INSURANCE

SUPREME COURT REVIEW

During its most recent term, the Nebraska Supreme Court handed down several noteworthy insurance cases. For purposes of this survey, the more significant of these have been categorized in the general topic areas of uninsured motor vehicles, subrogation, contract modification and interpretation, recovery of attorney fees, and indemnity bonds.

UNINSURED MOTOR VEHICLES

In *Crossley v. Pacific Employers Insurance Co.*,[1] the plaintiff (a Nebraska citizen) sustained personal injuries in an automobile accident occurring in Colorado and involving a resident of that state.[2] The insurance contract between the plaintiff and defendant provided him with $10,000 uninsured motorist coverage.[3] Prior to the accident the Colorado Legislature enacted a no-fault automobile accident insurance law.[4] The provisions of this statute, however, applied only to bodily injuries.[5] Following the accident, the plaintiff submitted a claim to the driver's insurance company seeking reparation for both property damage and physical injuries. That company paid for the property damage, but, after invoking the personal injury limitation in the no-fault law, refused to make any further payments.[6] The plaintiff then brought this suit against his own insurance company under the uninsured motorist provisions of his policy.[7]

Under Nebraska law, a nonresident driver involved in a Nebraska accident causing bodily harm must have minimal insurance coverage.[8] Anyone not complying with this provision is an "uninsured motorist."[9] Had this accident taken place in

1. 198 Neb. 26, 251 N.W.2d 383 (1977).
2. *Id.* at 27, 251 N.W.2d at 385.
3. *Id.*
4. COLO. REV. STAT. §§ 10-4-701 to -723 (1973). This piece of legislation requires parties injured in automobile accidents to submit claims to their own insurance companies only. Each company then compensates the policy holder without regard to fault. Coverage is compulsory and limited in amount. *Id.* §§ 10-4-705 to -706.
5. *Id.* § 10-4-706(b).
6. 198 Neb. at 28, 251 N.W.2d at 385.
7. *Id.*
8. NEB. REV. STAT § 60-509 (Reissue 1974).
9. Emery v. State Farm Mut. Auto. Ins. Co., 195 Neb. 619, 622, 239 N.W.2d

Nebraska, the tortfeasor's insurance coverage would have been sufficient to meet this requirement.[10] Since the driver had adequate coverage, he was not in the eyes of Nebraska law an uninsured motorist.[11] Applying this logic the court held that the insurance company rightfully refused payment.[12]

Even if the Colorado driver had been uninsured, the court still would have denied this action. It is generally accepted insurance law that the "claimant must establish the liability of the uninsured motorist to him before he may recover."[13] Since the local law where the tort occurred governs,[14] the Colorado no-fault provision would have applied. Its terms specifically require the insured motorist to collect from his own company "without regard to fault."[15] Without determining fault it would be impossible to ascribe liability to the uninsured motorist.

SUBROGATION

In a case of first impression, the court in *Stetina v. State Farm Mutual Automobile Insurance Co.*[16] faced the situation of an insurance company providing coverage for both parties to an automobile accident. Soon after it occurred, the plaintiff, in consideration of a $50,000 cash settlement, agreed not to sue the tortfeasor.[17] The plaintiff then submitted a claim under his policy with the defendant insurance company. The company in turn refused to pay, claiming instead that under the terms of the policy it owed nothing. The relevant section of the policy provided subrogation on the company's part and stated that the insured was to "do whatever is necessary to secure such rights and do nothing to prejudice them."[18] The company argued that the plaintiff's separate agreement destroyed its right to subrogation and thereby terminated any obligation to pay.[19]

Where one party is either uninsured or insured by a different carrier, an agreement not to sue clearly prejudices the insurer's right to subrogation.[20] But the facts in this particular case

798, 801 (1976). *See also Insurance - Supreme Court Review*, 10 CREIGHTON L. REV. 115, 117 (1976).

10. 198 Neb. at 29, 251 N.W.2d at 385.
11. *Id.*
12. *Id.* at 31, 251 N.W.2d at 386.
13. 12 COUCH ON INSURANCE 2d § 45:649 (2d ed. 1964).
14. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).
15. COLO. REV. STAT § 10-4-706(b) (1973).
16. 196 Neb. 441, 243 N.W.2d 341 (1976).
17. *Id.* at 442, 243 N.W.2d at 342.
18. *Id.* at 443, 243 N.W.2d at 342.
19. *Id.*, 243 N.W.2d at 343.
20. In Hastings v. Fireman's Fund Am. Ins. Co., 193 Neb. 417, 227 N.W.2d 418 (1975), the insured party agreed not to sue an uninsured party. The court

demanded a decision as to whether such an agreement between parties insured by the *same* insurer likewise destroyed or prejudiced them. Recently, the Nebraska Supreme Court, while denying subrogation to a self-insurer suing his own insured, held that "the rights of a subrogated insurer can rise no higher than the rights of its insured against the third party."[21] If, because of some separate agreement, the insured has no enforceable claim against the third party, application of this statement would mean that there existed no right to which the insurer could be subrogated. Going one step further, courts in other jurisdictions have denied subrogation where the same company insured both the tortfeasor and the insured.[22] As the Alaska high court stated in this area, "it is well settled that an insurer cannot recover by means of subrogation against its own insured."[23]

Several other courts have applied this line of reasoning in resolving situations directly analagous to the facts in *Stetina*.[24] These cases held that the insurer's subrogation rights had not been defeated.[25] Since by definition "subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty,"[26] the right never existed in the first place. Armed with such precedence, the Nebraska high court reasoned that Stetina's separate agreement could not possibly have prejudiced a right State Farm never possessed.[27] As a result, State Farm's defense failed and the court remanded for further proceedings consistent with its holding.[28]

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held the agreement to destroy the company's right to subrogation. The case of Bernardini v. Home & Auto. Ins. Co., 64 Ill. App.2d 465, 212 N.E.2d 499 (1965) found the same type of agreement entered into but this time between parties insured by separate companies. Again the court held the subrogation rights destroyed. *See also* Shepley v. Northwestern Mut. Ins. Co., 244 Ark. 1159, 428 S.W.2d 268 (1968); DeCespedes v. Prudential Mut. Cas. Co., 193 So.2d 224 (Fla. Dist. Ct. App. 1966); Poynter v. Aetna Cas. and Sur. Co., 13 Mich. App. 125, 163 N.W.2d 716 (1968); Foundation Reserve Ins. Co. v. Cody, 458 S.W.2d 214 (Tex. Civ. App. 1970).

21. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co., 188 Neb. 308, 312, 196 N.W.2d 377, 380 (1972).

22. *See generally* Graham v. Rockman, 504 P.2d 1351 (Alas. 1972); Traders & Gen. Ins. Co. v. Pacific Employers Ins. Co., 130 Cal. App. 2d 158, 278 P.2d 493 (1955); Pendlebury v. Western Cas. & Sur. Co., 89 Idaho 456, 406 P.2d 129 (1965); Miller v. Kujak, 4 Wis. 2d 80, 90 N.W.2d 137 (1958).

23. Graham v. Rockman, 504 P.2d 1351, 1356 (Alas. 1972).

24. Dupre v. Vidrine, 261 So.2d 288 (La. App. 1972), *aff'd*, 262 La. 312, 263 So.2d 48 (1972); Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 500 P.2d 945 (1972).

25. Dupre v. Vidrine, 261 So.2d 288, 290 (La. App. 1972); Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 225-26, 500 P.2d 945, 949 (1972).

26. 16 COUCH ON INSURANCE § 61:133 (2d ed. 1966).

27. 196 Neb. at 452, 243 N.W.2d at 347.

28. *Id.*

CONTRACT MODIFICATION AND INTERPRETATION

In *Neal v. St. Paul Fire & Marine Insurance Co.*,[29] the plaintiff's policy with the defendant insurance company covered his tractor and trailer. The plaintiff leased these to a carrier and in return hauled commodities for him.[30] The policy specifically excluded coverage while the tractor was either "used to carry property in any business" or "used in the business of any person or organization to whom the automobile is rented."[31] After unloading his cargo in Omaha, the plaintiff took the tractor to a truck stop for routine servicing. Along the way, the accident for which he claimed relief occurred.[32] Insisting that at the time of the accident the trailer was in the use of another's business, the insurance company refused payment.[33]

Under the terms of his agreement with the carrier, the plaintiff retained responsibility for service and maintenance to the equipment.[34] Even though the carrier derived some benefit from this, the court found these duties to be the business of the plaintiff and not that of the carrier.[35] Because the accident did not occur while working directly for the carrier, the court held that the defendant wrongly refused payment.[36]

In *Ruby Cooperative Co. v. Farmers Elevator Mutual Insurance Co.*,[37] the defendant insured several buildings owned by the plaintiff. During the term of the policy, the insurance company became aware of a hazardous condition existing in a portion of the complex. They requested that this situation be corrected and later notified the plaintiff by letter that it intended to cancel coverage on the buildings involved.[38] Not long thereafter, the insurer remitted to the plaintiff the portion of his premium attributable to its reduction in coverage. The insurer mailed the check alone without any transmittal letter as to why it had been issued.[39] Within two weeks, the buildings in controversy burned to the ground. The insurance company refused to compensate for the loss, claiming instead that it no longer insured the destroyed property.[40] It based this contention upon

29. 197 Neb. 718, 250 N.W.2d 648 (1977).
30. *Id.* at 719-20, 250 N.W.2d at 649.
31. *Id.* at 720, 250 N.W.2d at 650.
32. *Id.*, 250 N.W.2d at 649-50.
33. *Id.*
34. *Id.*
35. *Id.* at 721-22, 250 N.W.2d at 650.
36. *Id.*
37. 197 Neb. 605, 250 N.W.2d 239 (1977).
38. *Id.* at 606-07, 250 N.W.2d at 240-41.
39. *Id.*
40. *Id.* at 608, 250 N.W.2d at 241.

language in the policy giving it the right to cancel after providing the insured with adequate notice.[41]

An insurer may modify his contract only with the full consent and knowledge of the insured.[42] The court held that the company's correspondence with the plaintiff did not meet this standard.[43] Such a unilateral attempt at modification yielded absolutely nothing. The section of the policy allowing the company to cancel applied only with respect to full cancellation, and any action short of that demanded greater interaction between the principal parties.[44]

RECOVERY OF ATTORNEY FEES

In *Wendt v. Cavalier Insurance Corp.*,[45] the plaintiff sued his insurer for his refusal to pay a liability claim. The defendant first filed a general denial and then later made a written tender in full settlement.[46] Previously, the plaintiff had filed a motion for a reimbursement of attorney's fees.[47] While accepting the tendered sum, the plaintiff stipulated that he did so without prejudicing any subsequent claim he might make for attorney's fees.[48] Later he did challenge the tender but the court found it to fully satisfy the plaintiff's claim and denied reovery for attorney's fees.[49]

Nebraska law affords any person securing a judgment against his insurer a reasonable attorney's fee as part of the costs.[50] However, if the court fails to award more than the tender previously offered, the plaintiff is denied any such recovery.[51] In *Wendt*, the plaintiff asked the court to interpret this provision to include attorney's fees incurred prior to the time the tender was made.[52] It argued that the intent of the legislature was to expand the circumstances under which these fees could be recovered.[53] The court found application of the statute to be unambiguous.[54] Either the plaintiff obtains a judgment greater

41. *Id.*
42. 17 COUCH ON INSURANCE § 65:17 (2d ed. 1967).
43. 197 Neb. at 609-10, 250 N.W.2d at 242.
44. *Id.* at 608-09, 250 N.W.2d at 242.
45. 197 Neb. 622, 250 N.W.2d 243 (1977).
46. *Id.* at 623, 250 N.W.2d at 244-45.
47. *Id.*
48. *Id.*
49. *Id.*
50. NEB. REV. STAT. § 44-359 (Reissue 1974).
51. *Id.*
52. 197 Neb. at 624, 250 N.W.2d at 245.
53. *Id.*
54. *Id.*

than the tender or he does not. Since the judgment secured by the plaintiff did not exceed the tender, the court refused recovery of those attorney's fees incurred prior to the time of the tender.[55]

INDEMNITY BONDS

The case of *Foxley Cattle Co. v. Bank of Mead*[56] provided the Nebraska Supreme Court with the opportunity to rule for the first time upon the extent of coverage offered by an indemnity bond. The president of the defendant bank made certain false representations to the plaintiff which induced him to purchase several thousand head of cattle. These were never delivered.[57] The plaintiff obtained a judgment and then sought to collect under the terms of an indemnity bond issued to the bank covering the president.[58] The terms of the bond stipulated that the insured would be held harmless for any losses incurred during its term even though the insured may have committed dishonest, fraudulent, or criminal acts.[59]

The court held the insurance company not liable to the plaintiff.[60] In general, a fidelity bond is a contract whereby the insurer agrees to pay the obligee in the event the insured sustains a loss.[61] If the obligee never sustains a loss, he is entitled to no recovery. By the terms of this bond, the insurance company agreed to pay the bank for any loss incurred on its behalf by the president.[62] The court held these terms to restrict payment to the bank.[63] Going one step further, the court maintained that the company at issuance intended that no construction other than this one be given the contract.[64] Since it sustained no loss at all, the insurance company owed no obligation to the plaintiff.

In *State Surety Co. v. Peters*,[65] the plaintiff refused to pay a claim made by the state tax commissioner for taxes owed by a taxpayer. Nebraska law stipulates that an individual may not secure a special fuel dealer's license without first posting an indemnity bond.[66] The taxpayer began selling the fuels covered

55. *Id.* at 624-25, 250 N.W.2d at 245.
56. 196 Neb. 587, 244 N.W.2d 205 (1976).
57. *Id.* at 588, 244 N.W.2d at 206.
58. *Id.*
59. *Id.* at 589, 244 N.W.2d at 207.
60. *Id.* at 591, 244 N.W.2d at 207.
61. 13 COUCH ON INSURANCE § 46:219 (2d ed. 1965).
62. 196 Neb. at 589, 244 N.W.2d at 207.
63. *Id.* at 594, 244 N.W.2d at 209.
64. *Id.* at 594-95, 244 N.W.2d at 209.
65. 197 Neb. 472, 249 N.W.2d 740 (1977).
66. NEB. REV. STAT. § 66-609 (Reissue 1976).

by this provision some thirteen months before securing the necessary license and requisite bond.[67] The taxes the commissioner attempted to collect were for that period of time. The plaintiff refused to pay claiming that it was not liable for tax debts incurred prior to the purchase of the bond.[68]

The bond itself was silent on the question of liability for past debts.[69] However, since this was a bond required by statute, the court held the language of the bond not to be necessarily controlling. Instead, any interpretation must be made in light of the statute.[70] The statute provided that the bond was to cover "any and all taxes . . . due and to become due."[71] The court proceeded to incorporate the words "due and to become due" into the contract's terms and held that such language revealed a legislative intent imposing liability for past debts.[72] Thus the court found the statute to provide for retroactive effect and accordingly ordered payment by the plaintiff.[73]

LIENEMANN V. STATE FARM

In *Lienemann v. State Farm Mutual Auto Fire & Casualty Co.*,[74] the United State Court of Appeals for the Eighth Circuit decided a case dispositive on Nebraska insurance law. Factually, the estate of the insured sued State Farm for excess claims it paid following a jury's finding that the insured had been negligent in a fatal automobile accident.[75] The plaintiff contended that State Farm, acting in bad faith, refused to settle the claim before trial and accordingly should have accepted responsibility for the cost of a judgment rendered in excess of the policy limits.[76]

It is clear under Nebraska case law that the insurer is liable for amounts in excess of the policy where in bad faith it refuses to compromise a claim within the policy limit.[77] The difficulty with this area of the law lies in determining what constitutes bad faith. Originally, State Farm refused to discuss settlement basing its position on a favorable opinion given in expert medic-

67. 197 Neb. at 473, 249 N.W.2d at 741.
68. *Id.* at 474, 249 N.W.2d at 741-42.
69. *Id.*
70. *Id.* at 475, 249 N.W.2d at 742.
71. NEB. REV. STAT. § 66-609 (Reissue 1976).
72. 197 Neb. at 476, 249 N.W.2d at 742.
73. *Id.* at 477, 249 N.W.2d at 743.
74. 540 F.2d 333 (8th Cir. 1976).
75. *Id.* at 335.
76. *Id.*
77. Olson v. Union Fire Ins. Co., 174 Neb. 375, 118 N.W.2d 318 (1962).

al depositions.[78] Later, but still well before the trial, the company became aware of medical testimony directly to the contrary.[79] Ignoring this, the company ramained steadfast in its resolve not to negotiate. In addition, evidence surfaced of an interoffice memorandum in which the company decided to "stonewall" and resist any payment.[80] The court held such evidence to reveal "other than mere conflicting evidence on which the insurer mistakenly but in good faith, believed it would win at trial."[81]

While the standard may be bad faith, the difference between bad faith and negligence under Nebraska law has not always been clear.[82] Last term the high court held bad faith and not negligence to be the standard applied. However, it qualified this position by stating further that "an insurer is obligated to use due care and reasonable diligence to ascertain the facts surrounding a claim and obtain competent legal advice concerning the claim."[83] Apparently the court was saying that bad faith was the basis of liability, but that the exercise of due care was a material consideration in determining bad faith. Relying on this interpretation, the court found State Farm's refusal to consider the evidence at hand negligent behavior and thus contributed to a general overall attitude of bad faith.[84]

LEGISLATION

During the survey period, the Nebraska Legislature concerned itself mainly with consumer protection. It passed into law two major bills which will have a direct effect on insurance agents and sales personnel immediately.

The first of these provides that all agents selling sickness, accident, or life insurance must meet minimum educational standards.[1] The new law specifically requires that within five

78. 540 F.2d at 338.
79. *Id.*
80. *Id.* at 339.
81. *Id.*
82. In Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 195 Neb. 578, 239 N.W.2d 499 (1976), the Nebraska Supreme Court held bad faith and not negligence to be the standard.
83. *Id.* at 585, 239 N.W.2d at 504.
84. 540 F.2d at 340.

1. L.B. 209, 85th Legis., 1st Sess. (1977).

years of first receiving his license, the new agent must show he has successfully completed any one of a number of insurance courses or exams.[2] The agent must comply within five years of the passage of the bill,[3] and, if he fails to do so, the state will refuse to renew his license.[4] Several groups are specifically excluded from compliance.[5] Perhaps the most important of these is the group of agents having current valid resident's licenses since January 1, 1972.[6] In effect the new provision applies only to new agents and those who have entered the field within the past few years.

The other major insurance provision passed into law mandates the licensing of nonresident insurance brokers.[7] State law always has required resident insurance brokers to be licensed.[8] Now any broker licensed in any other state or province where he resides must also secure a Nebraska license if he sells within the state.[9] Upon the broker's showing a valid license from another state or province, the state of Nebraska will issue the nonresident license.[10] The law further requires the nonresident agent to agree to make the Department of Insurance his agent for service of process.[11]

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2. *Id.* § 3. Specifically the agent must have successfully completed:
Two parts of the Life Underwriter Training Council Curriculum or,
Either part of the Life Underwriter Training Council Life Course and two parts of the American College of Life Underwriters, Certified Life Underwriter diploma curriculum or,
Any four parts of the American College of Life Underwriters, Certified Life Underwriter Certified Life Underwriter diploma curriculum or,
Six credit hours of insurance courses from an accredited college or university or,
Any other courses so approved by the Director of Insurance.
Id. § 3(1)-(5).
3. *Id.* § 4.
4. *Id* § 7.
5. *Id.* § 5.
6. *Id.* § 5(1).
7. L.B. 336, 85th Legis., 1st Sess. (1977).
8. NEB. REV. STAT § 44-332 (Reissue 1974).
9. L.B. 336, 85th Legis., 1st Sess. §1 (1977).
10. *Id.* § 1.
11. *Id.* § 3.