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ESTOPPEL TO RAISE DEFENSES UNDER WISCONSIN'S REVISED SR-21 PROCEDURE

The ever sharper dilemma into which the Wisconsin Safety Responsibility Act seemed to be casting the automobile liability insurer, under a series of recent decisions, has taken on a different aspect since the enactment of Ch. 545 of the Laws of 1957.

The nature of the dilemma is all-too-familiar to every lawyer and insurance executive whose fate has brought him recently into contact with it. Prompted, in a major degree, by a businesslike desire to protect the policyholder against threatened revocation of his registration and/or operator's license, the insurer certifies to the Commissioner of Motor Vehicles that such policyholder was covered by an automobile liability policy to the extent of the \$10,000—20,000—5,000 minimum coverage required to exempt the policyholder from revocation. Subsequently, facts come to the attention of the insurer which indicate that a policy defense exists. In some cases, the failure to discover such facts earlier is tracable to inadequacies of investigation, interoffice mistake, or similar circumstances. In others, such failure results from circumstances in no way chargeable to the fault or neglect of the company. Largely, however, the general doctrine under the former law was that the insurer's generosity toward its policyholder rendered substantially all of its policy defenses unavailable against the injured person.

It shall be the writer's purpose to inquire, by a comparative analysis of the old law and the language of the new one, to what extent the legal and practical implications of this dilemma have been altered.

It might be well at the outset to indicate the general types of policy defenses which have been or are likely to become involved in the problem.

Such a list might include:

1. Operator driving without permission.¹
2. Use beyond geographical limits specified in the policy.
3. Violation of the purpose of use specified in the policy.²
4. Named insured exclusion.³
5. Injury to fellow servant in course of employment.
6. No action and household exclusion clauses.⁴
7. Misrepresentation in application.
8. Vehicle being operated by a garage or parking lot attendant.
9. Late notice of accident or other failure to cooperate with the insurance company.

¹ *Prisuda v. General Casualty*, 272 Wis. 41, 74 N.W. 2d 277 (1956), and 1 Wis. 2d 166, 83 N.W. 2d 739 (1957); *Behringer v. State Farm Mutual Automobile Insurance Company*, 275 Wis. 586, 82 N.W. 2d 915 (1957).

² *Henthorne v. M. G. C. Corporation* 1 Wis. 2d 180, 83 N.W. 2d 759 (1957).

³ *Pulvermacher v. Sharp*, 275 Wis. 371, 82 N.W. 2d 163 (1957).

⁴ *Perlick v. Country Mutual Casualty Company*, 274 Wis. 588, 80 N.W. 2d 921 (1957).

10. Defenses concerning coverage in excess of the required Safety Responsibility limits.⁵

Under the former law, as a reading of the above foot-noted cases will indicate, substantially all of the listed policy defenses were held unavailable. There were but two exceptions:

1. Defenses under the named insured exclusion clause, and
2. Defenses based on fraud in obtaining the filing.⁶

Of course defenses based on facts which could not have been known with due negligence before the filing were not barred, under the rule of the *Behringer* case.

Ch. 545 of the Laws of 1957 provides in this regard:

"Nothing in this chapter shall be construed to impose any obligation not otherwise assumed by the insurance company or surety company in its automobile liability policy or bond except that if no correction is made in the report within 30 days after it is mailed to the insurance company or surety company, the company, except in case of fraud, whenever such fraud may occur, is estopped from using as a defense to its liability the insured's failure to give permission or a violation of the purposes of use specified in the automobile liability policy or bond or the use of the vehicle beyond agreed geographical limits."⁷

Ostensibly, the statute is intended to limit the estoppel, consequent upon the new "certification by silence," to the classes of policy defenses specified therein. Under this construction, the remainder of the policy defenses would be available to the insurer even if it failed to correct the report within thirty days. Late discovery, or the insurance company's mistake or neglect, would appear to be immaterial since the new statute fails to mention the subject.

Under the new statute the insurance company will file the SR 21 only in those cases in which it wishes to make a correction in one of the seven statements printed thereon. This alone will go a long way in eliminating many of the mistakes and negligent filings which were common under the former law; since now the SR 21 will be filed only in extraordinary cases, whereas under the former law the form was filed in all cases except where a policy defense existed.

Under the former law, due to the wording of the statute, the commissioner would not accept an SR 21 filed on behalf of the owner or operator alone.⁸ This worked a hardship on the owner in cases where the car was stolen or being operated without his express or implied permission, and on the operator while driving under an operator's policy or under the "use of other vehicles" coverage. The insurance company would not file an SR 21 covering both the owner and operator

⁵ *Laughnan v. Griffiths*, 271 Wis. 247, 73 N.W. 2d 587 (1955).

⁶ 275 Wis. at 593, 82 N.W. 2d at 918.

⁷ Laws of 1957, chapter 545, §344.15(5).

⁸ WIS. STATS. §85.09(5) (9) (1955).

and the commissioner would not accept an SR 21 filed on behalf of one only. The insured was then faced with the prospect of losing his registration to all vehicles owned by him; or, in the case of an operator, both his registration and operator's license. In these situations the insured was forced to enjoin the commissioner under sec. 85.09 (2) (c), or proceed in the Circuit Court of Dane County for administrative review under sec. 127.16.

This problem has been eliminated by the new law, which makes it possible for the insurance company to file an SR 21 covering only the operator or only the owner.⁹

The new statute, however, cuts down the time allotted to the insurance company to make its investigation and raise its policy defenses. Under sec. 85.09 (5) Wis. Stats. (1955), the insurance company had sixty days from receipt of the accident report by the commissioner in which to investigate an accident, and decide whether to file an SR 21, before its insured's license and registration were subject to revocation. Ch. 545 of the Laws of 1957 provides that the insurance company must correct the report sent to it by the commissioner within thirty days after the date of mailing or it will be estopped from denying liability on the basis of the three defenses enumerated in the statute.

These three policy defenses seem to be the ones most commonly raised under the former law. It therefore appears that the new statute will be more stringent in this regard than the former law; since, while it limits the defenses subject to the estoppel, it also imposes a stricter burden of speedy investigation on the insurance company.

In summary, then, the apparent effect of the new statute upon the former law is to limit the estoppel to the defenses based on: (1) permission, (2) purpose of use and (3) geographical limits, in the event that the insurance company fails to correct and return the SR 21 within thirty days. However, it should be noted that the new statute is worded in such a way that the commissioner assumes: (1) that the policy was in effect, (2) that the policy afforded the limits required by the Safety Responsibility Act, and (3) that the policy applied to both the owner and the operator at the time of the accident, unless he is otherwise notified by the insurance company within the thirty day period.¹⁰ It follows, then, that unless the insurance company corrects items four, five, six, and seven on the SR 21 form, it will be estopped as to those defenses as well as to the three enumerated in the statute.

The new statute also provides a more efficient procedure for the administration of the Safety Responsibility Act by eliminating many of the difficulties which were present under the former law.

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⁹ Laws of 1957, c. 545, §344.14.

¹⁰ Laws of 1957, c. 545, §344.15(4).