INSURANCE

SUPREME COURT REVIEW

Many of the controversies which came before the Nebraska Supreme Court involved insurance. The cases which are presented below were selected mainly because they were cases of first impression for the state. However, the last case involved Nebraska's fairly well established law of waiver and estoppel; it is included because of the importance it places on actual reliance.

EMPLOYEE FIDELITY BOND

The case of *KAMI Kountry Broadcasting Co. v. United States Fidelity and Guaranty Co.*[1] concerned a loss under an employee's fidelity bond.

Under the terms of the bond involved, the defendant agreed to insure KAMI against " 'any loss of money or any other property which the insured shall sustain . . . through any fraudulent or dishonest act or acts committed by any of the employees, acting alone or in collusion with others, while in any position at any location in the service of the insured. . . .' "[2] The employee involved forged the company president's signature to get a loan from the First National Bank of Cozad. The bank was a major advertiser on KAMI and threatened to withdraw its advertising if the station did not repay the loan. As a result, KAMI repaid the loan with interest and brought action on the fidelity bond to recover the amount it had paid out.

The Nebraska Supreme Court held that under the Uniform Commercial Code[3] the forgery was an "unauthorized signature" and as such was "wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it . . . ."[4] Therefore, the court concluded that the signature was inoperative; KAMI had been under no legal obligation to pay the bank and had suffered no direct loss as a result of the fraudulent acts of its manager. According to the court the fraud was directed at the bank and the bank was the one defrauded. KAMI suffered a loss only when it determined to pay the bank.[5]

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1. 190 Neb. 330, 208 N.W.2d 254 (1973).
2. 190 Neb. at 330-31, 208 N.W.2d at 254.
3. The court cites NEB. REV. STAT. (UCC) § 3-404 and § 1-201(43) (Reissue 1971).
4. 190 Neb. at 332, 208 N.W.2d at 255, *citing* NEB. REV. STAT. (UCC) § 3-404 (Reissue 1971).
5. 190 Neb. at 332-33, 208 N.W.2d at 255.

Viewing the bank as the one who suffered the loss, the court relied on cases in which third parties had sought to recover under fidelity bonds. Drawing chiefly from a Kansas case,[6] the Nebraska court held the employee fidelity bond to be for the benefit of the insured employer only and not "members of the public harmed by the misconduct of the covered individual."[7] In both the Kansas case and part of an Indiana case[8] cited by the court, the action was brought by the third-party directly against the insurer.

However, in the KAMI case, the insured brought action for its own loss. The Nebraska court stated that the situation would have been the "same had the bank not been paid by KAMI and the bank sought recovery on the bond."[9] There appears to be a flaw in this conclusion, however, because it assumes that KAMI did not suffer a loss.

It is relatively clear that an employee fidelity bond ordinarily is not for the benefit of third parties.[10] Such bonds do not run to "members of the public." They are designed to cover loss by the insured. In the KAMI case the policy said "*any* loss of money or other property which *the insured* shall sustain." (Emphasis added.) The bank could not have brought action directly on the bond. But this should not have precluded KAMI from bringing action. The bank was a valuable customer of KAMI. If it had withdrawn its advertising, KAMI would have suffered a *loss*.[11] The station preferred to take the loss by paying the $4,037.84. Either way there was a direct loss of money to KAMI, and it was sustained through a dishonest act of an employee.[12]

It is well established that questions as to what is covered by an insurance contract should be resolved, where reasonably pos-

6. Ronnau v. Caravan In'tl Corp., 205 Kan. 154, 468 P.2d 118 (1970).

7. 190 Neb. at 334, 208 N.W.2d at 256.

8. National Sur. Co. v. Fletcher Sav. & Trust Co., 201 Ind. 631, 169 N.E. 524 (1930).

9. 190 Neb. at 335, 208 N.W.2d at 256.

10. *See* Ronnau v. Caravan Int'l Corp., 205 Kan. 154, 468 P.2d 118 (1970); American Empire Ins. Co. of S.D. v. Fidelity and Deposit Co. of Md., 408 F.2d 72 (5th Cir. 1969); 9 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 5662 (Supp. 1974).

11. Loss has been construed rather broadly. *See, e.g.*, Imperial Ins., Inc. v. Employers' Liab. Assurance Corp., 442 F.2d 1197 (D.C. Cir. 1970).

Also it is not necessarily loss resulting directly from the employee's act. 13 G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 46:101 (2d ed. 1965).

12. "Fraudulent or dishonest act" has also been construed broadly:

> An employee is required at all times to act in his employer's best interests. When by culpable conduct he fails to do so and a loss occurs, liability may arise under a fidelity bond.

Boston Sec., Inc. v. United Bonding Ins. Co., 441 F.2d 1302, 1304 (8th Cir. 1971).

sible, in favor of the insured.[13] It was reasonably possible in this case to include the loss under the term "any loss" for a more acceptable result.

The dissent by Justice McCown suggests another way in which a loss could have been determined. Under principles of agency KAMI could have possibly been held to respond to the bank in tort and thus have been legally liable so as to have a loss covered by the bond. The dissent concludes that there were at least enough facts pleaded to withstand demurrer,[14] and this appears to be a position preferable to that of the majority.

INTEREST

The case of *Niemeyer v. Estate of Tichota*[15] involved the question of whether a liability insurer is liable for interest on the entire amount of a judgment recovered against its insured, or only for interest on the amount within the policy limit. While the issue had been raised many times in other jurisdictions, this was the first time it was decided by the Nebraska court.

The controversy involved a standard interest clause of a liability policy. The clause, as quoted by the court, read:

> [T]he company shall:
>
> (b) (2) pay all expenses incurred by the company, *all costs taxed against the insured in any suit and all interest accruing after the entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limits of the company's liability thereon.* (Emphasis supplied by the court.)[16]

In this case the insurer was obligated to pay $7,550 under the policy.[17] The judgment against the insured was for $170,000. Thus, the question arose: Was the insurer liable for interest on the *entire* $170,000 or only for interest on $7,550?

The Nebraska court's answer was that the "clause in question should be construed to require interest on the entire amount of the judgment until the company has paid, tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon."[18]

13. American Standard Ins. Co. v. Tournor, 186 Neb. 585, 589, 185 N.W.2d 267, 269 (1971).

14. 190 Neb. at 338, 208 N.W.2d at 258.

15. 191 Neb. 484, 215 N.W.2d 885 (1974).

16. *Id.* at 485-86, 215 N.W.2d at 886.

17. The policy was for $20,000 maximum liability, but $12,450 had already been paid out for the same accident.

18. 191 Neb. at 488, 215 N.W.2d at 887.

In so holding the court aligned Nebraska with the majority of other jurisdictions which have considered the question. A few years ago jurisdictions were almost evenly divided as to whether the insurer was liable for interest on the total amount of a judgment, or only for interest on the company's liability under the policy.[19] However, recently the decisions have been in favor of requiring the insurer to pay interest on the total amount.[20]

There are two basic arguments for holding the insurer liable for interest only on the amount of the policy limit. The wording of the policy limits the amount for which the insurer is liable; "[i]t hardly seems probable, that the parties . . . after expressly limiting the liability of the company . . . intended to make it liable for interest on any greater amount."[21] Interest is only paid for the use of money. Since the insurer does not have the use of the money which is beyond its liability it need not pay interest on it.[22]

Those courts which have allowed interest on the total amount of the judgment counter with these points. It was the intent of the drafters of the liability clause that it apply to the total amount of the judgment. When some courts began limiting the interest recovery to the amount on the policy limit, the National Bureau of Casualty Underwriters informed its member companies that this was "contrary to the intent" and ordered that when policies were revised the language should make it "entirely clear that all interest on the entire amount of any judgment . . . is payable by the insurer until the insurer has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the insurer's liability . . . ."[23] As a result, more recent policies state "all interest on the entire amount of any judgment" shall be paid by the insurer until it "has paid or tendered or deposited in court" the amount for which it is liable.[24] In addition, payment of interest

19. *See* 15 G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW, § 56:36 (2d ed. 1966).

20. *See* McPhee v. American Motorist Ins. Co., 57 Wis. 2d 669, 205 N.W.2d 152 (1973); Stamps v. Consol. Underwriters, 208 Kan. 630, 493 P.2d 246 (1972); Weber v. Biddle, 4 Wash. App. 519, 483 P.2d 155 (1971); Draper v. Great Am. Ins. Co., 224 Tenn. 552, 458 S.W.2d 428 (1970); Peterson v. W. Cas. & Sur. Co., 19 Utah 2d 26, 425 P.2d 769 (1967); Germer v. Public Serv. Mut. Ins. Co., 99 N.J. Super. 137, 238 A.2d 713 (1967); Mayberry v. Home Ins. Co., 264 N.C. 658, 142 S.E.2d 626 (1965); Plasky v. Gulf Ins. Co., 160 Tex. 612, 335 S.W.2d 581 (1960); River Valley Cartage Co. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 242, 161 N.E.2d 101 (1959).

21. Sampson v. Century Indem. Co., 8 Cal. 2d 476, ___, 66 P.2d 434, 436 (1937).

22. *Id.* at ___, 66 P.2d at 437.

23. Ramsey, *Interest on Judgments Under Liability Insurance Policies*, 414 INSURANCE L.J. 411 (1957).

24. R. KEETON, BASIC TEXT ON INSURANCE LAW 662 (1971).

as well as the obligation to defend and all that it entails are undertakings to pay sums over and above the policy limits. The policy therefore recognizes that it is possible that the cost to the insurer will exceed the face amount of the policy.[25] The company recognizes its duty to defend and accepts the added cost. It has almost exclusive control of the defense and interest is one of the expected costs of the insurer.[26] "The insured cannot settle with the plaintiff without releasing the insurer from its obligation. Any delay that may cause the accumulation of interest is thus the responsibility of the insurer. Until it has discharged its obligations under the policy it should bear the entire expense of this delay."[27] In accepting this position, the Nebraska court noted that "[u]nlike the insured, the company may relieve itself of liability for excess interest by paying, tendering or depositing in court such part of the judgment as does not exceed the limits of the company's liability."[28]

These arguments in favor of allowing interest on the total judgment seem by far stronger than those supporting the minority position and the Nebraska court was properly persuaded to join the majority.

Temporary Substitute Automobile

The case of *Townley v. Whetstone*[29] arose when 17-year-old Larry Whetstone's insured car broke down. With his mother's permission Larry then drove an uninsured car owned by his parents. While driving the uninsured car, Larry was involved in an accident. The insurance covering Larry's own car provided for the use of a "temporary substitute automobile" but the insurance company denied liability[30] because the policy clause defining "temporary substitute automobile" excluded any car owned by the "named insured."[31] The named insured for Larry's car was Larry and his

25. United Services Auto. Ass'n v. Russon, 241 F.2d 296, 303 (5th Cir. 1957).

26. *Id.*

27. 191 Neb. at 487, 215 N.W.2d at 887, *quoting* River Valley Cartage Co. v. Hawkeye-Security Ins. Co., 17 Ill. 2d 442, ___, 161 N.E.2d 101, 103 (1959).

28. 191 Neb. at 489, 215 N.W.2d at 887.

29. 190 Neb. 541, 209 N.W.2d 350 (1973).

30. 190 Neb. at 543, 209 N.W.2d at 351.

31. The policy as quoted by the court read:

> Temporary Substitute Automobile—means an automobile not owned by the named insured or his spouse while temporarily used with the permission of the owner as a substitute for the described motor vehicle when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

190 Neb. at 543, 209 N.W.2d at 351.

father, and the car Larry was driving as a substitute at the time of the accident was owned by his father. Thus, the insurer argued that the substitute car was owned by the named insured.[32]

The state supreme court found the policy language ambiguous, and since the insurance contract was prepared by the insurer, the interpretation favorable to the insured was adopted,[33] making the insurance company liable under the policy.[34]

The court also looked to the purposes of the temporary automobile clause. The purpose of the temporary substitute automobile clause is to allow the insured the benefits of insurance in temporary cases when he needs to drive a substitute car while at the same time to prevent a person from insuring several cars for the price of one.[35] The clause is for the benefit of the insured and, thus, if construction is required, it should be construed in his favor.[36] As a result, courts have tended to find coverage when possible.[37] Even though it may appear that to do so strains the language of the policies, courts have held that "when two or more persons or a group are named as the 'insured' the substitute automobile is not deemed 'owned' by the 'insured' when it is only owned by one of them individually."[38] This was the position taken by the Nebraska Supreme Court and in so doing the purpose of the policy clause was upheld. Larry was not taking advantage of the company. He had not attempted to insure two regularly used cars under one policy. He was only driving the uninsured car temporarily, as a substitute, while his was being repaired.

WAIVER, ESTOPPEL

The recurring insurance problems of waiver and estoppel were again considered by the Nebraska Supreme Court in the case of *Tighe v. Security National Life Insurance Co.*[39] The case is of note because the court again required actual reliance by the policy

32. 190 Neb. at 543, 209 N.W.2d at 351.
33. *Id.* at 544, 209 N.W.2d at 352.
34. *Id.* at 545-46, 209 N.W.2d at 352-53.
35. R. KEETON, BASIC TEXT ON INSURANCE LAW 240 (1971); 12 G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 45:219 (2d ed. 1964).
36. 12 G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 45:221 (2d ed. 1964); Gabrelick v. National Indem. Co., 269 Minn. 445, ___, 131 N.W.2d 534, 535-36 (1964).
37. *See* Baxley v. State Farm Mut. Auto. Liab. Ins. Co., 241 S.C. 332, 128 S.E.2d 165 (1962); McKee v. Exchange Ins. Ass'n, 270 Ala. 518, 120 So. 2d 690 (1960); Mid-Continent Cas. Co. v. West, 351 P.2d 398 (Okla. 1960); Farley v. American Auto. Ins. Co., 137 W. Va. 455, 72 S.E.2d 520 (1952).
38. 12 G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 45:237 (2d ed. 1964).
39. 191 Neb. 271, 214 N.W.2d 622 (1974).

holder before the insurer could be estopped from denying liability. Mere internal operations of an insurer could not result in such an estoppel.

In this case the insured's life insurance policy was paid up until March 8, 1970. The insured died on May 14, 1970. Both before and after March 8, the insured had been notified that premiums needed to be paid. However, the insurance company made a practice of carrying overdue premiums on its computer as "accounts receivable" for 60 to 90 days.[40]

Because of the insurance company's practice of carrying the premiums as accounts receivable, the insured's beneficiary argued that the policy had not been forfeited for failure to pay premiums, that the insurance company had waived its right to forefeit the policy for nonpayment of premiums and that the company was estopped to claim that the previous premiums were unpaid.[41]

The court rejected the beneficiary's arguments. It stated the general rule that a provision for forfeiture for nonpayment of premiums is self-executing,[42] and that the insurer would have to take some sort of action amounting to recognition of the continued validity of a policy before there is an effective waiver.[43] Mere demand for premiums was not such action.[44]

In dealing with the estoppel issue, the court adopted its position set out earlier in *Pester v. American Family Mutual Insurance Co.*[45] which required "reliance, in good faith, upon the conduct . . . of the party to be estopped."[46] The insured did not know his premiums were carried on the insurer's computer as accounts receivable and there was no indication on the premium notices that the policy was still in force. Therefore the court found no reliance and no estoppel could be established.[47] The policy lapsed when the premium was due and unpaid.[48]

40. *Id.* at 272, 274, 214 N.W.2d at 623-24, 624-25.
41. *Id.* at 275, 214 N.W.2d at 625.
42. *Id.*
43. *Id.*
44. 191 Neb. at 276, 214 N.W.2d at 625.
45. 186 Neb. 793, 799, 186 N.W.2d 711, 714 (1971).
46. 191 Neb. at 276, 214 N.W.2d at 625.
47. *Id.* at 279, 214 N.W.2d at 627.
48. *Id.* at 275, 214 N.W.2d at 625.

LEGISLATION

SUPERVISION BY DIRECTOR

Several important enactments in the insurance area were made by the Nebraska Legislature in 1974, the most important of which was a new act providing for the rehabilitation and conservation of insurance companies by the Department of Insurance.[1] The act provides that if the Director of Insurance determines that any insurance company is insolvent, or is in a condition which renders the continuance of its business hazardous to the public or to its policyholders, or has "exceeded its powers,"[2] then he must notify the company of his determination and provide it with a list of requirements which it must satisfy in order to remedy the inadequacies.[3] Also, the Director may determine to place the company under his supervision, in which case the company must satisfy the Director's requirements within sixty days.[4]

If the insurance company is placed under supervision, the supervisor[5] is authorized during the period of supervision to prohibit the company from disposing of, transfering or encumbering any of its assets or property; lending or investing any of its funds; withdrawing any of its accounts; incurring any debt; merging with another company; or entering into any new reinsurance contract.[6]

At the end of the sixty day period, the Director may appoint a conservator[7] if, following notice and a hearing, the company has failed to comply with the Director's requirements, or if the company gives its consent.[8] The conservator will immediately take charge of the company and remedy these conditions which necessitated the conservatorship.[9] During the conservatorship, the conservator is empowered "to take all necessary measures to preserve, protect, and recover any assets or property of such insurance company . . . ."[10]

1. L.B. 1011, [1974] Laws of Neb. 1027.
2. The act sets out certain circumstances under which an insurer will be said to have exceeded its powers. These include, for example, situations where an insurer refuses to permit examination of its books and records, or fails to obey an order to cure a deficiency in its capital or surplus. *Id.*, § 2(3)(a) to (e), at 1028.
3. *Id.*, § 3, at 1028-29.
4. *Id.*
5. The Director of Insurance, or anyone appointed by him, will serve as supervisor. *Id.*, § 4(2), at 1029.
6. *Id.*, § 4(1).
7. The Director of Insurance, or anyone appointed by him, will serve as conservator. *Id.*, § 5, at 1030.
8. *Id.*
9. *Id.*
10. *Id.*

If the Director of Insurance determines that a company is not in a condition to continue doing business under a conservatorship provided for in the act, he is required to notify the Attorney General of that determination. The Attorney General must then apply to the district court for leave to file suit in the nature of quo warranto to forfeit the charter of the company or to require the company to comply with the law.[11]

CREDITOR INSURANCE CEILING

The statutory provisions governing group insurance policies issued to a creditor to insure the lives of his debtors was amended to eliminate the $15,000 ceiling on the amount of insurance allowed per debtor.[12] Under the prior law, the amount of creditor insurance on the life of each debtor, in a group policy, could not exceed the amount of the unpaid debt or $15,000, whichever was less.[13] The 1974 amendment makes the provisions with respect to group insurance consistent with other statutory provisions by limiting the amount of creditor insurance permitted for each debtor *only* to the amount of the unpaid debt.[14]

CAPITAL STOCK AND SURPLUS REQUIREMENTS

In L.B. 919,[15] new capital stock and surplus requirements for insurance companies were imposed. Under the original Nebraska statutes, all stock and mutual insurance companies were required to maintain a minimum surplus of $500,000 and stock insurance companies were also required to maintain a minimum capital stock of $500,000.[16] These requirements will remain the same in most instances. L.B. 919 provides, however, that if a stock insurance company transacts life insurance business and, in addition to life insurance, it also underwrites one or more kinds of insurance other than Sickness and Accident Insurance or Water Damage and Sprinkler Insurance, the company is required to maintain a minimum capital stock of $1 million and a minimum surplus of $1 million.[17] The same requirement with respect to a minimum surplus is required of mutual insurance companies.[18]

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11. *Id.* at 1030-31.
12. L.B. 944, [1974] Laws of Neb. 916.
13. NEB. REV. STAT. § 44-1603(4) (Reissue 1974), *as amended* L.B. 944, [1974] Laws of Neb. 916.
14. *See* NEB. REV. STAT. § 44-1705 (Reissue 1974).
15. L.B. 919, [1974] Laws of Neb. 871.
16. NEB. REV. STAT. §§ 44-214, 44-219 (Reissue 1974), *as amended* L.B. 919, [1974] Laws of Neb. 871.
17. L.B. 919, § 1, [1974] Laws of Neb. 871.
18. *Id.*, § 2, at 872.