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INSURANCE—1957 TENNESSEE SURVEY

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GROUP LIFE INSURANCE

The case of *Lee v. Occidental Life Ins. Co.*[1] is one of first impression in this state, and considers the effect of a change in the by-laws and constitution of a labor union—with a corresponding change in coverage under a group insurance policy issued to the union—on the rights of an insured member of the union. The plaintiff in 1943 joined a trade union in Illinois. At the same time he purchased insurance coverage under a master group policy issued by the defendant insurance company to the union. He was issued a certificate providing certain benefits, among them being $800 "in the event of the entire irrecoverable loss of the use of one entire hand or arm as the result of accident or disease." It contained the provision that it was issued "pursuant to . . . the constitution and by-laws [of the union] and the amendments thereto as now in force or as they may hereafter be amended." The certificate also showed on its face that the insurance coverage was under the terms and conditions of the master group policy.

In 1949, the constitution and by-laws of the union were duly amended at a convention, the effect of the amendment being to restrict coverage under the master group policy to loss of an arm while "working at our trade." At the same time an endorsement was added to the master group policy restricting coverage in the same manner. Plaintiff never knew of this action of the union, was not issued a new certificate and his premiums were not reduced.

In 1953, while pruning trees for a school, the plaintiff fell from a ladder and as a consequence lost the use of his right arm. No contention was made that he was working at his trade when injured.

The circuit judge, without a jury, held for the defendant, and in affirming, the court of appeals held that the amendment to the union's by-laws did not affect vested rights of the plaintiff and was reasonable. The court pointed out that the change in coverage was made in 1949, whereas the injury did not occur until 1953, and that plaintiff had no vested rights under his certificate when the change was made. On the question of reasonableness, the court pointed out that there were other provisions of the certificate which were left unchanged by the amendment, and consequently plaintiff must be

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1. 291 S.W.2d 273 (Tenn. App. M.S. 1956).

held to have elected to continue his membership in the union, with incidental insurance benefits, in order to avail himself of those possible future benefits. The court based its decision primarily on the holding in *Dyer v. Occidental Life Ins. Co.*,[2] which was the only case found dealing with a group insurance policy taken out by a union for the benefit of its members. Certiorari was denied by the Supreme Court of Tennessee.

Life, Health and Accident Insurance

In *Alvis v. Mutual Benefit Health and Acc. Ass'n*,[3] the Supreme Court construed certain provisions of a ten-year annual increasing policy issued to the plaintiff's intestate by defendant insuror.

The policy was issued to the insured on August 10, 1942, and provided that quarterly payments of $7.50 payable in advance on the first day of December, March, June and September would be required to keep the policy in force. It was stipulated by the parties that the insured had made the quarterly payments in advance, and that the policy was still in force on December 23, 1955, when the insured died in an accident. The controversial part of the policy provided that "after the first year's premium had been paid, each year's renewal premium paid in advance on the policy shall add $125.00 to the regular death benefit" until the same amounted to $1,250.00, the maximum amount payable under the policy. The plaintiff contended that under a reasonable construction of the policy, $125.00 would be added annually if the quarterly payments required to keep the policy in force were paid in advance. The insuror argued that the literal wording of the policy required the full year's premium to be paid in advance before the $125.00 would be added. The Supreme Court reversed a judgment for the insuror below and ordered the insuror to pay the plaintiff the $1,250.00. The court stated that the policy provisions relating to the annual premium payable in advance were ambiguous and would lead a layman to believe that so long as the quarterly premiums were paid in advance, the $125.00 would be added annually. Construing the ambiguous terms of the policy in favor of the insured, the court held the plaintiff entitled to the maximum amount of the policy. In reaching this result, the court registered its approval of *Thomas v. Mutual Benefit Health and Acc. Ass'n*,[4] in which the United States Court of Appeals for the Second Circuit adopted a similar construction of an identical provision.

Baker v. National Life and Acc. Ins. Co.,[5] involved a determination

2. 182 F.2d 127 (9th Cir. 1950) (applying the state law of Oregon).
3. 297 S.W.2d 643 (Tenn. 1956).
4. 220 F.2d 17 (2d Cir. 1955).
5. 298 S.W.2d 715 (Tenn. 1956).

of whether the insured met his death by "accidental means." The widow of the insured sued to recover additional benefits payable on the death of the insured if the death "resulted directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means . . . ." The stipulated facts showed that the insured, impressed by a collection of guns owned by one Bowerman, offered to hold a pepper can on his head and allow Bowerman to shoot it off. As Bowerman was squeezing the trigger of the pistol, the insured moved slightly, causing the can to tilt. In an attempt to prevent the can from falling off his head, the insured jerked his head up just as Bowerman fired. The shot entered the head of the insured killing him instantly. Upon these facts the Supreme Court affirmed the decree of the lower court holding that the insured did not meet his death through accidental means. The court stated that death is not caused by accidental means if it is the natural and foreseeable result of a voluntary act. The insured, in this case, should have reasonably foreseen that death might result from the voluntary act of holding a can on his head as a target for another.

In *Liberty Nat'l Life Ins. Co. v. Hamilton*,[6] the court was required to determine whether a "binder" issued to the insured on payment of the first premium constituted an interim insurance contract which must be rejected by the insuror within the life of the insured in order to avoid liability. On February 28, 1954, the insured paid the first premium called for by the application for life insurance, and received from the agent a binding receipt. The "binder" provided, in effect, that if a medical examination was required, the insurance would be effective as of the date of completion of the examination, if the insured was in good health on such date and was a risk acceptable to the company under its rules, limits and standards. Another provision of the "binder" was to the effect that in no event should the issuance of a "binder" cause the total liability of the company to exceed $100,000.00. However, on the back of the "binder" was the declaration that the insurance should not be considered in force until a policy had been issued by the company and received by the applicant.

On March 23, 1954, the insured died, apparently from a heart attack. Almost a month later, the insurance company sent the insured a formal notice of its rejection of the application. Upon receipt of this rejection, the beneficiary under the "binder" sued the company on the theory that the "binder" effected a contract of temporary insurance which was not rejected during the life of the insured. The insuror contended that there was no contract of insurance, but only

6. 237 F.2d 235 (6th Cir. 1956).

an offer which was rejected by it. A trial before a jury resulted in a verdict and judgment for the insured.

Upon appeal, the court of appeals held that the jury was justified in finding that the insured had completed his medical examination and was in good health at the time of the completion of the examination. Finding no Tennessee case controlling on the question of the effective date of the policy, the court held that the "binder" should be considered an effective temporary insurance contract. In reaching this result, the court gave individual attention to the various parts of the "binder." One part stated that the insurance would be effective as of the date of completion of the medical examination. Another part stated that in no event would such a "binder" cause the company liability beyond $100,000.00, thereby implying that insurance to an amount less than this could be effected by a "binder." In addition, the "binder" repeatedly spoke of "insurance issued hereunder." Contrasted with these provisions was the declaration that the insurance would not be effective until the policy was issued. Looking at the "binder" as a whole, the court stated that there was at least an ambiguity which should be construed in favor of the insured.

It was also noted by the court, but not stressed, that there is authority from other jurisdictions for the proposition that where a premium has been paid, there is insurance coverage regardless of other stipulations in the application.

LIABILITY INSURANCE

Two cases involve attempt by insurors to utilize the chancery court and declaratory judgment procedure to determine their liability to the insured.

In *Southern Fire and Cas. Co. v. Cooper*[7] a rather standard fact situation was presented. The insured had delayed in giving notice of the accident and the insuror sought a declaration as to whether or not it was required to defend a tort action brought against the insured. In this respect, the case was substantially identical to one decided by the court in 1955, wherein a declaration that the insuror was not obligated to defend was obtained.[8] However, in the present suit, the company also sought in its declaratory judgment suit to stay the tort action until the declaration was obtained. The complainant's right to proceed was challenged before the chancellor and the chancellor declined to make a declaration. The Supreme Court affirmed. The court noted that no estoppel or waiver arises against

7. 292 S.W.2d 177 (Tenn. 1956).
8. Pennsylvania, etc., Ins. Co. v. Horner, 198 Tenn. 445, 281 S.W.2d 44 (1955), noted in Sturdivant, *Insurance—1956 Tennessee Survey*, 9 VAND. L. REV. 1005 (1956).

the company by reason of defending the tort action provided that it gives the insured proper notice, and that accordingly no equitable remedy was necessary to prevent an irreparable loss. The court noted that previous Tennessee cases had consistently recognized the discretion granted the trial court as to whether or not it would render a declaratory judgment and concluded that there had been no abuse of discretion in this case.

The other case involving this question sought a declaration in a situation unique in Tennessee cases.[9] There was no question as to coverage under the policy, but the company had undertaken to settle certain tort claims within the policy limits, had failed to do so, and judgments had been entered against the insured in excess of policy limits. In advance of the insured making demand on the insuror, the insuror filed this suit in the chancery court seeking a declaration as to its liability for the excess. A plea in abatement was filed to the bill alleging that it could not be maintained because it sought a declaration of future rights or possible controversies and involved the determination of a possible tort action. The plea was sustained by the chancellor and his action was affirmed by the Supreme Court. Again the court emphasized the discretion resting with the trial judge as regards declaratory judgments and concluded that not only had there been no abuse of discretion but rather it had been correctly exercised. The court considered the determinative factor to be that the question as to the insuror's liability for the excess presented a tort issue, liability being dependent upon a finding of bad faith. Certainly a sharply disputed issue of fact would be presented. The opinion probably does not quite hold that tort actions cannot be the subject of a declaratory judgment suit, but it might be so construed. Certainly our cases have indicated that the resolving of disputed determinative issues of fact is not the normal purpose of declaratory judgment procedure.

Two cases involved construction of exclusion clauses in liability policies. The first, decided by the Supreme Court, was *Edwards v. Travelers Indemnity Co.*[10] The policy involved was a farmer's comprehensive personal liability policy. The insured had engaged an independent contractor to clear some of his land. On finishing a day's work, the independent contractor left a bulldozer on the site and, the weather being cold, had drained the radiator. The insured, before the arrival of the contractor for the commencement of a day's work, decided to use one of the bulldozers to mark out a line for clearing. He closed one of the radiator drains but overlooked another. The

9. Tennessee Farmers Mut. Ins. Co. v. Hammond, 290 S.W.2d 860 (Tenn. 1956).
10. 300 S.W.2d 615 (Tenn. 1957).

water which he had put in the radiator accordingly drained out, the motor became overheated, and the block was severely damaged. The contractor obtained a judgment against the insured for this damage and sought in this suit to recover same from the insurance company. The general insuring clause covered damages sustained because of injury to, or destruction of property, and the critical clause excluded "injury to or destruction of (1) property used by, rented to or in the care, custody or control of the insured . . . ." The position of the company was that the bulldozer was being "used by" the insured at the time of the accident. Both the chancellor and the court of appeals had rejected this argument, apparently feeling that "used by" was ambiguous and was susceptible of a meaning that would define "use" other than here presented. The Supreme Court, however, concluded that said clause was not ambiguous and that clearly the insured was using the property within the ordinary meaning of the term at the time of the accident. Accordingly, the lower courts were reversed and the suit dismissed. The court distinguished *Great American Indemnity Co. v. Saltzman*,[11] which was noted as the only case cited involving the identical language. In this case the insured, who was an airplane enthusiast, got into a plane without the knowledge or consent of the owner, for the purpose of looking at it. In his inspection he pressed the starter control but had no intention of starting or using the plane. To his surprise, the engine started and the plane crashed into a wall and was severely damaged. The court held that the insured was not using the plane within the ordinary meaning of the word.[12]

In *Sam Finley, Inc. v. Standard Acc. Ins. Co.*,[13] the insured had an automobile liability policy with one company and also had with another company general liability coverage for accidents occurring "on premises owned, rented or controlled" by the insured. The latter policy was the subject of this suit. The automobile liability carrier had paid the loss and was seeking contribution from the other carrier. The insured was a road construction contractor and was building a highway in Montgomery County. For several months it had been taking delivery of asphalt from railroad tank cars on a publicly used siding several miles from the road construction work. It maintained at this siding a truck which was equipped with a pump and heater. While pumping asphalt from a tank car into one of its trucks, there

11. 213 F.2d 743 (8th Cir. 1954).
12. In State Automobile Mut. Ins. Co. v. Connable-Joest, Inc., 174 Tenn. 377, 125 S.W.2d 490 (1939), the policy excluded damages to property "owned, rented, leased, in charge of, or transported by the assured." While the insured, a filling station operator, was greasing an automobile it fell from the hoist and was damaged. The court held that the loss was excluded for the reason that the vehicle was "in charge of" the insured.
13. 295 S.W.2d 819 (Tenn. App. M.S. 1956).

was an explosion causing injury to certain third persons. The defendant's position was that the accident did not occur on premises "owned, rented or controlled" by the insured and that further, the policy excluded coverage of liability arising from the loading or unloading of motor vehicles. The court of appeals considered both of these positions well taken and rejected the complainant's argument that the policy provisions were ambiguous. It noted that the railroad siding was a facility owned by the railroad and available to all members of the shipping public, as distinguished from an industrial siding for use by a particular industry. The frequent use of the facility and the maintaining of a pump and heater there did not amount to control of the premises by the assured.

In *Pyle v. Bituminous Cas. Corp.*,[14] an automobile registered in Kentucky to Treva Johnson was involved in an accident in Fentress County, Tennessee. Suit was brought by the injured parties in Fentress County, naming as defendants one Hollins Dishman, the driver of the automobile, and Treva Johnson, the owner. Service was had on both through the Secretary of State, both being nonresidents. The declaration alleged that the automobile at the time of the accident was being operated on the business of Treva Johnson and by her agent, representative and employee and with her knowledge, acquiescence and consent. The defendant who was the insurance carrier for Treva Johnson was notified of the accident and of the claims of the injured parties. Neither Dishman nor Treva Johnson pleaded to the suits filed against them; defaults were taken and damages assessed. After *nulla bona* returns were had as to said defendants, this suit was brought seeking a recovery on the policy. The company in defense sought to prove that Treva Johnson had gone to West Virginia at the time of the accident and had left her automobile in Kentucky in the possession of one Brown and that Brown had loaned it to Dishman for a limited trip within Kentucky and that accordingly Dishman was not the agent or servant of Treva Johnson as alleged in the declaration. Upon these allegations it was insisted that accordingly Treva Johnson was not making use of the highways in Tennessee and accordingly had not constructively or otherwise appointed the Secretary of State as her agent for the service of process. Both the trial court and the court of appeals rejected this evidence and rejected the insistence of the insuror that the judgments were void. The court noted that the original declarations alleged that Dishman was operating the vehicle on the business of Treva Johnson and as her agent. Proper notice having been served upon her that said suits were pending containing such allegations, it became incumbent upon her to present her defenses to those charges, and having failed

14. 299 S.W.2d 665 (Tenn. App. M.S. 1956).

to do so, the judgment became binding and conclusive upon her. It accordingly followed that the judgments were likewise binding upon her insuror, particularly since it appeared that the insuror had notice of the suits.

There was only one reported case during the survey period involving the often litigated "omnibus clause."[15] The insured was an automobile dealer and his policy provided that the word "insured" included not only the named insured but also "any person while using an automobile owned or hired by the named insured . . . provided the actual use is with the permission of the named insured." One Fritts agreed with the insured's used car salesman for the purchase of an automobile. There were difficulties regarding the financing and finally it was agreed that the conditional sales paper could be sold if an accommodation endorser were secured. The accommodation endorser agreed to endorse if insurance could be obtained. Before the sale had been finally closed, the salesman gave Fritts permission to take the car out. There was a conflict in the testimony as to when he was to return and as to whether or not he did return. Fritts testified that he was to return in the afternoon and that he did return and was told that everything was "okeh" and to come back the next morning for a "tune-up job." The salesman testified that he was to return that afternoon to complete the insurance but that he did not return. While driving the car he was in an accident that night. The injured parties obtained judgments against him, and, following *nulla bona* returns, brought this action against the insuror. In the district court, the insuror urged that at the time of the accident the car was owned by Fritts and accordingly excluded by the policy; they further sought the benefit of the rule recognized in Tennessee that where an owner loans a car to one person and that such person loans the car to another person, that the ordinary "omnibus clause" does not extend coverage to the second user.[16] In the court of appeals the insuror had abandoned its first insistence. The court of appeals recognized the Tennessee rule stated above but held that the facts did not bring the case within this rule. The vehicle had not been loaned by the insured to the salesman; rather, the salesman was acting as the agent for the insured. While proof had been offered to the effect that the salesman was not authorized to give Fritts possession of the car until the sale had been concluded and had been instructed not to do so, and while the court stated that if such were the situation, coverage would not extend, it was held that a factual issue was presented in this

15. General Cas. Co. v. Woodby, 238 F.2d 452 (6th Cir. 1956).
16. Messer v. American Mut. Liab. Ins. Co., 193 Tenn. 19, 241 S.W.2d 856 (1951); American Automobile Ins. Co. v. Jones, 163 Tenn. 605. 45 S.W.2d 52 (1932); Card v. Commercial Cas. Ins. Co., 20 Tenn. App. 132, 95 S.W.2d 1281 (M.S. 1936).

regard and that the jury verdict would not be disturbed. Further the court held that the permitted use of the car was general, bringing the case within the rule of *Stovall v. New York Indemnity Co.*[17] rather than within the rule of *Moore v. Liberty Mut. Ins. Co.*[18]

FIRE INSURANCE

Agriculture Ins. Co. v. Holter,[19] involved the interpretation of the arbitration clause in a fire insurance policy. Holter had suffered a fire loss and was unable to agree with the insurance company as to the damage. The company wrote him demanding an appraisal of the loss in conformity with the policy and forwarding a memorandum of appraisal with the request that such memorandum be executed and returned. Each party named an appraisor but the insured failed to execute and return the agreement. Thereafter, without notice to the insuror, the insured appeared by attorney and on oral application sought and obtained from a circuit judge an order for the appointment of an umpire. Thereupon, the insuror filed a petition in the circuit court seeking to set aside the order of appointment and seeking an order upon the insured that he return the appraisal agreement. On motion of the insured, this petition was dismissed and writ of error was perfected. The court held that the appraisal provisions[20] involved were purely a matter of contract and there was not presented a court proceeding for arbitration as contemplated by the Tennessee Code.[21] Since the policy did not require a court to appoint the umpire but only required that a judge do so, there was no judicial requirement that notice of the application for the appointment be given to the insuror and there was no such requirement in the contract. The fact that the appraisers had not had an opportunity to attempt to agree on an umpire was not deemed prejudicial. Accordingly, the trial court's dismissal of the petition seeking to invalidate the order

17. 157 Tenn. 301, 8 S.W.2d 473, 72 A.L.R. 1368 (1928); see also Foley v. Tennessee Odin Ins. Co., 193 Tenn. 206, 245 S.W.2d 202 (1951).

18. 193 Tenn. 519, 246 S.W.2d 960 (1952).

19. 299 S.W.2d 15 (Tenn. 1957).

20. The provision of the policy was as follows: "Appraisal. In the case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized. of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally." 299 S.W.2d at 16.

21. TENN. CODE ANN. §§ 23-501 to -519 (1956).

of appointment by the judge was affirmed.

Exum v. Washington Fire and Marine Ins. Co.,[22] involved essentially a question of fact. However, a rather interesting question of law was incidentally involved. Exum, a Negro with only a moderate education, had purchased a used automobile, financing most of the purchase price by a conditional sales contract with monthly payment notes. A fire insurance policy was issued naming both a bank, as the holder of the notes, and Exum as insureds. While the policy was in force the automobile burned. After the insurance company had been notified, an adjuster contacted Exum and later took Exum to his office where a deputy state fire marshall was also in attendance. Exum was advised that he was suspected of having set fire to the car. Exum denied his guilt but agreed to a settlement suggested by the adjuster, under which the company paid $131.85 to the bank to cover the unpaid notes and paid Exum nothing. A release was obtained from Exum. It also appeared that prior to this settlement the adjuster had been notified in writing by an attorney that he had been engaged by Exum. The attorney was not notified of the meeting at which the release was obtained. Subsequently, Exum filed this suit against the insurance company for the balance claimed to be due on the policy and alleged that the release was procured by duress. The insurance company filed an answer to the bill apparently denying these allegations. The court found the evidence clear, cogent and convincing[23] that the release had been procured under duress and accordingly invalidated same. The point of law discussed had to do with tender. In his suit, Exum had not tendered the $131.85 which had been paid to the bank for the release. On appeal the insurance company urged that his failure to do so should prevent recovery and cited in support thereof *Gibbons v. Mutual Benefit, Health and Acc. Ass'n.*[24] The court distinguished the holding in this case on two grounds. First, since the insurance policy named both the bank and Exum as insured, the court doubted that the insuror could have avoided payment to the bank even though arson by Exum had been shown, and second, since the lack of tender had not been raised in the trial court it came too late on appeal.

22. 297 S.W.2d 805 (Tenn. App. W.S. 1955).

23. This is the quantum of proof required in such cases. Napier v. Stone, 21 Tenn. App. 626, 114 S.W.2d 57 (M.S. 1937); City of Lawrenceburg v. Maryland Cas. Co., 16 Tenn. App. 238, 64 S.W.2d 69 (M.S. 1933).

24. 195 Tenn. 339, 259 S.W.2d 653 (1953). In this case, the court had sustained a demurrer to a bill seeking to avoid a release and recover on a health and accident policy notwithstanding the fact that complainant had alleged that he was entitled to more than the amount received for the release. The court deemed this allegation simply a conclusion of the pleader and insufficient to meet the requirement of tender. The holding of this case does not represent the universal view and the Restatement of Restitution has taken a position to the contrary. RESTATEMENT, RESTITUTION § 65(f) (1937). See Hartman, *Contracts—1957 Tennessee Survey*, 10 VAND. L. REV. 1013, 1043 (1957); Wade, *Restitution—1954 Tennessee Survey*, 7 VAND. L. REV. 941, 943 (1954).