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Insurance - The Effect of an Insurer Filing the SR-21 Form

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Insurance—The Effect of an Insurer Filing the SR-21 Form— The defendant insured permitted one Smith, a former employee, to utilize his garage and equipment in order to paint the car of another. En route home, Smith collided with the plaintiff. Upon notification of the accident by the insured, defendant insurer (Aetna Casualty and Surety Co.) filed an SR-21 (Safety Responsibility) form with the Commissioner of Motor Vehicles in which the following question was answered in the affirmative: "Does this policy apply to the above operator in the above accident?" Considerably later, but prior to trial, the insurer attempted without success to change the answer to that question. From an order denying a summary judgment, the defendants, insured and insurer, appealed. *Held:* Reversed as to the defendant insured, affirmed as to the defendant insurer. The court negated the existence of any agency, employment, or partnership relationship between the insured and Smith, the operator of the vehicle. Therefore, in view of the absence of any relationship upon which to ground liability, the court held that the insured was entitled to a summary judgment. However, as to the defendant insurer, the SR-21 form clearly constituted an admission against interest. Hence, the motion for a summary judgment by the insurer was correctly denied by the trial court. *Laughnan v. Griffiths,* 271 Wis. 247, 73 N.W. 2d 587 (1955).

The *Laughnan* case was followed a few months later by *Prisuda v. General Casualty Co. of America,* 272 Wis. 41, 74 N.W. 2d 777 (1956). In this case the insured's son permitted a friend, one George Rogers, to operate the car although the insured had expressly directed the son not to permit anyone else to drive. While Rogers was thus operating the vehicle, the accident occurred. The defendant's local agent sent a report of the accident to the home office, and the latter filed the SR-21 form mistakenly stating that the operator was covered by the policy at the time of the accident. Three years later, the defendant attempted to modify the form in this particular without avail. The plaintiff tried to introduce the SR-21 as an admission, but the trial court excluded it upon the ground that "it is in the nature of a statement of financial responsibility and does not alter the terms of the insurance contract."[1] However, the lower court decided that there was an implied consent for Rogers to drive, which put him within the coverage of the policy and upon that theory held the defendant liable. *Held:* Reversed. Rogers was not within the coverage of the policy since the insured had in no way consented to his driving, which in fact was outside the use granted to her son. Nonetheless, the plaintiff was entitled to a new trial because the trial court erred in refusing to admit the SR-21 form into evidence as an admission against the insurer.

[1] Prisuda v. General Casualty Co. of America, *supra,* at 51.

Section 85.09 of the Wisconsin Statutes has three principal components.[2] Subsections (1)-(4) define terms and grant to the Commissioner of Motor Vehicles certain powers and duties.

The second portion is contained in subsections (5)-(16), known as the Safety Responsibility Law, and contains the provisions involved in the present consideration. Every state in the union has some variety of a Safety Responsibility Law, and 41 states have provisions substantially similar to those of Wisconsin.[3] The general purpose of the law is to require the negligent operator of a motor vehicle to provide compensation for the injured party, for the failure of which the Commissioner[4] will revoke his operator's license and certificate of registration.[5] This purpose is sought to be attained by requiring the Commissioner, within 60 days after receiving a report of an accident resulting in death, bodily injury, or property damage in excess of $100.00, to revoke the operator's licenses of both drivers, and the certificate of registration of the owners, unless the owner or the operator, or both, deposit with the Commissioner a bond to insure payment of the damage occasioned by the accident. There is, however, one pertinent exception—if the owner or operator has automobile liability insurance that satisfies specified requirements, then the insured need not post the previously mentioned bond; instead, the insurer files the SR-21 form. The SR-21 form is a standard form, prescribed by the Commissioner in accordance with the authority vested in him under Sec. 85.09(2), and contains two significant questions which the insurer must answer: 1) Does this policy apply to the above owner in above accident? 2) Does this policy apply to the above operator in above accident?

Subsections (17)-(29) comprise the Financial Responsibility Law, and in essence provide that in order to re-acquire a license and registration that has been suspended, the applicant must furnish proof of his financial responsibility for the future.

There is considerable speculation and interest as to the precise effect of these dceisions upon the automobile liability insurers of this state. An attempt to intelligently predict the impact of the present cases upon insurance practice must obviously be prefaced by an understanding of the basis upon which the court predicated its pronouncement.

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[2] For a brief history and discussion of the Safety Responsibility Law, as well as some interesting pre-Laughnan speculation, see: Bjork, 26 WIS. BAR BULL. No. 3, p. 21. As to the constitutionality of the Safety Responsibility Law, see: 35 A.L.R. 2d 1021, *Automobiles—Financial Responsibility,* superseding 115 A.L.R. 1376; and State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953).

[3] State v. Stehlek, *supra,* note 2.

[4] As to the Commissioner's duty to suspend being mandatory, see. State v. Stehlek, *supra,* note 2.

[5] Laughnan v. Griffiths, *supra.*

Unfortunately, this requisite information must itself be the product of speculation.

That the form constitutes an admission against interest can scarcely be doubted in view of the court's express statement in the *Laughnan* case,[6] and the reversal in *Prisuda* upon this very ground. There would seem to be little basis to criticize the court upon this declaration, since admissions are merely voluntary statements or acknowledgments made by a party to the action, as to the existence of a material fact that is against the interest of the declarant.[7] The use of an admission is not limited to impeaching purposes via the prior inconsistent statement approach, but may also be introduced as substantive evidence of the facts contained therein.[8] However, admissions are merely evidence, which may be weak or strong depending upon the circumstances of the case, and as such may be rebutted by the party against whom they were used.[9] In both cases, the statement on the SR-21 admitting coverage as to the operator was filed by mistake, proof of which should be fairly effective to neutralize the effect of the admission. Realizing this, the injured party (respondent) in the *Laughnan* case contended that the form constituted more than a mere admission. The court did not directly answer the contention, but in some very interesting dicta they stated that:

> ". . . an automobile liability insurance company can make itself liable on a policy issued by it where, after investigating the facts, it, acting through a duly authorized agent or employee, voluntarily files with the Commissioner an SR-21 form coverage as to the accident described in such SR-21 intending to be bound thereby, even though without the filing of the SR-21 there might not be liability."[10]

Hence, it would seem that in effect the court does agree that it constitutes more than an admission—which makes the question now: how much more?

The question presented by these cases has, with but one exception, never been handled at the appellate level. Consequently, similar cases in sister states can scarcely be called upon to provide an explanation for the court's conclusion. Nowhere in either decision does the court make any mention of waiver or estoppel, notwithstanding the fact that the litigants in both cases devoted a substantial part of their argument

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[6] "We consider that the last sentence of the above quoted subsection (Sec. 85.09(11)) clearly recognizes that an SR-21 form may be admissible as an admission against interest on the part of the company which has filed the same." Laughnan v. Griffiths, *supra,* at 259. (parenthesis added).

[7] 21 C.J.S. §270.

[8] Leslie v. Knudson, 205 Wis. 517, 238 N.W. 397 (1931), cited in Frawley v. Kittel, 254 Wis. 432, 37 N.W.2d 57 (1948).

[9] Levandowski v. Study, 249 Wis. 421, 25 N.W.2d 59 (1946).

[10] Laughnan v. Griffiths, *supra,* at 259.

to this precise possibility. Nonetheless, a brief consideration of these doctrines is warranted by the likelihood that the court was tacitly guided by these equitable principles.

By definition, a waiver is the intentional relinquishment of a known right;[11] or more graphically stated, waiver is the judicial doctrine that within certain limits " . . . one shall not be permitted to blow hot, then with advantage to himself turn and blow cold. . . ."[12] However, full knowledge of the material facts is a prerequisite to waiver,[13] and certainly the insurers in the cases at hand did not possess this qualification. But, as stated by the court in *Pabst Brewing Co. v. Milwaukee:*[14]

> "It is suggested that there can be no waiver without intent to waive based on knowledge of the facts. True, but one is presumed to know that which in contemplation of law he ought to know, and one is presumed to waive that which is necessarily implied from his conduct. Constructive as well as actual knowledge of the facts, and implied as well as express intent, satisfies the prime essential of a conclusive waiver."

Hence, it would appear to be a judicial question in the last analysis as to whether or not the insurer ought to know sufficient facts so as to be able to determine coverage before filing the SR-21 form, and these decisions impliedly at least suggest that the insurance company does in fact have a duty to ascertain these facts. In view of the fact that the insurer has 60 days from the filing of the accident report in which to file the SR-21 form, and in addition can revoke the form within 30 days from the filing thereof,[15] it would be difficult to contend that this would be too harsh a requirement to impose upon the insurance company.

Aside from knowledge, there is the further obstacle of an *intentional* relinquishment before a waiver can develop. But, as indicated in the *Pabst* case, a person is in effect presumed to intend the ordinary consequences of his act.[16] Application of this rule to the present situation might well prompt the court to read the requisite element of intent from the act of filing by the insurer.[17]

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[11] Swedish American Nat. Bank v. Koebernick, 136 Wis. 473, 117 N.W. 1020 (1908); Pfuehler v. General Casualty Ins. Co., 239 Wis. 30, 300 N.W. 469 (1941).

[12] Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 105 N.W. 563 (1905).

[13] Smeesters v. New Denmark M.H.F. Ins. Co., 177 Wis. 41, 187 N.W. 986 (1922).

[14] *Supra,* note 12.

[15] Prisuda v. General Casualty Co. of America, *supra,* at 46.

[16] Swedish American Nat. Bank v. Koebernick, *supra,* note 11.

[17] As stated by Justice Currie in a concurring opinion to the Prisuda case: "The Safety-Responsibility Law and not the secret intention of the insurance company, which has voluntary filed an SR-21, must govern the legal effect of such filing. The words *'intending to be bound thereby'* of the Laughnan case should be interpreted as meaning no more than that the company files the SR-21 for the purpose of complying with the provision of section 85.09(5)(d), Stats. A mistaken idea of what the legal consequences are which may result from such

Waiver seems to afford a plausible solution to the judicial thinking behind the type of cases which have faced the court to date as regards the effect of filing the SR-21. The question than arises: Would the result remain the same if the insurer filed the form in reliance on the insured's misrepresentation either as to the facts in the accident, or as to facts upon which the company issued the policy?

The only other case dealing with the effect of filing the form arose in Iowa,[18] a state with substantially the same Safety Responsibiilty Law as Wisconsin. In that case, the insured stated to the insurer, in applying for an automobile liability policy, that his operator's license had never been revoked and that he had never had a policy of this type cancelled, both of which statements were knowingly false. In a declaratory action brought by the insurance company against the injured party among others, the court stated that waiver was not applicable because there was no intentional relinquishment of known rights in view of the fact that the insurer was ignorant of the insured's fraud prior to filing the SR-21 form. Perhaps Wisconsin would concur with the position adopted in the *Hoosier* case, and if such a contingency arose hold that a filing by the insurer would not be *voluntary*.

On the other hand, if the policy were issued in the absence of fraud, and thereafter the insured misrepresented the facts pertaining to the accident, the result would probably remain the same. This is particularly true in view of the fact that the ordinary policy makes notice of the accident, and a full and fair disclosure of the facts, a condition precedent. This result was attained in *Hunt v. Dollar*.[19] A misrepresentation as to pre-accident intoxication by the insured to the insurer, blocked the injured party's recovery from the insurer. The rule had existed that such conduct by the insured would void the policy as to the insured.[20] This case extended the rule so as to abrogate an innocent third party's claim against the insurer, due to the misconduct of the insured, upon the ground that the rights of the beneficiary are limited by the terms of the contract. Admittedly, such a condition could be waived,[21] but should an insurer be held to have waived a right of which he had no knowledge due to the fraud of the insured? It is doubtful that the court would read waiver into such a situation.[22]

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filing will not relieve it from liability. Such is not the type of mistake with which we are dealing in the Laughnan case."

[18] Hoosier Cas. Co. of Indianapolis, Ind. v. Fox, 102 F.Supp. 214 (E.D. Iowa 1952).

[19] 224 Wis. 48, 271 N.W. 405 (1937).

[20] Hoffman v. Labutzke, 233 Wis. 365, 289 N.W. 652 (1940).

[21] Bachhuber v. Boosalis, 200 Wis. 574, 229 N.W. 117 (1930).

[22] See: Wisconsin Transp. Co. v. Great Lakes Cas. Co., 241 Wis. 523, 6 N.W.2d 708 (1942); 29 AM. JUR., INSURANCE §878; 38 A.L.R. 2d 1170, *Liability Insurance Waiver—Estoppel*, supplementing 81 A.L.R. 1368; Buckner v. General Casualty Co., 207 Wis. 303, 241 N.W. 342 (1932).

Ordinarily, the insurer can preserve any available policy defenses by sending a non-waiver notice,[23] and thereby gain freedom of conduct without risk of waiver. Further, such notice obviates the possibility of waiver notwithstanding the lack of consent to the non-waiver on the part of either the insured[24] or the injured party.[25] This is no solution though, since the authorized SR-21 form provides for no such contingency and it is questionable if the Commissioner would accept a form qualified by an inserted non-waiver clause as a compliance with the statute.

The Iowa court in the *Hoosier* case considered at length the feasibility of estoppel, and concluded that the doctrine was not applicable. They stated the elements of estoppel *in pais* to be:

> "(1) an act or representation on the part of the one against whom the estoppel is invoked, (2) with the intention that reliance should be placed on such act or representation, (3) justifiable reliance on the same, and (4) prejudice resulting from such reliance."[26]

In general, filing the SR-21 form would satisfy the first three elements: 1) filing the form constitutes the act or representation; 2) filing the form would also indicate an intention to be bound;[27] and 3) in view of the fact that the form is a public record, the injured party should be justified in relying thereon. However, the fourth element is not to be readily conceded. In the Wisconsin cases under consideration, as well as in the *Hoosier* decision, the insurer argued that there was no prejudicial reliance on the part of the injured party because the injury had occurred prior to the filing of the form, and with or without the form, the injury would be the same. This contention was not passed upon in either the *Laughnan* or the *Prisuda* decisions, but was adopted in the *Hoosier* case. Generally, estoppel is not to be found where the insurer merely remains silent as to liability,[28] or where an adjusting agent investigates the claim.[29] However, where the insurer erroneously inserts a statement into the policy without inquiry;[30] or with knowledge of facts taking the injury outside

[23] Guardianship of Schneider, 244 Wis. 323, 12 N.W.2d 138 (1943); Wisconsin Transp. Co. v. Great Lakes Cas. Co., *supra,* note 22; United States Guarantee Co. v. Liberty Mut. Ins. Co., 244 Wis. 317, 12 N.W.2d 59 (1943), and cases there cited.

[24] 38 A.L.R. 2d 1175, *supra,* note 22, supplementing 81 A.L.R. 1397; 29 AM. JUR., INSURANCE §879.

[25] 38 A.L.R. 2d 1177, *supra,* note 22.

[26] See also: Pfuehler v. General Casualty Ins. Co., *supra,* note 11; Welch v. Fire Association, 120 Wis. 456, 98 N.W. 227 (1904); Jungdorf v. Little Rice, 156 Wis. 466, 145 N.W. 1092 (1914); Pabst Brewing Co. v. Milwaukee, *supra,* note 12.

[27] See Justice Currie's concurring opinion in the Prisuda case, *supra,* note 17.

[28] Woodward v. German-American Ins. Co., 128 Wis. 1, 106 N.W. 681 (1906); but see: Moller v. J. L. Gates Land Co., 119 Wis. 548, 97 N.W. 174 (1903).

[29] Pfuehler v. General Casualty Ins. Co., *supra,* note 11.

[30] Emmco Ins. Co. v. Palatine Ins. Co., 263 Wis. 558, 58 N.W.2d 525 (1953).

the policy, undertakes to assist the insured in defending an action without a reservation of rights,[31] estoppel has normally been applicable. In the latter two situations there is little difficulty in finding a detrimental reliance, either in the form of change of position, or expense and inconvenience that has been occasioned by the conduct of the insurer.[32] Hence, if in some manner the injured party were prejudiced by reasonably relying on the SR-21 it would seem to follow that the doctrine of estoppel *in pais* should be invoked; however, in the usual case it might prove difficult to find such detrimental reliance. The injured party in the *Laughnan* case argued that he had ceased his investigation upon discovering the SR-21, but in view of the fact that such contention went without comment by the court, and further that there was no alleged prejudicial reliance in the *Prisuda* case, it would seem that the presence or absence of any detrimental reliance is not a significant factor, i.e., that the court is not utilizing the doctrine of estoppel.

In conclusion, it is submitted that an SR-21 form constitutes more than a mere admission against interest, and that the court is applying the theory of waiver, rather than estoppel, if in fact the court is tacitly employing either doctrine. However, in the event of fraud on the part of either the insured or the injured party, it seems unlikely that the insurer would be precluded from denying liability on the policy.[33]

JOHN A. HANSEN

Wills—Partial Revocation—In the recent decision of *Will of Mattes*,[1] a son took a share in his father's estate, notwithstanding the son had been entirely omitted from his father's will. Arthur M. Mattes executed his will leaving the entire residue to his wife, Meta, entirely omitting a living son by a former marriage.[2] When the will was presented to probate, the son filed an objection claiming he was omitted by mistake and should have the same share in his father's estate as if his father had left no will according to WIS. STATS. (1953) §238.11 which states:

> "Provision for child omitted by mistake, etc. When any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, and it shall appear that such omission was made by mistake or accident, such child or the

[31] 38 A.L.R. 2d 1151, *supra*, note 22; but see: Fitzgerald v Milwaukee Automobile Ins. Co., 226 Wis. 520, 277 N.W. 183 (1938).
[32] Fraser v. Aetna Iife Ins. Co., 114 Wis. 510, 90 N.W. 476 (1902).
[33] *Supra*, notes 19 and 21; Koerts v. Grand Lodge, Herman's Sons, 119 Wis. 520, 97 N.W. 163 (1903); Allstate Ins. Co. v. Moldenhaurer, 193 F.2d 663 (7th Cir., 1952); Matlock v. Hollis, 153 Kan. 227, 109 P.2d 119 (1941).
[1] 268 Wis. 447, 68 N.W.2d 18 (1955).
[2] Two specific bequests were made. They are not material here.