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Private Law: Insurance

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the *Fudickar* and *Ortego* cases because "the principles laid down in these cases continue to be applicable today."[5]

In allowing claimant to pursue claims against the "distributees of the assets at least to the amount received from the distribution,"[6] the court doubtless intended to limit individual liability *at most* to the value of the assets of the corporation each received.

INSURANCE

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Courts elsewhere have generally followed the rule that an automobile liability insurer faced by several claimants may settle with some of them although this may exhaust the insurance fund or so deplete it that a subsequent judgment creditor may be unable to collect the judgment in full. The rule requires that the settlement be reasonable and made in good faith. The supreme court followed this rule in *Richard v. Southern Farm Bureau Casualty Insurance Co.*[1] It rejected the plausible argument that upon the occurrence of the accident and injury the insurer became bound to the plaintiff by virtue of the so-called direct action statute[2] for a proportionate amount of the insurance proceeds. In support of its position, the court reminded that settlements are favored by the law. It was not persuaded that an alternate procedure, such as interpleader or concursus, was available to the insurer. It may well be that a solution to this problem, which is troublesome for both claimants and insurers, will have to be provided by legislation.

In *Tyler v. Touro Infirmary*[3] the supreme court, following an earlier court of appeal case, held that the failure of a nurse assisting in an abdominal operation to count correctly the sponges being removed from the patient was a simple administrative act not amounting to the rendition of a professional service within the meaning of an exclusionary clause in a policy issued to Touro Infirmary. This interpretation of the clause drew dissents from Justices Barham and Summers. While the position of the dissenters seems more compatible with the language of the

5. *Id* at 243.
6. *Id.*

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1. 254 La. 429, 223 So.2d 858 (1969).
2. LA. R.S. 22:655 (1962).
3. 254 La. 204, 223 So.2d 148 (1969).

clause, it is interesting to notice that the wording has seemingly remained unchanged despite earlier holdings in this state and in others in accord with the view of the majority.

An interesting and illuminating discussion of what constitutes a "direct loss by windstorm" is contained in the opinion handed down in *Lorio v. Aetna Insurance Co.*[4] In accord with the interpretation usually given to such a provision, the view of the court was that it suffices if the windstorm was the proximate or efficient cause of the loss notwithstanding the presence of other contributing factors. A valuable horse, moved from one stall to another because of damage to the barn by Hurricane Betsy, died from eating too much wheat, which was contained in a bin adjoining the stall to which the horse was removed. Access to the wheat was gained by his kicking or knocking out two slats of a partition that separated the bin from the stall. The court agreed that if the evidence had established that the stall had been weakened by the hurricane so that otherwise the horse could not have reached the wheat, recovery would have been allowed. The evidence to support this conclusion was found insufficient. Justice Sanders dissented on the latter point.

In *Normand v. Hertz Corp.*[5] a third party driving a rented car with the permission of the lessee contrary to a specific provision of the rental agreement was held not covered by the lessor's automobile liability insurance. In answer to the contention that the lessee, who was present on the front seat when the accident occurred, was "using" the car or was "legally responsible for the use thereof" the court replied that the "actual use" was not with the permission of the named insured, as required by the policy. The opinion seems to be in harmony with the course of recent jurisprudence concerning second permittees.

In *Adam Miguez Funeral Home, Inc. v. First National Life Insurance Co.*[6] a father procured a policy of insurance on the life of his son who was in the state penitentiary on a narcotics conviction. The father was seemingly actuated by the desire to provide a funeral for his son in the event of the latter's death. The son was indeed killed in the penitentiary. When the father explained his purpose to the agent, the agent told him to sign the son's name to the application. He did so, and the agent signed as a witness to the signature of the "son." The court found the

4. 255 La. 721, 232 So.2d 490 (1970).
5. 254 La. 1075, 229 So.2d 104 (1969).
6. 234 So.2d 496 (La. App. 3d Cir. 1970).

company bound on the basis of estoppel. Its view was that the provision in R.S. 22:616 reading, "No life . . . insurance contract upon an individual . . . shall be made" unless the individual applies therefor was not aimed at the preservation of public order or good morals but simply the protection of the rights of the insured. On the basis of the facts reflected in the opinion, the judgment in favor of the plaintiff was an appealing one but it seems of doubtful propriety. The apparent primary purpose of the statutory provision is to prevent wagering on human life, a practice that has long been discountenanced. This seems to be borne out by the fact that the provision in question makes an exception in the case of one spouse insuring the life of another. The evidence indicated clearly that the father was not engaged in wagering. Although this fact provides moral justification for the holding, no exception to cover such a case appears in the statutory provision.

Cases involving application of the uninsured motorist provisions of an automobile liability policy are increasing in volume. The position of the Third Circuit Court of Appeal was affirmed by the supreme court in the case of *LeBlanc v. Davis*.[7] It was held that an insured claiming uninsured motorist protection is contractually bound by the terms of the policy to furnish to the insurer full medical information concerning claimed injuries. Doing so was counted as a prerequisite to the enforcement of the right of recovery under the policy. In consequence, the plaintiff's suit was dismissed as of nonsuit. Apparently the refusal to furnish the requested information came after the institution of suit. Justice Barham dissented for this reason, believing that the failure of the insurer to seek the required information prior to suit coupled with its denial of liability constituted a waiver of its contractual right. Justice Barham's position is appealing, provided that before the suit was filed the insurer was possessed of the information it acquired subsequent to the filing. Waiver involves the intentional relinquishment of a known right. This might well require knowledge of the facts which call for the exercise of the right.

In a case of first impression, *Barrett v. State Farm Mutual Automobile Insurance Co.*,[8] it was held that there is no statutory requirement that a policy of automobile liability insurance written by a surplus line insurer contain an uninsured motorist pro-

7. 254 La. 439, 223 So.2d 862 (1969).
8. 226 So.2d 74 (La. App. 3d Cir. 1969).

vision under R.S. 22:1406D (1). The claimant, whose car was covered by a surplus line policy not containing an uninsured motorist clause, was held to have no cause of action against his insurer. The decision seems to be in keeping with the statutory provision, which does not provide for such a case.

The cases of *Lott v. Southern Farm Bureau Casualty Insurance Co.*,[9] *Rolling v. Miller*,[10] *Frazier v. Jackson*,[11] *Collins v. New Orleans Public Service, Inc.*,[12] *Guidry v. Rhodes*,[13] and *Puckett v. Emmons*,[14] all dealing with claims based on the uninsured motorist provisions of liability policies, will be covered in a Comment in a later issue of this Review. As an off-the-cuff opinion, it appears that the statutory and policy provisions may need amendment if the purpose of protecting insureds against injury caused by motorists who are not covered at the time by liability insurance is to be furthered.

The case of *Clemmons v. Zurich General Accident & Liability Insurance Co.*[15] contains extended and helpful discussions in the majority and dissenting opinions of the right of an insured, employing his own counsel by way of defense, to recover attorney fees from an insurer under a duty to defend.

The supreme court has granted writs in *Gremillion v. Travelers Indemnity Co.*,[16] which concerns the effect to be given to a policy provision requiring that suit be brought within twelve months following the inception of the loss, and *Deshotel v. Travelers Indemnity Co.*,[17] which poses the difficult question of whether the responsibility of a father for the torts of his minor child is vicarious in nature or rather is based on the theory that he is himself negligent in not properly controlling the minor. In the latter case the court held that the father was not contributorily negligent nor could his responsibility for the tort of his minor son be counted as based on his own negligence. In a per curiam opinion the court recognized that its holding was in conflict with a prior decision but added that "the present decision is correct."

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9. 223 So.2d 492 (La. App. 1st Cir. 1969).
10. 233 So.2d 723 (La. App. 4th Cir. 1970).
11. 231 So.2d 629 (La. App. 4th Cir. 1970).
12. 234 So.2d 270 (La. App. 4th Cir. 1970).
13. 238 So.2d 248 (La. App. 3d Cir. 1970).
14. 231 So.2d 672 (La. App. 1st Cir. 1970).
15. 230 So.2d 887 (La. App. 1st Cir. 1970).
16. 228 So.2d 520 (La. App. 3d Cir. 1969).
17. 231 So.2d 448 (La. App. 3d Cir. 1970).