PROBLEMS ARISING OUT OF INSURANCE LAW*

If there is one thing which legal advisers of insurance companies realize it is the difficulties which are confronting executives, claims departments and adjusters from day to day and the writer hopes that a discussion of some of them may lead to their removal either by legislation or decisions of the courts.

Dealing first with automobile insurance, which is full of difficulties, a problem has arisen in regard to a total constructive loss where the assured feels that the repair of the car would not place him in the same position because he says its "turn-in" value is affected by the accident and repair. This is not always the case because we all know that sometimes the car is better by reason of its repair, but where the cost of repair is much less than the ordinary "turn-in" value of the car, some assureds have been taking the position that if the car is a constructive total loss, the full "turn-in" value of the car should be paid, salvage, if any, of course going to the company. Furthermore some companies have acquiesced in such demands but the writer ventures to suggest that the same is not really a claim which should be recognized under the existing law, which after all shows what the company has to do. It should be remembered that companies have shareholders, and only legal claims should be paid except in so far as it may be advisable to placate assureds in individual cases.

* * However, let us see what the law is in regard to such a contention. In the first place, Statutory Condition 5 (3) fixes the obligation of the company to the actual cash value, not a "turn-in" value if there be any difference, and furthermore "shall in no event exceed what it would cost to repair or replace the automobile or any part thereof with material of a like kind and quality". It will perhaps be surprising to claims agents and adjusters to learn that there is no provision in the Statutory Conditions or in the standard form allowing the companies to repair; the only obligation and the only right is monetary. A careful reading of Statutory Condition 5 (3) shows this. It is as follows :

> " The insurer shall not be liable beyond the actual cash value of the automobile at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would cost to repair or replace the automobile or any part thereof with material of like kind

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and quality; provided that in the event of any part of the automobile being obsolete and out of stock, the liability of the insurer in respect thereof shall be limited to the value of such part at the time of loss or damage not exceeding the maker's last list price."

Former Statutory Condition 9 (5), now repealed, gave the company the option to "repair, rebuild or replace the property damaged or lost with other of like kind and quality."

Another point which has been giving trouble is section 8 (2) of the Automobile Statutory Conditions. This deals with the existence of other valid insurance in force in favor of a person not named in the policy but insured thereby. The section is as follows :

" Where by any other valid insurance indemnity is provided for a claim under this policy against a person not named herein but insured hereby, the insurer shall only be liable under this policy, in respect of any such claim, to the extent of any deficiency in the amount of such other insurance of such claim, not exceeding in any event the limits of liability of the insurer under this policy."

The point is, as will be apparent at once, what is the effect of this section in the case of an action by an injured person against the owner of an automobile who has an owner's policy, the automobile being driven at the time of the accident by another person with the owner's consent, and the driver having taken out at his own instance a driver's policy protecting him from personal liability no matter whose automobile he might be driving? This situation requires close attention to the wording of the new Automobile Insurance Act covering the question of financial responsibility.

* * The definitions of owner's and driver's policies are as follows :

" 169 (d) ' Driver's policy ' means a motor vehicle liability policy insuring a person named therein in respect of the operation or use by him of any automobile other than an automobile owned by him or registered in his name ;

" (g) ' Owner's Policy ' means a motor vehicle liability policy insuring a person named therein in respect of the ownership, operation or use of any automobile owned by him and designated in the policy."

The writer's view is that nothing turns specially upon these definitions which are the commonly accepted understanding of the policies. Now an owner's policy, as stated by the Act (section 183a. (1)) insures not only the person named therein, that is to say the owner, but every other person who with the owner's consent uses the automobile designated in the policy. This is made clear because the section states that the owner and

driver are insured against the liability imposed by law upon the owner or upon such other person. The section is as follows:

> " Every owner's policy shall insure the person named therein, and every other person who, with his consent, uses or is responsible for the use of any automobile designated in the policy, against the liability imposed by law upon the insured named therein or upon any such other person for loss or damage."

Furthermore, under section 183a. (2) the driver, although not named in the policy, may recover in the same manner as if named and for that purpose shall be deemed to be a party to the contract. The exact wording of the section is as follows:

> "Any person insured by but not named in a policy may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor."

The difficulty faced by the insurance companies arises because of Statutory Condition 8 (2). Let us look at the wording again.

> " Where by any other valid insurance indemnity is provided for a claim under this policy against a person not named herein but insured hereby, the insurer shall only be liable under this policy, in respect of any such claim, to the extent of any deficiency in the amount of such other insurance of such claim, not exceeding in any event the limits of liability of the insurer under this policy."

Consequently the position has been taken on the above hypothesis of facts that under the owner's policy the company issuing same is only liable for such deficiency and that therefore the injured person, assuming he recovers judgment, cannot apart from any question of deficiency collect from the insurer issuing the owner's policy but only from the company insuring the driver.

* * On the other hand, some insurance executives and lawyers take the view that under section 183h. (4) the insurer under the owner's policy may only require contribution from the driver's company rateably according to their respective liabilities. That section is as follows:

> " The insurer may require any other insurers liable to indemnify the insured in respect of judgments or claims referred to in sub-section 1 to be made parties to the action and to contribute rateably according to their respective liabilities, and the insured shall, on demand, furnish the insurer with particulars of all other insurance covering the subject-matter of the contract."

Now by section 169 (a) "Insured" means a person insured by contract whether named or not and so includes the driver. The argument is that contribution can be required from other insurers liable to indemnify the "insured" in respect of judgments or claims referred to in sub-section 1. Now sub-section 1 provides that the injured person having a claim against an insured for which indemnity is provided by a motor vehicle liability policy shall notwithstanding that such person is not a party to the contract (for instance, the driver) be entitled upon recovering a judgment therefor against the "insured" to have the policy money applied in or towards satisfaction of his judgment. This clearly intends that, in the hypothetical case stated the injured person could recover from the insurer under the owner's policy upon a judgment against the driver although the driver is not a party to the contract. He might also have the right to collect for the driver's insurance.

* * The companies insuring the owner contend they are not liable because it is not a claim against an insured "for which indemnity is provided by a motor vehicle liability policy" and point to Statutory Condition 8 (2) which says there is no indemnity "where by any other valid insurance indemnity is provided for a claim under this policy against a person not named herein but insured hereby." The insurers under the owner's policy therefore say it is not a case for contribution but that the only liability under the owner's policy in the hypothetical case dealt with herein is that provided by 8 (2) which is limited "to the extent of any deficiency in the amount of such other insurance." that is to say of the driver's policy, and the further limit to a sum "not exceeding in any event the limits of liability of the insurer under this policy."

From the foregoing, it will be seen that there is perhaps something to be said for both views. No doubt the question will have to go to the courts in respect to existing losses and possibly will de dealt with by legislation as to future claims. Possibly the intention of the Legislature was to have contribution in such a case but on the other hand, the owner's insurer being liable for the negligence of the driver, although getting no premium from him, says that if the driver has insurance, then its liability is only for a deficiency.

Arising out of the above situation is another point which has been discussed. Assuming that the driver in the hypothetical case dealt with thus far was a servant of the owner and that as a result of the servant's negligence, the master's automobile was

damaged. It has been suggested that the company issuing the owner's policy could claim from the company insuring the driver because the owner has a claim against the servant for negligence causing damage to the automobile, and that the owner's insurer can sue by way of subrogation for property damage on paying a collision loss. This was a somewhat unexpected result of the dual insurance and probably the view of the owner's insurer was sound, but quite recently a new endorsement has been approved by the Association of Superintendents of Insurance of the Provinces of Canada and is being adopted by the Companies entitled "Property Damage Exclusion Endorsement" which provides for the amendment of clause (a) of sub-section 2 of section A. of the Insuring Agreements of the Standard Automobile Policy to exclude liability "for loss of or damage to property . . . in the care, custody or control of any person insured by this policy." It will be seen that this if attached prevents the driver's insurer being liable for damage to the automobile in the custody of the driver.

Thus far the problems discussed have been in relation to automobile insurance, but in fire insurance, too, during the last year several difficult points have arisen. One of these is that fire insurance companies have been asked to attach to policies endorsements prepared by finance companies giving special rights to the finance companies in respect to cancellation and receipt of rebates. These endorsements vary in form and unless one were dealing in this article with a definite form, perhaps the most helpful thing to do is to remind insurance men of the general principles applicable coupled with the advice to submit any such proposed forms to their solicitors.

Perhaps it will suffice to say that Statutory Condition 10 confers the only right to termination either by the company or by the assured, and to emphasize that this condition must be strictly complied with. However, one may add that it is not impossible for an assured to nominate a finance company or any one else to act for him in exercising his rights under Statutory Condition 10, and in so far as any such proposed endorsements are confined to such authorization, it would probably be valid as it has been definitely held in our own courts that there is nothing in the Insurance Act which prevents the assured and the company from agreeing to cancellation in another manner altogether than that prescribed by the Act. To repeat, if either party is relying on the Act, it must be strictly complied with, but if on an agreement, that should, of course, be definite and in writing so that proof thereof will be procurable.

Then, too, it must always be borne in mind that under section 102 of the Insurance Act, the special stipulations authorized apart from the Statutory Conditions are restricted to cases "where the rate of premium is affected or modified by the user, condition, location, or maintenance of the insured property, etc." Therefore, if the endorsement does not comply with that section or goes further than authorizing some one to act for an assured, it would probably be of no effect.

* * Some of these endorsements purport to state the time at which cancellation shall go into effect but as that is only by agreement between the finance company and the assured, although the insurance company has notice of it, it is not a contract with the insurance company. Probably the true result is that although cancellation can be effected by a nominee of the assured it will only have effect as to time of cancellation according to the agreement between the company and the nominee (finance company) when cancellation is arranged.

This question of cancellation is often affected by the interests of the mortgagee. Statutory Condition 9 provides for notice of cancellation to the mortgagee although he cannot prevent cancellation, but it would seem that if a finance company is the mortgagee, there is no reason why it should not waive the notice.

Just as the interest of the mortgagee is of importance in the above mentioned endorsements, so again there are arising from time to time new questions as to the rights, duties and obligations of the mortgagee and the insurance companies by reason of the mortgage clause commonly attached. One practical question is, what is the result if the amount of the fire loss is less than that of the existing mortgage and the insurance company contends that it has no liability to the assured but pays the mortgagee by virtue of the mortgage clause and then demands to be placed in the position of the mortgagee to the extent of the payment made relying on Statutory Condition 24? Condition 24 is as follows :

> " The insurer may require from the insured an assignment of all right of recovery against any other party for loss or damage to the extent that payment therefor is made by the insurer. R.S.O. 1927, c. 222, s. 98, Cons."

The mortgagee may not know nor care whether the company has a good defence against the assured or not. Payment may be, as far as the mortgagee knows, a payment made by the insurance company on behalf of the mortgagor; that is to say, made to the mortgagor's payee under the policy because the company has to pay the loss.

* * Under these circumstances, what are the rights of the insurance company? It is true that the mortgage clause provides for subrogation where the insurance company disputes liability but nevertheless pays to the mortgagee but even on the terms of the clause itself "no such subrogation shall impair the rights of the mortgagee to recover the full amount of their claim." Supposing the mortgagee contends, as he undoubtedly will, that he wants the balance of his money over and above the amount paid by the insurance company, and the mortgagor is willing to pay that balance but demands a discharge of the mortgage, can the mortgagee give it in face of the claim of the insurance company that it is interested in the mortgage to the extent of the payment made? If the mortgagee cannot give a discharge, is not his right to collect his money impaired? Apart from this question raised by the wording of the mortgage clause itself, can the insurance company, assuming it contends that it is not liable to the mortgagor (assured), demand an acknowledgment from the mortgagee that it has an interest in his mortgage? The answer to this may perhaps be that it is said to have been held by the Supreme Court of Canada that an insurance company must show in an action that it is under no liability to the assured before it has any right to enforce the mortgagee's security by way of subrogation even when paying the mortgagee his full claim. This view of the case has not been universally accepted and all one can say is that the question is a very difficult one and should be settled.

The question is further complicated when there is only a partial payment of the mortgagee's rights. From the standpoint of the mortgagee at least, it might well be held that the mortgagee could take the balance of his money and give a discharge, and in this connection it is important to remember that a discharge is only a receipt for money which by statute has the effect of a reconveyance of the property. If then the mortgagee can take his money and give such a receipt, would it not be for the company to establish in an action against the mortgagor (assured) that it was not liable under the policy and therefore made payment to the mortgagee under and by virtue of the mortgage clause and that it therefore stands subrogated to the rights of the mortgagee in the property of the mortgagor (assured) to the extent of the payment made. This solution would not fetter the mortgagee's remedy if the suggested action were taken simultaneously with payment to the mortgagee and if a lis pendens were asked for in the writ, the insurance company's charge would be effective until trial when, if successful, it would

have a mortgage on the property to the extent of the amount paid and the mortgagee would be free from the transaction throughout as one would think he should be.

May I conclude with the humble suggestion to the companies that perhaps from a legal standpoint there is too much of a tendency to look at legal expenses as ones which should be proportionate to the amount involved. This is not always possible where principles of great importance are involved. It might be well in the long run to have disputed points decided in the courts. Perhaps also it is rather hard on claims departments that questions involving great principles should be charged up as expenses in connection with individual losses whereas the determination thereof is for the benefit of the company as a whole over a long period of time. No lawyer worthy of being retained by a company will encourage litigation about comparatively small matters unless a real principle is involved, and if there is it would seem that possibly the matter should be determined by the courts even at a disproportionate expense.

Then again there is a feeling that one company should perhaps not bear the expense of determining a point which will be of benefit to all companies, and while there is extreme difficulty in securing co-operation from other companies and perhaps that practice itself is not free from objection, still there might well be some arrangement between the companies providing for reimbursement by the companies generally where one company is proved to have gone to the expense of actually having determined some question of vital interest to all insurance companies. If there were such a possibility, then questions such as have been outlined here, and many others, might be brought to a conclusion in the courts or at least steps taken to secure legislation properly covering same.

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