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Insurance

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INSURANCE

I. AUTOMOBILE INSURANCE

In the six South Carolina Supreme Court decisions handed down during the past year dealing with the various coverages found in automobile policies the court was concerned with problems in two general categories. Though deciding issues in narrow areas, the court was confronted with diverse situations in which insurers were asserting cancellations or avoidances of policies; and, cases in which insurers were contesting the extent of liability under particular coverage clauses.

A. Cancellation and Avoidance

In *Allstate Insurance Company v. Smoak*,[1] the circuit court had in effect directed a verdict in favor of plaintiff-respondent Allstate by finding an oral binder of liability insurance effective, thus allowing Allstate to avoid payment under the uninsured motorist provisions of its policy issued to Smoak. On July 24, 1964, Smoak was involved in a collision with a vehicle owned by William Seabrook, doing business as Seabrook Transfer and Storage Co. Smoak later filed suit and, believing Seabrook to be uninsured, had a copy of the suit papers served on Allstate Insurance Company.[2] Allstate brought this action, asserting that Carolina Casualty Insurance Co., through an oral binder of an agent (Martens), did provide coverge to Seabrook on the date in question. It should be noted here that the "agent" in question was not an employee of Carolina Casualty but was seeking on Seabrook's behalf to find a company that would insure Seabrook.

The pivotal question in the case on appeal was whether the trial judge erred in finding, as a matter of law, that the insurance "agent" was acting in a capacity which would permit liability for his acts to be imputed to Carolina Casualty.[3]

1. 256 S.C. 382, 182 S.E.2d 749 (1971).

2. S.C. CODE ANN. §46-750.33 (Supp. 1971) provides:

> No action shall be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing such liability are served in the manner provided by law upon the insurance carrier writing such uninsured motorist provision.

3. The lower court relied on its interpretation of S.C. CODE ANN. §37-233 (1962) in finding a principal-agent relationship. *See* 182 S.E.2d at 752-53.

The supreme court, in reversing, found error in two primary respects. First of all, the court indicated that even if the applicable statute made Martens the agent of Carolina Casualty, a jury question remained to determine whether Martens had acted within the scope of his authority in making the alleged oral binder.[4] The court then strengthened its reversal by considering whether Martens might be classified as a broker rather than an agent of the company. It found decisions of other states in harmony with a prior South Carolina case and again concluded, on the facts, that error existed when the lower court decided, as a matter of law, that Martens was agent for Carolina Casualty.[5] The opinion of the court reflects the many difficulties encountered in laying down rules relative to alleged principal-agent relationships in the insurance field. Each case arises from facts rarely analogous to other cases. Consequently, it is virtually impossible for the court to do other than enunciate broad principles from which reasoned judgments may be drawn in each particular situation. To do otherwise would only create a burdensome confusion in the area.

Lack of specific guidelines was not the problem in *National Service Fire Insurance Co. v. Jordan.*[6] In this case the court applied the clear language of the Motor Vehicle Safety Responsibility Act[7] to require a company to provide liability coverage for a collision that occurred on December 22, 1964, despite the fact that the vehicle originally insured under the policy had been disposed of and the policy allegedly cancelled at the insured's request on or about April 30, 1963.

Although facts existed that would evoke sympathy for the insurer's position, the statute clearly required the result set out in the court's decision. In July, 1962, Junior Chestley

4. 182 S.E.2d at 753, relying on Cook v. Canal Ins. Co., 245 S.C. 238, 140 S.E.2d 166 (1965); and Cauthen v. Metropolitan Life Ins. Co., 189 S.C. 356, 1 S.E.2d 147 (1939).

5. The prior case of Cook v. Canal Ins. Co., *supra* n.4, provided the necessary local authority along with Tri-City Transp. Co. v. Bituminous Cas. Corp., 311 Ill.App. 610, 37 N.E.2d 441 (1941); Reserve Ins. Co. v. Duckett, 240 Md. 591, 214 A.2d 754 (1965); Kelly v. Empire Fire & Marine Ins. Co., 237 Or. 443, 391 P.2d 770 (1964); and Monast v. Manhattan Life Ins. Co., 32 R.I. 557, 79 A.932 (1911). *But, cf.* Hahn v. Carolina Cas. Co., 252 S.C. 518, 167 S.E.2d 420 (1969).

6. 187 S.E.2d 230 (S.C. 1972).

7. S.C. CODE ANN. §§46-701 to 750.72 (Supp. 1972).

Larrimore's driver's license was suspended. Prior to the restoration of the license Larrimore, by statute,[8] was required to file proof of financial responsibility with the Highway Department. In December, 1962, Larrimore's wife obtained a liability insurance policy from Canal Insurance Co., showing Larrimore as a driver, that was properly certified to the Department via SR-22 sent by Canal. Due to confusion in the Highway Department records Larrimore was notified, with a copy to Canal, that certification was unnecessary. The Department later found its error, but noting the SR-22 filed by Canal, took no further action. In April the insured vehicle was sold and Canal cancelled the policy, refunding unearned premium to Mrs. Larrimore. Canal failed, however, to notify the Highway Department of the cancellation as required by the Act.[9] No other liability policy was available to Larrimore on December 22, 1964.

On that date Larrimore was driving a borrowed vehicle on which the owner had no insurance. As a result of the collision Jordan, a passenger, was killed. Mrs. Jordan sought recovery from National Service Fire under the uninsured motorist provision of a policy issued to the Jordans.[10] National Service Fire protested by an action for declaratory judgment, asserting Canal's alleged failure to properly cancel the certified policy. Both the circuit court and the supreme court agreed with National Service Fire as previously indicated. In striking down the attempted cancellation, the court stated:

> The statute placed the burden upon the insurer to give notice that a policy previously certified will be cancelled or terminated and, in the absence of compliance therewith, continuous coverage is afforded the insured.[11]

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8. S.C. CODE ANN. §46-744 (Supp. 1971).

9. S.C. CODE ANN. §46-702(7)(h) (Supp. 1971) provides:
> When an insurance carrier has certified a motor vehicle liability policy . . . the insurance so certified shall not be cancelled or terminated until at least ten days after a notice of cancellation or termination of the insurance certified shall be filed with the Department, ...

10. Uninsured motorist coverage generally provides for recovery by the named insured and members of his household of damages occasioned by the negligence of an uninsured motorist even when the insured is a passenger in a non-owned vehicle, provided similar coverage is not available on the vehicle in which he is riding.

11. 187 S.E.2d at 232.

Canal also proposed the argument that since Larrimore was operating a non-owned automobile not described in the certified policy, any coverage extended must be termed voluntary and outside the notification requirements of the Act. The court concluded:

> The person whose license has been suspended and is about to be restored, not any particular automobile, is regarded as the potential hazard to the general public. He is required to give and thereafter maintain proof of financial responsibility and a policy which afforded coverage with respect to only one vehicle . . . would not afford "proof of financial responsibility" as that term is defined in the statute.[12]

A totally different problem of notification was resolved by the court in *Factory Mutual Liability Insurance Co. v. Kennedy*.[13] In this case, Factory Mutual sought to avoid defense and indemnification of its policyholder, Kennedy, in an action arising out of a collision which occurred on February 18, 1966. The company alleged it received no notice of the collision until July 29, 1967, at a time when a suit against Kennedy was in default. The court below agreed with Factory Mutual's contention that late notice of a collision or suit was sufficient to avoid the company's usual obligations irrespective of whether the company's position in the matter had been prejudiced. The supreme court, in reversing, clarified its position in this area by stating:

> [W]e think the sound rule to be that, in an action affecting the rights of innocent third parties under an automobile liability policy, the noncompliance by the insured with policy provisions as to notice and forwarding suit papers will not bar recovery, *unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights*.[14]

The requirement that the company prove "substantial prejudice" resulting from noncompliance with this policy condition will undoubtedly discourage much litigation in this area even though the lower limit of the term "substantial" is yet to be defined.

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12. *Id.* at 233, *citing* S.C. CODE ANN. §§46-702(13), -748 (1962).

13. 256 S.E. 376, 182 S.E.2d 727 (1971).

14. *Id.* at 381, 182 S.E.2d at 729-30. The court relied on prior similar statements in Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965), but apparently has enunciated the rule as specifically applying to the notice clause for the first time in *Factory Mutual* (emphasis added).

B. Extent of Insurer's Liability

In a brief, decisive opinion the court, on first impression, has rejected one approach to "stacking limits" of uninsured motorist and medical payments coverages. The facts giving rise to the dispute in *Nationwide Mutual Insurance Co. v. Bair*[15] are as follows: Nationwide issued a policy to J. Harold Bair on which two automobiles were listed as "Described automobile" providing uninsured motorist protection limits of $10,000.00 per person and $20,000.00 per occurrence on each automobile. The same policy also provided medical payments coverage limits of $500.00 per person, per occurrence, on each automobile. On July 6, 1968, one of the covered automobiles was involved in a collision with an uninsured motorist resulting in three injuries and three deaths in the Bair automobile. Nationwide filed this action for declaratory judgment, asserting that its maximum exposure was $20,000.00 under the uninsured motorist provisions of the policy and $500.00 per person under the medical payments provision. Bair, *et al.*, contended that the limits of Nationwide's responsibility should be doubled since two cars were covered under the policy. In the circuit court Nationwide prevailed in its arguments related to the uninsured motorist coverage. Bair, *et al.*, prevailed on the medical payments issues.

In applying the applicable statutes[16] the supreme court could find no support for the contention that Nationwide's obligation under the uninsured motorist coverage exceeded $20,000.00, concluding:

> We hold that Section 46-750.33 does not require uninsured motorist endorsement limits to be multiplied by the number of vehicles insured under the policy of which the endorsement forms a part.[17]

Whether the court's position on "stacking" uninsured motorist limits will extend to other situations arising under this coverage remains to be explored.[18]

15. 186 S.E.2d 410 (S.C. 1972).

16. S.C. CODE ANN. §§46-750.32, 750.33 (Supp. 1971).

17. 186 S.E.2d at 412.

18. Using the facts of this case, it will be recalled there were five passengers in Bair's automobile. It is conceivable that each of these people owned automobiles on which similar coverage had been purchased. Uninsured motorist protection routinely follows its named insured wherever he might be situated when injured by an uninsured motorist (with some limitations). The question would then arise on whether the passenger's coverage would apply to his injury

The court similarly found no support for requiring Nationwide to pay more than $500.00 per person under the medical payments coverage. Resorting to the particular policy language involved, the court found the $500.00 limitation "plain and unambiguous."[19]

In *Martin v. Nationwide Mutual Insurance Co.*[20] the efficacy of an endorsement adding subrogation rights to a "family compensation"[21] provision in an auto policy was disputed. On March 20, 1968, appellant Nationwide issued a properly countersigned policy containing these benefits, minus the subrogation. On June 20, 1969, the company issued an uncountersigned endorsement subrogating itself to its policyholder's rights in the event of a loss. On March 18, 1970, policyholder Martin lost his life in a motor vehicle collision. Subsequently, representatives of the tort-feasor entered into a settlement agreement with Martin's estate and releases were executed. Nationwide then refused to pay the "family compensation" benefits, claiming the prior settlement and execution of releases had conclusively prejudiced its subrogation rights. The lower court found the endorsement to be ineffective for lack of countersigning[22] and awarded the proceeds to respondent Martin.

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or death, irrespective of whether the host driver had similar coverage available. Three options would be available to the court. First, if the host driver's coverage, by virtue of a multiplicity of claims, failed to make the minimum of $10,000.00 available to the passenger, the court could allow the passenger's policy to provide the difference. Secondly, the court could require the passenger's policy to provide its full limit regardless of the coverage provided by the host driver's policy. Or, thirdly, the court could refuse to require the passenger's policy to apply. *See generally* Sellers v. U.S. Fid. & Guar. Co., 185 So.2d 689 (Fla. 1966); State Farm Mut. Auto. Ins. v. Murphy, 226 Ga. 710, 177 S.E.2d 257 (1970); Travelers Indem. Co. v. Williams, 119 Ga.App. 414, 167 S.E.2d 174 (1969); Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965).

19. 186 S.E.2d at 413.

20. 256 S.C. 577, 183 S.E.2d 451 (1971).

21. This provision allowed a recovery of $5,000.00 for accidental death resulting from motor vehicle accidents as well as a maximum of $5,000.00 medical benefits if injury or death resulted from the same cause.

22. S.C. CODE ANN. §37-247 (1962) provides, in part:

> All business done in this State by insurance companies . . . shall be transacted by their regularly authorized agents . . . and all policies, except life insurance policies, so issued must be personally countersigned by such agents.

The supreme court, reversing, found the statutory requirement of countersigning of the *policy* had been met and could find no language requiring endorsements to be countersigned. No statutory language revealed a legislative intent to require such a procedure. Or, even if such was the intent of the legislature, the court could find no authority under which the endorsement could be voided, noting that failure to comply with the statute only subjected the company to penalty.[23]

In *Vann v. Nationwide Insurance Co.*[24] a disgruntled claimant under the medical payments and uninsured motorist coverages of a Nationwide policy brought suit for actual and punitive damages resulting from an alleged breach of the insurance contract said to have been accomplished with a fraudulent intention, accompanied by a fraudulent act. In short, Vann alleged he had incurred covered medical expenses that Nationwide refused to pay unless he would, at the same time, agree to a compromise of his uninsured motorist claim. Nationwide moved to strike the allegations of fraud upon which the claim for punitive damages was based. The circuit court granted the motion and Vann appealed.

In affirming, the supreme court first pointed out ". . . that a mere violation of a contract will not support an allegation of fraud."[25] Further, "[p]unitive damages are not recoverable for the mere failure or refusal to pay a debt."[26] Nor could the court find any change of position by Vann or any act by Nationwide which could have prevented Vann from recovering his actual damages. As the court stated:

> [T]he complaint is devoid of any allegation of fact which shows a fraudulent act on the part of the respondent accompanying the alleged breach of the contract . . . .[27]

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23. 256 S.C. at 581, 183 S.E.2d at 453, citing S.C. CODE ANN. §37-248 (1962).

24. 257 S.C. 217, 185 S.E.2d 363 (1971).

25. *Id.* at 220, 185 S.E.2d at 364, *citing* Calder v. Commercial Cas. Ins. Co., 182 S.C. 240, 188 S.E. 864 (1936).

26. *Id.* at 221, 185 S.E. 2d at 364, *citing* Patterson v. Capitol Life & Health Ins. Co., 228 S.C. 297, 89 S.E.2d 723 (1955).

27. *Id.* at 222, 185 S.E.2d at 365, *citing* Blackman v. Ind. Life & Acc. Ins. Co., 229 S.C. 54, 91 S.E.2d 709 (1956).

II. ACCIDENT AND HEALTH INSURANCE

In an important decision construing an "anti-duplication provision"[28] in a group major medical policy, the South Carolina Supreme Court has severely restricted the application of such clauses. In *Millstead v. Life Insurance Company of Virginia*,[29] the plaintiff protested the application of such provision to his medical expenses by the defendant.

Mr. Millstead was the victim of a lengthy and expensive illness which he alleged fell within the terms of a group health policy issued by the defendant and procured by his employer. The same illness, or the expense therefrom, was also allegedly covered under another group health policy issued to Millstead's wife, procured by her employer. Life of Virginia's provision deducted:

> . . . all payments made *to or on behalf of the insured individual* for medical care or services . . . under any group . . . or other service prepayment plan . . . arranged through any employer . . .[30]

In the circuit court the defendant's position prevailed by virtue of the court's interpretation of the phrase "any employer" as including the employer of Mrs. Millstead.

In reversing, the supreme court found it unnecessary to consider whether "any employer" was the crucial phrase in the clause. It noted that the clause was operative only when payment was "made to or on behalf of the insured individual." Looking to the stipulated facts, the court saw that *the group insurer had paid Mrs. Millstead* based on the bills she had submitted from her husband's illness and noted that, once paid, she could use the money as she saw fit. The fact that she paid medical bills for her husband was considered immaterial. "Payment of her husband's medical bills by the wife with her money did not constitute payments *to or on behalf of the husband* under any insurance plan."[31]

28. Group accident and health policies, and frequently private plans, often include "anti-duplication" or "coordination of benefits" which restrict the policy pay-out to medical expenses for which coverage is not provided by other policies. The companies rationalize that such provisions prevent the public from "making money" from illnesses by the purchase of multiple policies. Of course, in addition to serving that end, such provisions decrease the loss payments of the companies.

29. 256 S.C. 449, 182 S.E.2d 867 (1971).

30. *Id.* at 451, 182 S.E.2d at 868.

31. *Id.* at 452, 182 S.E.2d at 868.

III. LIFE INSURANCE

Whether particular "war risk" exclusions were to prevent recovery by the beneficiaries for the death of a son in Vietnam was the issue in *Hazle v. Liberty Life Insurance Co.*[32] Bruce Hazle, son of the plaintiffs, was accidentally shot and killed in a supply room in a combat zone in Vietnam by another soldier who was cleaning a gun. The defendant company refused to pay under an accidental death policy and denied double indemnity under a life insurance policy.

The circuit court, in awarding judgment for plaintiffs, stated: ". . . military service wartime exclusions must be construed as applicable only to death from increased hazards related to wartime military service."[33] Since this statement went unchallenged by the defendant, as the supreme court says, "that declaration is the law of this case."[34] The negative implication is that the declaration by the trial judge *may* have been error. If so, the holding in this case should be narrowly viewed and approached with caution in other cases. Since the specific clause in question was not reprinted in the supreme court's opinion, no judgment can be formed on whether the exclusion depended only on the status of the insured or whether it was a "result" clause, requiring the increased hazard and causal connection mentioned by the court. Both type clauses are written and are effective within their proper ambit.[35]

IV. LICENSE FEES AND TAXES

The battle of *United States Fidelity and Guaranty Co. v. City of Newberry*[36] continues. Newberry enacted a city license tax on the gross receipts of fire and casualty companies doing business within its confines.[37] In the lower court the company, in seeking a summary judgment, claimed the tax, as imposed, was unreasonable and a burden upon it. The city did not op-

32. 186 S.E.2d 245 (S.C. 1972).

33. *Id.* at 246.

34. *Id.*

35. *Compare* McQueen v. Sovereign Camp W.O.W., 115 S.C. 411, 106, S.E. 32 (1921) *with* Young v. Life & Cas. Ins. Co. of Tenn., 204 S.C. 386, 29 S.E.2d 482 (1944).

36. 186 S.E.2d 239 (S.C. 1972). *See also,* U.S. Fid. & Guar. Co. v. City of Newberry, 253 S.C. 197, 169 S.E.2d 599 (1969).

37. The tax is generally authorized by S.C. CONST. Art. VIII, §6.

pose the motion and it was granted. The city then appealed. After a thorough consideration of the constitutionality of the tax from both a state and federal perspective, the court viewed the proceeding below and concluded that the record was inadequate in respects of the city's opposition to the motion. The court also considered the case one of "grave public importance" which deserved a full evidentiary hearing to give the city ". . . an opportunity upon trial to justify, if it can, the classification and rate of tax as being constitutionally permissible."[38] The result, though procedurally unusual,[39] could easily be characterized as judicial restraint at its best. It would seem that monumental issues are best decided upon all the evidence.

In *State v. Pilot Life Insurance Co.*[40] the court was called upon to determine whether certain investments made by Pilot Life were property applied by that company as credits against the state graded license fee. In affirming, the court adopted the exhaustive opinion of the lower court as its judgment of the issues. At the risk of substantial oversimplification, the result may be summarized as:

(1) allowing insurance companies to reduce graded license fees when investments are made in "first mortgage bonds of real estate in this state"[41] regardless of the identity of the owner;[42] and

(2) disallowing credit against the fee for investments in collateral loans, even though the collateral is a note secured by a first mortgage on South Carolina realty.[43]

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38. 186 S.E.2d at 243.

39. The court found no error in the lower court and did not expressly reverse the trial judge, but carefully remanded the case for further proceedings.

40. 257 S.C. 383, 186 S.E.2d 262 (1972).

41. S.C. CODE ANN. §37-123 (1962).

42. 257 S.C. at 398, 186 S.E.2d at 270.

43. *Id.* at 400, 186 S.C. at 271.