UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 2 Article 10

2-1-1957

Insurance -- Automobile Liability Policies -- Proportionate Distribution for Multiple Claimants

Benjamin S. Marks Jr.

burden of proving his ownership,[170] and the condemnor may show that the title is in some third person.[171]

Statute of limitations:

Property may be acquired by the state or condemnor by user or adverse possession for the requisite period, in addition to grant, dedication, or condemnation.[172] If the charter of the condemnor provides that all claims for compensation must be made within a certain time, this is a positive statute of limitations and bars all claims of parties sui juris not made within that time.[173] But if the statute or charter is silent as to when the claim for compensation must be brought, the owner may sue any time before the period for adverse possession or prescription has expired.[174]

GERALD CORBETT PARKER

Insurance—Automobile Liability Policies—Proportionate Distribution for Multiple Claimants

Multiple claims arising under an automobile liability insurance policy, when the insured motorist is insolvent and the proceeds of the insurance fund are insufficient to cover all claims, have created a situation in which some of the claimants find that instead of receiving compensation for their injuries, they will receive only a valueless judgment against the tortfeasor.

This situation is growing; one has only to look at the records to see that deaths and injuries on our highways are increasing; that judgments are larger, resulting in a corresponding increase in settlements. The coverage of insurance policies is relatively small in comparison to these increases.

To illustrate, suppose that A, the insolvent motorist, negligently col-

[170] Fuller v. Elizabeth City, 118 N. C. 25, 23 S. E. 922 (1896).

[171] Abernathy v. South & W. Ry., 150 N. C. 97, 63 S. E. 180 (1908). A trap was laid for the title searcher in Norman Lumber Co. v. United States, 223 F. 2d 868 (4th Cir. 1955), which held that the North Carolina statutes relating to recording and cross-indexing of judgments have no application to federal judgments of condemnation. This means that the title lawyer must inquire at the office of the Clerk of the United States District Court before his title is cleared. As to parties other than the United States, condemnation judgments must be recorded and cross-indexed in the office of the superior court clerk of the county in which the land is located, but judgments are recorded as special proceedings judgments and are exempt from the requirements as to registration of deeds. Carolina Power & Light co. v. Bowman, 228 N. C. 319, 45 S. E. 2d 531 (1947). Nevertheless, such judgments must include a description of the land and the estate or interest secured by the condemnor. Beal v. Durham & C. R. R., 136 N. C. 298, 48 S. E. 674 (1904).

[172] Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344 (1915).

[173] Carolina Cent. R. R. v. McCaskill, 94 N. C. 746 (1886).

[174] Carolina & N. Ry. v. Piedmont Wagon and Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); Love v. Postal Telegraph-Cable Co., 221 N. C. 469, 20 S. E. 2d 337 (1942).

lides with another automobile driven by B. B was not at fault. Guests X, Y and Z in A's car were seriously injured. Guests M and N in B's car were killed. B was seriously injured. A has a liability policy with a coverage of $5000 for injuries to any one person and $10,000 for any one accident. X settled for $3500. M's estate settled for $6000. N's estate secured a judgment for $10,000, receiving $500 from the insurer, as the balance due on its liability under the policy. B and Z have already started their respective suits but have not received a judgment. Y, who suffered a back injury, has not commenced his suit because he is partially paralyzed and the full extent of this paralysis cannot be determined until sometime in the future. Therefore, under the principle, "first come, first served" which apparently prevails in this State,[1] X and M's estate are paid in full, and N's estate got only $500 of the $10,000 judgment. B, Z and Y will receive nothing of the proceeds of the insurance fund.[2]

An unfortunate, collateral aspect of the situation of multiple claims, arising out of an accident when the insurance is insufficient and there is an insolvent motorist, is that the insurer possesses the power to force inequitable settlements upon claimants with a threat of preference to the others if anyone of them does not submit. For example, suppose that X, Y and Z are injured by the negligence of A, the insolvent, insured motorist. A's policy covers up to $10,000 for any one accident. X, Y and Z are willing to settle for $6000 each, even though they stand a good chance of getting more in a court action. The insurer approaches each claimant in turn and threatens to pay the insurance proceeds to the other claimants, if he does not settle for $3000. X, Y and Z submit to this pressure. Therefore, the insurer has saved itself $1000 plus the cost of defending an action brought by any of the claimants.

North Carolina has realized the need to protect innocent, injured parties from the financially irresponsible motorist.[3] It is not the purpose

[1] While no case has arisen in this State involving a liability insurance policy, priority in judgments is recognized in N. C. GEN. STAT. §§ 1-215, 1-233 (1953) and 44-40 (1950). Since settlements are allowed by statute, N. C. GEN. STAT. § 1-540 (1953), a reasonable deduction would be that payment of settlements could be made in preference to subsequent judgments.

[2] This is only one of many possible combinations of claims involving serious injuries and death. This illustration is indicative of such combinations.

A similar situation is possible in a separate and distinct suit by a parent for the loss of services of a child. Automobile Underwriters v. Camp, 109 Ind. App. 389, 32 N. E. 2d 112 (1941). North Carolina allows such a suit. Ellington v. Bradford, 242 N. C. 159, 86 S. E. 2d 925 (1955).

That a husband or wife may not maintain a separate suit for loss of consortium, mental anguish, nursing and care, or any other damage that the injured spouse might recover in an action against the tort-feasor. Helmsteller v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1945) (suit by husband); McDaniel v. Trent Mills, 197 N. C. 342, 148 S. E. 440 (1929) (suit by wife). See Note, 29 N. C. L. REV. 178 (1950) (loss of consortium).

[3] N. C. GEN. STAT. §§ 20-279.1-.39 (1955), known as the Motor Vehicle Safety-Responsibility Act of 1953 (hereinafter referred to as the Responsibility Law). See Survey of Statutory Changes, 31 N. C. L. REV. 420 (1953).

A survey of other plans now in effect throughout the United States and Canada

of this note to discuss the sufficiency of the coverage required under the Responsibility Law, but rather to suggest a solution to the situations under the existing forms of liability policies. The solution, the writer feels, must provide for some method of proportionate distribution of the insurance fund among the various claimants.

Pro Rata Distribution—Argument Against:

The courts' argument against ratable distribution is that such a procedure would eliminate settlements and require the reduction of all claims to judgments, in order to determine judicially what the pro rata share shall be, thereby increasing litigation; that such a change would make it necessary for the insurance company to ascertain, before it could safely pay anyone, how many persons might have claims on the policy and what the total amount of judgments which might be presented would be.[4]

In answer to contentions that failure to allow ratable distribution results in inequitable preferences and is contrary to public policy, the courts have said that since the insurance policy does not disallow settlements, equitable results may be reached in this manner.[5]

Statutes are in force in these jurisdictions which have refused pro rata distribution, requiring that the form of automobile insurance policy must be one of a *liability* form, instead of the *indemnity* form. Under the liability form, the insurer is liable regardless of the solvency or insolvency of the insured, and it is not a condition precedent to the insurer's liability that the insured make satisfaction of a judgment obtained against the insured. In other words, the injured person may maintain an action on the policy of insurance against the insurer upon its failure to pay a judgment received against the insured; that is, coverage attaches when liability attaches, regardless of actual loss by the insured at the time, and the coverage inures to the benefit of the party injured.[6]

The courts have answered the contention that these statutes require, by their nature, pro rata distribution, by saying that the absence of a provision in these statutes for proportionate distribution does not lend itself to a construction that these statutes include the same and that it is

may be found in Plummer, *Uncompensated Automobile Accident Victim*, 1956 INS. L. J. 459; Note, 66 HARV. L. REV. 1300 (1953).

[4] Pisciotta v. Preston, 170 Misc. 376, 10 N. Y. S. 2d 44 (1938); Stolove v. Fidelity & Casualty Co., 157 Misc. 106, 282 N. Y. S. 263 (1935); Bruyette v. Sandini, 291 Mass. 373, 197 N. E. 29 (1935); Bartlett v. Travelers' Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933).

[5] Bruyette v. Sandini *supra* note 4; Bartlett v. Travelers' Ins. Co. *supra* note 4.

[6] The liability form is required in North Carolina. See, N. C. GEN. STAT. § 20-279.21 (1955) (Responsibility Law); All other automobile insurance policies which are not held to meet the Responsibility Law are of the liability form through the power of the Insurance Commission to regulate. N. C. GEN. STAT. § 58-9 (1950). See also, Hall v. Harleysville Mutual Casualty Co., 233 N. C. 339, 64 S. E. 2d 160 (1951).

not the power of the courts to legislate.[7] Further, the courts have emphasized that under the terms of the contract, in which the insured is forbidden to settle any claim, except at his own cost, and which accords the insurer the exclusive right to adjust such claims,[8] to disallow settlements would be a breach of the contract and would materially prejudice the insured and leave him at the mercy of the jury. The courts further pointed out the advantages[9] to be gained from settlements by all parties concerned, as outweighing the disadvantages.[10]

It is apparent from the courts' argument that the main objection to proportionate distribution would be the termination of settlements. They feel that reduction in litigation is to be valued above equality.

Pro Rata Distribution—Argument For:

In the case of *Century Indemnity Co. v. Kofsky*,[11] an action in equity, the court allowed the insurer, under a liability policy, to interplead the claims of four judgment creditors arising under the policy, and the court further provided for a proportionate distribution of the proceeds among the judgment creditors, regardless of the time when actions were commenced or judgments rendered. The Chief Justice, who wrote the opinion of the court, in dictum, said, "The exigencies of this case do not require that we deal at large with the various situations which might be presented where several parties suffer injuries by reason of a single accident and the total amount recovered against the insured exceeds the limits of the obligation of the insurer. Such a contingency seems not to have been contemplated when the statute in question was enacted,[12] and it is a matter which might well have the attention of the Legislature, as it has in New York, for instance, in a particular class of cases.[13] We would, in the absence of strong considerations to support such a ruling, be reluctant to apply legal principles which would recognize any priority between the judgment creditors."[14]

[7] It was further stated that to give these statutes the construction sought would also restrain the motorist or the Secretary of State, depending on whether the motorist furnished cash or bond, instead of a liability insurance policy, from utilizing the funds so created as a means of compromising any claim arising out of the negligent operation of a motor vehicle even to the extent of exhausting the entire fund.

[8] This same provision appears in policies issued in this State.

[9] (1) As compensation to the injured party without the delay, expense, inconvenience, anxiety and uncertainty of result attendant upon pursuit of litigation; (2) Relief of the insured from similar annoyances; and (3) The benefit to the insured and the insurer of settlement below maximum coverage.

[10] Bartlett v. Travelers' Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933).

[11] 115 Conn. 193, 161 Atl. 101 (1932); *Accord*: Underwriters for Lloyds of London v. Jones, 261 S. W. 2d 686 (Ct. App. Ky. 1953).

[12] The court is here referring to the statute which makes all automobile insurance policies of the liability form and makes the insurer liable regardless of the solvency or insolvency of the insured.

[13] This particular class of cases is discussed later in this note.

[14] Century Indemnity Co. v. Kofsky, 115 Conn. 193, 197, 161 Atl. 101, 103 (1932).

Pro Rata Distribution—Allowed:

Several states, New York the leader, by statute,[15] have provided for ratable distribution of insurance proceeds in the case of motor vehicles for hire, applicable only in cases where the insured is either bankrupt or insolvent.[16] In the case of *Bleimeyer v. Public Service Mut. Casualty Ins. Corp.*,[17] Cardozo, C. J., set out the appropriate procedure by which ratable distribution is to be made under the statute. It is first required that a claimant secure a judgment in an action at law; then this same claimant is to bring an action in equity, on behalf of himself and all the other claimants, for an interlocutory judgment requiring other judgment creditors to prove their claims within a stated time if they wish to share in the fund. If claims are in litigation, but have not yet been reduced to judgment, there is a reasonable allowance of time, six months, or a year, or whatever other period is fair in the light of all the circumstances, within which claims are to be perfected. When the allotted time elapses, final judgment is rendered for the proportionate distribution of the fund, according to the amount of their respective judgments, among the judgment creditors entitled. It was further set out that the action in equity for the interlocutory judgment does not have to be postponed until the other claimants' rights are barred by the Statute of Limitation.

In a similar case,[18] involving a similar statute, the court held that the policy of insurance is for the benefit of all, but that a claimant has no right to rely upon other claimants or the insurer to protect his interest in seeing that the fund is apportioned, and that under circumstances which to his knowledge show him that they are not acting for him, in the absence of any collusion between the insurer and the other claimants, he has the duty to exercise reasonable diligence to prosecute his own claim, so as not to lead the insurer to believe that he has abandoned his claim. In which case, if he fails to act, he is precluded from recovery by laches.

From Whom the Remedy Must Come:

In those jurisdictions which have refused to pro rate the insurance fund, the courts have uniformly held that, in the absence of an express provision, the policy cannot be construed to include proportionate distribution. This has even been true of jurisdictions which have passed the "motor vehicle for hire" acts when the statute does not provide for ratable distribution.[19] It is interesting to note that in all these cases

[15] N. Y. HIGHWAY LAW § 282-b, *transferred to* VEHICLE AND TRAFFIC LAW § 17.

[16] Frank v. Hartford Acc. & Indemnity Co., 136 Misc. Rep. 186, 239 N. Y. S. 397 (1930).

[17] 221 N. Y. S. 794, 165 N. E. 286 (1929).

[18] Darrah v. Lion Bonding & Surety Co., 200 S. W. 1101 (Tex. Civ. App. 1918).

[19] O'Donnell v. New Amsterdam Casualty Co., 50 R. I. 275, 146 Atl. 770 (1929); Turk v. Goldberg, 91 N. J. Eq. 283, 109 Atl. 732 (1920).

the *Bleimeyer* case was distinguished because of its statutory provision for ratable distribution, but the courts never denounced its equitable advantage.

The Supreme Court of North Carolina has never ruled upon this question of ratable distribution. The views of the courts of other jurisdictions, that they will not rewrite the insurance contract to include pro rata distribution, probably explain counsels' reluctance to seek such relief.[20]

Therefore, the writer feels that if relief is to come, it will have to be by act of the Legislature.[21]

There are, the writer feels, certain justifications in our statutes and the purposes for which they were passed for finding that all injured parties have a beneficial interest in the proceeds of the insurance fund to such an extent that the Legislature would be warranted in requiring all such insurance policies to include a provision for pro rata distribution of the proceeds in the case where multiple claims arise out of a single accident, or the Legislature may say in the statute that all policies carry this implication.

The change over from indemnity to the liability form of policy, under which the latter provides that the insurer is liable upon the adjudication of a claim against the insured and gives the injured party a right of action against the insurer if he does not meet this obligation;[22] the purpose[23] of the Responsibility Law to protect injured parties from financially irresponsible motorist; the provisions under the Responsibility Law prohibiting the insurer from cancelling the policy after the accident has occurred by any agreement with the insured, or from defeating the policy because of a statement made by the insured or on his behalf, or from voiding the policy for a violation by the insured,[24] give support to a construction that *all* injured parties have a beneficial interest in the proceeds of the insurance.

Compromise:

The position of the courts that ratable distribution would disallow settlements is not without merit.[25] But this position is based upon the

[20] No recent cases in other jurisdictions have been found.

[21] Possibly the relief could come through action by the Insurance Commissioner under his statutory power to regulate the form of insurance policy which shall be used in this State. See, N. C. GEN. STAT. § 58-9 (1950).

[22] See note 6 *supra.*

[23] N. C. GEN. STAT. §§ 20-225 (1950) and 20-279.38 (1955).

[24] N. C. GEN. STAT. § 20-279.21 (1955).

[25] N. C. GEN. STAT. § 20-279.21 (1955) specifically provides for settlements. However, the writer feels that equality should not be subordinate to a maxim advocating reduction in litigation, no matter what the cost.

The justice of proportionate distribution of limited funds is well recognized. Terry v. Little, 101 U. S. 216, 25 L. Ed. 864 (1879); Monmouth Lumber Co. v.

assumption, it seems, that proportionate distribution requires that all claims be perfected through an action of law. This is the procedure required under the "motor vehicle for hire" acts.

However, the writer feels that an equitable solution can be reached which provides for ratable distribution and settlement and which maintains a balance between and retains the advantages and equities of both.

Suggested Solution:[26]

A statute could be passed providing that:

1. When the multiple claim, insufficient insurance situation arises, there will be a pro rata distribution of the insurance fund, according to the amount of the claimants' respective settlements or judgments, without regard to when either were obtained.

The statute should set out certain criteria for determining when a multiple claim situation arises from which it will be necessary to pro rate the insurance fund. For example, the provisions of the statute may be made to apply only when three or more persons, other than the insured (or one of the insured, if there are two or more automobiles involved and the motorists are insured), of which two or more of such persons are either killed or injured to such an extent that each is required to be hospitalized for more than a certain number of hours.[27]

2. When the multiple claim situation arises, the insurer shall have the right to settle any and all claims, but the insurer shall not be permitted to discharge such settlement.[28] Instead, the claimant should be allowed

Indemnity Insurance Co., 21 N. J. 439, 122 A. 2d 604 (1956) (citing the *Kofsky* case, note 11 *supra*, and quoting the dictum of the Chief Justice in that case).

The provision of N. C. GEN. STAT. § 20-279.34 (1955) calling for assigned risk plans indicates the willingness of this State to pro rate to bring about an equitable solution. See also, N. C. GEN. STAT. § 44-11 (1950) (pro rata distribution on subcontractors' liens).

[26] Illustrations will be based on the hypothetical case set out at the beginning of this note. The insurance coverage will be $5000/$10,000 because this is the minimum allowed under the Responsibility Law. B, Y and Z received judgments of $4000, $15,000 and $6500, respectively.

[27] The suggestion, applying the statute only to the situation when two or more persons are either killed or hospitalized for more than a certain number of hours, is to eliminate those accidents in which the injuries are not serious, or if only one is serious, and the insurance fund will be sufficient to cover all claims.

This suggestion, however, will have the effect of restricting settlements in a non-serious accident to the extent that such cannot be made until it can be determined that a multiple claim accident under the statute is not involved; in other words, until the time of hospitalization has passed it will be impossible to determine whether or not a multiple claim situation arising under the statute is present. However, there is no serious objection to such a short delay because fast settlements should be scrutinized. In fact, many states have statutes prohibiting settlements until a certain length of time has expired after an accident.

[28] This provision should eliminate most of the power in the hands of the insurer to force inequitable settlements upon claimants with threats of preference.

For example, under the hypothetical case in which the total of all claims was $45,000, each claimant's proportionate share of the $10,000 insurance fund would be as follows: B, $888.90 ($4000); M, $1333.34 ($6000); N, $2222.22 ($10,000); X, $777.80 ($3500); Y, $3333.34 ($15,000); Z, $1444.40 ($6500).

an advancement upon his settlement.[29] Such advancement should be determined by the court, based upon the facts and circumstances of each case.[30] When this amount is determined, the insurer is notified that it is to pay the amount of the advancement.

3. A procedure for effecting the pro rata distribution should be established. The writer feels that the use of the interlocutory judgment under the New York statute[31] in the *Bleimeyer* case is basically a good one. The statute should provide a definite time in which such a suit in equity[32] must be brought, and such time should be as soon as possible after the accident.[33] An additional provision is needed to meet the contingency whereby the suit for the interlocutory judgment is not brought within the prescribed time.[34]

4. There shall be a right to appeal by any party, plaintiff or defendant, from any judgment rendered in an action at law.[35]

5. There shall be an alternative right of claimants to enter into a voluntary agreement among themselves for proportionate distribution.

6. The proportionate distribution of the insurance fund shall not relieve

[29] There are, the writer feels, two major reasons why an injured party is willing to settle. One is that he is uncertain and in doubt that he can recover in an action at law. The other is that the injured party or his family, in case of death, needs immediate cash to meet the expense of the necessities of life.

When the latter reason is the motivating factor, there would be no inducement to the injured party to settle if he could not get this immediate relief. Therefore, a provision for an advancement on his settlement should be able to meet this situation.

[30] For example, under the hypothetical case, X settled for $3500, and M settled for $6000. An advancement might be computed by taking the amount of the settlement, divided by twice the number of persons injured. Therefore, X would receive around $290, and M would receive $500. Of course, the advancement would be credited against the claimant's final proportionate share. The court, the writer feels, should be given the power, in their discretion, to determine the formula for such advancements, depending on the facts and circumstances of each case.

[31] See note 15, *supra*.

[32] The statute could provide that the suit in equity for the interlocutory judgment may be brought by any claimant, on behalf of himself and all the other claimants, or by the insurer.

Cost of this suit should be divided among the claimants. Cost for services in bringing the suit, the writer feels, should be set by the court upon a *quantum meruit* basis.

[33] The interlocutory judgment should direct that all claims be perfected by a certain, fixed date, in order for a claimant to be entitled to share in the pro rata distribution of the fund.

However, the date of distribution should be soon enough after the accident—that the insurer will not get a new power to force settlements in order that a claimant may get an advancement.

Some provision may prove to be needed for allowing review of a settlement where it appears the settlement is excessive in proportion to the claimant's injury. However, except in cases of a fraudulent scheme between an insurer and one of the claimants, such a provision is needless, since the original amount of the settlement should still be good against the insured as representing an excess due over the proceeds of the insurance fund.

[34] The statute may provide that it is the duty of the insurer to bring this action in equity if a claimant has not done so within the prescribed time.

[35] Some provision will be needed to define how a claimant's share will be set aside until final judgment is rendered.

the insured from liability for that amount due claimants in excess of the obligation of the insurer.

7. The proportionate distribution of the insurance fund shall not relieve the insurer from his duty to defend all suits against the insured, when the policy of insurance so provides.

The writer feels that this addition to our insurance law will bring North Carolina one step closer to better protection of innocent parties from the irresponsible motorist and to realization of equality for all.

BENJAMIN S. MARKS, JR.

Insurance—Soliciting Agent—Waiver of Initial Policy Provisions

In the case of *Life and Casualty Ins. Co. of Tennessee v. Gurley*,[1] recently before the Fourth Circuit of the United States Court of Appeals, the court was faced with the question of whether a valid insurance contract had come into existence. The applicant had made application[2] for a plan of life insurance calling for a $99.00 quarterly premium. The premium was paid at the time of application and a receipt[3] given. A policy of the plan applied for was issued, but at a quarterly premium of $122.00, the applicant having been given a "Class B" rate. The applicant refused to pay the premium increase or accept the policy, and requested the local agent to get the policy issued at the standard rate.[4]

[1] 229 F. 2d 326 (4th Cir. 1956). The district court decision appears in 132 F. Supp. 289 (1955).

[2] The application was signed by the applicant and stated in part, "3) With the exception of officers of the Company, notice to or knowledge of the agent, medical examiner or any other person is not notice to or knowledge of the Company unless stated in either Part A or B of this application, and none of such persons are authorized to accept risks or pass upon insurability, nor shall any of such persons have the power on behalf of the Company to make or modify any contract on behalf of the Company or to waive any of the Companies rights or requirements." The policy contained the following provision. "ENTIRE CONTRACT . . . only the President, a Vice-President, Secretary, and Assistant Secretary, Actuary, or Treasurer has power on behalf of the Company to make or modify this contract." And on the back of the policy, "NOTICE TO POLICYHOLDERS . . . The Company's agents have no authority to alter or amend the Policy, to accept premiums in arrears, or to extend the due date of any premium."

[3] The receipt stated in part, "If this sum is equal to the first full premium on the policy applied for then if the Company shall be satisfied that at the time of completion of the medical examination or Part B of the application, if no medical examination is required, that the risk was acceptable to the Company under its rules, for the plan and amount of insurance herein applied for at the rate of premium, declared paid, then the insurance shall be in force as of the date of completion of the medical examination, or of Part B of the application if no medical examination is required, but otherwise no insurance shall be in force under said application unless and until a policy has been issued and delivered and the first full premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant. The above sum shall be refunded upon request if the application is declined or if the policy is issued other than as applied for and is not accepted by the applicant."

[4] The district court record reveals that the applicant was at one time a life insurance salesman. Transcript of Record, Page 20, 132 F. Supp. 289 (1955). Question addressed to Mrs. Gurley, wife of applicant. "Q. Mr. Gurley as a matter of fact used to be a life insurance salesman? A. Yes, Sir."