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# Insurance—1961 Tennessee Survey (II)

Robert N. Covington\*

## I. SELECTION AND CONTROL OF RISKS

- A. *Definition of Insured in Group Policy*
- B. *Definition of the Insured Event*
- C. *Interpretation of Exclusions in Liability Policy*
- D. *Failure To Fulfill Occupancy Condition*

## II. SERVICING THE POLICY—BREACH OF COOPERATION CLAUSE IN LIABILITY POLICY

The Tennessee decisions in the field of insurance law during the survey period dealt almost exclusively with problems that may be characterized as the selection and control of risks. The importance of the principles used in the solution of these problems is obvious. Only by being able to select carefully those risks for which insurance will be offered can the insurer properly determine the premium that is to be charged. If policy language is interpreted to grant broader coverage than that actually intended, then the insurance fund is subjected to greater potential loss than estimated, so that the insurer's profits will be eliminated or reduced; on the other hand an unfairly narrow interpretation will mean that the insurer has received premiums for little or no protection. In the latter situation it may, of course, be possible that some adjustment may be made regarding the return of premiums paid.<sup>1</sup>

### I. SELECTION AND CONTROL OF RISKS

#### A. *Definition of Insured in Group Policy*

The policy involved in *Boyd v. Peoples Protective Life Insurance Co.*<sup>2</sup> insured the lives of the named insured (in this case the father) and "his wife and unmarried children (including stepchildren and legally adopted children) under 19 years of age who live in his household."<sup>3</sup> At the time

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1. See generally PATTERSON, *ESSENTIALS OF INSURANCE LAW* 226-30, 347-49 (2d ed. 1957).

2. 345 S.W.2d 869 (Tenn. 1961).

3. 345 S.W.2d at 871. The policy also contained a clause restating the coverage in slightly different terms: "If a child becomes married, reaches his or her 19th birthday, or moves away from the Insured's household, the insurance on that child will cease." *Ibid.*

the policy was issued, the named insured's son Roy was living at home with his father. Soon afterwards, however, Roy was adjudged a juvenile delinquent and committed for an indefinite term to the State Vocational School for Boys at Jordonia. Roy attempted to escape from Jordonia and during his abortive attempt was shot and killed. Defendant insurer declined to pay benefits and named insured sued. After a verdict for the plaintiff was returned by the jury, the trial judge sustained a motion for new trial by the insurer and entered judgment for the defendant on the ground that Roy was not covered by the terms of the policy. On appeal, the court of appeals reversed, but by the instant decision the Tennessee Supreme Court reversed the court of appeals and affirmed the trial judge's action.

At issue, in the court's view, was whether under any reasonable interpretation Roy, although confined in Jordonia, could be considered as living in the insured's household. The court answered in the negative.

At first blush, this seems the only possible resolution. Plaintiff, however, was able to build a forceful case by pointing out the numerous meanings that have been ascribed to the term "household" in various contexts. Thus the term may refer to a family,<sup>4</sup> to a residence,<sup>5</sup> or to a group of persons living together under one roof.<sup>6</sup> This meaning, modified by the addition of the words "under one head and under the common control of one person"<sup>7</sup> is the meaning adopted by the court as the only reasonable construction of the term as used in the instant policy. In formulating this definition the court seems to have been influenced by the fact that the policy apparently does not employ "household" and "family" in apposition but rather uses the term household as a limitation on the word family. The court cites an Alabama decision to this effect.<sup>8</sup>

It must be pointed out that this construction of the policy does not require the actual physical presence of the child or spouse in the father's abode on the date of death. Those temporarily absent from the dwelling place are to be deemed covered so long as they still remain under the father's dominion and control, a control which had been abrogated in this instance by court order.<sup>9</sup> Thus, some latitude of interpretation remains under these policies. Moreover, the court's definition is itself not entirely

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4. *E.g.*, *Allen v. Multnomah County*, 179 Ore. 548, 173 P.2d 475, 477 (1946).

5. *E.g.*, *Appeal of Hoopes*, 60 Pa. 220, 222 (1869).

6. *E.g.*, *People v. Whitted*, 124 N.Y.S.2d 189, 191 (New York City Magis. Ct. 1953).

7. 345 S.W.2d at 872.

8. *McGrady v. Liberty Nat'l Life Ins. Co.*, 40 Ala. App. 390, 114 So. 2d 324 (1959). In this case the court said: "The use of 'family' and 'household' in the same sentence in defining who . . . is insured shows a difference in meaning of the two words." 114 So. 2d at 324-25.

9. The court places great emphasis on the factor of the father's lack of dominion. *Query*, what would be the effect of emancipation if a child under 19 returned to live in the same dwelling with his parents? See 345 S.W.2d at 873.

free from ambiguity, for the phrase "living together" has been broadly interpreted in an adjoining jurisdiction.<sup>10</sup>

### B. Definition of the Insured Event

*Beeler v. Pennsylvania Threshermen & Farmers Insurance Co.*<sup>11</sup> involves the definition of the word "automobile" appearing in the coverage clause of an automobile policy. Defendant insurer had issued a policy providing medical coverage up to \$2,000 for a member of the insured's family for injuries accidentally sustained "while occupying or being struck by an automobile."<sup>12</sup> Plaintiff, a member of insured's family, was accidentally injured while operating a motorcycle. She submitted a claim for medical expenses to the defendant who refused to pay them on the ground that the motorcycle did not fall within the category of automobile. Plaintiff thereupon brought this action, which was dismissed by the trial court. On appeal to the court of appeals for the eastern section, *held*, affirmed.

The great majority of American jurisdictions which have passed on the matter have held that motorcycles are not automobiles within the meaning of these policies.<sup>13</sup>

In the instant case, however, there was a complicating factor which plaintiff maintained indicated that the word automobile was used in a very broad sense in this policy. This factor was the presence of an exclusionary clause: "This policy does not apply . . . to bodily injury . . . while occupying or being struck by a vehicle operated on rails or crawler-treads or a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads." The plaintiff's argument was that this listing of excluded vehicles should be taken to mean that all other vehicles are included in the category of automobile. The argument possessed special force because of a relatively recent decision by the Tennessee Supreme Court that a one-half ton pickup truck was included within the term "a private passenger automobile of the pleasure car type," a conclusion reached because of a clause stating that the term automobile should not include motorcycles or airplanes.<sup>14</sup> Applying the maxim *expressio unius est exclusio alterius*, the court in that case held that

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10. Thus under a similar policy insuring "any of the following persons residing together as one family" and naming deceased and his mother, the fact that deceased was killed while serving with the armed forces in Holland while his mother was in Mississippi was held not to preclude recovery. Residing together does not mean living at the same place. *Mississippi Benefit Ass'n v. Majure*, 201 Miss. 183, 29 So. 2d 110 (1947).

11. 346 S.W.2d 457 (Tenn. App. E.S. 1960).

12. *Id.* at 458.

13. See, e.g., *Moore v. Life & Cas. Ins. Co.*, 162 Tenn. 682, 40 S.W.2d 403, 405 (1931); 4 WORDS & PHRASES 856-57 (1940); see also PATTERSON, ESSENTIALS OF INSURANCE LAW 488 (2d ed. 1957).

14. *Aetna Life Ins. Co. v. Bidwell*, 192 Tenn. 627, 241 S.W.2d 595 (1951).

had the insurer intended to exclude any vehicles other than airplanes or motorcycles from the policy, it should have listed them in the same clause. "[T]hat which is expressed, puts an end to that which is implied."<sup>15</sup>

In the instant case, the court held that the earlier case was not controlling. It noted that the maxim involved was merely an aid in construction, applicable in limited types of situation. "It should not be used," in the words of Judge McAmis, "to create an ambiguity, or to contradict a clear expression of intent . . ."<sup>16</sup> Moreover, in the earlier case, the clause which excluded airplanes and motorcycles was a clause whose function was to define the word automobile, while in the instant case, the clause involved is simply one stating a condition of coverage, focusing not so much on the definition of the term automobile as on the type of activity being engaged in by the insured.<sup>17</sup> On the whole, the decision seems a just one, even in face of the usual principles applied when dealing with contracts of adhesion.

### C. Interpretation of Exclusions in Liability Policy

The defendant insurer in *Hill v. United States Fidelity & Guaranty Co.*<sup>18</sup> issued a policy of liability insurance to plaintiff by which it agreed to indemnify plaintiff for damage he caused to the property of others while engaged in his work as a contractor. The policy contained a clause, however, excluding liability for injury to "property in the care, custody or control of the insured or property as to which the injured [*sic*] for any purpose is exercising physical control . . ."<sup>19</sup>

In May 1958 plaintiff undertook to rewire a number of motors which were used to power printing presses. These motors were bolted to the presses, but someone—either plaintiff, one of his employees or one of the printing company's employees—before working on each motor, would loosen the power transmission belt which would activate the press when the motor was turned on. In the case of one motor, the workers failed to do this and when plaintiff turned on the motor to check his work, the press began to work and was damaged. Plaintiff sought by this action to compel defendant insurer to pay the repair costs which plaintiff bore as a result, alleging that the damaged press did not fall within the exclusion on which insurer relied. Plaintiff's theory was that the only property in his control was the motor, and that any control he might have had over the press was purely incidental so that damage to it would fall within the limits of the policy's coverage.<sup>20</sup> The chancellor below ruled against

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15. 241 S.W.2d at 596.

16. 346 S.W.2d at 459.

17. *Ibid.*

18. 348 S.W.2d 512 (Tenn. App. M.S. 1961).

19. *Id.* at 513.

20. The court does not in so many words accept the thesis that property which is only incidental to a contractor's work does not fall within such an exclusion, but this

plaintiff, holding that even if employees of the printing firm were present and disconnected the presses in each case rather than allowing plaintiff's employees to do it, plaintiff still had control over the press, no doubt because these employees would be "borrowed servants" within the meaning of that agency concept. The court of appeals for the middle section affirmed in a well documented opinion.

The decision seems to be a correct one. The apparent rationale of this exclusion would seem to be that the insured is to be indemnified only for incidental damage resulting from the acts of his employees and himself, not for shoddy or negligent accomplishment of the particular work for which he was hired and in which he supposedly is expert. This is to say that this is not a policy warranting plaintiff's care and skill in his trade, but rather one which protects him against damage which he may do to property of his employers other than that on which he is working. Since in this case plaintiff insured may properly be viewed as having been hired to put the presses in running order, and since the motors were physically bound to the presses, damage to these presses could legitimately be found by a trier of fact to fall within the quoted exclusion.

#### *D. Failure To Fulfill Occupancy Condition*

*Cashen v. Camden Fire Insurance Ass'n*<sup>21</sup> called for a construction of the conditional clause in the standard fire policy calling for suspension of coverage "while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days." The policies in the case were issued to the plaintiff insureds to cover a building and equipment which were used for restaurant purposes, being so described in the policies. The restaurant was padlocked during the life of the policy. A month after the padlocking, which was reported in a news article in a local newspaper, one of the plaintiffs made a premium payment to the defendant insured's local agent. During the months after the padlocking, one of the insureds stored tools in the building, and visited the structure almost daily to obtain and use these tools. One hundred thirteen days after the padlocking, the building burned, causing the loss for which plaintiffs now sue. The defendant declined to indemnify because of an alleged violation of the suspensive condition relating to occupancy.

Plaintiffs met this defense with a double-barrelled attack. First, they argued the building was not unoccupied, since tools were being stored in it and frequent visits were being made. Second, the defendant is said to have waived the suspension by accepting premium payments after the padlocking when it should be charged with knowledge of this situation

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is no doubt implied. For a discussion of various views on the breadth of this exclusion, see APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4493.4 (rev. vol. 1962).

21. 348 S.W.2d 883 (Tenn. App. E.S. 1961).

because of the article in the newspaper. In the trial court, the jury returned verdicts for the plaintiffs, but in the court of appeals for the eastern section this decision was reversed and the cases were ordered dismissed.

The court disposed of plaintiffs' first argument by saying that since the policies described the property involved as being used for restaurant purposes, the unoccupancy clause should be construed with this in mind. Thus storing tools—although it might prevent the building from being "vacant" in the conventional sense—did not mean that the structure was "occupied" for it was not being occupied as a restaurant or similar commercial enterprise. This construction is eminently reasonable. As the most recent edition of *Vance on Insurance* puts it:

[I]t is apparent at the outset that buildings designed for different purposes are susceptible of occupancy in very different degrees. . . . Therefore the condition requiring that the property shall be occupied, and not vacant, will be construed reasonably, with reference to what must have been the intention of the parties, in view of the character of the building.<sup>22</sup>

Plaintiffs' second argument called for a somewhat more extended discussion. Under Tennessee law<sup>23</sup> it would be true that if the local agent had sufficient knowledge concerning the breach of the unoccupancy clause, his acceptance of the premium might well lead to a finding of waiver. In this case, however, the court held that the single newspaper article reporting the padlocking was not enough to support a finding of knowledge when the premium was accepted. The fact that the agent read the article at the time is not conclusive, for he did not receive the premium until a month later. The agent was not to be charged with knowledge that the padlocking continued until this time. In view of the circumstances, this seems reasonable, for when the premium was paid, the agent could have been told of the continued padlocking. This is particularly relevant since each policy contained a provision requiring the insured to request a non-occupancy permit if one was desired.<sup>24</sup>

## II. SERVICING THE POLICY—BREACH OF COOPERATION CLAUSE IN LIABILITY POLICY

*Southern Fire & Casualty Co. v. Gean*<sup>25</sup> presented to the Supreme Court of Tennessee another situation involving the thorny problem of whether or not an insured is to be deprived of the benefits of a liability policy because of failure to cooperate with the insurance company in the defense of an action against him. Insured was sued by the plaintiff in this action for

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22. VANCE, INSURANCE 858 (3d ed. 1951).

23. See *Life & Cas. Ins. Co. v. King*, 137 Tenn. 685, 701-02, 195 S.W. 585, 589 (1917).

24. 348 S.W.2d at 887.

25. 346 S.W.2d 262 (Tenn. 1961).

personal injuries sustained in an automobile accident which occurred while she (plaintiff) was a guest in insured's car. During the pendency of the action insured met with the attorneys retained by the insurance company, went over the case with them, and apparently did all that was asked of him. On the day of trial, however, insured failed to appear in court. The attorney located him in a town about one hundred ten miles away, and learned that he had confused the date of the trial. They asked him if he could not leave work there and come to the trial immediately, but he replied that he could not since he had no car available to him. The attorneys retained by the insurer thereupon returned to the courtroom, informed the judge of the situation, and stated that they were withdrawing from the case because of this failure to cooperate. The judge asked if it would not be possible to get the insured to court by 1:00 P.M., which was some two and one-half hours away, indicating that he would be willing to postpone the trial until then. The attorneys replied that insured had indicated this would not be possible. The trial continued, a verdict against insured resulted. Insured then retained his own attorney and moved for a new trial, but this was overruled. Plaintiff attempted to obtain execution against the insured, but the writ was returned *nulla bona*, and now plaintiff brings this action against the insurer.

Below, the chancellor held that since the insured had failed to fulfill the condition precedent of cooperation, plaintiff could not recover. The court of appeals reversed, and by this decision the Tennessee Supreme Court upheld the reversal.

The court's reasoning is that the insurer did not go far enough in attempting to obtain the insured's presence and testimony. Within the period of the suggested postponement, the court proposes, it would have been possible for the insured to travel the distance involved by cab, or perhaps by borrowing an automobile. By failing to phone the insured back, to tell him of this possibility, and by failing to offer to aid insured in finding transportation, the insurer was remiss.

It is a bit difficult to tell from the court's language whether its conclusion was that since insured's mistake about the date of trial was honest and innocent he had substantially complied with the cooperation clause, or whether the court felt that by failing to inform insured of the alternatives open to him and trying to find transportation for him the company waived this defense or was estopped from asserting it.