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Insurance - Automobile Liability - Extent of Coverage under Substitution Provision

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rection of technical irregularities relates back to the time of the filing of the removal petition.[15]

Jurisdiction vests in the federal court at the time of the filing of the removal petition,[16] but until such time as the removal statute has been complied with there is a dual jurisdiction in the state court.[17] State court jurisdiction may be waived by acquiescing in the actions of the federal court and by failure to take appropriate action in the state court.[18] Until removal is completed however, the plaintiff is free to proceed with the action in the state court[19] but in event of conflicting proceedings federal jurisdiction predominates.[20]

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INSURANCE — AUTOMOBILE LIABILITY — EXTENT OF COVERAGE UNDER SUBSTITUTION PROVISION. — The holder of an unexpired automobile liability policy was involved in an accident after the sale of the automobile described in the policy and the ordering of a new one. The accident occurred in a borrowed automobile within the 30 day period allowed by the policy for notifying insurer of any replacement under the automatic insurance provision of the policy. The policy contained a substitution provision extending coverage to any automobile not owned by him "while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction". The United States District Court, District of South Dakota, refused recovery, and on appeal the United States Court of Appeals, Eighth Circuit, one justice dissenting, *held* that there was no coverage on the grounds that ownership of some automobile was a condition precedent to liability of the insurer. *Daugaard v. Hawkeye Security Ins. Co.*, 239 F.2d 351 (8th Cir. 1956).

A court should take notice of the purpose the insured had in mind when seeking insurance and should avoid an interpretation

15. Shenandoah Chamber of Progress v. Frank Associates, 95 F. Supp. 719, 720, (E. D. Pa. 1950) (dictum).

16. Steamship Co. v. Tugman, 106 U. S. 118 (1882); Coyle v. Skirvin, 124 F.2d 934 (10th Cir. 1942); Kingston v. American Car & Foundry Co., 55 F.2d 132, 136 (8th Cir. 1932) (dictum); Shenandoah Chamber of Progress v. Frank Associates, 95 F. Supp. 719, 720 (E. D. Pa. 1950) (dictum).

17. See Donlan v. F. H. McGraw & Co., 81 F. Supp. 599 (E. D. N. Y. 1948); but see Peavey v. Reed & Co., 41 F. Supp. 351 (E. D. N. Y. 1941).

18. Kramer v. Jarvis, 81 F. Supp. 360 (D. Neb. 1948).

19. Donlan v. F. H. McGraw & Co., 81 F. Supp. 599, 600 (E. D. N. Y. 1948) (dictum).

20. Miners Savings Bank v. United States, 63 F. Supp. 305 (M. D. Pa. 1945). *But cf.* Hopson v. North American Ins. Co., 71 Idaho 461, 233 P.2d 799.

which will forfeit the rights which insured may have believed he was securing.[1] These rights are presently cast in doubt because of the insurer's failure to use clear language. Words may even be construed contrary to their literal meaning in order to carry out the general object of the insurance contract.[2] A substitution clause should not narrowly limit or defeat coverage, but should make the coverage reasonably definite as to the vehicles the insured intended normally to use.[3] By using the words "loss or destruction" in the substitution provision, the insurer obviously contemplated a situation wherein insured would be protected in the absence of any ownership.[4]

The only other case in point in this country held that where a provision extended coverage to the use of other automobiles by the insured, coverage was not terminated by insured's sale of described automobile for junk after its breakdown, notwithstanding the custom of insurers to issue distinct types of policies to persons not owning automobiles and to persons owning automobiles.[5] Had the intention of the insurer been to make ownership an absolute prerequisite to coverage, it would have been a simple matter for the insurer to have made that fact clear in the contract.[6] Not having done so, there is a presumption that this result was never intended.[7] The cardinal rule in the construction of an insurance policy is to ascertain the intention of the parties, gathered from the contract construed as a whole.[8] Ambiguities are generally resolved in favor of the insured and against the insurer.[9]

A contrary decision in the instant case seems justifiable, if for no other reason that such a holding does not increase the risk to the insurer, since coverage would remain confined to but one vehicle of the type and for the uses described in the contract.

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1. See Siemers v. United Benef. Life Ins. Co., 246 Minn. 459, 75 N.W.2d 605 (1956).

2. Bolduc v. New York Fire Ins. Co., 244 Minn. 192, 69 N.W.2d 660 (1955). See American Aviation & General Ins. Co. v. Georgia Telco Credit Union, 223 F.2d 206 (5th Cir. 1955). Annot., 51 A. L. R.2d 316.

3. Lloyds America v. Ferguson, 116 F.2d 920 (5th Cir. 1941). Annot., 34 A. L. R.2d 947.

4. Daugaard v. Hawkeye Security Ins. Co., 239 F.2d 351 (8th Cir. 1956) (dissenting opinion).

5. Freeport Motor Casualty Co. v. Tharp, 338 Ill. App. 593, 88 N.E.2d 499 (1949) (There are two English cases which have denied recovery on similar facts).

6. Miller v. Farmers Mut. Auto Ins. Co., 179 Kan. 50, 292 P.2d 711 (1956).

7. Prudential Ins. Co. of America v. Heyn, 139 F.Supp. 602 (S.D. Cal. 1956). See Exchange Lemon Products Co. v. Home Ins. Co., 235 F.2d 558 (9th Cir. 1956). *cf.* Oil Base Inc. v. Transport Indem. Co., 299 P.2d 952 (Cal. 1956).

8. See American Aviation & General Ins. Co. v. Georgia Telco Credit Union, 223 F.2d 206 (5th Cir. 1955) (Annot., 51 A. L. R.2d 316); Motor Vehicle Casualty Co. v. Smith, 76 N.W.2d 486 (Minn. 1956).

9. 13, Appleman, Insurance Law & Practice, § 7483 (1943).