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Insurance - Injured Party Held Proper Person to Give Notice "On Behalf Of" Insured

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INSURANCE—INJURED PARTY HELD PROPER PERSON TO GIVE NOTICE "ON BEHALF OF" INSURED

After obtaining judgment against the insured, plaintiff brings action on the judgment against defendant insurer under provisions of Section 388 of the Insurance Code permitting direct action by an injured person against the insurance company.[1] The uncontroverted facts show that on June 30, 1948, the plaintiff suffered personal injuries in an automobile accident with one Burke, who was insured under defendant's automobile liability policy. Defendant's first notice of this accident was 37 days later on August 7, 1948 when its agent received written notice from the plaintiff's attorney. The trial judge found as a fact from the evidence that defendant had been given reasonable notice and entered judgment in favor of the plaintiff. The Appellate Court reversed, holding that the plaintiff's suit was barred by reason of the insured's failure to give reasonable notice to the defendant. The Illinois Supreme Court reversed the judgment of the Appellate Court and held that the injured person was a proper party to give notice "on behalf of" an insured, as required by the policy contract, and that the factual finding that the notice given within 37 days after the accident had been given within a reasonable time was not against the manifest weight of the evidence. *Simmon v. Iowa Mutual Casualty Co.*, 3 Ill. 2d 318, 121 N.E. 2d 509 (1954).

Generally there appears to be little doubt that notice to the insurance company of an accident is a condition precedent when so specified by the policy, recovery being barred if there is no compliance.[2] There is further a well settled rule of law in disputes between an injured third person and an insurer that the injured person's rights are no better than those of the insured, and that the insurer may assert any defense against the injured party which it could assert against the insured.[3] The rule is also stated that the plaintiff, the judgment creditor, has only the rights of the insured and must abide by his case when suing on the policy.[4] It follows, then, that should the insured breach a material term of the policy or fail to comply with a condition precedent to recovery, by means of which the insurer would be released from liability to the insured, the injured third party would be unable to recover from the insurer.[5] This principle

[1] Ill. Rev. Stat. (1953) c. 73, § 466(a).

[2] Zauder v. Continental Casualty Co., 140 F. 2d 211 (C.A. 2d, 1944); Fireman's Fund Indemnity Co. v. Kennedy, 97 F. 2d 882 (C.A. 9th, 1938); Malloy v. Head, 90 N.H. 58, 4 A. 2d 875 (1939); Whittle v. Associated Indemnity Corp., 130 N.J.L. 576, 33 A. 2d 866 (Ct. Er. & App., 1943).

[3] Sun Indemnity Co. v. Dulaney, 264 Ky. 112, 89 S.W. 2d 307 (1936); Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367 (1928); Peeler v. United States Casualty Co., 197 N.C. 286, 148 S.E. 261 (1929).

[4] Rushing v. Commercial Casualty Insurance Co., 251 N.Y. 302, 167 N.E. 450 (1929).

[5] Firebaugh v. Jumes, 341 Ill. App. 1, 92 N.E. 2d 790 (1950).

is vividly demonstrated in *Rushing v. Commercial Casualty Insurance Co.*,[6] where the defendant issued to a householder its policy indemnifying against claims for damages, containing the usual "immediate notice" clause. The named insured failed to give notice as required, and the court, speaking through Judge Cardozo, denied the injured party recovery because of this failure by the named insured to give notice.

There is, thus, quite an array of decisions holding that failure by the insured to notify the insurance company of an accident will serve as a bar to recovery by an injured third party. At first blush it may then appear that a similar result should obtain in the instant case. However, this case is distinguishable on a factual basis from the cases setting forth that rule. In those cases, while it is true that reasonable notice was not given by the insured, neither was there any reasonable notice tendered by the injured third party. In the instant case the injured third party did serve notice on the defendant, although reasonable notice was not given by the named insured.

Numerous courts have apparently recognized this distinguishing feature. In the 1937 case of *Butler v. Eureka Security Fire and Marine Insurance Co.*[7] a school bus, which was insured by the defendant insurer, caused injury to the plaintiff, a third party beneficiary under the policy, occupying the same legal position as the plaintiff in the instant case. The court stated, in dicta, that a compliance by a beneficiary of the policy covering liability for automobile accidents, with the condition of the policy as to prompt notice and information, will enable him to maintain an action on the policy, notwithstanding the failure of the insured to act. The Ohio Supreme Court held in *Hartford Accident and Indemnity Co. v. Randall*[8] that an injured person has a substantial right in the policy from the very moment of his injury, and although it does not develop into a vested right until a judgment is secured, his rights are such as to entitle him to comply with the terms and conditions of the policy, and thus make them effective in his behalf, if the insured fails to discharge his duty under the policy.[9]

It seems that the holding in the instant case was determined as a case of first impression in Illinois, rather than as an abrogation of the rule that the rights of the injured party can rise no higher than those of the insured. Justice Hershey dissented from the majority opinion with the statement that the decision is contrary to established principles of law, and that the opinion of the Illinois Appellate Court had correctly applied the law.

This dissent was directed in part to the holding that the Supreme Court was without power to set aside the factual finding of the trial court as to reasonable

[6] 251 N.Y. 302, 167 N.E. 450 (1929).

[7] 21 Tenn. App. 97, 105 S.W. 2d 523 (1937).

[8] 125 Ohio St. 581, 183 N.E. 433 (1932).

[9] For other cases affirming the principle see: Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270 (1941); Deaven v. Baumgardner, 62 Pa. D. and C. 183 (1947); Superior Lloyds of America v. Boesch Loan Co., 130 S.W. 2d 1036 (Tex. Civ. App., 1939).

notice. The Appellate Court held that where there is no dispute as to the facts of notice, that it is a question of law, not a question of fact for the jury. The court cited *Knickerbacker Insurance Co. v. Gould*[10] and *Gullo v. Commercial Casualty Co.*[11] which clearly state this to be the rule. Although the Supreme Court in the instant case did not follow this rule, there is nothing in the decision which would indicate an intention to abolish it.

Research has disclosed no prior instance in which the Illinois Supreme Court was called upon to decide whether the injured third party could comply with the policy condition regarding prompt notice, the breach of which would prevent his recovery from the insurer. However, in the 1933 case of *Scott v. Inter-Insurance Exchange*,[12] the court departed from the strict rule that no recovery could be had unless the insured notified the insurer. There the insured owner of an automobile was merely a passenger while another person drove. Shortly after an accident occurred, the insured notified the insurer giving the full details plus a statement from the driver. Not knowing that he was also covered by the policy, the driver engaged his own counsel for the trial while the insurance exchange furnished counsel for the owner. The injured third party recovered judgment against the driver who then brought action against the defendant for indemnification under the policy. The defendant contended that the driver's action was barred because, as an additional insured, he had not complied with the notice provision of the policy. The court held that it does not matter who gives notice to the insurer as long as notice is actually given and that accordingly the condition was complied with either by the named insured or the driver.

Obviously there was no intention to extend the *Scott* holding beyond an instance where the insurer actually received notice. This was made clear when the 1950 *Firebaugh v. Jumes*[13] case was decided by the Illinois Appellate Court. There a trial court ruling that an injured party acquires a right to recover under the policy irrespective of any violation of a notice provision was reversed. The plaintiff's contention, which was rejected on appeal, was much broader there than the plaintiff's contention in the instant case, for there recovery was asked even if the insurer was found to have had no notice. As a result of the *Firebaugh* case, viewed in the light of the *Scott* decision, we can say that notice from some interested party is still required before the insurer becomes liable.

Although the Appellate Court relied on *Firebaugh* to dispose of the plaintiff's contentions, the Supreme Court of Illinois in reversing has not disturbed the law in that case. Rather, the court has distinguished between those cases wherein no notice is given and those in which the notice is tendered by some interested party other than the insured. In the *Scott* case the notice came from another insured; in the instant case the notice came from the injured third party.

[10] 80 Ill. 388 (1875).

[11] 226 App. Div. 429, 235 N.Y. Supp. 584 (4th Dept., 1929).

[12] 352 Ill. 572, 186 N.E. 176 (1933).

[13] 341 Ill. App. 1, 92 N.E. 2d 790 (1950).