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Contracts—Contracts of Insurance Colljltued Against the Insurer

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the basis of what the firm earned, not merely on what was collected in any particular year.

The term "net profits" was employed in another context in the agreement. The partnership agreement established what it labelled a "Participation Schedule." Net profits of the firm uncollected during any one year were to be distributed in accordance with this schedule in the year such fees were paid. However the section referring to this "Participation Schedule" expressly applied only to those members remaining with the firm, and excluded withdrawing partners. This would seem to divest plaintiff of his interest in the uncollected fees, except for a savings clause in the case of withdrawing partners contained in Article IV of the agreement. This clause provided that in the case of a withdrawal of a partner, a prompt estimate be made of the "net profits" of the firm on the date of withdrawal. The Court pointed out that if the term "net profits" was meant to include only cash on hand, there would have been no need of an estimate, for an exact computation would have sufficed.

The Court excluded respondent's argument that "net profits" meant only cash net profits on hand as of the date of a withdrawal of a partner. If this argument was sustained, the section containing the Participation Schedule would have been meaningless.

Other partners in the law firm who retired at the same time as plaintiff were not deprived of participating in unbilled or uncollected fees of the law firm. The Court saw no apparent reason to treat plaintiff any differently.

CONTRACTS OF INSURANCE CONSTRUED AGAINST THE INSURER

The problem presented by *Sperling v. Great American Indemnity Company* involves the interpretation of insurance contracts.¹⁵ The insured's 16 year old daughter stole an automobile, with which she negligently injured the decedent. The daughter was covered by a "Family Automobile Policy" in her mother's name, issued by the defendant.

The pertinent parts of the policy in question stated:

- (A) "With respect to the owned automobile . . . provided the actual use thereof is with the permission of the named insured."
- (B) "With respect to a non-owned automobile . . . any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative."^{15a}

Plaintiff sued the insured in a wrongful death action which the defendant refused to defend, or to pay the judgment. Plaintiff then sued the defendant and was awarded a summary judgment,¹⁶ from which this appeal was taken.

The defendant claimed that the policy implies that in order for it to be liable the car must have been "furnished," and that since the accident occurred

15. 7 N.Y.2d 442, 199 N.Y.S.2d 465 (1960).

15a. Id. at 446, 199 N.Y.S.2d 468.

16. 8 A.D.2d 986, 191 N.Y.S.2d 150 (1st Dep't 1959).

during the commission of a crime, public policy will bar a recovery by the plaintiff. In reality the defendant is asking that the court insert or imply an additional condition, that the defendant should not be liable for injuries caused by a stolen car. It is the general rule, however, that if an insurer desires a specific exclusion from liability, he must expressly include it in the policy.¹⁷ The court cannot rewrite the policy to add an exclusion which it feels may be desirable,¹⁸ but it will uphold the exclusion if it is expressly included in the contract.¹⁹ Where the language of the contract is clear, the words used must be given their usual and actual meaning.²⁰ Even if there was an ambiguity, the court would still construe the pertinent clause against the defendant as the author of the contract.²¹

The New York Court of Appeals has held that the commission of a crime while driving, which causes an accident to one not involved in the crime, is not sufficient to relieve liability of the insurer, in a valid insurance contract.²² That holding, however, involved a misdemeanor and not a felony, as is involved in the instant case. In accident and life insurance policies the general rule is that when the insured is killed during the commission of a felony, if the insurer failed to include a specific exclusion from liability he would be held liable.²³ New York, however, has reached an opposite result by holding that the felon assumed the risk of death, and that to allow the beneficiaries to recover on a policy which did not specifically assume the risk of felonies would be contrary to public policy.²⁴ This would seem to lend support to the defendant's argument.

The Court of Appeals in the instant case strictly adhered to the literal meaning of the insurance contract. It refused to consider the factual circumstances involved in the accident when it interpreted the insurance contract. This resulted in the defendant suffering a loss due to the criminal act of the insured, which it probably had not contemplated when it made the contract. Should the court continue to adhere to these strict principles of interpretation, it will be incumbent upon insurance companies to insert specific exclusions from coverage in their policies or else bear the losses which may accrue in similar situations.

In the instant case the defendant insurance company had notice of the strict rules which are used in the interpretation of insurance contracts. While the actual situation was one for which there was no precedent, the defendant knew that it would be held liable for contingencies not expressly excluded by

17. *Morgan v. Greater N. Y. Taxpayers Mutual Ins.*, 305 N.Y. 243, 112 N.E.2d 273 (1953).

18. *Taylor v. United States Casualty Co.*, 269 N.Y. 360, 199 N.E. 620 (1936).

19. *Wagener v. Fidelity and Casualty of N. Y.*, 200 App. Div. 70, 213 N.Y. Supp. 188 (3d Dep't 1926).

20. *Gage v. Conn. General Life Ins. Co.*, — Mo. App. —, 273 S.W.2d 761 (1954).

21. *Smith v. Mutual Ben. Health and Acc. Assoc.*, 175 Kan. 68, 259 P.2d 993 (1953).

22. *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921).

23. *Domico v. Metropolitan Life Ins. Co.*, 199 Minn. 215, 253 N.W. 538 (1934).

24. *Piotrowski v. Prudential Life Ins. Co.*, 141 Misc. 172, 252 N.Y.S. 313 (Sup. Ct. 1921).

the policy, including felonies. It would have been possible for the defendant to have avoided liability, by merely inserting into the policy a clause to the effect that it would not be liable for damages which occur during the commission of a felony. Certainly this would not have been, nor will the instant decision in the future place a heavy burden on insurers, who have almost complete control over the conditions upon which they will issue insurance, and accept liability.

EFFECT OF THIRD PARTY BENEFICIARIES' REFUSAL TO PERMIT PERFORMANCE

In *Yorktown Homes Inc. v. County of Westchester*,²⁵ plaintiff, a builder and seller of homes, brought suit against defendant County Health Department to recover \$10,000 which plaintiff had deposited with the department to guarantee performance of work under a contract with defendant to correct violations of the Westchester Sanitary Code. The violations concerned the drainage of surface water and the operation of 'septic tanks in plaintiff's development. Plaintiff's theory is not that he has fully completed the terms of the agreement but that performance had been made impossible by the refusals of the homeowners, who are third-party beneficiaries of the agreement, to permit him on their lands. The trial court felt that the case presented questions of fact for the jury as to whether plaintiff made reasonable efforts to get the consents of the homeowners, and if so, whether their refusals made performance impossible. The jury answered these questions in the negative, and thereafter, judgment was entered on the verdict for the defendant. The Appellate Division unanimously affirmed the judgment.²⁶ The Court of Appeals affirmed,²⁷ holding that the trial judge correctly presented the case to the jury, and that the verdict was justified by the proof.

There appears to be no dispute on either side as to plaintiff's claim that the homeowners were third-party beneficiaries of his contract with defendant. Nor does there appear to be any dispute as to the rule of law relied on by plaintiff, that when a third-party beneficiary refuses to accept the tendered benefits, the promisor is excused from performances.²⁸

In *Patterson v. Meyerhofer*, it was held that ". . . there is an implied understanding on the part of each party [to a contract] that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part."²⁹ The majority, for purposes of this case, assumed that the rule of *Patterson v. Meyerhofer* applied to hindrance by one who is not a party to the contract but a third-party beneficiary.³⁰ Although there is no mention of a third-party in the *Patterson* case, the Court

25. 7 N.Y.2d 321, 197 N.Y.S.2d 156 (1960).

26. 7 A.D.2d 649, 181 N.Y.S.2d 184 (2d Dep't 1958).

27. Supra note 25.

28. 4 Corbin, Contracts 237 (1951).

29. 204 N.Y. 96, 100, 97 N.E. 472, 473 (1912).

30. Ibid.