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I. Insurable Interest

In *Phoenix Ins. Co. v. Brown*,[1] the named insured in a fire policy was Walter Brown. Walter had at one time owned the property insured. He had, however, conveyed it to his divorced wife Elsie, for whom he "was looking after the property," prior to the taking out of this policy. It was not alleged that the defendant's agent (who had previously written other policies on the property in Walter's name at the time Walter was the title-holder) knew of the conveyance to Elsie. After total destruction by fire the defendant refused to pay on the grounds of the lack of insurable interest. The Court of Appeals for the Eastern Section affirmed a judgment against the company. In its opinion, the court reviewed at some length the Tennessee cases indicating that the insurable interest requirement does not demand legal title in the insured. The court concluded:

> Under the proof in this case, Walter Brown acted as the agent of the owner in looking after the property and keeping it insured. If he had failed to procure insurance he might have been held responsible for the loss and we think, under the authorities above cited and discussed, he had an insurable interest.

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1. 381 S.W.2d 573 (Tenn. App. E.S. 1964).

The decision is unusually liberal in interpreting the insurable interest requirement.[2] It may be viewed as an extension of the rule adopted from a legal encyclopedia in *Baird v. Fidelity-Phenix Fire Ins. Co.*:[3] "One having the care, custody, or possession of property for another (or others) without liability and without any pecuniary interest therein may nevertheless obtain insurance thereon for the benefit of the owner." However, it is not necessary to go so far, for the court's emphasis on the potential liability of the named insured as custodian demonstrates a relationship between him and the res insured which supports the policy.[4]

II. SELECTION AND CONTROL OF RISKS

A. *Scope of Coverage*

The policy issued by the insurer in *American Employers Ins. Co. v. Knox-Tenn Equipment Co.*[5] provided for indemnity to the insured for liability to pay "damages because of injury to or destruction of property . . . caused by accident." The insured sold a customer drill bits which were allegedly too large for the job the customer had undertaken; as a result of using the oversize bits, a hardwood floor laid by the insured's customer buckled and had to be relaid. After agreeing to relay the floor, the insured's customer filed suit against the insured. The insured asked the insurer to defend the action; the insurer refused and brought this declaratory judgment action. The court of appeals reversed the trial court's decision in favor of the insurer. The court traced at some length the shades of meaning attributed to the term "accident" in the Tennessee cases, ending by noting that "the trend of modern decisions is to treat the terms 'accidental means, accident, accidental result, accidental injury, accidental death and the like as being legally synonymous.'" The opinion makes it clear that the fact that the insured's customer intended to use the particular drill bits he used, and that the insured intended to sell those bits did not preclude the existence of an accident. The court drew analogies to cases in which accidental death benefits were allowed to persons who intentionally consumed food or drugs whose poisonous effect they did not anticipate.[6]

2. See generally 4 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 2149 (husband-wife), 2212 (principal-agent), 2211 (custodian) (1941).

3. 178 Tenn. 653, 670, 162 S.W.2d 384, (W.S. 1942).

4. The problem remains of determining the extent to which one caring for property has insured solely his own interest, or has taken out the policy on his interest and also for the benefit of the owner. See 3 COUCH, INSURANCE §§ 24:21, 24:22 (2d ed. 1960).

5. 377 S.W.2d 573 (Tenn. App. W.S. 1964).

6. The court employed many analogies from contracts of personal insurance, since cases dealing with products liability policies are relatively infrequent.

The policy in *Kernodle v. Peerless Life Ins. Co.*[7] provided a 5,000 dollar accidental death benefit for death arising from injuries "received while the insured is riding as a fare-paying passenger within the enclosed part of any railway passenger car . . . ." The *cestui que vie* boarded a train at Little Rock, Arkansas as a coach passenger, and then transferred to a pullman car. Shortly thereafter, the conductor noted that one of the doors in the vestibule to the pullman car was open and that the *cestui que vie* was missing from his compartment; his body was later found beside the tracks. The insurer sought to defend on two grounds: first that the *cestui que vie* had intentionally taken his own life; second, that his injuries were not received while within the enclosed part of the railway car. The trial court found against the insurer on both points, and the supreme court affirmed. The suicide issue is dealt with elsewhere.[8] With regard to the language of the policy dealing with the "enclosed part of the railway car," the court held that recovery could properly be based on a finding that the *cestui que vie's* riding within the enclosed part of the railway car (the vestibule) was the proximate cause of his death. Since the evidence below would support such an interpretation of the events that took place, the award was affirmed.

The policy involved in *Hattley v. Lumberman's Mutual Cas. Co.*[9] provided in part for protection from "injury to or destruction of property in charge of the insured arising out of the ownership, maintenance or use of any hoist for raising the entire automobile for the lubricating or servicing thereof . . . ." The insured, operator of a service station in Memphis, raised the vehicle in question on his hoist in order more easily to repair the vehicle's gas tank. Preparatory to making the repairs, it was necessary to drain the tank. While draining it, a quantity of gasoline spilled out, and its fumes ignited. The vehicle on the hoist was damaged in the ensuing fire, and the insured sought recovery for this damage. The company refused on the ground that the damage did not "arise out of" the use of the hoist since there was no causal connection between use of the hoist and the fire. The trial court found for the defendant, but the court of appeals reversed. The court stated: "we think the absence of causal connection is immaterial . . . ." The court supported its conclusion by reliance on the decision in *Ludlow v. Life & Casualty Ins. Co.*, in which it was held that an insurer need not demonstrate causal connection between intoxication and death in order to defend under a suspension clause providing the policy would not cover loss or injury "sustained by the

7. 378 S.W.2d 744 (Tenn. 1964).

8. Patterson, *Evidence—1964 Tennessee Survey*, 18 VAND. L. REV. 1221 (1965).

9. 383 S.W.2d 764 (Tenn. App. S.W. 1964).

insured while he has physically present in his body intoxicating liquors . . . ." It is respectfully submitted that the term "while" would carry to the ordinary mind a different connotation from the phrase "arising out of." This latter phrase has been accepted as requiring some sort of causal connection both in workmen's compensation cases,[10] and in the interpretation of insurance contracts.[11] It would seem obvious that in order to justify recovery under this policy, the insured should be required to show some connection between the use of the hoist and the injury received; otherwise the language would be totally disregarded. If the connection that need be shown is not causal, then what is it? One would hope that in saying the absence of causal connection is immaterial under this wording, the court was simply referring to the absence of that particular type of causal connection between the use of the hoist and the injury which would be required in a tort action for negligence. Certainly, there is no reason to import into the law of insurance the technical niceties of proximate cause. But it does not seem unjust to require of an insured that he demonstrate some rational connection between use of the hoist and injury to property. Not to require this would seem to abandon the definition of the insured event entirely.

Two cases published during the survey period involve the concept of implied permission, applied to extend coverage to an additional insured, under the standard automobile policy. The familiar language involved is that defining the term "insured" to include "any person while using the automobile and any person or organization responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either." In *Pollard v. Safeco Ins. Co.*,[12] the automobile was purchased by Miss Judy Towle, a minor, but was registered in the name of her mother, Mrs. Hamilton. One day Miss Towle, whom the policy listed as driver after naming Mrs. Hamilton as owner (and therefore named insured), had a flat tire. She asked the owner at her parking garage to have it fixed. The garage had no facilities for repairing the puncture, so the owner drove the car to a tire repair shop. En route, he struck and injured a third party. The court was asked to hold the garage owner to be an additional insured under the policy. The court did so, stating: "She [the named insured] must have known that somewhere, sometime in the course of that general use it would become necessary for her daughter to have the car repaired and as an incident thereto it would normally be temporarily delivered into the possession of the repairman and very likely operated for short distances by such repair-

10. 1 LARSON, WORKMEN'S COMPENSATION § 6.00 (1952).
11. Annot., 89 A.L.R.2d 150, 154 (1963).
12. 376 S.W.2d 730 (Tenn. App. E.S. 1963).

man." The court distinguished two previous cases: *American Automobile Ins. Co. v. Jones*,[13] on the ground that in that case the named insured had expressly forbidden the original permittee to allow another to drive; and *Card v. Commercial Casualty Ins. Co.*,[14] on the ground that the use to which the car was put by the second permittee was not in any way for the benefit of the original permittee.

In *Teague v. Tate*,[15] the named insured gave his son (Teague) permission to drive the insured car to a social event near Jackson. During the evening, young Teague became sleepy and asked another teen-ager in the car with him (Tate) to take the wheel. Tate did so, and while driving had an accident. The injured third party recovered in federal district court against Tate and both Teagues. The insurer paid the judgment, and then brought this action against Tate to recover from him and his parents (and their liability insurer) the amount paid out. The trial court entered judgment for the insurer; the defendants appealed; the court of appeals reversed; in this opinion the Supreme Court of Tennessee affirmed the action of the court of appeals. The named insured testified that he had never forbidden his son to allow his companions to drive the family car, and that he assumed that from time to time they "swapped up driving." The supreme court noted: "We think all of us, including the insurance companies, may assume with Mr. Tate, that boys seventeen or eighteen years of age out in an automobile with their girl friends will 'swap up' on the driving occasionally." As a result, the court found that Tate had implied permission to make use of the automobile, and thus was an additional insured.

Both decisions seem sensible. Both reflect the practicalities of modern use of automobiles by minors. Indeed, one would have been surprised had the daughter phoned home in the first case to ask her mother if she might have the tire repaired; to all intents and purposes it was the daughter's responsibility to see to it the car was properly cared for. One would be almost astounded if the teen-age boy in the second case had phoned his father in the middle of the night to ask him if young Tate could bring the car home. Moreover, it is significant that in this case Teague's father had been found liable under the family purpose doctrine without reference to the insurance problem. While it is certainly true that not all the niceties of respondeat superior and its variants may properly be read into the definition of additional insured, it is reasonable to extend the coverage of the policy as far along those lines as its language will reasonably permit. Otherwise, the named insured will be subject to potential

13. 163 Tenn. 605, 45 S.W.2d 52 (1932).
14. 20 Tenn. App. 132, 95 S.W.2d 1281 (M.S. 1936).
15. 375 S.W.2d 840 (Tenn. 1964).

liabilities arising out of the ownership, maintenance and use of his vehicle from which he is in practice unable to protect himself.[16]

In two cases published during the period it was held that the United States may be an "additional insured" of its employees' automobile liability policies in spite of the 1961 amendments to the Federal Tort Claims Act.[17] One of these cases represented a change in rule by a federal district judge.[18] The writer still considers the result unfortunate, as was stated in last year's *Survey*, although justifiable under the broad language of the typical omnibus clause.[19]

In *Lazenby v. Universal Underwriters Ins. Co.*,[20] it was held that an insurer may be held liable for punitive damages assessed against the named insured in one of its liability policies. The supreme court discussed at length the recent decision of the Fifth Circuit Court of Appeals in *Northwestern National Cas. Co. v. McNulty*,[21] which reached the contrary result. The *Lazenby* opinion offered three principal bases for differing with *McNulty*: First, the court expressed skepticism with regard to the deterrent effect that would be achieved by requiring the insured to pay his own punitive damages. Second, the court indicated it felt the average insured would expect to be covered for punitive damages. Third, the court was concerned about the "fine line between simple negligence and negligence upon which an award for punitive damages can be made." This last point was developed in greater detail in Justice White's concurring opinion. In that opinion, Justice White traces the development of liability insurance and notes that at one time it was argued such insurance was itself violative of public policy for it permitted a man to insure against his own carelessness. Allowing this, it was then said, would encourage recklessness and wanton negligence. Should this argument, rejected as to basic liability coverage, prevail as to punitive damages? No, Justice White suggests, because one cannot probe the minds of juries to determine what persuaded them to reach their verdict.

The decision in the instant case is difficult to reconcile with the underlying theory of permitting punitive damage awards. If the intent of allowing such awards is to punish the offender, then this intent is

16. Similar decisions have been reached in other states. See, *e.g.*, Maryland Cas. Co. v. Marshbank, 128 F. Supp. 943 (D. Pa.), *aff'd*, 226 F.2d 637 (3d Cir. 1955).

17. McCrary v. United States v. State Farm Auto. Liab. Ins. Co., 235 F. Supp. 33 (E.D. Tenn. 1964); Patterson v. United States v. State Farm Mut. Auto. Ins. Co., 233 F. Supp. 915 (E.D. Tenn. 1964).

18. In the *McCrary* opinion, Judge Neese acquiesced in this rule for the sake of uniformity in spite of his personal preference as expressed in Gipson v. Shelly, 219 F. Supp. 447 (E.D. Tenn. 1964).

19. Covington, *Insurance—1963 Tennessee Survey*, 17 VAND. L. REV. 1075, 1077-79 (1964).

20. 383 S.W.2d 1 (Tenn. 1964).

21. 307 F.2d 432 (5th Cir. 1962), 16 VAND. L. REV. 435 (1963).

in large part thwarted by transferring this liability to a third party. If, as the court seems to suspect (although the point is not directly made), punitive damage awards are at times partly compensatory, then one is led to suggest that the trouble lies with the punitive damages doctrine, not with insurance. On the other hand, the rule adopted by the *Lazenby* opinion does have the salutary effect of reducing potential conflicts of interest between insurer and insured, it does offer a better prospect of full recovery by the injured third party, and it probably reflects the interpretation put on their policies by most insureds. Moreover, as the concurring opinion notes, it would be quite simple for the standard policy form to resolve the problem by new wording.

B. *Exclusions*

The two exclusion decisions handed down during the year were not unexpected. In *Dressler v. State Farm Mutual Automobile Ins. Co.*,[22] the issue was whether the injured party was a "member of the family of the insured residing in the same household as the insured" under an automobile policy. The injured party was the named insured's mother. Named insured was a doctor who had recently completed his internship at Memphis, and who was occupying the first floor of his parents' home at the time of the accident. It was shown that the doctor, his wife, and the parents spent much time together; that they ate together, and so on. The court held that under these facts it was proper for the lower court to find the exclusion applied.

Maryland Cas. Co. v. American Fidelity & Cas. Co.[23] was a decision by the Sixth Circuit Court of Appeals affirming a decision discussed in last year's *Survey*. With all respect, the passage of time has done nothing to change the writer's conclusion that the employee exclusion has been misapplied.

C. *Exceptions*

Horace Mann Mutual Ins. Co. v. Burrow,[24] called for interpretation of the "pre-existing sickness" exception in a health and accident policy. The particular clause provided the policy did not cover "any loss resulting from sickness contracted or commencing prior to the time a person is insured under this policy. . . ." Insured became covered under the policy on April 12, 1959. On October 26, 1959, he "developed an internal physical difficulty, which was determined to be a congenital esophageal bronchial fistula, requiring surgery . . . ."

22. 376 S.W.2d 700 (Tenn. App. E.S. 1963).
23. 330 F.2d 526 (6th Cir. 1964).
24. 373 S.W.2d 469 (Tenn. 1963).

The insurer declined to pay the resulting medical expenses on the ground of the clause just quoted. In the trial court, the insured was awarded a judgment for these expenses. The supreme court affirmed, holding that the inception of sickness should be dated from the time of its manifestation. Prior to October 26, the insured had led a full active life, in no way conscious of his congenital defect. He had at one time served in the military and had passed the physical examination for service. This holding is in accord with the overwhelming majority of decisions in this country.[25] It should be considered in conjunction with an earlier decision of the court of appeals placing the burden of proof of pre-existing disease on the insurer in cases in which it defends on the basis of such a clause.[26]

D. *Warranties and Representations*

Only two cases on warranty and misrepresentation were published during 1964. In one, the court of appeals found the evidence that misstatements were included in insured's application for a group policy to be so clear and convincing that a verdict should be directed for the insurer.[27] In the other, recovery was denied on the grounds of breach of the occupancy warranty over insured's objection that this clause was not mentioned in the memorandum of the policy sent to him.[28] The original policy containing the occupancy clause had been sent to a mortgagee who held a security interest in the insured res. The memorandum sent to the named insured stated: "This is furnished simply as a memorandum of said policy as it stands at the date of issue hereof, and is given as a matter of information only and confers no rights on the holder and imposes no liability upon this company."

III. MAKING AND MODIFYING THE CONTRACT

A. *Agents' Errors*

In two decisions published during 1964, insurers were held estopped to defend on the basis of coverage limitations, on the grounds that the companies failed to respond to notice of changes in the risk when they should have done so. In *Britt v. Fidelity & Cas. Co.*,[29] a federal district court found that the insured had requested (through his wife)

25. See Annot., 53 A.L.R.2d 686 (1957).

26. Reserve Life Ins. Co. v. Boss, 37 Tenn. App. 456, 264 S.W.2d 587 (M.S. 1953).

27. Minnick v. Federated Life Ins. Co., 378 S.W.2d 189 (Tenn. App. E.S. 1963). The case also involves a claim of waiver and estoppel on the ground that the insurer's agent knew the true facts. However, the plaintiffs apparently failed to show that this particular agent knew of the application for insurance.

28. Provident Washington Ins. Co. v. Reese, 373 S.W.2d 613 (Tenn. 1963).

29. 285 F. Supp. 150 (E.D. Tenn. 1964).

that an endorsement be added to his liability policy indicating a change in the status of the insured. The agent apparently failed to see to it after having assured the insured it would be done. In *Shelby Mutual Ins. Co. v. Wilson*,[30] the company sought to plead that the property insured under a homeowners policy was not located at the place indicated in the policy. The court of appeals found adequate evidence to support the trial jury's apparent conclusion that the defendant insurer's agent had accepted and the company had retained premiums on the policy after having learned of the insured's change of address. While the decisions are not wholly unanimous, there is considerable authority in other jurisdictions to the effect that such limitations can be waived,[31] and that failure to act may result in estoppel of the insurer, especially where premiums are retained.[32]

B. *Effect of Temporary Binder*

In *National Life & Accident Ins. Co. v. Carmichael*,[33] the *cestui que vie's* wife applied for a policy on his life. She paid the insurer's agent two dollars and ninety cents, apparently what they anticipated would be the first premium, and was given a premium receipt dated August 19, 1962, which stated:

> If said deposit is at least equal to premium for one full month, insurance under terms of policy applied for shall take effect as of date of said deposit or date of medical examination (if required), whichever shall be the latter, *provided* that on that date Proposed Insured, in the opinion of the Company's authorized officers in Nashville, Tennessee was insurable and acceptable under the Company's rules and practices for the Amount, Premium and Rating Class applied for.

On September 4, 1962, a policy was mailed to the agent, dated September 1, which called for a higher premium because of the *cestui que vie's* occupation. The agent received the policy on September 7. On September 8, before the agent had been able to visit the plaintiff and collect the additional premium, the *cestui que vie* was killed. Although the agent later delivered the policy and collected the premium, the company denied liability on the ground that the policy had not come into force at the time of the insured event. Deceased's wife then brought suit on the policy as beneficiary. The trial court held that the insurance was already in effect at the time of the husband's death, apparently on the ground of *American National Life Ins. Co. v. Thompson*,[34] a 1957 court of appeals decision, which had

30. 383 S.W.2d 791 (Tenn. App. E.S. 1964).
31. VANCE, INSURANCE § 140, at 821 (3d ed. Anderson 1951).
32. Annot., 4 A.L.R.2d 868, 901-08 (1949).
33. 381 S.W.2d 925 (Tenn. App. E.S. 1964).
34. 44 Tenn. App. 627, 316 S.W.2d 52 (W.D. 1957). The decision adopted much of

held that a differently worded binding receipt was ambiguous and capable of being interpreted to create a contract of temporary insurance that would be terminated only by rejection of the application.

In the instant case, the court of appeals reluctantly distinguished the *Thompson* decision. In the *Thompson* opinion it had been noted that "a counter offer to issue a different policy or to issue the policy at a different premium rate . . ." would present a separate problem. The instant court felt that this variation in facts required application of the usual principle that an acceptance of an application which adds different terms to it constitutes a rejection of the application and a counter-offer. Therefore, the trial court was reversed and recovery denied.[35]

C. *Change of Beneficiary*

In *Republic National Life Ins. Co. v. Sackmann*,[36] the Sixth Circuit upheld a finding of a federal district court that there was insufficient evidence to support a finding of substantial compliance with the change of beneficiary provisions of a life policy. The court's statement of the proper test is: "[W]hether the insured has done everything that he could do to make the change. The import of this is that he must convey to the company or its agent a request for the change of beneficiary. A mere unexecuted intention on the part of the insured is not enough."

IV. ACTIONS ON THE CONTRACT

A. *Assignability of Liability Insured's Claim*

In *Dillingham v. Tri-State Ins. Co.*,[37] the Tennessee Supreme Court held that a judgment creditor of the named insured under a liability policy cannot maintain an action against the insurer for bad faith and negligence in refusing to settle within policy limits, whether in his own right or as assignee of the named insured. In reaching the decision, the court relied heavily on the reasoning of Professor Keeton in a 1954 article[38] where he stated: "The excess liability of the company arises out of the relationship between insured and company. Claimant is a stranger to that relationship." From this premise it

Judge Learned Hand's distinguished opinion in Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir.), *cert. denied*, 331 U.S. 849 (1947).

35. For a similar result, see New England Mut. Life Ins. Co. v. Hinkle, 248 F.2d 879 (8th Cir. 1957), criticized, 33 NOTRE DAME LAW. 656 (1958). See also Annot., 2 A.L.R.2d 943 (1948), cited in the instant case.

36. 324 F.2d 756 (6th Cir. 1963).

37. 381 S.W.2d 914 (Tenn. 1964).

38. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1175-77 (1954).

would follow that the injured claimant cannot sue the insurer in his own right for bad faith failure to settle.[39] The question of assignability is a bit more difficult. In this jurisdiction, the test of assignability has been said to be whether the action is survivable. In *Carne v. Maryland Cas. Co.*,[40] it had been held that such causes of action are not survivable, but rather abate on the death of the named insured.[41]

B. *Contractual Time Limitation*

In *Phoenix Ins. Co. v. Brown*,[42] the insurer defended in part on the ground that insured's action was not filed within twelve months after the loss. The court of appeals, relying on the *Hill* case, held that the twelve month period did not begin to run until the insurer denied liability.[43]

C. *Penalty Statute*

Tennessee Farmers Mutual Ins. Co. v. Cherry[44] held that the penalty statute, section 56-1105 of the Code, does not apply to a liability insurer, since sums due under this type of contract would not bear interest until time of entry of judgment. Under the rule of *Peoples Bank & Trust Co. v. United States Fidelity & Guaranty Co.*,[45] the test for application of the penalty statute has been whether interest would accrue prior to judgment. This rule is derived from the presence in the statute of these words: "shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty five per cent. . . ."

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39. Of course, the policy may require a different result, as the article and opinion both point out.

40. 208 Tenn. 403, 346 S.W.2d 259 (1961).

41. Principal cases contra are from California, where it has recently been held such a cause of action may be assigned *prior to trial of the injury claim.* Critz v. Farmers Ins. Group, 41 Cal. Rptr. 401 (Cal. App. 1964).

42. *Supra* note 1.

43. On the validity and application of such clauses, see generally 20 APPLEMAN, *op. cit. supra* note 2, §§ 11601-03.

44. 374 S.W.2d 371 (Tenn. 1964).

45. 156 Tenn. (3 Smith) 517, 3 S.W.2d 163 (1928).