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Insurance

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Cases involving the Ohio Financial Responsibility Law are beginning to reach the appellate courts. In *Hunsicker v. Buckeye Union Casualty Co.*[1] while a property damage insurance policy was in effect, allegedly negligent operation of insured's automobile caused damage to another automobile. Suit was brought against insured but no service sufficient to give him legal notice was had and without his knowledge a default judgment ordered. The policy required the insurer to defend actions against the insured, this duty being conditioned upon the insurer forwarding to the insured any legal process which he received. Since no process was served on insured the court declared the judgment against him void. Further, the court held that since no service was forwarded to the insurer its duty to defend was not activated, the condition precedent not having been performed. Consequently, no action for tort liability would lie against the insurer for having failed to defend the action.

In holding that there was no duty, the court decided that a telephone notification from the attorney for the owner of the damaged automobile to the insurer that suit was being brought was not a performance of the condition in the policy. The court went on to say that, assuming there was a duty on the insurer to defend, injury resulting from the loss of his driver's license by insured was not a consequence of the breach of that duty.

The Financial Responsibility Law provides that before a license can be revoked notice must be given the operator by registered mail and the revocation order shall be revoked if proof is given that a liability policy is in effect sufficient to cover the damage involved. Here insured was given verbal notification by the telephone and failed to notify the state that he had liability insurance. This amounted, in the court's words, to the insured's having "voluntarily surrendered his license." Consequently, even assuming negligence on the part of the insurer the insured's own acts proximately caused the loss of the license and any injury resulting therefrom.

In *Nellas v. Manufacurers Casualty Ins. Co.*[2] an insurance solicitor acted as an independent contractor salesman for an authorized agent of the insurer. The salesman accepted an application for liability insurance, notified the agent to put the insurance into effect and informed the insured that the insurance was in effect as of that time. It was held that the solicitor was the agent of the insurer and that insured was entitled to recover for a loss, which occurred prior to the effective date of the written policy, on the oral contract of insurance. The court relied on the statute[3] which provides

[1] 95 Ohio App. 241, 118 N.E.2d 922 (1953).

[2] OHIO REV. CODE §§ 4509.01 *et seq.*

[3] 96 Ohio App. 196, 121 N.E.2d 651 (1953).

that one soliciting insurance and procuring application shall be held to be the agent of the company thereafter issuing a policy based on such application. This statute although originally concerned with insurance on "buildings and structures" was later placed in the general provisions governing insurance on property and against certain contingencies other than life and is properly applicable to liability insurance.

In *Coletta v. Ohio Cas. Ins. Co.*[4] insured sought to recover for loss on burglary insurance policy. Insured had suffered a prior loss within the policy which according to its terms would have reduced the obligation of the insurer by the amount of that loss. Thereafter, a general agent of the insurer agreed to have the policy reinstated for its original amount. This was not done. After a second burglary the insured sought to recover for loss up to the original amount of the policy. The evidence established that the general agent had authority to contract on behalf of the insurer subject to the effect of a provision in the policy that such policy embodied the entire agreement unless there was alteration by a written endorsement signed by the insurer's president or secretary. The insurer cannot disable himself from subsequently contracting orally to modify a written instrument and he cannot so disable himself from acting through an authorized agent. The general agent was authorized to contract for the insurer and to elect the procedure for contracting. Consequently, the general agent was authorized to make an oral contract modifying the existing contract, *i.e.* reinstating the original face value of the policy.

In *Patten v. Continental Cas. Co.*[5] the plaintiff applied for an insurance policy covering the risk to himself and his family from being afflicted by poliomyelitis and paid the first premium thereon. One day before the policy was issued, plaintiff's daughter fell victim to the stated disease. Admitting no contractual liability on the part of the insurer, plaintiff sought a tort recovery because of insurer's alleged negligence in acting on the application. The court, after referring to the uncertain state of the law throughout the country, held that the trial court was correct in directing a verdict for defendant on the ground that there was no duty on the insurer to act on the offer which had been made to it other than to return the premium if the offer was not accepted.

There was a concurring opinion in which dismissal of the action was also approved but on the ground that as a matter of law there was a failure of proof as to plaintiff's obligation to establish defendant's negligence. The policy was acted on nine days after the application was made. Three of the nine days consisted of Saturday, Sunday and Labor day on each of which

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[4] OHIO REV. CODE § 3929.27.

[5] 96 Ohio App. 70, 121 N.E.2d 148 (1953).

days defendant's home office was closed. There was also a dissenting opinion stating that the petition did state a cause of action and that the evidence raised a jury question as to negligence.

In *Royal Sausage & Meat Co. v. Aetna Casualty & Surety Co.*[6] recovery was sought on a "water damage" policy which excluded recovery for loss caused by explosion. Plaintiff operated a sausage stuffing machine under compressed air pressure. While in operation the pressure caused the top of the machine to break and fly into the air. One piece of the lid struck and punctured a water pipe resulting in a discharge of water which caused damage. The court held that "an explosion is a rapid, sudden and violent expansion of air or relinquishment of energy causing a rupture" and that although usually caused by fire could be caused by other energy factors such as the air pressure in the present case. Hence, the injury was caused by an explosion and coverage for the injury was excluded from the policy.

In *Burks v. Louisville Title Ins. Co.*[7] suit was brought on a title insurance policy when, after claim by a neighboring landowner, the insured employed a surveyor who ascertained that a portion of the land insured was not within the premises described and purchased by the insured. The title company claimed the suit was premature since the disputed boundary had not been judicially determined and therefore no loss had been established. However, the court held that there was no provision in the contract of insurance requiring the plaintiff to institute an action to clear up adverse claims of title before proceeding against the insurer. The existence of the claimed defect is a fact to be proved which when established, furnishes the predicate for the recovery of damages for breach of contract.

In *Griffin v. General Acc. Fire & Life Assur. Co.*[8] deceased took out insurance, the policy for which gave his name and address in the proper place. The policy, in the space provided for his occupation, also listed the address of his place of employment. The policy provided that it could be cancelled by "mailing to the named insured at the address shown in this policy written notice. . . . The mailing of notice as aforesaid shall be sufficient proof of notice. . . . " Notice of cancellation was mailed to the address which insured had given in the policy and was subsequently returned to sender with the notation "not at." Upon insured's death, suit was brought on the policy and the insurer defended on the ground that the policy had been cancelled. The court held the purported cancellation was ineffective.

In this case insurer knew that the notice had not been received; knew the business address of the insured, where in fact he could have been

[6] 162 Ohio St. 18, 120 N.E.2d 441 (1954).
[7] 117 N.E.2d 207 (Ohio App. 1954).
[8] 95 Ohio App. 509, 121 N.E.2d 94 (1953).

reached; and, through the knowledge of their agent, knew where the insured could be reached.

> In the absence of evidence that reasonably diligent efforts were made to find the insured and deliver such notice, mere proof of the depositing of the notice in the mail addressed to the insured at the address stated in the policy is sufficient, but not conclusive, proof of notice, and may be overcome by evidence that such notice was not actually received by the insured and is ineffective to support a finding as a matter of law that the policy was duly cancelled.

The cases dealing with this problem show some variations in holding due to difference of policy language. Also, nation wide, there is lack of uniformity in decision even on similar language. However, the present case is in accord with the more usual holding that mere mailing of the notice will not effect a cancellation of the policy when the insurer could have actually communicated with the policy holder by the exercise of "reasonably diligent" efforts.

The apparently ever-present question of the scope of the term "insured" within an automobile liability policy, where use by a permittee of the named insured is included, was again before the courts of Ohio. In *Folden v. Wolf*[9] the general principle is recognized that the mere fact of use by a permittee of an automobile owned by the named insured was the proper basis for a reasonable inference that such operation was by permission of the named insured. However, in that case the court found that such inference was refuted by the explanatory evidence presented.

In *Hoosier Condensed Milk Co. v. Doner*[10] plaintiff had suffered an accident for which defendant was allegedly responsible. Plaintiff carried $100 deductible automobile insurance on the damaged vehicle. Insurer paid plaintiff the amount of the loss minus the $100 deduction and took what purported to be an assignment of all of plaintiff's rights against the parties responsible. Plaintiff then sued defendant for the injury and defendant moved for judgment on the ground that plaintiff was not the real party in interest. The trial court granted the motion, but the appellate court reversed holding that the assignment in the subrogation receipt was to be read in the light of the obligation of the insurer to the plaintiff. Since insurer's obligation did not cover the first one hundred dollars the plaintiff retained his interest in that portion of the claim. He was, therefore, a real party in interest.

Rademaker v. Atlas Assur. Co. Limited[11] considered the effect of submission to appraisers of sound value of a building and value of loss and damage following a fire. The submission was as provided in the insurance

[9] 94 Ohio App. 403, 116 N.E.2d 41 (1953).
[10] 119 N.E.2d 90 (Ohio App. 1951).
[11] 96 Ohio App. 84, 121 N.E.2d 100 (1951).