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Automobile Insurance -- Limitations Upon Comprehensive Coverage

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CASES NOTED

AUTOMOBILE INSURANCE—LIMITATIONS UPON COMPREHENSIVE COVERAGE

The plaintiff owned an automobile which disappeared from his home and was never recovered. His insurance policy contained a "comprehensive" provision[1] but did not include separate "theft" coverage.[2] A claim was made against the insurer for loss of the automobile by theft. The company refused to honor the claim, and the plaintiff instituted suit. After the close of the pleadings, the company moved for and received a summary judgment. The Third District Court of Appeal affirmed, and held that the coverage of a "comprehensive" provision did not include loss caused by theft, even though such a loss was apparently insured by the implications of the provision.[3] On appeal, *held*, reversed: Loss of an automobile by theft is covered by the owner's "comprehensive" provision. *Hartnett v. Southern Ins. Co.*, 181 So.2d 524 (Fla. 1965).

The standard form of an automobile insurance policy invariably includes a "comprehensive" provision.[4] The purpose of this provision is to consolidate many separate coverages into one, and to cover those types of losses which were not previously insured.[5]

As a general rule, there are two situations in which a person's comprehensive provision will repay losses to his automobile. One is when the

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1. The standard form of an automobile "comprehensive" provision, as the one involved in this case, reads as follows:

Coverage A—Comprehensive Loss of, or Damage to the Automobile

Except by Collision or Upset: To Pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, except loss of the automobile caused by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, *theft*, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, shall *not* be deemed loss caused by collision or upset. (Emphasis supplied.)

2. The broad form "theft" coverage provides:

Coverage D—Theft (Broad Form): To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

3. Hartnett v. Southern Ins. Co., 171 So.2d 439 (Fla. 3d Dist. 1965).

4. CHAMBER OF COMMERCE OF THE UNITED STATES, DICTIONARY OF INSURANCE TERMS 16 (1949):

Comprehensive insurance: Insurance that covers, under one insuring agreement, all hazards within the general scope of the agreement, except those specifically excluded. Sometimes, insurance, under one policy, against a variety of named perils.

5. 5 APPLEMAN, INSURANCE LAW & PRACTICE § 3222 (1941):

Most companies have now adopted the policy of writing what is termed "comprehensive" coverage, which is for the purpose of including all property damage to an automobile, other than mechanical breakdown, exclusive of collision losses. It includes all the older coverages . . . such as fire, *theft*, damage caused from force of the elements, and, in addition, many new losses never before contemplated by any coverage whatever. . . . Most companies, however, have now adopted the liberal plan in such close cases of paying the full extent of the loss under comprehensive. . . .

It is not a profitable coverage for the average insurer, as the hazards therein included bring the loss ratio above the premium level, but it does possess excellent sales angles, and is simple of analysis and application. (Emphasis supplied.)

loss is a direct result of the peril insured against,[6] and the other is when the insured peril causes harm in a way which is not insured.[7] With two exceptions, harm caused by "mechanical breakdown" or "collision or upset," this provision covers all accidental property damage to the automobile.[8]

In order for the insured to recover under his policy, it is necessary for him to demonstrate that there was a direct and accidental loss to his automobile,[9] and that the insured peril was the proximate cause of that loss.[10] This burden of proof is often the determining factor in the success of an insured's claim. When confronted with questions of causation re-

6. Pohl v. Commercial Ins. Co., 36 Misc. 2d 173, 232 N.Y.S.2d 92 (1962) (A set of wheels separated from one vehicle, became airborne and struck another. These were "falling objects."); Getzoff v. Piedmont Fire Ins. Co., 203 Misc. 2d 267, 122 N.Y.S.2d 43 (1953) (A stone fell from a moving truck and struck the insured vehicle. The stone was a "falling object."); Farmer's Ins. Exch. v. Wallace, 275 S.W.2d 864 (Tex. Civ. App. 1955) (The insured automobile was overturned by a sudden, violent gust of wind. This was a loss by "windstorm.").

7. Unkelskee v. Homestead Fire Ins. Co., 41 A.2d 168 (D.C. Munic. Ct. App. 1945) (A child committed malicious mischief with the insured car and collided with another object. The loss was within the malicious mischief-vandalism clause of the comprehensive provision.); Tonkin v. California Ins. Co., 294 N.Y. 326, 62 N.E.2d 215 (1945) (A fire broke out in the insured's automobile. The smoke from it obscured his vision and caused him to lose control and strike a car in front of him. Fire was the proximate cause of the loss.).

8. MOWBRAY & BLANCHARD, INSURANCE 183-84 (1955):

> The broadest available coverage of loss to the automobile is afforded under the heading: Comprehensive Loss of or Damage to the Automobile, Except by Collision or Upset . . . Available separately from the comprehensive coverage is the *collision* or upset; the two items, when taken together constitute an *'all-risk'* cover. (Emphasis supplied.)

American Fire & Cas. Co. v. Standridge, 104 Ga. App. 539, 122 S.E.2d 124 (1961); Stohlman v. State Farm Mut. Auto. Ins. Co., 262 Wis. 157, 54 N.W.2d 53 (1952); *supra* note 4.

9. Moore v. New Jersey Mfr. Indem. Ins. Co., 48 N.J. Super. 70, 73, 137 A.2d 41, 44 (1957); Bolling v. Northern Ins. Co., 280 N.Y. 570, 19 N.E.2d 920 (1939); Guenther v. American Indem. Co., 246 Wis. 478, 17 N.W.2d 570 (1945).

10. 11 COUCH, INSURANCE 128 (2d ed. 1963):

> The term "direct" in a comprehensive provision obligating the insurer to pay for any direct or accidental loss of or damage to the insured automobile, refers to the causal relationship and is to be interpreted as limited to the harm resulting from an immediate or *proximate* cause as distinguished from a remote cause . . . .

Tonkin v. California Ins. Co., 294 N.Y. 326, 62 N.E.2d 215, 217 (1945). As in other areas of the law, courts have been greatly troubled when attempting to apply the standard of proximate cause to determine the extent of liability. Perhaps the most forthright statement on this problem was made by Justice Cardozo in Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 54-55, 120 N.E. 86-88 (1918). The insured's boat had been damaged by an explosion that occurred several blocks away. The explosion was caused by a fire, and fire insurance was the only coverage which the boat owner had purchased.

> The case, therefore, comes to this: Fire must reach the thing insured, or come within such proximity to it that damage, direct or indirect, is within the compass of reasonable probability. Then only is it the proximate cause, because then only may we suppose that it was within contemplation of the contract. In last analysis, therefore, it is something in the minds of men, in the will of the contracting parties, and not merely in the physical bond of union between events, which solves, at least for the jurist, this problem of causation. . . .
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> It may be said that these are vague tests, but so are most distinctions of degree. On the one hand you have distances so great, that as a matter of law the cause becomes remote; on the other, spaces so short that as a matter of law the cause is proximate. . . . Between these extremes there is a borderland where juries must solve the doubt.

lated to comprehensive provisions, courts have not always agreed on the extent of insurance companies' liability.[11] The majority of courts, however, have consistently allowed the insured to recover when his loss was directly caused by the insured peril.[12] When the manner in which the harm occurs is not insured against, but the insured peril causes it, courts have not been consistent in their interpretations.[13]

In order for the insurance company to prevail, it must, as an affirmative defense, prove that the claimed loss was within some specific exclusion of the insurance policy.[14] If it is not clear whether the particular loss was intended to be insured, then the ambiguity is ordinarily resolved against the insurance company and in favor of the policyholder.[15]

Florida has had a brief history of litigation directly concerning comprehensive provisions. The only two reported cases were decided by the

11. Unkelskee v. Homestead Fire Ins. Co., 41 A.2d 168 (D.C. Munic. Ct. App. 1945) (This was a case which allowed recovery when a child mischievously released the brake from a car, steered it down a hill and collided with a tree.); Rich v. United Mut. Fire Ins. Co., 328 Mass. 133, 102 N.E.2d 431 (1951) (this case reached an opposite conclusion based upon substantially the same set of facts); Shahin v. Niagra Fire Ins. Co., 265 App. Div. 397, 39 N.Y.S.2d 887 (1943) (recovery was denied when a boy wrongfully took a parked car, drove it and hit a tree).

12. Moore v. New Jersey Mfr. Indem. Ins. Co., 48 N.J. Super. 70, 137 A.2d 41 (1957); Pohl v. Commercial Ins. Co., 36 Misc. 2d 173, 232 N.Y.S.2d 92 (1962); Getzoff v. Piedmont Fire Ins. Co., 203 Misc. 267, 122 N.Y.S.2d 43 (1953); Farmer's Ins. Exch. v. Wallace, 275 S.W.2d 864 (Tex. Civ. App. 1955); Guenther v. American Indem. Co., 246 Wis. 478, 17 N.W.2d 570 (1945).

13. Tonkin v. California Ins. Co., 294 N.Y. 326, 62 N.E.2d 215 (1945), reached a sound result when it held that the insured, whose car was damaged in a collision, could recover because a fire occurred in the car, obscured his vision and caused him to hit the other car. Bolling v. Northern Ins. Co., 280 N.Y. 570, 19 N.E.2d 920 (1939), allowed recovery under the "theft" part of the comprehensive provision. The car was wrecked in a collision while a policeman, who recovered it, was on his way to the police station. At that time, the insurance company did not know that the car had been recovered.

On the other hand, however, Rich v. United Mut. Fire Ins. Co., 328 Mass. 133, 102 N.E.2d 431 (1951), denied recovery when the insured's automobile was taken by a child and later found smashed at the bottom of a hill; Clark v. Fidelity & Guar. Fire Corp., 39 N.Y.S.2d 377 (Buffalo City Ct. 1943), denied recovery under a windstorm part of a comprehensive provision. A 28 m.p.h. wind set the insured car in motion and caused it to strike a tree. The court stated that although a 28 m.p.h. wind was no aerial breeze, it still fell short of the meteorological definition of a windstorm.

14. 11 COUCH, INSURANCE § 42.606 (2d ed. 1963); Boeker v. Aetna Cas. & Sur. Co., 281 S.W.2d 561 (Mo. App. 1955); Moore v. New Jersey Mfr. Indem. Ins. Co., *supra* note 9, at 44-45.

15. *Id.* §§ 42.192, 42.601; Sanz v. Reserve Ins. Co., 172 So.2d 912 (Fla. 3d Dist. 1965) ("[A]n insurance policy must be interpreted to provide coverage whenever possible," citing 18 FLA. JUR., *Insurance* § 94); Fireman's Fund Ins. Co. v. Boyd, 45 So.2d 499, 501 (Fla. 1950) ("This court is committed to the rule that a contract of insurance prepared and phrased by the insurer is to be construed liberally in favor of the insured, and strictly against the insurer where the meaning of the language used is doubtful, uncertain or ambiguous."); Pohl v. Commercial Ins. Co., 36 Misc. 2d 173, 176, 232 N.Y.S.2d 92, 95 (1962) ("If perchance, the term 'falling object' is ambiguous, under the rules [of] construction of insurance contracts, [the ambiguity] must be resolved in favor of the policyholder."); Getzoff v. Piedmont Fire Ins. Co., 203 Misc. 267, 122 N.Y.S.2d 43, 44 (1953) ("[A]ny doubt as to the meaning of the language of the policy must be resolved in favor of the assured [sic]."); Bolling v. Northern Fire Ins. Co., 280 N.Y. 570, 19 N.E.2d 920 (1939).

Third District Court of Appeal and were misinterpretations of the law. *Frank v. State Farm Mut. Auto. Ins. Co.*,[16] involved a stolen car. The insurance company recovered it three months later in a damaged condition. The policyholder sought indemnification under the "theft" section of his comprehensive provision, but was forced to sue when the company did not honor his claim. His suit was dismissed for failure to state a cause of action, and the third district affirmed on the basis that:

> It was the loss of or damage to the automobile and not a theft thereof that was insured against under the terms of the appellee's policy . . . . Undoubtedly the appellant sustained a loss as a result of the theft, but the loss was not direct and accidental . . . . The terms of the policy of insurance . . . are clear and unambiguous and do not require or admit of an interpretation on our part.[17]

In reaching this result, the court relied on two cases from other jurisdictions: one reached the opposite conclusion on a similar set of facts,[18] and the other seemingly was not on point.[19] The dissenting opinion,[20] however, did not let these facts escape unnoticed. It revealed the error in the majority's reasoning by demonstrating that the loss from theft was direct and accidental,[21] and by showing that the cases relied on by the majority did not support their conclusion.[22]

The value of a comprehensive provision was substantially reduced

16. 109 So.2d 594 (Fla. 3d Dist. 1959).

17. *Id.* at 596.

18. Farmers Ins. Exch. v. Wallace, 275 S.W.2d 864 (Tex. Civ. App. 1955), *allowed* the insured to recover under a comprehensive provision when the wind blew over his automobile as he was driving it. The wind was the peril insured against; it set other causes in motion, which in an unbroken sequence produced the final result. Stated in another manner, the wind was the proximate cause of the loss.

19. Sparrow v. American Fire & Cas. Co., 243 N.C. 60, 89 S.E.2d 800 (1955), dealt with an automobile lent to an employee by his employer. The employee wrecked the car at a location where he was not authorized to be. The court apparently denied recovery because the harm was not "accidental." Accidental was equated with unexpected, unusual and unforeseen. The court possibly felt that since the employer had lent his car in the first instance, anything was expectable or foreseeable. The court relied on a medical malpractice case, and the *Farmer's Ins. Exch.* case, *supra* note 18—a most curious circle of reasoning.

20. 109 So.2d 594, 596 (Fla. 3d Dist. 1959).

21. *Id.* at 596:

> I am unable to agree that a loss by theft is not a 'direct and accidental' loss. It seems that a loss by theft is both direct and accidental . . . .
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> When one has his automobile stolen he suffers a 'loss' even though it is recovered in a distant city, whether it be Chicago or Calcutta, and that such a loss is 'direct'; and when one suffers a loss of an automobile by theft, as to him the loss is 'accidental' in the sense that it is undesirable, unfortunate and happened by chance. . . .
>
> I would hold a loss by theft to be within the coverage of the 'comprehensive' clause of the policy and reverse.

Loss to the automobile caused by theft was precisely the loss which the provision purported to cover.

22. *Id.* at 596.

in the third district by the instant case, *Hartnett v. Southern Ins. Co.*[23] The court unequivocally stated:

> [The policyholder] purchased insurance . . . covering . . . direct and accidental loss of or damage to the automobile, but not loss *caused* by theft. . . . His claim in this instance was excluded under the terms of the policy and its terms are not ambiguous nor does it require any interpretation.[24]

The court's own statement revealed the error of its interpretation of the policy. If the comprehensive provision did not cover loss caused by fire, theft and the other enumerated perils, then it necessarily covered nothing. By express language, it did not cover the risk of collision or upset; through necessary implication, it covered the risks which it enumerated.[25] It is absurd to assume that one would purchase insurance against nothing,[26] yet this was the logical extension of the court's reasoning. The decision was also incongruous with other Florida interpretations[27] in which the courts had committed themselves to the rule of construction favoring coverage whenever possible.[28]

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23. 171 So.2d 439 (Fla. 3d Dist. 1965).

24. *Id.* at 440-41.

25. At least one insurer, The Allstate Insurance Co., has obviated any problem of construction by phrasing its comprehensive provision in the following manner. (from p. 13 of its "Crusader" policy)

> Allstate will pay for loss to the owned automobile or non-owned automobile, except loss caused by collision, but *including* breakage of glass, and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion. (Emphasis supplied.)

26. The standard form of comprehensive provision means the same thing as the Allstate provision. It is only a difference in wording that distinguishes them. In the former, the listed perils are insured against by implication. They are the "direct and accidental" losses of which the policy speaks. In the latter, they are expressly included.

There are, however, justifiable exclusions from comprehensive coverage, and the following are some examples: Maynard Molasses Co. v. Sun Ins. Office Ltd., 170 So.2d 691 (La. App. 1965) (The case involved a vehicle which was parked and unloading molasses onto a ship. The ship moved, and pulled the truck with it onto the deck; the truck was demolished. The court held that this was a loss by collision or upset.); Clark v. Fidelity & Guar. Fire Corp., 39 N.Y.S.2d 377 (Buffalo City Ct. 1943) (The insured car was set in motion by a strong breeze, 28 m.p.h., and collided with a tree. By meteorological definition, the wind was not strong enough to be a windstorm.).

27. Sanz v. Reserve Ins. Co., 172 So.2d 912 (Fla. 3d Dist. 1965), allowed the insured to recover on a non-owned vehicle which was involved in an accident. The policy afforded coverage whenever the insured vehicle was "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction." The court felt that "servicing" should be given a broad general meaning including sign painting; United Services Auto. Ass'n v. Park, 173 So.2d 162 (Fla. 3d Dist. 1965), involved a comprehensive provision and theft. In spite of the *Hartnett* case, which the court decided only a few months earlier, comprehensive provisions were not mentioned. The court allowed recovery when a car dealer "bought" an automobile from a customer but fraudulently kept the title which the customer was supposed to retain until the dealer paid him for the car. The dealer absconded with the car and the title. The court seemingly gave effect to the comprehensive provision after deciding that a theft had actually occurred, but the decision did not directly involve a denial of liability because of theft.

28. Sanz v. Reserve Ins. Co., 172 So.2d 912, 913 (Fla. 3d Dist. 1965).

The third district's decision has, however, since been overruled by the Florida Supreme Court.[29] In so doing, the court clarified an important[30] area of the law which had been misinterpreted since the *Frank* case was decided in 1959.[31] The court construed the language of the insurance contract, and concluded that it meant what it appeared to say—that loss to the automobile by theft was covered by the comprehensive provision, and by implication, that the loss was indeed "direct and accidental."[32]

Moreover, the decision stressed that as long as insurance companies insist on drawing their contracts in language which is difficult and confusing to the ordinary purchaser, then that language will be construed strictly against the company and liberally in favor of the policyholder.[33] The stress was well placed.

MELVILLE DUNN

ANTI-LAPSE—RIGHT OF ADOPTED CHILD TO TAKE

The adopted daughter of a devisee, who had predeceased the testatrix, sought to recover the share to which her adopting father would have been entitled had he survived the testatrix. The trial court rendered final judgment for the adopted child. On appeal, *held*, affirmed: The adopted child of a devisee who predeceases the testatrix is a "lineal descendant" within the meaning of Florida's anti-lapse statute,[1] and is therefore entitled to the share her adopting parent would have received had he survived the testatrix. *In re Baker's Estate*, 172 So.2d 268 (Fla. 2d Dist. 1965).

Since adoption was unknown to the common law,[2] there was no com-

29. Hartnett v. Southern Ins. Co., 181 So.2d 524 (Fla. 1965).

30. Virtually every standard form of automobile insurance contract contains a comprehensive clause. See *supra* note 5.

31. Frank v. State Farm Mut. Auto. Ins. Co., 109 So.2d 594 (Fla. 3d Dist. 1959).

32. 181 So.2d at 528:

> Elemental principles in construing these contracts . . . requires a conclusion that theft is included in the coverage. How there could be any doubt of this in view of the plain language showing a premium charge . . . for 'A—Comprehensive—Loss of or damage to the automobile, except by collision or upset, *but including fire, theft and windstorm*' escapes us.

It is interesting to note that the third district's decision apparently did not consider the express inclusion of theft on the face of the insurance policy. As previously noted, however, this difference in form should not make any difference in interpreting the contract. The standard form appears in note 1 *supra*, and the third district's reference to it in 171 So.2d at 440. The clause in which theft is expressly included is cited in 181 So.2d at 527.

33. *Id.* at 528.

1. FLA. STAT. § 731.20 (1963). For the text of this statute, see note 22 *infra*.

2. *In re* Palmer's Adoption, 129 Fla. 630, 176 So. 537 (1937); Hockaday v. Lynn, 200 Mo. 456, 98 S.W. 585 (1906); *In re* Howlett's Estate, 366 Pa. 293, 77 A.2d 390 (1951); see ATKINSON, WILLS (1953); REPPY & TOMPKINS, LAW OF WILLS (1928); 1 AM. JUR., *Adoption of Children* § 32 (1936).