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Insurance

by *Robert A. Seligson**

Insurance Defense Counsel—His Obligations and Rights

Possibly the most important decision in the insurance field in 1968 involved not the rights and obligations of an insurance carrier per se but rather those of an attorney selected by the carrier to protect and defend its insured. In *Lysick v. Walcom*,¹ the appellate court held that an attorney who is employed by an insurance company to defend an action arising out of an accident involving an insured represents both the insured and the insurer and owes to both a high duty of care imposed both by statute and the rules governing professional conduct.

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Golden Gate College, School of Law, for assistance in preparation of this article.

1. 258 Cal. App.2d 136, 65 Cal. Rptr. 406 (1968). For a further discussion of this case, see Moreau, TORTS, in this volume.

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Where a conflict of interest arises between the insured and the insurer the attorney is not necessarily required to withdraw from the case, or terminate his relationship with one client or the other, although he may choose to do so. He may represent dual interests as long as there is full consent and full disclosure. Where counsel represents two clients of conflicting or divergent interests, he must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his clients to make free and intelligent decisions regarding the subject matter of the representation. The attorney is liable to the client who suffers loss caused by the failure of the attorney to make full disclosure. An insurer is required to exercise good faith in settling a claim where there is great risk of recovery beyond the policy limits and where settlement is the most reasonable manner of disposing of the claim. This rule however applies to the insurance *company* and not to the attorney, who is not a party to the insurance contract. His obligations are governed by the established standards of professional ethics, which have as their guideposts the elements of good faith and fidelity to his client. The attorney may be employed with respect to all matters associated with the claim, or he may be employed solely for the defense in court. Where the attorney properly represents only the insurance company in the matter of settlement, it is his duty to make that clear to the insured. If he does so, he has no obligation to give proper consideration to the interests of the insured in his recommendations with respect to the settlement of the case. However, where counsel does not advise the insured that he is acting solely for the insurer in the matter of settlement, his duty includes the representation of the insured in that respect, including the obligation to attempt to effectuate a reasonable settlement as the most reasonable manner of disposing of the action.

In *Lysick* the court held that counsel, who had not limited his obligation to the insured in the manner set forth above, was negligent as a matter of law: (1) in failing to notify the insured of settlement offers and demands; (2) in failing to take positive and timely steps to urge and advise the insurer to make settlement to the full amount of the policy; and (3) in

failing to advise the insured of action which the insured might take. The court reversed judgment for defendant with directions to re-try the single issue of proximate cause. The court noted that there was sufficient evidence from which the jury could determine that the conduct of the attorney was not a proximate cause of the damage caused to the insured by reason of the failure of the insurer to settle the claim within policy limits. It was further stated that the sole proximate cause of the insured's loss could have been the breach of duty of good faith on the part of the insurer, where the insurer withheld the authority to settle the claim for policy limits until it was too late for the insured to pay any settlement proposal offered some months before trial and gave equivocal instructions regarding settlement to the attorney at various times prior to trial.

The writer believes that this case is important for the courses which the court indicated that defense counsel may now follow. (*Caveat*, however: following the court of appeal's decision, the case was settled; and the supreme court may not agree with either the *Lysick* decision or this writer's interpretation of that decision.) Where there is a coverage problem, and the company has hired two counsel—one for the coverage problem and one to defend the injury action—counsel defending the injury action may limit his obligation by advising both the insurer and the insured that he will not take part in settlement negotiations. Counsel representing the insurer in the coverage dispute may and should handle the settlement negotiations, so as to remove counsel defending the injury case from what at best is an embarrassing, although permissible situation.

Where there is no coverage problem and only one defense attorney is involved, then counsel may limit his authority and obligation by advising the insured that he represents only the insurer with respect to settlement negotiations. The insured should certainly be told that he may and probably should, at his own expense, retain counsel to advise him with respect to the question of settlement. Of course, counsel must keep the insured fully informed concerning negotiations, so that

the insured may take whatever action he deems proper to protect his own interests.

Automobile Insurance

Exclusions of Specifically Named Individuals

For a number of years the California courts and legislature have engaged in a continuing battle over the right of automobile liability insurance carriers to limit their coverage with respect to persons using the vehicle with the owner's permission. This struggle was initiated by the supreme court's decision in *Wildman v. Government Employees' Ins. Co.*,² where the court held that public policy required that coverage be afforded to permissive users. Following this landmark decision, which among other results invalidated class exclusions such as those purporting to exclude drivers under and over certain ages³ and use exclusions,⁴ the legislature made several attempts to alter, modify and repeal the rule of the *Wildman* case.⁵ However, the court so construed the legislative amendments as to render them ineffective.⁶ This was accomplished through the technique of statutory construction; and certainly the language chosen by the legislature could have been more precise and to the point.

In 1963, however, practitioners in the field honestly felt that the legislature had explicitly set forth the policy of the state in terms which even the courts could not deny. In that year the requirements for a non-certified motor vehicle liability policy, that is the normal automobile policy issued to the great preponderance of the public,⁷ were removed from the

2. 48 Cal.2d 31, 307 P.2d 359 (1957).

3. See *American Automobile Ins. Co. v. Republic Indemnity Co.*, 52 Cal.2d 507, 341 P.2d 675 (1959); *Cassin v. Financial Indemnity Co.*, 160 Cal. App. 2d 631, 325 P.2d 228 (1958).

4. See *Exchange Casualty & Surety Co. v. Scott*, 56 Cal.2d 613, 15 Cal. Rptr. 897, 364 P.2d 833 (1961).

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5. See, e.g., 1957 amendment of former Vehicle Code § 415(a); 1959 enactment of Vehicle Code §§ 16450 and 16451.

6. See e.g., *Interinsurance Exchange etc. Southern Cal v. Ohio Cas. Ins. Co.*, 58 Cal.2d 142, 23 Cal. Rptr. 592, 373 P.2d 640 (1962).

7. A certified policy is one that is issued following an accident to satisfy

Vehicle Code and placed in the Insurance Code; and Insurance Code section 11580.1 was adopted which specifically provided in subsection (e):

Notwithstanding the foregoing subdivisions, the insurer and any named insured may, by the terms of such policy or by a separate writing, agree that coverage under the policy shall not apply while said motor vehicles are being used by a natural person or persons designated by name. Such agreement by any named insured shall be binding upon every insured to whom such policy applies.

Thus, it was thought that while, generally speaking, a motor vehicle liability policy had to provide coverage for permissive users, the insurer and the named insured could agree that coverage would not be afforded under the policy for “a natural person or persons designated by name.” This was designed to cover the situation where the carrier might be perfectly willing to cover the parents but was unwilling to voluntarily grant coverage to the wild teenage son who was known to be a bad risk. If the son wanted coverage, he would presumably have to obtain coverage through the Assigned Risk Plan.

The case of *Abbott v. Interinsurance Exchange*⁸ demonstrated once again the refusal of the courts to allow any watering down of the *Wildman* principle. Mr. and Mrs. Abbott had a policy with Interinsurance Exchange which covered the automobile in question. However, their son “had previously had difficulties with his driving and the parents had signed an endorsement added to the policy which stated that the insurance would not be effective while their son was using the car in question.”⁹ As might be expected, they nevertheless permitted their son to use the car; and an accident occurred. The court held that the endorsement was against public policy, notwithstanding Insurance Code section 11580.1 (e); and that the company was required to defend

the requirements of the Financial Responsibility Laws contained in Vehicle Code §§ 16250–16503.

8. 260 Cal. App.2d 528, 67 Cal. Rptr. 220 (1968).

9. 260 Cal. App.2d at 530, 67 Cal. Rptr. at 221.

the Abbots and pay the possible judgment in favor of the injured third party. Then, in an amazing piece of legal reasoning, the court held that if the company had to pay the injured person, it was entitled to be indemnified by Mr. and Mrs. Abbott.

The supreme court denied a hearing in the *Abbott* case; and, accordingly, the decision became final. The decision could make it more difficult for parents with teenage children to obtain automobile insurance in this State; and individuals who are good risks themselves and were formerly able to obtain coverage at regular rates might have to resort to the Assigned Risk Plan because of the risk presented by their children. Companies which were still willing to issue coverage might have second thoughts about extending more than the minimum required coverage. Finally, parents who had limited statutory liability under Vehicle Code sections 17151 and 17709 could conceivably find their life savings wiped out because of their obligation to indemnify the insurer for the full amount paid out to the injured party.

In this last connection, it should be noted that parents would have to face the following dilemma: If they wanted and were able to obtain large limits to cover the risk of their driving, they would have to indemnify the carrier for the entire loss if their child had an accident. On the other hand, if they wished to restrict the amount of their indemnity liability to their statutory obligations, they might be compelled to accept minimum limits which would not adequately cover them for their own accidents. Perhaps, however, this difficult decision will not be imposed on people confronted with the problem of a bad risk in the family. Following *Abbott*, the legislature was swift to react; and it amended Insurance Code section 11580.1 (e) to provide:

Notwithstanding the foregoing subdivisions *or the provisions of Article 2 (commencing with Section 16450), Chapter 3, Division 7 of the Vehicle Code*, the insurer and any named insured may, by the terms of such policy or by a separate writing, agree that coverage under the policy shall not apply, *nor accrue to the benefit of the in-*

sured or any third party claimant, while said motor vehicles are being used by a natural person or persons designated by name. Such agreement by any named insured shall be binding upon every insured to whom such policy applies *and upon every third party claimant*.

The object of this amendment is quite clear—namely; to nullify the result of the *Abbott* case and restore to insurers what the legislature felt that it had provided in 1963, the right to exclude a person or persons designated by name. However, in view of the long history of action and counteraction by our courts and legislature, it remains to be seen whether the 1968 amendment will be honored and applied in the courts of this State.

Cancellation of Policy

The public's complaints about unwarranted and unreasonable cancellation of automobile liability insurance policies have resulted in considerable legislation restricting the right of carriers to cancel such policies. In 1968 the legislature repealed the former law on this subject and adopted new sections 660–667 of the Insurance Code. Among other things, this legislation provides that any policy which has been in effect for more than 60 days, may be cancelled only for nonpayment of premium or the suspension or revocation of the driver's license or motor vehicle registration of the named insured or any other operator who either resides in the same household or customarily operates an automobile insured under the policy. Section 663 contains restrictions and requirements upon the insurer which does not desire to renew the policy. Section 665 requires that the company notify the named insured of his possible eligibility for insurance through the Assigned Risk Plan.

Hopefully, these restrictions will curb abuses which may have existed in the past. The writer wonders when the Legislature will enact similar legislation with respect to fire insurance policies. The public cannot condone the wholesale or even widespread cancellation of fire policies in ghetto areas. Reasonable regulations should be adopted to insure that the

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owner of property has the coverage which he needs and which he thought he had obtained. If the carrier has agreed to furnish a three or five year policy, it should not be permitted *carte blanche* to cancel the policy without sufficient and socially acceptable reasons. In the absence of such justification, such as non-payment of premium or increase in risk through change in conditions over which the owner has control, the insurer should be bound to honor the commitment it made when it accepted the risk and issued the policy.

Uninsured Motorist Coverage

Uninsured motorist cases accounted, as usual, for a great number of decisions. Several of these cases involved the question of whether or not the court or the arbitrator should determine if the insured automobile had any *physical contact* with the alleged phantom vehicle, which is a prerequisite for coverage under Insurance Code section 11580.2 (b). The decisions appear to be hopelessly in conflict.

In *Page v. Insurance Company of North America*,¹⁰ plaintiff sued his own uninsured motorist carrier, alleging that in a three-car collision, a car driven by a Doe caused Pickell to collide with plaintiff's vehicle. Judgment of dismissal following the sustaining of a demurrer was affirmed. The court rejected plaintiff's argument that the Doe car was an "uninsured motor vehicle", since Insurance Code section 11580.2 (b) requires physical contact with the automobile whose owner or operator is unknown. In the absence of such contact, mere proximate causation is insufficient. Yet, in *Esparza v. State Farm Mutual Automobile Insurance Company*,¹¹ the court reversed an order denying arbitration of an uninsured motorist claim notwithstanding that both the policy and Insurance Code section 11580.2(b) required "physical contact" with respect to a "hit and run automobile" and there was no physical contact between the two cars. The court held that the arbitration provision of the policy was "a broad agreement to arbitrate the liability of the insurance company to its

10. 256 Cal. App.2d 374, 64 Cal. Rptr. 89 (1967).

11. 257 Cal. App.2d 496, 65 Cal. Rptr. 245 (1967).

insured and that the question whether the insured could recover in the absence of contact with the hit and run vehicle was itself an issue subject to arbitration. This case appears to be in conflict with *Farmers v. Ruiz*,¹² *Key Insurance Exchange v. Biagini*,¹³ and *Commercial Insurance Company v. Copeland*,¹⁴ which held that the only issues to be determined by arbitration are (1) the liability of the uninsured motorist to the insured and (2) damages. *Esparza* was then followed in *American Insurance Company v. Gernand*,¹⁵ where it was held that the trial court had erred in granting a preliminary injunction restraining arbitration where it found no physical contact between the unidentified vehicle and either the insured vehicle or a third vehicle. Once again, this was held to be an issue for the arbitrator. But in *Pacific Automobile Insurance Company v. Lang*,¹⁶ the court held in line with the *Copeland* and *Ruiz* cases that the trial court had erred in accepting the arbitrator's determination as to physical contact. It was a question for the court to determine whether the arbitrator had jurisdiction to proceed; and the court should have made its own factual determination of this matter.

Under these decisions, there appears to be ample authority for whatever position one wants to take. Hopefully, the supreme court will resolve this conflict in the near future.

The legislature also addressed itself to the subject of uninsured motorist coverage. As reported in last year's volume, in *Lopez v. State Farm Fire & Casualty Company*,¹⁷ the court struck down a provision excluding from uninsured motorist coverage a relative who owned an automobile. The court held this provision to be void as conflicting with the applicable statute, stating that the argument that it was reasonable to exclude one who did not insure his own car "would better be addressed to the Legislature." This suggestion was accepted; and, accordingly, Insurance Code section 11580.2 was

12. 250 Cal. App.2d 741, 59 Cal. Rptr. 13 (1967).

13. 250 Cal. App.2d 143, 58 Cal. Rptr. 408 (1967).

14. 248 Cal. App.2d 561, 56 Cal. Rptr. 794 (1967).

15. 262 Cal. App.2d —, 68 Cal. Rptr. 810 (1968).

16. 265 Cal. App.2d —, 71 Cal Rptr. 637 (1968).

17. 250 Cal. App.2d 210, 58 Cal. Rptr. 243 (1967).

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amended to provide that uninsured motorist coverage does not apply "to bodily injury of an insured while occupying a motor vehicle owned by an insured, unless the occupied vehicle is an insured motor vehicle."

No longer may one obtain uninsured motorist coverage for all his cars by paying the premium for only one automobile.

Homeowner's Insurance

Pacific Employers Revisited

In *Cal Law Trends and Developments—1967*, this writer discussed at some length the supreme court's decision in *Pacific Employers Insurance Company v. Maryland Casualty Company*,¹⁸ and pointed out that following that decision, numerous claims had been made that homeowner's policies, which offered what was thought to be limited automobile coverage for the "premises and the ways immediately adjoining" were, by virtue of the legal legerdemain utilized in the opinion, converted into automobile policies furnishing coverage for accidents occurring miles away from the insured's premises. In the past year, superior courts throughout the state refused to accept these claims and held instead that homeowner's policies, intended primarily as protection for household risks, do not afford coverage for automobile accidents away from the home.

At the present time, the writer knows of eleven superior court decisions in favor of the homeowner's carrier. Most of these decisions have gone to the nitty-gritty of contract law, the intention of the parties; and they have refused to impose coverage that was not bargained for and for which no premium was paid. In so doing, the writer believes that the courts have followed the supreme court's admonition in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage*,¹⁹ in which Chief Justice Traynor declared:

In this state, however, the intention of the parties as ex-

18. 65 Cal.2d 318, 54 Cal. Rptr. 385, 419 P.2d 641 (1966).

19. 69 Cal.2d —, 69 Cal. Rptr. 561,

442 P.2d 641 (1968). For further discussion of this case, see Harvey, EVIDENCE, in this volume.

pressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used.²⁰

At this writing, there is no California appellate court decision on the subject; but if the intention of the parties is to be determined, honored and applied, the writer feels that the superior court rulings will be affirmed and coverage will not be imposed upon the homeowner's carrier which neither underwrote the risk of automobiles away from the premises nor collected a premium for such risk.

Finally, it should be noted that here too the legislature has taken action. In 1968 subsection (g) was added to Insurance Code section 11580.1 to provide:

Nothing in this section nor in Section 16057 or 16450 of the Vehicle Code shall be construed to constitute a homeowner's policy as an 'automobile liability policy' within the meaning of Section 16057 of said code nor as a 'motor vehicle liability policy' within the meaning of Section 16450 of said code, notwithstanding that such homeowner's policy may provide automobile or motor vehicle liability coverage on insured premises or the ways immediately adjoining. For the purposes of this section, 'homeowner's policy' means an insurance policy providing fire and other insurances covering either residence properties occupied by not more than four families and appurtenances, or the contents thereof other than merchandise, or both,

Certainly, for cases arising after the effective date of the statute, this should solve the problem. As to cases arising prior to the statute, it should be noted that while the statute does not provide that it is retroactive, it does purport to be a statute of construction and also appears to announce that public policy does not require holding a homeowner's policy to be an automobile policy for accidents away from the home.

²⁰. 69 Cal.2d at —, 69 Cal. Rptr. at 564, 442 P.2d at 644.

Fire Insurance

After what appears to have been considerable debate, the supreme court handed down its long-awaited decision on re-hearing in *Reichert v. General Insurance Company of America*.¹ The assured claimed that because of the refusal of his fire insurance carriers to promptly adjust and settle his loss due to a fire, he lost possession of his property and was subsequently adjudicated a bankrupt. He sued not just for the fire damage to his motel but also for all consequential damage flowing from the breach as well as punitive damages. In its initial opinion, the court held that the complaint stated a cause of action and that demurrers had been wrongfully sustained without leave to amend. However, the court then granted a re-hearing; and by a 4-3 decision reversed itself and held that plaintiff's causes of action constituted "rights of action arising under contract" which passed to plaintiff's trustee in bankruptcy, so plaintiff had no right to assert such claims himself.

In a strong dissent, Justice Peters takes issue with the technical basis of the majority's decision and also discusses the substantive question with which the majority did not deal, namely, whether an insured may recover damages caused by bankruptcy which result from the wrongful conduct of an insurer in failing to pay a fire loss. Justices Peters, Tobriner, and Mosk give an emphatic "yes" to that question in language reminiscent of Justice Peters' opinion in *Crisci v. Security Insurance Company*.² In compelling language, which the writer feels will be accepted as the law of this state in time to come, the dissenting justices state:

Where the owner of a heavily mortgaged motel or other business property suffers a substantial fire loss, the owner may be placed in financial distress, may be unable to meet his mortgage payments, and may be in jeopardy of losing his property and becoming a bankrupt. A

1. 68 Cal.2d 822, 69 Cal. Rptr. 321, 442 P.2d 377 (1968). For a further discussion of this case, see York, REMEDIES, in this volume.

2. 66 Cal.2d 425, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

major, if not the main, reason why a businessman purchases fire insurance is to guard against such eventualities if his property is damaged by a fire. Certainly, the property owner who purchases fire insurance may reasonably expect that if a fire occurs, the insurance proceeds will be promptly available to protect him from those eventualities. The business of the fire insurer is to provide such protection. Insurers are, of course, chargeable with knowledge of the basic reasons why fire insurance is purchased, and of the likelihood that an improper delay in payment may result in the very injuries for which the insured sought protection by purchasing the policies.³

The dissent also points out that money is not always available in the market and that consequential damages are not always too remote to be proximately caused by a delay in payment. Certainly, tight money conditions existing in recent times demonstrate that that is true; and the writer believes that the fire insurance carrier which wrongfully refuses to promptly pay a legitimate fire claim may find that its exposure is far greater than the amount of the damage to the property.

Comprehensive Liability Policy: Products Hazard Exclusion

The advent and increase in products liability cases have brought with them corresponding problems in insurance law. In the past year, the Supreme Court decided an important case dealing with the "products hazard" exclusion found in most comprehensive general liability policies. In *Insurance Company of North America v. Electronic Purification Company*,⁴ the insured was engaged in the business of selling, leasing and installing water purification machines, called Nion Generators. It leased a Nion Generator to a motel for one year. Prior to the installation by the insured's part-time employee, the

³. 68 Cal.2d at 849, 69 Cal. Rptr. at 337, 442 P.2d at 393.

⁴. 67 Cal.2d 679, 63 Cal. Rptr. 382, 433 P.2d 174 (1967).

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insured suggested that the motel pool be acid-washed to rid it of algae. While so washing the pool, the insured's employee replaced an underwater light. Upon completion, the employee installed the Nion Generator, filled the pool with water and left the job. The next day a small boy was fatally injured from an electric shock. A wrongful death complaint was filed against the insured and the motel owners, alleging that they negligently, carelessly and recklessly installed the electric wiring leading to the submerged light fixture. The insured's comprehensive multiple liability policy contained "products hazard" exclusions for (1) products manufactured, sold, handled or distributed by the insured and (2) completed operations.

The court found the exclusions inapplicable on two grounds. Initially, the "products" exclusion did not apply to property that had been rented, rather than sold, to others. The "operations" exclusion was to be read in conjunction with the "products" exclusion and was, therefore, also inapplicable to products which had been rented. Alternatively, noting that the electrocution may have occurred from negligence in the acid-washing and installation of the flood lights, the court felt that it was not the intent of the insured to exclude coverage for this service found to be independent of the installation of the Nion Generator. In noting that a liberal interpretation of the "completed operations" exclusion would destroy the insured's principal objective in purchasing insurance, the court sounded a clarion call for clarity in insurance policies, stating:

The instant case presents yet another illustration of the dangers of the present complex structuring of insurance policies. Unfortunately the insurance industry has become addicted to the practice of building into policies one condition or exception upon another in the shape of a linguistic Tower of Babel. We join other courts in decrying a trend which both plunges the insured into a state of uncertainty and burdens the judiciary with the task of resolving it. We reiterate our plea for clarity and

simplicity in policies that fulfill so important a public service.⁵

As one who has wrestled with language inserted into policies by people who obviously never try cases dealing with the words they use, the writer joins Justice Tobriner in his plea for clarity and simplicity. On the other hand, the writer decries those decisions where ambiguity is sought and found simply as a vehicle for a desired result. In the words of an ancient Chinese seer, “ambiguity lies in the eyes of the beholder and some people are blind.”

5. 67 Cal.2d at 691, 63 Cal. Rptr.
at 390, 433 P.2d at 182.

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