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# Insurance

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# INSURANCE

HERBERT A. KUVIN\*

Since the last survey of this subject,<sup>1</sup> the Florida courts have reported twenty-four decisions and the Federal courts twenty-nine decisions. Since the Federal courts follow the state's substantive law, equal consideration is given herein to all decisions without specific distinction, unless required by the nature of the subject matter involved.

## STATE REGULATIONS

The Commissioner of Insurance is not, by virtue of his official position as a state officer, immune from accountability in an action against him and others charging them with a conspiracy in restraint of trade. On a motion for summary judgment by the Commissioner on the grounds that he was immune because what he did was his official duty, it was held that since there was no authority, statutory or otherwise, authorizing such official to enter into any conspiracy to restrain commerce, the motion should be denied.<sup>2</sup>

Firemen of a municipality sued for an accounting of the funds collected by the municipality from the fire insurance companies writing business in their jurisdiction under the excise tax law which was created for establishing firemen's pension funds.<sup>3</sup> The court held that the municipality must use the proceeds of the tax for the benefit of firemen members and their dependents and not for the benefit of all members of the city relief or pension fund. The proceeds had to be segregated for the purposes intended.<sup>4</sup>

A declaratory decree determined that it was legal and proper for public insurance adjusters to solicit business in regard to claims against insurers for losses sustained. Part of a statute<sup>5</sup> applying to public insurance adjusters, which prohibited the solicitation of business or clients, was held unconstitutional as a restraint imposed on the right to contract. Nor was it based on or reasonably justified by, the needs of public health, safety or welfare.<sup>6</sup>

## SCOPE AND COVERAGE OF POLICIES

Courts must apply the rules of construction to insurance contracts as written by the parties, and even though the result compelled by the plain

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1. 12 U. MIAMI L. REV. 450 (1958).
2. *Bankers L. & C. Co. v. Larson*, 257 F.2d 377 (5th Cir. 1958).
3. FLA. STAT. ch. 175 (1957).
4. *City of Miami v. Carter*, 105 So.2d 5 (Fla. 1958).
5. FLA. STAT. § 636.261 (1957).
6. *Larson v. Lesser*, 106 So.2d 188 (Fla. 1958).

words used may appear to be unreasonable, unduly harsh, or stringent, they cannot be ignored, and other words may not be substituted for them. In interpreting an insurance policy, courts must ascertain whether the words used really leave a doubt or create an uncertainty which needs construction; if not, the words of the policy control.<sup>7</sup>

The extent of intended insurance coverage, warranties, exceptions from coverage and exclusions from intended liability are construed in accordance with the plain meaning of the words used by the parties in their contract. However, if the terms are ambiguous, equivocal, or uncertain to the extent that the intention of the parties cannot be clearly ascertained they are to be construed strictly and most strongly against the insurer and in favor of the insured in order to effectuate insurance rather than to defeat it. The courts will not declare an ambiguity if the words used are plain and clearly indicate the intent.

In a case of first impression, the court, attempting to construe insurance policy terms, permitted evidence to be introduced by a national insurance trade association to prove that it, as a service to its members, conducted research surveys, compiled statistics and drafted proposed policy provisions in addition to establishing recommended rates for various types of insurance coverage. And, the association was permitted to declare what its intent was as to the interpretation of such policy provisions. The court held that if the association's interpretation was not authoritative it was very persuasive.<sup>8</sup> The court considered this evidence to be a valuable aid in construing the intent of the parties.

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7. *Nardelli v. Stuyvesant Ins. Co. of New York*, 269 F.2d 592 (5th Cir. 1959) (for purpose of construction, trade association part in drafting policy is a persuasive, if not an authoritative, aide to construction); *Morgan v. E. J. Evans Co.*, 266 F.2d 423 (5th Cir. 1959); *Lineas Aereas Colombianas Exp. v. Travelers Fire Ins. Co.*, 257 F.2d 150 (5th Cir. 1958) (court cannot assay what factors the insurers considered to be of underwriting importance); *Zipperer v. State Farm Mut. Auto. Ins. Co.*, 254 F.2d 853 (5th Cir. 1958) (where no statutory prohibition, insurance company may restrict liability); *Craig Funeral Home v. State Farm Mut. Auto. Ins. Co.*, 254 F.2d 569 (5th Cir. 1958) (no ambiguity in words used, court will construe); *Hobbs v. Franklin Life Ins. Co.*, 253 F.2d 591 (5th Cir. 1958) (coverage not so restrictive as to dictate fraud or overreaching); *Stokes v. Travelers Ins. Co.*, 249 F.2d 155 (5th Cir. 1957) (action to recover for injuries in auto accident held not maintainable under policy provision); *Canal Ins. Co. v. Dougherty*, 247 F.2d 508 (5th Cir. 1957) (construes warranty as to substitution of insured vehicles); *Balogh v. Jewelers Mut. Ins. Co.*, 167 F. Supp. 763 (S.D. Fla. 1958) ("all risk" and "other insurance" clauses construed); *Continental Cas. Co. v. St. Paul Mercury F. & M. Ins. Co.*, 163 F. Supp. 325 (S.D. Fla. 1958) (construes "other insurance" clause); *Highway Cas. Co. v. Johnston*, 104 So.2d 734 (Fla. 1958) (policy unambiguous); *King v. Sturge*, 113 So.2d 257 (Fla. App. 1959) (intent of parties must be used as guide to interpretation of contract); *Kimbrow v. Metropolitan Life Ins. Co.*, 112 So.2d 274 (Fla. App. 1959) (neither court nor jury may alter terms of contract in suit); *Frank v. State Farm Mut. Auto. Ins. Co.*, 109 So.2d 594 (Fla. App. 1959) (auto theft policy not ambiguous); *Cochrane v. American Sur. Co. of New York*, 108 So.2d 315 (Fla. App. 1959); *Peninsular Life Ins. Co. v. Rosin*, 104 So.2d 792 (Fla. App. 1958) (life insurance application construed as unambiguous).

8. *Nardelli v. Stuyvesant Ins. Co. of New York*, 269 F.2d 592 (5th Cir. 1959).

With the exception of the above case, the Florida law as to construction of insurance contracts remains the same as heretofore,<sup>9</sup> in both state and federal courts.

### *Exemptions*

"Other insurance" clauses came before the courts for interpretation and application. One case involved the mysterious loss of jewelry which was consigned under an agreement that the consignee would pay the consignor for any losses incurred. The consignor and the consignee each insured the articles. The court concluded that the same person had the benefit of two coverages, the one specific and the other blanket; therefore, the specific covered the described pieces and the blanket type policy covered the other jewelry.<sup>10</sup>

Another case involved automobile liability insurance policies. The insured owner of an automobile rented a motor vehicle which was insured by another insurance company. Both policies contained the usual "other insurance" clauses, which provided that the insurance of that policy was to be liable pro-rata with other valid insurance, but that if such insurance was as to "temporary substitute" vehicles, it was to be excess insurance over other valid insurance. It was held that each company was obligated to contribute its pro-rata share of any judgment recovered against the insured, but not beyond its policy limits.<sup>11</sup>

### *Exclusions*

Provisions in insurance policies excepting or excluding certain types of coverage are legal and will be enforced by the courts in favor of the insurers and will be interpreted and construed in accordance with their plain intent if not so unreasonably restrictive as to indicate fraud or overreaching. The courts are without authority to make new contracts for the parties, or to extend coverage, where none was intended.<sup>12</sup>

An airline pilot's disability income insurance policy contained a provision to the effect that it did not cover disability or loss resulting from injury sustained while other than "as a fare-paying passenger in a regularly scheduled flight." The insured was acting as the co-pilot of an airplane when

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9. As set forth in last survey article. See note 1 *supra*.

10. *Balogh v. Jewelers Mut. Ins. Co.*, 167 F. Supp. 763 (S.D. Fla. 1958).

11. *Factory Mut. Liab. Ins. Co. v. Continental Cas. Co.*, 267 F.2d 817 (5th Cir. 1959).

12. *Lineas Aereas Colombianas Exp. v. Travelers Fire Ins. Co.*, 257 F.2d 150 (5th Cir. 1958); *Meyerson v. Jewelers Mut. Ins. Co.*, 255 F.2d 366 (5th Cir. 1958); *Craig Funeral Home, Inc. v. State Farm Mut. Auto. Ins. Co.*, 254 F.2d 569 (5th Cir. 1958); *Zipperer v. State Farm Mut. Auto. Ins. Co.*, 254 F.2d 853 (5th Cir. 1958); *Hobbs v. Franklin Life Ins. Co.*, 253 F.2d 591 (5th Cir. 1958); *Kimbrow v. Metropolitan Life Ins. Co.*, 112 So.2d 274 (Fla. App. 1959); *Grand Assembly, etc. v. New Amsterdam Cas. Co.*, 102 So.2d 842 (Fla. App. 1958).

it crashed into the Pacific Ocean. It was held that since he was not a fare-paying passenger in the airplane at the time of his death, his death occurred within the policy exception or exclusion and he was not insured at that time.<sup>13</sup> Even though the insured paid premiums for twelve years and the insurance company knew that he was regularly employed during that time as an airline pilot, the court stated that:

The coverage afforded is not so unreasonably restricted as to indicate fraud or overreaching. . . . Under the circumstances of this case, we think that the courts are without authority to make a new contract for the parties, or to extend the coverage upon any theory of waiver or estoppel.

The omnibus clause in an automobile liability policy contained the exclusionary provision that the insurance did not apply to the insured (anyone driving with the insured's permission was included among the classed "insured") or any member of the insured's family residing in the same household. The insured lent the automobile to a friend who drove it, accompanied by the driver's stepson, who was under twenty-one years of age and who resided with his mother and stepfather. The car was involved in an accident and the stepson, being injured, brought an action against the owner of the car, obtained a judgment against him, and garnisheed the insurer claiming under the policy. It was held that insurance companies "have the same right as individuals to impose such conditions as they wish upon their obligations, not inconsistent with public policy, and the courts are without right to add anything to their contracts, or to take anything therefrom."<sup>14</sup>

An auto liability insurance policy on an ambulance provided that it did not insure against liability while the vehicle was being used for "emergency purposes." The court held that it was a jury question to decide whether or not the automobile was being driven at the time of the accident for "emergency purposes" when it was on a mission to obtain blood for a patient undergoing an operation at the hospital.<sup>15</sup>

An undertaker had one of his automobiles insured. The policy provided that the coverage would not apply while the vehicle was being used for carrying persons for charge unless this use was specifically described and a premium charged therefor. It also provided that the vehicle could be used for passenger-carrying purposes "incidental to the insured's business" as a funeral director. The court held that the language of the policy was not ambiguous so as to permit parol evidence to explain any of its provisions and went on to indicate that the question as to the meaning of "incidental to the insured's business" could not be answered by the test of what was the

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13. *Hobbs v. Franklin Life Ins. Co.*, note 12 *supra*.

14. *Zipperer v. State Farm Mut. Auto. Ins. Co.*, note 12 *supra*.

15. *Grand Assembly, etc. v. New Amsterdam Cas. Co.*, note 12 *supra*.

business of a funeral director generally considered, but rather what was the business of this particular (insured) funeral director. Since he conducted a livery business, such phase of his business was covered by the policy and the intended exclusion did not apply.<sup>16</sup>

The insured, a wholesale and retail jeweler, consigned jewelry to a dealer for display in his show window. The jewelry was stolen. The insurance policy excluded from coverage any loss to property exhibited by the insured. The court determined that a consignee was not the agent of the insured since the relationship of agency does not arise as a matter of law (upon which to found a summary judgment) out of the consignment of merchandise for purpose of display; it is rather an issue of fact.<sup>17</sup>

An airplane was insured for "all risk" hull damages, but the policy provided that it should apply only while the airplane was being operated by the insured's regular pilots who held licenses issued by the United States or Columbian authorities. The airplane crashed while being controlled by Mexican pilots not holding the required licenses. Such operation was contrary to the instructions of the insured and the agreement between the insured and the operators of the plane. It was held that traditional notions of proximate cause are not the test in determining whether a violation of policy provisions suspends the coverage, since such suspension continues as long as the proscribed activities continue.<sup>18</sup>

A life insurance policy provided for double indemnity in the case of accidental death, but excluded self destruction. The court held that although it is true that an insurance company may limit its liability and that neither the court nor the jury may rewrite the contract, "it does not follow that the parties to a private contract may alter the rules of evidence." An insurance contract cannot require the insured to disprove every possible defense, such as in this case that the death did not result from suicide.<sup>19</sup>

### *Conditions*

The same legal principles are applied to conditions as are applied to exclusions, exemptions and other provisions.

When a policy issued by plaintiff insurer (in an action for declaratory judgment to determine the liability between respective insurers) and the policy issued by the defendant insurer to the same motorist provided that if there were other insurance, each would be responsible only for the excess over any valid and collectible insurance, the respective excess insurance clauses were ineffective and both insurance companies were primarily liable to the insured. This is predicated on the basis that it was not the intent of the

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16. *Craig Funeral Home, Inc. v. State Farm Mut. Auto. Ins. Co.*, note 12 *supra*.

17. *Meyerson v. Jewelers Mut. Ins. Co.*, note 12 *supra*.

18. *Lineas Aereas Colombianas Exp. v. Travelers Fire Ins. Co.*, note 12 *supra*.

19. *Kimbrow v. Metropolitan Life Ins. Co.*, note 12 *supra*.

parties to provide that a second policy should extinguish the liability of both policies. Therefore, each company remains primarily liable to the insured on its respective policy.<sup>20</sup>

A conditional receipt, given beneficiary's husband, providing that insurance would take effect when the application was approved and accepted at the home office, was a clear and unambiguous provision and no contract of insurance took effect until such approval was effected. When the husband died prior to such approval, there was no interim insurance on the husband's life, even though the receipt provided that insurance would take effect from the date of the application.<sup>21</sup>

In an action upon an "all risk loss" insurance policy pertaining to jewelry, the court held that substantial compliance with the condition which required the insured to maintain a detailed and itemized inventory of his property was sufficient to satisfy the policy provisions. Also, under Florida law, a failure to file proof of loss in accordance with policy requirements, does not work a forfeiture but simply postpones the time when suit can be brought, and a late filing of proof of loss is sufficient, provided it is within the statutory period for commencing suit.<sup>22</sup>

When an attorney apparently represents an insured, but in fact is trying the case on behalf of the insurer under the provisions of the policy, and he discovers fraud and collusion on the part of the apparent client, he should terminate his ostensible employment. The insurance company should make the fraud and collusion of its insured the subject of a plenary action between them to avoid liability for breach of a condition of the policy. The attorney should not, in the negligence action, which he is defending for the insured, make an issue of the fraud and collusion of his ostensible client.<sup>23</sup>

An insurance policy was issued and delivered in Illinois to an Illinois resident who paid the full premium there. The policy provided that suit had to be commenced within twelve months after discovery of the loss. The insured moved to Florida where his property was either stolen or destroyed. A Florida statute provides that contractual provisions shortening the period of limitations are invalid. In an action brought two years after the loss, the court held that to apply the Florida statute would not be consonant with due process of law, as the only contacts that Florida had with the policy were the presence of the insured property and the beneficiary in the state.<sup>24</sup>

In another declaratory judgment action between two insurers as to their rights under the "other insurance clauses" of each policy, the court main-

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20. *Continental Cas. Co. v. St. Paul Mercury F. & M. Ins. Co.*, 163 F. Supp. 327 (S.D. Fla. 1958).

21. *Peninsular Life Ins. Co. v. Rosin*, 104 So.2d 792 (Fla. App. 1958).

22. *Balogh v. Jewelers Mut. Ins. Co.*, 167 F. Supp. 763 (S.D. Fla. 1958).

23. *Spadar v. Palmisano*, 109 So.2d 418 (Fla. App. 1959).

24. *Sun Ins. Office, Ltd. v. Clay*, 265 F.2d 522 (5th Cir. 1959).

tained that each company was liable for its respective pro-rata share of defense costs of a suit which was pending against an insured driver. The driver insured by one company rented a motor vehicle which was insured by the other company. The insured's policy excluded liability on a vehicle other than the described motor vehicle unless it was furnished for regular use to the insured. It was held that the rental motor vehicle having been in use by insured for three weeks was within the coverage of the first company's policy.<sup>25</sup>

### *Cancellation*

Whether or not an insurance company successfully substituted one insurance policy for a pre-existing policy and then cancelled the second policy was a question of fact for the court sitting without a jury, which ruled in favor of the insured.<sup>26</sup>

A policy provided that either party could cancel the insurance by sending notice of cancellation to the policy address. The company sent a notice of cancellation to the insured but failed to return the unearned premium with the notice. The court decided that the cancellation was effective notwithstanding the fact that it was not accompanied by a tender of unearned premium. Also, under Florida law, it was essential for the insured to show that the insurer was guilty of conduct influencing insured into believing that the policy was still in effect before the company could be estopped to claim the cancellation.<sup>27</sup>

## MAKING THE CONTRACT

### *Premiums*

A life insurance policy provided for a grace period of one month (not less than 30 days) during which period the policy should continue in force. Quarterly payments were made on the 10th of November, February, May and August. The assured made the last payment on May 10th and he died on September 10th. The court held that in computing given periods of grace in a policy, the first day should be excluded, in order to construe liberally the policy in favor of the insured so as not to defeat, without necessity, a claim to indemnity.<sup>28</sup>

### *Application*

A conditional receipt for life insurance contained a condition that the insurance should not become effective until the application had been approved and accepted by the home office of the company. The condition

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25. *Factory Mut. Liab. Ins. Co. v. Continental Cas. Co.*, 267 F.2d 817 (5th Cir. 1959).

26. *Harris v. State Farm Mut. Auto. Ins. Co.*, 157 F. Supp. 5 (N.D. Fla. 1957).

27. *Johnson v. New Amsterdam Cas. Co.*, 162 F. Supp. 582 (N.D. Fla. 1959).

28. *Shoaf v. World Ins. Co.*, 162 F. Supp. 654 (N.D. Fla. 1958).

was upheld and no insurance was effected when the application was not so approved and accepted, even though the applicant had paid the first premium in advance.<sup>29</sup>

### *Insurable Interest*

A partnership has an insurable interest in all of its property, both real and personal, since such property is theoretically vested in the partnership entity. Also, since no partner has the right to possess any of the partnership property to the exclusion of the other partners, the interest of each partner consists of that undivided portion of the partnership assets which may remain after all partnership debts are paid.<sup>30</sup> But where persons of a partnership have agreed that one of the partners may maintain a separate business at a location different from that of the partnership, such separate business is not insured or covered by the partnership policy of insurance.

### *Agency*

The use of a declaratory decree action to interpret an agency contract for the sale of title insurance was approved in order to establish: (1) the rights of the parties to the contract; (2) the rights of the agency and the purchaser of the agent's business with respect to the records and files; and (3) questions relating to the title policies written by the agent which were included in the sale of the agent's title abstract business. In such circumstances, a declaratory action will lie regardless of whether the insurer had an adequate remedy by an action at law for replevin.<sup>31</sup>

### *Existence of Insured Subject*

Where the terms of a life insurance contract are plain and unambiguous as to when it shall come into being, it will not be considered an unreasonable requirement that the insured be alive and in good health on the date of delivery of the policy.<sup>32</sup>

## CONCEALMENTS, REPRESENTATIONS AND WARRANTIES

Under a motor truck cargo liability policy, the insured "warranted" to report a substitution of described vehicles to the insurer within seventy-two hours of such substitution and agreed to pay an additional premium, if required. It was held that this was a continuing "privilege" of the insured, and that once it decided to make a substitution, it was "required" to give notice to the insurer. The policy was limited to the extent that prior accidents

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29. *Peninsular Life Ins. Co. v. Rosin*, note 21 *supra*.

30. *Cochrane v. American Sur. Co. of New York*, 108 So.2d 315 (Fla. App. 1959).

31. *Title & Trust Co. v. Title Company Guar. & Abstract Co.*, 103 So.2d 211 (Fla. App. 1958). The declaratory action also dealt with the appointment of a receiver.

32. *Peninsular Life Ins. Co. v. Rosin*, note 21 *supra*.

were to be deducted from the policy limitation. Two accidents did occur and it was decided that since the insured did not give notice to the carrier of the substitution of the vehicle in place of the vehicle lost by the first accident, the company was not liable for the full amount of damage to the second cargo, but was only liable to the extent of the balance of insurance remaining after deducting the extent of cargo damages sustained in the first accident. The court again reiterated its stand that when the language was unambiguous and not against public policy nor in violation of any statutory prohibition, it will be construed in accordance with the plain meaning of the language used.<sup>33</sup>

A jewelry salesman, who was the victim of an armed robbery on a train at night, brought an action against his insurer on an "all risk" policy covering jewelry against loss during travel between designated cities. The policy contained a warranty clause which provided that the jewelry would be carried in a locked satchel during the day and would be locked in a hotel vault each night. It was held that an insurance policy must be construed as a whole in an attempt to determine the intent of the parties, and that the provision that the jewelry be locked in a hotel vault each night was susceptible of more than one reasonable interpretation thereby creating an ambiguity which precluded the entry of a summary judgment for either party.<sup>34</sup>

#### WAIVER OR ESTOPPEL

When an insurer denies liability during the period prescribed for presentation of proofs of loss on grounds other than those relating to the proof of loss, such denial of liability ordinarily will be considered as a waiver of the policy requirements as to the filing of proof of loss with the insurer.<sup>35</sup>

The type and extent of insurance coverage under a policy cannot be extended by waiver or estoppel. Therefore, an airline pilot who lost his life while acting as a co-pilot contrary to an exclusion in the policy could not recover even though the insurer knew he was employed and actively engaged in that pursuit and collected premiums on its policy for twelve years with this knowledge.<sup>36</sup>

An insurer who refused to defend an action instituted against its assured, on the ground that such action was not within the coverage of the policy, was not precluded from asserting non-coverage or non-insurance when the judgment creditor garnished the insurer; a denial of liability was not waived by the insurer.<sup>37</sup>

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33. *Canal Ins. Co. v. Dougherty*, 247 F.2d 508 (5th Cir. 1957) (a good case demonstrating that warranties in insurance policies are still considered and enforced).

34. *King v. Sturge*, 113 So.2d 257 (Fla. App. 1959).

35. *Keel v. Independent Life & Acc. Ins. Co.*, 99 So.2d 225 (Fla. 1957). Beneficiary advised insurer's agent of circumstances surrounding death of insured and filed proofs of loss on separate ordinary life policy and agent denied any liability on accidental death policy. *Held*: waiver of proof of loss under accidental death policy provisions.

36. *Hobbs v. Franklin Life Ins. Co.*, note 12 *supra*, at 593.

37. *Zipperer v. State Farm Mut. Auto. Ins. Co.*, note 12 *supra*.

When an automobile liability insurer sent a notice of cancellation of a policy to the insured in accordance with the provisions of the policy, the insured could not hold the insurer liable for costs of defending an action against him on the theory of estoppel, unless the insured showed that the insurer was guilty of conduct influencing the insured into believing that the policy was still in effect.<sup>38</sup>

An insured's participation in a negligence action and in the appeal from the judgment recovered against it, on the ground that the judgment was excessive, does not preclude it from suing its insurer for the latter's bad faith in refusing to settle the negligence action.<sup>39</sup>

Generally, an unconditional denial of liability within the period allowed by an "all risk" jewelry policy for the filing of proof of loss, constitutes a waiver of that requirement. Under Florida law, failure to file a proof of loss does not work a forfeiture but simply postpones the time when suit can be brought.<sup>40</sup>

The insured named his wife as sole beneficiary. Thereafter in a fit of rage, the husband shot his wife and then took his own life; the jury established that the wife predeceased her husband. The court determined that the murder of the wife did not work a forfeiture or otherwise prevent the proceeds from being paid into insured's estate, since the insured was not benefited materially by his crime.<sup>41</sup>

Section 455.06 of the Florida Statutes, which waives governmental immunity from tort liability, applies only to an agency which acts and serves as a state instrumentality and only to the extent of the insurance coverage obtained by it.<sup>42</sup>

#### RIGHTS OF PARTIES

##### *Policyholders-Insureds*

An insured was in possession of a stock of goods immediately after a fire. Certain suppliers assured him that if the insurers did not take the goods for \$4,900, the suppliers would take them for over \$12,000. The court determined that evidence of such outstanding assurances was not only relevant and material to the inquiry as to the value of the stock immediately after the fire, but the true value of the stock at such time could not be arrived at without such evidence.<sup>43</sup>

An insured is not entitled to costs of defense of an action when his insurance policy had been properly cancelled before the occurrence which was the basis for the action.<sup>44</sup>

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38. *Johnson v. New Amsterdam Cas. Co.*, note 27 *supra*.

39. *American Fid. & Cas. Co. v. Greyhound Corp.*, 258 F.2d 709 (5th Cir. 1958).

40. *Balogh v. Jewelers Mut. Ins. Co.*, note 10 *supra*.

41. *Robbins v. Prudential Ins. Co. of America*, 168 F. Supp. 668 (N.D. Fla. 1958).

42. *Moreno v. Aldrich*, 113 So.2d 406 (Fla. App. 1959).

43. *Pennsylvania Lumbermens Mut. Fire Ins. Co. v. Nichols*, 253 F.2d 504 (5th Cir. 1958).

44. *Johnson v. New Amsterdam Cas. Co.*, note 27 *supra*.

When an insured kills his wife, the beneficiary, and then shoots himself, the proceeds of the policy should be paid into the insured's estate.<sup>45</sup>

The questions of whether or not the insured sustained a loss and the extent of such losses, under the terms of accident benefit insurance policies, were properly submitted to the jury for determination.<sup>46</sup>

In a workmen's compensation case, the court held that the deputy commissioner was in error in his refusal to receive evidence and make findings as to the intent of the parties as to which one of two insurance policies was in effect as to the one employer.<sup>47</sup>

### *Beneficiary*

Under Florida law, a beneficiary's interest in a life policy, which reserves to the insured the right to change the beneficiary, is an expectancy only, and the insured remains in effect the real owner of the policy. When the right to change the beneficiary is not reserved, the beneficiary's interest becomes vested when the policy is issued and the beneficiary in effect becomes the real owner of the policy and any claim he might have is against the insurer and not the insured. In such event, the beneficiary's interest is not embraced by a separation agreement providing for a release by the parties of all claims against each other.<sup>48</sup>

Generally, divorce alone does not automatically divest the wife of the proceeds of life insurance as a beneficiary, although her interests may be terminated by an agreement between the parties.<sup>49</sup>

When a separation agreement between husband (insured) and wife (beneficiary) provided that upon performance of all of the terms of such agreement, all claims against each other were released, and the policies reserved the right in the insured to change the beneficiary, the designated beneficiary was precluded from recovering or retaining the policy proceeds.<sup>50</sup>

When the beneficiary predeceases the insured the insurance proceeds revert to the insured or his estate, even if the insured killed his beneficiary and then shot himself.<sup>51</sup>

A corporation, as beneficiary, paid the premiums on an endowment policy which had been issued on the life of its stockholder-officer-director in order for it to purchase the insured's stock interest in the corporation

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45. *Robbins v. Prudential Ins. Co. of America*, note 41 *supra*.

46. *Guaranty Life Ins. Co. of Florida v. Jackson*, 113 So.2d 256 (Fla. App. 1959).

47. *Hartford Acc. & Indem. Co. v. King*, 114 So.2d 184 (Fla. App. 1959). This case follows the decision in *Blumberg v. American Fire & Cas. Co.*, 51 So.2d 182 (Fla. 1951).

48. *O'Brien v. Elder*, 250 F.2d 275 (5th Cir. 1957).

49. *Ibid.*

50. *Ibid.*

51. *Robbins v. Prudential Ins. Co. of America*, note 41 *supra*.

upon his death. The insurance policy provided that if the insured was living on or after a certain date, he was to receive the monthly payments from the proceeds of the endowment policy until his death and any net proceeds remaining after his death were to be paid to the beneficiary. It was therefore held that the corporation had no claim upon the monthly payments to the insured.<sup>52</sup>

A widow sued her husband's brother for the proceeds of her husband's life insurance policy. The court found that the deceased husband, during his life, under a reservation of right to change the beneficiary, did in fact properly change the designation of his wife as beneficiary to that of his brother, thereby precluding his widow from any right in the proceeds of that policy.<sup>53</sup>

### *Creditors of Insured*

Generally a Florida insured is entitled to exemption from execution or levy on the cash surrender values of his life insurance policies.<sup>54</sup> However, when a husband was a citizen of California at the time he asserted his right to exemption from the claims of his wife in Florida, he was not entitled to such statutory exemption, even though he was a resident of Florida when the policies were issued.<sup>55</sup>

In another case between a former husband and wife when the wife attempted to assert her rights against the policy proceeds of her husband, she was not as successful. The parties had entered into a settlement agreement which became a part of the divorce decree, and the court held that this released his ex-wife's claims against his life insurance policies.<sup>56</sup>

When the insured's judgment creditor brought garnishment proceedings against the insured's liability insurer, it was entitled to recover the interest on that part of the claim which was not deposited in court.<sup>57</sup>

### *Creditors of Insurer*

Agents of an insolvent insurance company in receivership held funds derived in payment of premiums of insurance, and such funds were not turned over to the insurer before its adjudication of insolvency. The receiver was entitled to possess such funds as assets of the insolvent insurer, even though the policyholders had assigned to the agent their claims for unearned

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52. *Morgan v. E. J. Evans Co.*, 266 F.2d 423 (5th Cir. 1959).

53. *Lerner v. Lerner*, 113 So.2d 212 (Fla. App. 1959).

54. FLA. STAT. § 222.15 (1957).

55. *Marshall v. Bacon*, 97 So.2d 252 (Fla. 1957).

56. *O'Brien v. Elder*, note 48 *supra*.

57. *Highway Cas. Co. v. Johnston*, 104 So.2d 734 (Fla. 1958).

premiums due to cancellation of their respective policies after such insolvency.<sup>58</sup>

### *Landlord and Tenant*

A government lease of a shipyard required the tenant to maintain and improve the property and to procure and maintain fire insurance in definitely specified amounts. Hence, the government (as landlord) was entitled to the proceeds of the insurance in the full and specified amounts, not merely to the extent of the market value, even though the lessee had paid extensive premiums and spent large sums in rehabilitation and improvement of the property, as required by the lease. The tenant's obligations were all regarded as consideration for the lease and were not dependent on each other.<sup>59</sup>

### *Bailor-Bailee-Consignment*

In actions by insureds for loss of jewelry allegedly covered by "all risk" policies issued by defendant-insurers, when the insured-consignee of the lost jewelry was liable for the loss to the consignor due to failure to exercise proper care for the jewelry, the insurance on the jewelry carried by the consignor-bailor did not constitute "other risk" insurance. Therefore, the consignee was entitled to recover for the loss from his own insurer despite the "other insurance" clause in his policy.<sup>60</sup> The insurance obtained by the consignor had no relationship with the insurance obtained by the consignee, even though they both covered the same articles. Each had a separate property and insurable interest in the articles.

### *Agents*

The use of the word "consignment" (or words of like import) does not of itself as a matter of law, create the relationship of principal and agent. It is a question of fact from the context of the documents creating the relationship as to whether for purposes of an insurance policy an agency relationship or a bailor-bailee relationship was created.<sup>61</sup>

Insurance agents are not entitled to retain premium payments due an insolvent insurance company even if the policies upon which they were paid were cancelled and the insureds were entitled to a return of unearned premiums. These funds belong to the receiver of the defunct insurance corporation.<sup>62</sup>

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58. *Charles W. Virgin Ins. Agency v. Alabama Gen. Ins. Co.*, 114 So.2d 524 (Fla. App. 1959).

59. *United States v. Seaboard Mach. Corp.*, 256 F.2d 166 (5th Cir. 1958).

60. *Balogh v. Jewelers Mut. Ins. Co.*, note 10 *supra*.

61. *Meyerson v. Jewelers Mut. Ins. Co.*, note 12 *supra*.

62. *Charles W. Virgin Ins. Agency v. Alabama Gen. Ins. Co.*, note 58 *supra*.

*Excess or Co-Insurer*

When a policy issued by plaintiff insurer and a policy issued by defendant insurer to the same motorist provided that if there were other insurance, each would be responsible only for the excess over any other valid and collectible insurance, these excess clauses were ineffective and both companies were primarily liable to the insured. However, when the defendant insurer's policy contains a provision to the effect that it is not liable for a greater portion of such loss than the applicable limit of liability that its policy bears to the total applicable limit of liability of all valid and collectible insurance, the provision is effective to limit its liability to a pro-rata contribution in proportion to the amount its respective insurance policy bears to the total amount of the combined policies.<sup>63</sup>

The effect to be given exclusionary clauses found in policies has been categorized by different criteria to determine on which insurer the liability will fall, *e.g.*, as (1) priority in time of the policies; (2) which policy is the more specific; (3) the exact wording of the particular exclusionary clauses.<sup>64</sup>

*Total or Partial Disability*

Whether or not an insured suffered a partial or total disability is a question of fact for the jury and if the court is trying the case without a jury, then it is for the court as a question of fact. The trial judge's determination will not be reversed if there are any facts in the record upon which such finding is based.<sup>65</sup>

## SERVICE OF PROCESS ON AN UNAUTHORIZED INSURER

A Missouri corporation issued its marine insurance policy to a Florida corporation, delivered it in Florida and had it countersigned by a Florida resident agent under the endorsement, "This policy is hereby countersigned below by a resident agent of the State of Florida, to comply with the resident agent's law of said State." By such act, the insurer designated the resident agent under section 625.33(3) of the Florida Statutes as an "unauthorized insurer."<sup>66</sup> Hence, service upon him was valid.

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63. *Continental Cas. Co. v. St. Paul Mercury F. & M. Ins. Co.*, note 20 *supra*.

64. *Cf. Annot.*, 122 A.L.R. 1204 (1939); *Balogh v. Jewelers Mut. Ins. Co.*, note 10 *supra*. See also *Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952). Where, however, there are two policies applicable to one situation, one policy specific and the other general, *cf. Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill & Ginnery Co.*, 26 Ga. App. 288, 105 S.E. 856 (1921); *Trinity Universal Ins. Co. v. General Acc. Fire & Life Ass. Corp.*, 138 Ohio St. 488, 35 N.E.2d 838 (1941).

65. *Continental Cas. Co. v. Stokes*, 249 F.2d 152 (5th Cir. 1957).

66. *Kansas City Fire & Marine Ins. Co. v. Dan Arias Shrimp Co.*, 261 F.2d 490 (5th Cir. 1958).

## SUBROGATION

An insurer cannot deny an insured recovery under a policy merely because the insured has a cause of action against a third person who carries like insurance for the occurrence. The insurer is liable to its insured and then becomes subrogated against the third party and its insurer for the loss.<sup>67</sup> The remedy of subrogation does not justify the application of the "other insurance clause" to the transaction.

An insured commenced an action against a third party for damages to his person and to his automobile, and at the trial, the judge sustained the third party's objection to evidence showing damage to the insured's automobile on the ground that the insured had already been paid for such loss from his collision insurer. A verdict in favor of the insured was entered for the personal injury damages and a final judgment was entered. The insured accepted payment of that judgment without moving for a new trial or appealing from the court's ruling on its refusal to admit the evidence of the damage to the automobile. The court decided that the insured did not discharge his fiduciary obligation to his collision insurer to protect its subrogation rights against the third party, and therefore the collision insurer was entitled to recover from its insured the amount it paid him under the collision policy.<sup>68</sup> The insured had only one cause of action against the third party. Florida does not recognize any splitting of causes of action.

## WORDS AND PHRASES

The following words and phrases have been defined during the period of this survey:

"accident"<sup>69</sup>

"All risk"<sup>70</sup>

"bodily or accidental injury"<sup>71</sup>

"carrying passengers for hire"<sup>72</sup>

"direct and accidental loss or damage to auto"<sup>73</sup>

"external cause"<sup>74</sup>

67. *Balogh v. Jewelers Mut. Ins. Co.*, note 10 *supra*.

68. *Titus v. Emmco Ins. Co.*, 109 So.2d 781 (Fla. App. 1959).

69. *Christ v. Progressive Fire Ins. Co.*, 101 So.2d 821 (Fla. App. 1958) (where roofing contractor left repair job unfinished over weekend without proper precautions, leakage of rain water into storerooms was not an "accident").

70. *Balogh v. Jewelers Mut. Ins. Co.*, note 10 *supra*; *Hawkeye-Security Ins. Co. v. Iori Bros, Ltd.*, 106 So.2d 916 (Fla. App. 1958).

71. *Stokes v. Travelers Ins. Co.*, 249 F.2d 155 (5th Cir. 1957). *But cf.* companion case with opposite result, *Continental Cas. Co. v. Stokes*, note 65 *supra*.

72. *Craig Funeral Home v. State Farm Mut. Auto. Ins. Co.*, note 12 *supra*.

73. *Frank v. State Farm Mut. Auto. Ins. Co.*, 109 So.2d 594 (Fla. App. 1959) (theft of auto which was located by insurer and insured advised of the location of same was not such loss under theft policy as to sustain insured's action for damages).

74. *Hawkeye-Security Ins. Co. v. Iori Bros, Ltd.*, 106 So.2d 916 (Fla. App. 1958) (damage to a cab caused by the falling of a dragline boom construed within policy provision).

“Emergency purpose”<sup>75</sup>  
 “external, violent and accidental means”<sup>76</sup>  
 “mysterious disappearance”<sup>77</sup>  
 “total loss”<sup>78</sup>

#### ATTORNEYS' FEES AND COSTS OF SUIT

When an insured was without fault in having a notice of pending action against it until after default judgment had been rendered, the insurer was not excused from defending the action and was liable to the insured for expenses in setting aside the default judgment.<sup>79</sup>

An insured is entitled to reasonable attorneys' fees from an insurer which refused to defend an action against the insured, but the insured is not entitled to an allowance of attorneys' fees for a successful prosecution of an appeal from an order which set aside the verdict in favor of the insured and granted a new trial.<sup>80</sup>

When an insurer rightfully cancels an insurance policy in accordance with the terms thereof before the insured has suffered a loss, the insurer is not liable to the insured for attorneys' fees and costs incurred by the insured in defending an action by a third party.<sup>81</sup>

When an insured successfully sued an insurer for exercising bad faith in the settlement of a tort claim against the insured, the insured is entitled to recover attorneys' fees under section 625.08 of the Florida Statutes as a successful litigant.<sup>82</sup>

When a non-resident insurer issued a marine policy as an unauthorized insurer, it came within the exemption provisions of section 625.33 and it was not liable for attorneys' fees in an action by a successful insured.<sup>83</sup>

#### LIABILITY OF INSURER IN EXCESS OF POLICY LIMITS

When an insured brought an action against its insurer for an excess of policy limits for exercising bad faith in the settlement of a tort action against the insured, evidence of reinsurance was material, even if the insurer's claim adjusters had no knowledge of the existence of such insurance, when the insurer's home office did have knowledge thereof and had placed a limit on the amount of settlement. When it appeared that liability policy limits

75. *Grand Assembly, etc. v. New Amsterdam Cas. Co.*, note 12 *supra*.

76. *Kimbro v. Metropolitan Life Ins. Co.*, note 12 *supra*.

77. *Balogh v. Jewelers Mut. Ins. Co.*, note 10 *supra*.

78. *Continental Cas. Co. v. Stokes*, note 65 *supra*.

79. *St. Paul Mercury Indem. Co. v. Valdosta Milling Co.*, 253 F.2d 667 (5th Cir. 1958).

80. *Grand Assembly, etc. v. New Amsterdam Cas. Co.*, note 12 *supra*.

81. *Johnson v. New Amsterdam Cas. Co.*, note 27 *supra*.

82. *American Fid. & Cas. Co. v. Greyhound Corp.*, note 39 *supra*.

83. *Kansas City Fire & Marine Ins. Co. v. Dan Arias Shrimp Co.*, note 66 *supra*.

might not be sufficient to satisfy a tort claim against the insured and that the excess or reinsurance carrier had disclaimed liability, the insured was entitled to exercise the privilege, offered by its insurer, of participating in litigation (to protect its uninsured potential liability) without prejudicing its claim against its insurer for exercising bad faith in the settlement negotiations.<sup>84</sup>

An insurer is liable only to its insured, if at all, for the exercise of bad faith in settlement of a tort action by third-party claimants against its insured. The plaintiff, who had recovered a judgment against the insured in excess of an insurance liability policy limit cannot maintain any action against its judgment debtor's insurer on any theory of negligence or bad faith in the conduct of its negotiations for settlement of the tort action. The relationship upon which such an action may be maintained exists only between the insured and insurer and unless the insurance policy is for the benefit of a third party, the third party has no rights by virtue of the contract.<sup>85</sup>

#### CONFLICT OF LAWS

A resident of Illinois obtained a personal property floater policy insuring his personal property located in Illinois from an insurer (not a Florida corporation) and paid the premium in full. He then moved to Florida with his insured chattels. While a resident of Florida, his chattels were either stolen or destroyed. The policy, as delivered to insured and under the provisions of the Illinois law, contained a clause that required actions on the policy to be instituted within twelve months after discovery of the loss or they were barred. The court held that this was an Illinois contract, the laws of Illinois applied, and the Florida Statute (section 95.03 which forbids agreements shortening the statute of limitations) did not apply. This limitation provision is a substantial property right in the insurer and is protected by the Fourteenth Amendment to the Constitution. Hence, when the action was brought without the limitation period, a violation of due process would result if the Florida Statute were applied.<sup>86</sup>

#### MISCELLANEOUS

In an action to recover damages for the alleged negligent operation of an automobile, plaintiff sought by discovery proceedings to obtain information as to the limits of the defendant's liability insurance. It was held that such information was not a proper subject for discovery; an adverse ruling by the trial court was subject to review by certiorari to avoid irreparable harm, even though the order was interlocutory.<sup>87</sup>

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84. *American Fid. & Cas. Co. v. Greyhound Corp.*, note 39 *supra*.

85. *Canal Ins. Co. of Greenville, South Carolina v. Sturgis*, 114 So.2d 469 (Fla. App. 1959).

86. *Sun Ins. Office, Ltd. v. Clay*, 265 F.2d 522 (5th Cir. 1959).

87. *Brooks v. Owen*, 97 So.2d 693 (Fla. 1957).

On the theory of unfair competition, an automobile association and its agents and employees were enjoined from using the same name as an insurance company.<sup>88</sup>

A state agency's immunity from liability for tort is waived only to the extent of insurance coverage obtained by it pursuant to statutes.<sup>89</sup>

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88. *All State Ins. Co. v. Allstate Auto. Ass'n, Inc.*, 171 F. Supp. 107 (S.D. Fla. 1959).

89. FLA. STAT. § 455.06 (1957); *Moreno v. Aldrich*, note 42 *supra* (dealing with Game and Fresh Water Fish Commission, FLA. CONST., Art. IV, § 30).