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Insurance—Duty to Defend—Alleged Facts Not Within Policy Coverage

D issued to P an automobile liability insurance policy. The policy provided coverage for injury to any person while using insured's automobile with his permission but excluded from coverage injury to any employee of the insured arising out of and in the course of such employment. D agreed to defend any suit against the insured alleging injury within policy coverage, even if such suit was groundless, false or fraudulent. A collision occurred while C was operating P's automobile with his permission. L, a passenger in the automobile at the time of the accident, instituted an action against P for injuries received as a result of the collision. L alleged that she and C were employees of P at the time of the collision. Upon these facts, D refused to defend P in the suit because of the employee exclusion. P contended that they were independent contractors. The court found that C and L were not P's employees, and P was dismissed as a party defendant. P demanded of D reimbursement for the expenses and reasonable attorney's fees incurred in defending the suit. P's petition was dismissed. Held, reversed. When the complaint against the insured alleges untrue facts placing the claim within an exception in the policy, but the true facts, known or ascertainable to the insurer, are within coverage, the insurer is obligated to defend the suit. Loftin v. United States Fire Ins. Co., 127 S.E.2d 53 (Ga. App. 1962).

Concern here is not with the insurer's ultimate liability to reimburse for the injuries covered by the policy but rather for the insurer's duty to defend the insured against actions for damages arising from such injuries even if the action is groundless, false or fraudulent. "If the allegations of the complaint state a cause of action within the coverage of the policy the insurance company must defend." Boyle v. National Cas. Co., 84 A.2d 614, 615 (D.C. Munic. Ct. App. 1951). Such a rule advises the insurer at the institution of the suit that his duty to defend exists. Difficulty arises, however, when the allegations in the pleadings state facts which bring the injury within the exception in the policy, and these facts are in contradiction to the true facts known or ascertainable to the insurer which bring the injury within the policy coverage. The issue then presented is whether the insurer's duty to defend is to be determined by the plaintiff's allegations alone or by those facts not in the allegation which show policy coverage. It appears that this issue has never been decided in the courts of West Virginia.
The decisions of the American jurisdictions are not uniform with regard to this issue. The court in the principal case made a statement recognizing that some courts in other jurisdictions have taken the view that the allegations alone determine the insurer's duty to defend. It appears that the majority view is in accord with that interpretation. See generally, Annot., 50 A.L.R.2d 458, 497 (1956) and cases thereunder; Comment, 30 N. Y. U. L. Rev. 1019 (1955); Comment, 103 U. Pa. L. Rev. 445 (1954). Ohio, Pennsylvania and Virginia appear to follow the majority view. Lessak v. Metropolitan Cas. Ins. Co., 168 Ohio St. 153, 151 N.E.2d 730 (1958); Wilson v. Maryland Cas. Co., 377 Pa. 588, 105 A.2d 304 (1954); London Guarantee & Accident Co. v. White & Bros., 188 Va. 195, 49 S.E.2d 254 (1948).

The effect of these decisions is, in the majority view, to allow the insurer to ignore the true facts which are not alleged but which are available to him and to rely solely upon the insured party's allegations when determining the existence of his duty to defend. The reasoning behind this view seems to be that the insurer should not be obligated to defend a suit against the insured when the insurer would be under no duty to pay the judgment if the allegations prevail. Lessak v. Metropolitan Cas. Ins. Co., supra; Ocean Accident & Guarantee Corp. v. Washington Brick & Terra Cotta Co., 148 Va. 829, 139 S.E. 517 (1927). This view is termed "more logical" by the author in Annot., 50 A.L.R.2d 458, 497 (1956), apparently because the insurance company can immediately determine its duty to defend.

In recognizing those jurisdictions which are in accord with the principal case and opposed to the majority view, Mr. Appleman states that "the insurer may thus be under a duty to investigate the facts, even where the complaint, on its face, indicates that the claim against the insured falls outside the policy coverage." 7A Appleman, Insurance Law and Practice § 4683 at 442, 443 (1962). The basis of this view, according to the principal case, is that the parties did not intend to allow the insurer to ignore the true facts and to place the burden on the insured to prove coverage already known to the insurer. The decision in the principal case does eliminate one possible hardship which may be placed upon the insured under the majority view. If, under the majority view, the injured party has more than one theory upon which to base his claim and he chooses to allege that theory which does not show policy coverage, the insurer is relieved of his obligation to defend even though the injured party did have a claim which would show coverage and if alleged would
obligate the insurer to defend. The view of the principal case would require the insurer to investigate such facts and to defend the insured when they exist even though the injured party did not allege them.

The minority view places importance upon the intent of the parties and grants to each policy holder the assurance that the insurer will make every reasonable inquiry in order to establish his duty to defend. The majority view, on the other hand, grants to the insurer a definite basis upon which he may determine his duty to defend and if the facts do not fall within this basis, the duty does not exist. When considering the great number of arm's length transactions entered into by insurance companies today, the majority view would eliminate the expense and time involved in investigation for each policy holder under the minority view.

While the decision in the principal case and the decisions of those jurisdictions with which it is in accord may carry weight in a future West Virginia litigation, the majority view cannot be overlooked. The principal case does illustrate that its view can be competently argued and may prevail. Which of these views West Virginia counsel may wish to adopt shall probably be determined, as a practical matter, by whether his client is the insurer or the insured. The preferred view, with regard to the West Virginia law, will have to be determined by the court.

Charles David McMunn

Insurance—Release—Recission for Mutual Mistake—Existing but Unknown Injury as Grounds Therefor

P received a bruised knee in an automobile accident. She did not consult a doctor, but signed a general release for consideration, ostensibly covering damages to the vehicle and all injuries “known at this time or which may hereafter develop.” P subsequently discovered that she had suffered a serious knee fracture, and instituted an action for damages. D asserted the release as an affirmative defense, and P prayed for recission. The trial court entered judgment for D. Held, reversed. The evidence clearly established that the release was executed under a mutual mistake as to an existing but unknown injury which was not intended by either party to be covered by the release. Dansby v. Buck, 373 P.2d 1 (Ariz. 1962).