South Carolina Law Review

Volume 30 | Issue 1 Article 10

1979

Insurance

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INSURANCE

I. PERSONAL INJURY PROTECTION BENEFITS UNDER THE AUTOMOBILE REPARATION REFORM ACT OF 1974: *Tillotson* AND THE 1978 AMENDMENTS

In 1977, the South Carolina Supreme Court was asked to construe the personal injury protection (PIP) benefits provisions[1] of the 1974 Automobile Reparation Reform Act.[2] In *Tillotson v. State Farm Mutual Automobile Insurance Co.*[3] the parties sought interpretation of the ambiguous language of the Act's subrogation and offset provisions.[4] The legislature has amended the statute since *Tillotson* was decided;[5] because they will affect future cases that are similar to *Tillotson* the case will be discussed in light of the amendments.

Before the 1978 amendments the Act provided that no automobile insurance policy was to be issued or renewed in South Carolina unless it contained the minimum required PIP coverage.[6] The 1978 amendments made these PIP benefits no longer mandatory. The insurer must make them available to the insured who may purchase them at his option.[7] PIP benefits are generally paid to the injured person by his own insurer. The Act, however, provides three exceptions to this rule: if the injured party is a pedestrian, permissive user, or passenger, he recovers not from his own insurer, but from the insurer of the owner of the vehicle that struck him or in which he was riding.[8]

PIP benefits are payable without regard to fault and include medical, hospital, and disability payments[9] of up to $1000 per

1. S.C. CODE ANN. §§ 56-11-110 to -170 (1976).

2. South Carolina Automobile Reparation Reform Act of 1974, No. 1177, 1974 S.C. Acts 2718 (codified at S.C. CODE ANN. §§ 56-11-10 to -800 (1976)) (amended 1978).

For an excellent discussion of the major provisions of this Act, see Note, *The South Carolina Insurance Reform Act (Part I): "No Fault" and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C.L. REV. 705 (1975).

3. 268 S.C. 248, 233 S.E.2d 295 (1977).

4. S.C. CODE ANN. §§ 56-11-110, -130 (1976) (amended 1978).

5. No. 569, 1978 S.C. Acts 1668.

6. S.C. CODE ANN. § 56-11-110 (1976) (amended 1978).

7. No. 569, 1978 S.C. Acts 1668.

8. S.C. CODE ANN. § 56-11-150(b) (1976).

9. In 1978, the South Carolina Supreme Court held that PIP "disability" benefits were to be paid while the insured person is living and recuperating. When the insured died almost instantly, he incurred no loss while living and was not "disabled" under the meaning of the Act. "It is not the function of PIP no fault insurance coverage to provide funds for the creation or enhancement of one's estate." Hamrick v. State Farm Mutual Auto. Ins. Co., 270 S.C. 176, 180, 241 S.E.2d 548, 549-50 (1978).

person to cover

> all reasonable expenses arising from the accident and sustained within three years from the date thereof for necessary medical, surgical, chiropractic, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services; and in the case of an income producer who exercises the option to receive such benefit, payment of benefits for loss of income as the result of the accident; and where the person injured in the accident was not an income or wage producer . . . payments . . . must be made in reimbursement of . . . expenses incurred for essential services ordinarily performed by the injured person for care and maintenance of the family. . . . [10]

Two types of PIP coverage are available under the Act. Section 56-11-110 provides that minimum PIP benefits, called Basic Economic Loss (BEL) benefits,[11] must be offered to the insured in the amount of $1000.[12] Section 56-11-120 requires insurers to offer additional PIP coverage, called Supplemental Economic Loss (SEL) benefits,[13] in increments ranging up to a $5000 maximum.[14] Before the 1978 amendments, only the SEL benefits were optional; BEL benefits are now accorded the same treatment.[15]

Tillotson[16] involved an interpretation of the confusing language of the Act's subrogation provisions:[17] specifically, do these

10. S.C. CODE ANN. § 56-11-110 (1976) (amended 1978). The 1978 amendments to the Act provide that the insured must be provided with three options. He may choose (1) medical, hospital, disability, loss of income benefits, and essential service expense; or (2) medical, hospital, disability benefits, excluding loss of income benefits and essential service expense; or (3) no coverage at all. No. 569, 1978 S.C. Acts 1668. See S.C. DEP'T OF INS., BULL No. 6-78 at 2, (Aug. 16, 1978). In Hamrick v. State Farm Mut. Auto. Ins. Co., 270 S.C. 176, 241 S.E.2d 548 (1978), the supreme court, interpreting the meaning of "disability" as used in § 56-11-110, dictated that the "plain and generally accepted meaning" of the word is "the inability of a living person to work." *Id.* at 180, 181, 241 S.E.2d at 550. Conceivably, an individual could opt for the lower premium coverage that excludes "loss of income benefits" and, in a later suit, argue that "disability" under South Carolina case law includes "loss of income." This would effectuate full recovery even though the lower premium protection had been chosen. This argument, however, would have a minimal chance of success.

11. Memorandum from Members of Insurance Subcomittee, to Members of Labor, Commerce and Industry Committee, S.C. House of Representatives (December 14, 1977).

12. S.C. CODE ANN. § 56-11-110 (1976) (amended 1978).

13. Interview with R. Kelsey Foster, Jr., Director of the Auto Rating Section, State Rating and Statistices Division, S.C. Dept. of Insurance, in Columbia, S.C. (April 13, 1978).

14. S.C. CODE ANN. § 56-11-120 (1976).

15. No. 569, 1978 S.C. Acts 1668.

16. 268 S.C. 248, 233 S.E.2d 295 (1977).

17. Respondent, in his brief, referred to the "difficulty and ambiguity in the tortious

provisions apply to the SEL benefits available under section 56-11-120.[18] Plaintiff Tillotson, a pedestrian, was injured when he was struck by an automobile. He incurred compensable PIP losses of $4492.06.[19] Because he was a pedestrian, he received $1000 pursuant to the BEL provisions of the driver's policy.[20] The driver did not carry the SEL coverage, but Tillotson had elected this coverage up to the amount of $5000 under his own automobile policy. After receiving the maximum BEL benefits available under the driver's policy, Tillotson filed a claim to recover $3492.06 in SEL benefits from his own carrier, State Farm.[21] State Farm offered to pay the claim in full if Tillotson would agree to execute a "Loan Receipt Under Personal Injury Protection Coverage."[22] The loan receipt would have required Tillotson to reimburse State Farm if he later recovered damages for personal injuries from the driver or the driver's insurance carrier. Tillotson refused to execute the loan receipt and commenced the action against his insurer, claiming $3492.06 and alleging that the policy's subrogation clause was in contravention of the Act. Prior to the trial, Tillotson and the driver's insurer settled for $14,000 over the $1000 BEL benefits already paid under the driver's policy.[23] The trial court held for the insured, awarding him the full amount he sought. State Farm appealed the case to the supreme court.

Before its amendment in 1978, the BEL provision stated that "[n]o benefit payable pursuant to this section shall be subject

drafting of the Act. . . ." Brief of Respondent at 9.

18. 268 S.C. at 251, 233 S.E.2d at 297.

19. The facts are stated in Brief of Appellant at 4-6. This statement of the case was adopted by the Respondent. Brief of Respondent at 4.

20. S.C. CODE ANN. § 56-11-150(b) (1976).

21. Tilloson set off the $1000 he had recovered from the driver's policy, as required by S.C. CODE ANN. § 56-11-150(a) (1976). The provisions of the Act relating to who recovers from whom are complicated, to say the least. The Act defines "insured" to include pedestrians, permissive users, and guests, along with the named insured and members of his family. S.C. CODE ANN. § 56-11-110 (1976) (amended 1978). This provision, standing alone, would seem to indicate that a person injured as a pedestrian, guest, or permissive user, could choose between recovering from his own insurer or that of the driver of the automobile. Section 56-11-150, however, sets up a definite scheme to govern these situations. If the owner of the car involved is insured under a PIP policy, the injured party must recover from the insurer of the vehicle. *Id.* § 56-11-150(b). If, on the other hand, the owner of the vehicle has no PIP coverage, the injured person may recover from his own insurer. *Id.* § 56-11-150(a). Although the Act is not explicit on this matter, a person who has elected the SEL coverage may apparently recover the SEL benefits from his own insurer if the owner of the vehicle involved in the accident has not bought this extra coverage. This is what happened in *Tillotson.*

22. Record at 18.

23. *Id.*

to subrogation or assignment except as provided for in § 56-11-130(b)."[24] Section 56-11-130(b), which was repealed in 1978, was called the "offset provision," by members of the insurance industry.[25] It required that any subsequent recovery by the insured from another party in the accident be reduced by the amount of the BEL benefits paid to him.[26] This set-off took place only if the person's insurance policy contained at least the mandatory BEL coverage.[27] The SEL provision requires that the optional benefits be "of the same kind and supplemental to"[28] those described in the BEL provision. These provisions were at the center of the arguments offered by the parties in *Tillotson.*

Appellant made two contentions in support of its position that the SEL benefits should be subject to subrogation. First, it pointed out that the sentence in the BEL provision strictly limiting subrogation and assignment applies only to benefits payable pursuant to that section.[29] Appellant contended that the SEL benefits were not benefits payable pursuant to the BEL section and that the insured and the insurer therefore should be allowed to contract freely over subrogation of the SEL benefits.[30]

Appellant's second argument was not as straightforward as the first, and its weaknesses were caused in part by the imprecision of the language of the Act. Appellant contended that for the SEL benefits to be "of the same kind" as the BEL benefits, they had to be subject to subrogation.[31] This argument was seriously flawed. Although the Act seems to say that PIP benefits are to be subject to subrogation at times, in reality no exception existed to the no-subrogation rule found in the BEL section. The BEL section provided that there would be no subrogation or assignment except as provided in section 56-11-130(b).[32] This latter section, however, had nothing to do with subrogation as that term is commonly understood. Subrogation is generally defined as the substitution of one person in the place of another with reference to a lawful claim or right.[33] Section 56-11-130(b) did not permit

24. S.C. CODE ANN. § 56-11-110 (1976) (amended 1978).
25. S.C. DEP'T OF INS., BULL. No. 6-78, at 2 (Aug. 16, 1978).
26. S.C. CODE ANN. § 56-11-130(b) (1976) (repealed 1978).
27. *Id.*
28. *Id.* § 56-11-120 (1976).
29. Brief of Appellant at 6.
30. *Id.* at 6-7.
31. *Id.* at 11-12.
32. S.C. CODE ANN. § 56-11-110 (1976) (amended 1978).
33. 73 AM. JUR. 2d, *Subrogation* § 1 (1974).

an insurer which had satisfied a claim under an insured's PIP protection to step into the shoes of its insured to pursue legal rights against a tortfeasor. Instead, section 56-11-130(b) required that any recovery of damages from a tortfeasor who was covered under a PIP policy be reduced by the amount recovered by plaintiff under the BEL provisions of his or anyone else's policy. This is not subrogation; it is more in the nature of a set-off.[34] The drafters of the Act purposely chose this form of remedy to make certain that the burden of the BEL losses was not shifted from the insurer of the injured party to the insurer of the tortfeasor.[35] Because BEL benefits were not subrogable, appellant's argument that SEL benefits had to be subject to subrogation to be "of the same kind" as BEL benefits was without merit.

Respondent's contention, which the court ultimately accepted, was that the SEL benefits were subject to neither subrogation nor set-off.[36] Respondent pointed out that the BEL benefits were not subject to any true subrogation at all.[37] To be of the "same kind" as the BEL benfits, he argued, the SEL benefits also had to be immune from subrogation.[38] He emphasized that the set-off provision applied by its own terms only to the required BEL benefits and that, because the SEL benefits were purely optional, they were not to be set off under section 56-11-130(b).[39]

The court's opinion reflects the confusion that characterized the arguments in the briefs of the parties. The court plainly held that the SEL benefits were not to be subrogated.[40] The precise ground for this holding, however, is difficult to ascertain. The court stated that "[t]he only subrogation or assignment permitted is that described in [section 56-11-130(b)], and this section refers to '. . a claimant recovering from his insurer the benefits required by [the BEL section] . . . .' It does not refer to supplemental benefits permitted by [the SEL section]."[41] The court's point is clear, but the court neglected to refute appellant's argument that the subrogation prohibition applied only to benefits payable under the BEL section.[42] This is unfortunate, because it

34. *See* 20 AM. JUR. 2d, *Counterclaim, Recoupment, and Setoff* § 2 (1965).
35. *See* Note, *supra* note 2, at 717-18.
36. Brief of Respondent at 5-9.
37. *Id.* at 7.
38. *Id.*
39. *Id.* at 8 (quoting Note, *supra* note 2).
40. 268 S.C. at 253, 233 S.E.2d at 298.
41. *Id.*
42. *See* notes 29-30 and accompanying text *supra.*

makes the court's opinion incomplete. One way in which the holding can be reconciled with the statutory language is if the court found that the SEL benefits are payable pursuant to the BEL section. This interpretation of the Act, however, would be very contrived. A better rationale for the holding that the no-subrogation clause applies to both SEL and BEL benefits appears in respondent's brief.[43] It is that for the SEL benefits to be of the "same kind" as the BEL benefits, they must not be subject to subrogation. The court did not discuss this interpretation, but it might have been the underlying rationale for its decision.

Tillotson's status as a pedestrian might lead a reader unfamiliar with the intricacies of the Act to dismiss the holding of the court as applicable only to cases in which PIP benefits are received by the injured party from an insurer other than his own. This reading of the case, however, would be unduly restrictive. Although the facts in *Tillotson* were complicated by the plaintiff's recovery of BEL benefits from one insurer and of SEL benefits from another, the court's holding would apply even if two vehicles covered by separate PIP policies were involved in an accident. If the insurer of the party not at fault conditioned its payment of SEL benefits upon the agreement of its insured to subrogate it to his rights against the tortfeasor, the insured would have to rely upon *Tillotson* to show that these SEL benefits are not subject to subrogation.

The posture of the law after *Tillotson* and before the 1978 amendments was clear: no subrogation of any SEL or BEL benefits was to take place, and the set-off was to be limited to only the $1000 BEL coverage. Any SEL benefits received by an insured from his insurer were to be immune from set-off in a subsequent tort recovery. The 1978 amendment changed this legal status quo in one material respect. Section 56-11-130(b), the offset provision, was repealed;[44] because of this deletion, no set-off will take place of *any* benefits received under the wholly optional coverage now provided for in the Act.[45]

The South Carolina Automobile Reparation Reform Act, as it existed prior to the 1978 amendments, was a "modified form of no fault automobile insurance."[46] In a true no-fault system, PIP benefits are substitutes for damages that might be recovered in a

43. *See* note 38 and accompanying text *supra*.
44. No. 569, 1978 S.C. Acts 1668.
45. S.C. DEP'T OF INS., BULL. No. 6-78 at 2 (Aug. 16, 1978).
46. Note, *supra* note 2, at 706.

lawsuit against another party in an accident, if that party was at fault.[47] In pure no-fault systems, an injured party may not bring a suit against a tortfeasor unless he can show that damages in excess of a statutorily set threshold amount were suffered. One of the goals of a no-fault PIP system is decreasing the number of automobile accident-related lawsuits.[48] The South Carolina Act, subsequent to the 1978 amendments, falls considerably short of being a pure no-fault system. Because the benefits recovered from an injured party's insurer under the wholly optional coverage available under the Act can neither be set off nor subjected to subrogation, the injured party is not discouraged from bringing a lawsuit against a tortfeasor. By successfully bringing suit he can recover double the amount of his compensable PIP losses. Therefore, the South Carolina Automobile Reparation Reform Act does not provide "no-fault coverage" at all.

II. LIABILITY INSURANCE AND THE INTENTIONAL ACT EXCLUSION

In *Miller v. Fidelity-Phoenix Insurance Co.*[49] the supreme court upheld an insurer's liability under a homeowner's policy for damages resulting from an intentional act of the insured. A ten-year-old boy, an "insured" under his parents' policy, set fire to his neighbor's home, causing extensive damage to that property. The suit was based on the coverage of the parents' homeowner's policy.[50] The insurer, alleging that the damage was "intentional," contended that it was not liable because a provision in the policy excluded coverage for property damage "caused intentionally by or at the direction of the insured."[51] The court was asked to determine whether this clause excluded coverage for the boy's act.

The court reasoned that for an act to be intentional, and therefore excluded from coverage under the policy, "not only the act causing the loss must have been intentional, but . . . the results of the act must also have been intentional."[52] That the child had set the fire intentionally was not disputed;[53] he had

47. AM. ENTERPRISE INST. FOR PUBLIC POLICY RESEARCH, FEDERAL NO-FAULT INSURANCE LEGISLATION 15 (1978).

48. *See* Nations, *Statutory Damages Recovery: Personal Injury Protection Coverage*, 18 S. TEX. L.J. 289, 290 (1977).

49. 268 S.C. 72, 231 S.E.2d 701 (1977).

50. *Id.* at 74, 231 S.E.2d at 702.

51. *Id.*

52. *Id.* at 74, 231 S.E.2d at 703.

53. *Id.* at 74, 231 S.E.2d at 702.

broken into the house to set the fire.[54] The insurer could not show, however, that the child intended the fire to "cause the type of loss or injury which result[ed]."[55] The child intended a fire to result from his act; his father testified that the child wanted to experience "the excitement of the fire trucks."[56] The trial judge determined, and the supreme court agreed, however, that the child "set the fire as a prank without any conscious intent to cause major destruction and property damage."[57] The harm done, in substantially exceeding that intended, could not be said to have been caused "intentionally." The insurer, therefore, failed to meet the test, and the supreme court affirmed the lower court's finding that the insurer was liable under the parents' policy.

A forceful dissent was filed by Justices Littlejohn and Ness. The dissenters contended that "[a] homeowner's policy serves to protect against loss from the unexpected or unlikely. It is not designed to protect against acts purposefully planned."[58] These two justices would have denied coverage.

The majority decision follows the lead of a number of jurisdictions.[59] These decisions initially appear to conflict with the long-standing rule that prohibits individuals from insuring against their own intentional torts.[60] This rule originated from the belief that individuals would be more inclined to commit intentional torts if they could be sure of insurance for the consequences.[61] The apparent conflict between *Miller* and this general rule, however, can be reconciled. For certain classes of insured persons, such as young children or the mentally handicapped, the "propensity for intentional wrongdoing would not be measurably affected by the availability of insurance."[62] For these classes of insured persons, the public policy against allowing liability coverage for intentional wrongs is totally inapplicable.

In the wake of *Miller,* insurers of South Carolina residents may wonder if the exclusionary clauses for intentional acts are

54. *Id.* at 76, 231 S.E.2d at 703.
55. *Id.* at 75, 231 S.E.2d at 702.
56. *Id.* at 78, 231 S.E.2d at 704.
57. *Id.* at 75, 231 S.E.2d at 702.
58. *Id.* at 76, 231 S.E.2d at 703.
59. *See, e.g.,* American Ins. Co. v. Saulnier, 242 F.Supp. 257 (D.Conn. 1965); Smith v. Moran, 61 Ill. App.2d 157, 209 N.E.2d 18 (1965); Morrill v. Gallagher, 370 Mich. 578, 122 N.W.2d 687 (1963).
60. Farbstein & Stillman, *Insurance for the Commission of Intentional Torts,* 20 HASTINGS L.J. 1219 (1969).
61. *Id.* at 1245-46.
62. *Id.* at 1252.

worth the space they occupy on the policy forms. The situation is not, however, as bleak as it might appear to be. Insurers could probably rewrite their provisions to further limit their liability for intentional acts. A properly drafted clause could completely negate the effect of the *Miller* decision. If an exclusionary clause expressly stated that the insurer would not be liable for *any* damage, no matter how unforeseen, resulting from an act the performance of which was intended by the insured, the insurer would be protected from liability, regardless of the insured's capacity. While insurance policies are generally to be construed against the insurer and in favor of the insured,[63] when a provision is unambiguous the courts may not twist its meaning to extend coverage beyond that intended by the parties.[64]

Sue C. Erwin

63. Miller v. Fidelity Phoenix Ins. Co., 268 S.C. 72, 231 S.E.2d 701 (1977); Whittington v. Ranger Ins. Co., 261 S.C. 582, 201 S.E.2d 620 (1973).

64. General Ins. Co. of America v. Palmetto Bank, 268 S.C. 355, 233 S.E.2d 699 (1977); Torrington v. Aetna Cas. & Sur. Co., 264 S.C. 636, 216 S.E.2d 547 (1975).