4. 182 La. 551, 565, 162 So. 177, 181 (1935): "The valued policy is controlling, as it is a measure in the public interest in order to secure greater certainty in the contract of insurance.

"The valued policy statute must be regarded as part of the policy of insurance, and the amount written in the policy as liquidated damages agreed upon by the parties, and this is so, notwithstanding the policy is inconsistent therewith."

See also *Southern Prod. Co. v. The American Ins., Co.* 166 So.2d 59 (La. App. 4th Cir. 1964), *writ refused*, 246 La. 863, 167 So.2d 675 (1964) as an indication that the valued policy still controls.

5. *Reedsburg Farmers' Mut. Ins. Co. v. Koenecke*, 8 Wis.2d 408, 99 N.W.2d 201 (1959).

6. *Ludwig v. Detroit Fire & Marine Ins. Co.*, 342 F.2d 608 (7th Cir. 1965); *Wisconsin Screw Co. v. Detroit Fire & Marine Ins. Co.*, 183 F. Supp. 183 (E.D. Wis. 1960).

7. WIS. STAT. 203:11 (1933): "Whether or not a condition is included in any fire insurance policy . . . the insuring company shall not be liable for loss or damage occurring while the insured shall have any other contract of insurance . . . such other additional insurance . . . shall nevertheless not operate to relieve the insuring company from liability for loss . . . each insurance company shall be liable for its proportionate share of any loss or damage, but in no event shall the insured be entitled to recover from any or all of such insuring companies a sum greater than his actual loss." This statute is the amended version of its predecessor WIS. STAT. 203:215 (1929), which began with the phrase, "When a condition is included . . ." The court, in the Wisconsin case, *Ciokevicz v. Lynn Mut. Fire Ins. Co.*, 212 Wis. 44, 248 N.W. 778 (1933), noted that the policy contract did not so provide and thus WIS. STAT. 203:215 (1929) was inapplicable. This avoided the necessity of interpreting the statute.

8. LA. R.S. 22: 691(F) (1950).

It has been held that the amount to be recovered under a Valued Policy Statute is a matter of public policy and cannot be waived or arbitrated in case of a total loss,⁹ as by the insured agreeing to less than the face amount of the policy,¹⁰ and any stipulation that the insurer's liability shall not exceed a specified proportion of the value of the property¹¹ or a stipulation that the insurer shall be liable only for replacement or rebuilding at the insurer's option is invalid.¹²

Among many other authorities on the subject, Appleman¹³ states: "In case of a total loss of the property insured under a Valued Policy Statute, *the valuation in the policy is conclusive* upon the parties, in the absence of a showing of fraud, misrepresentation, collusion, mistake, or criminal conduct on the part of the insured." (Emphasis added.) Almost identical statements are to be found in *Corpus Juris Secundum*, *American Jurisprudence*, and *Couch*.¹⁴

The prior Louisiana jurisprudence, although there have been no cases in point, provides an additional basis for the result reached in the instant case. In an early case the court held that the Valued Property Statute repealed the Standard Fire Policy in the areas of conflict.¹⁵ This conflict develops in situations where insurance is written on immovables by destination or nature. In the recent federal case of *Reliance Ins. Co. v. Orleans Parish School Board*¹⁶ it was held that the jurisprudence in

9. *Horn v. Atlas Assur. Soc.*, 43 S.W.2d 675, 677 (Ky. App. 1931).

10. *Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wash. 590, 66 P.2d 827 (1937).

11. *Mann v. Charter Oak Fire Ins. Co.*, 196 F. Supp. 604 (E.D. Ark. 1961). (Mortgagor and mortgagee each obtained insurance. The court held that the measure of loss was the aggregate of all concurrent policies in force); *Hensley v. Farm Bureau Mut. Ins. Co.*, 243 Ark. 408, 420 S.W.2d 76 (1967) (a credit sale whereby both the vendee and the vendor insured for the full value. The court ruled the pro rata clause in the policies ineffective as being in conflict with the Valued Policy Statute.); *Farmer's Home Mut. Fire Assn. v. McAlister*, 171 Ark. 574, 285 S.W. 5 (1926).

12. *Occhipinti v. Boston Ins. Co.*, 72 So.2d 326, 335 (La. App. 4th Cir. 1954): "[I]f the loss sustained should be considered as total, the insurer did not have the option to replace the property but was bound to pay the plaintiffs the full amount of the policy . . ."

13. J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 3828 (1942).

14. 29A AM. JUR. *Effect of Valued Policy Statutes* § 1711, 1790 (1960);

16 G. GOUGH 2d *Effect of Valued Policy Statutes* § 62:28, 487 (1966); C.J.S. *Valued Policy Statutes* § 916, 1790 (1946).

15. *New Orleans Real Estate v. Teutonia Ins. Co.*, 128 La. 46, 66, 54 So. 466, 473 (1911): "But this law, in our view, has been repealed. It was adopted, we have seen, in 1898. In 1900 the Legislature of this state adopted the valued policy law (Act No. 135 of the session of the legislature). There is a conflict between the New York standard policy and the valued policy of 1900, for the valued policy statute does not confer a personal privilege which may be renounced."

16. 322 F.2d 803 (5th Cir. 1963), *cert. denied*, 377 U.S. 916 (1964).

Louisiana was settled to the effect that the Valued Policy Law,¹⁷ not the Standard Fire Policy,¹⁸ governs fire losses on immovables. On two occasions the Louisiana Supreme Court has held that the Standard Fire Policy applies solely to movables¹⁹ and that the Valued Policy Statute governed immovables. Since those decisions the Louisiana legislature has re-enacted or amended the Standard Fire Policy no less than six times²⁰ without reference to any change in judicial interpretation of these statutes.

The court's appraisal of the legislative intent prompting the amendment of R.S. 22:695 in 1964 by the addition of subsection *E*²¹ also seems to be correct. Subsection *E* provides: "Liability of the insurer, in the event of total or partial loss, shall not exceed the *insurable interest* of the insured in the property, and nothing herein shall be construed as precluding the insurer from questioning or contesting the insurable interest of the insured." (Emphasis added.) The court noted that the provision requires only that the insurer's liability not exceed the insurable interest. It makes no reference to the insurer's liability exceeding the actual loss. Insurable interest is defined as "any lawful and substantial *economic interest* in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage."²² (Emphasis added.) If the 1964 amendment had provided the insurer's liability should not exceed the loss or value of the property destroyed, the principal provision of the value policy law that the insurer must pay the total amount of its coverage where the property is totally destroyed would have been repealed. Considering the prior jurisprudence and legislative background surrounding the amendment the court was unable to reach such a conclusion. The Supreme Court had held in *Lighting Fixtures Supply Co. v. Pacific Fire Ins. Co.*²³ that the Valued Policy Statute did *not* apply in cases of divided ownership. The statute was amended in 1952 and following this amendment the court allowed recovery in the total amount of

17. LA. R.S. 22:695 (1950).

18. *Id.* 22:691.

19. *Hart v. North British & Merc. Co.*, 182 La. 553, 162 So. 177 (1935); *Lake Arthur Dredging Co. v. Mechanics Ins. Co.*, 162 La. 1090, 111 So. 466 (1927).

20. La. Acts 1944, No. 251; La. Acts 1950, No. 540; La. Acts 1952, No. 295; La. Acts 1958, No. 125; La. Acts 1963, No. 115; La. Acts 1964, No. 464.

21. LA. R.S. 22:695(E) (1950).

22. *Id.* 22:614(B).

23. 176 La. 499, 146 So. 35 (1933). The insurance was obtained by a lessee on improvements and betterments. The court found that the insured property was immovable but did not apply the Valued Policy Statute because the property was firmly affixed to the building and would remain with the building at the termination of the lease.

the policy even though there was only a fractional ownership of the insured property.²⁴ Following this change in the jurisprudence R.S. 22:695 was amended by the addition of subsection *E*. It appears that since this amendment followed this change in the jurisprudence, R.S. 22:695(E) relates not to the value of the property but to the totality or percentage of ownership of the insured. This view was affirmed by the Third Circuit in a case decided shortly after the amendment became effective.²⁵

It should be noted in conclusion that the court left itself a possible method of applying the Standard Fire Policy pro rata clause in some factual situations despite the Valued Policy Statute. The court suggested that it might be in order to apply the pro rata clause where there were two separate policies and at least one of the policies was sufficient to pay the entire loss. The writer submits that this approach should be taken only when the amount of insurance is so greatly in excess of the actual valuation of the property that the court could reasonably find constructive fraud.²⁶

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INSURANCE—INSURER'S LIABILITY ABOVE POLICY LIMITS

The defendant in a personal injury suit was cast in judgment for \$7,000 above the \$20,000 policy limits of his automobile liability insurance policy.¹ The policy provided that the insurer would have the exclusive right to litigate or settle any claim

24. *Southern Prod. Co. v. The American Ins. Co.*, 166 So.2d 59 (La. App. 4th Cir. 1964), *writ refused*, 246 La. 863, 167 So.2d 675 (1964); *The Forge v. Peerless Cas. Co.*, 131 So.2d 838 (La. App. 2d Cir. 1961).

25. *Roberts v. Houston Fire & Cas. Co.*, 168 So.2d 457 (La. App. 3d Cir. 1964). Roberts was a lessee with an option to renew with all construction to become the property of the lessor without reimbursement upon termination of the lease. Roberts effected a credit sale of his interest and bought insurance on the building and contents which were later destroyed by fire. The court held that as regards the building the value policy applied and that the 1964 amendment changed the law but since the policy was issued and the loss occurred in 1960 the insurable interest in that case was not open to question.

26. Both statutes could also be given effect by the simple method of interpreting the phrase "the total amount for which the property is insured . . . in the policy of such insurer" as meaning the face amount of the policy when there is only one policy of insurance written on the property. Where there are two or more policies written by different companies this phrase could be interpreted as meaning the pro rata amount, under the pro rata clause in the policy, of the whole insurance written. However, the writer believes that this would be a strained construction of the statute which would lead to less desirable results.

1. *Pitre v. Roberie*, 117 So.2d 74 (La. App. 1st Cir. 1959).