1-1-1959

Chapter 16: Insurance

J. Albert Burgoyne

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Insurance Law Commons

Recommended Citation
CHAPTER 16

Insurance

J. ALBERT BURGOYNE

A. COURT DECISIONS

§16.1.  Motor vehicle insurance: Loading and unloading coverage. August A. Busch & Co. of Massachusetts v. Liberty Mutual Insurance Co.1 was a suit in equity brought by a beer manufacturer and its insurer against U-Dryvit Auto Rental Company and its insurer to determine the respective liabilities of the two insurers. The controversy arose out of the use by the beer manufacturer of a truck leased from U-Dryvit to deliver beer to a restaurant. In order to make the delivery, the beer manufacturer’s employees removed fifty cartons of beer from the truck, stacked the cartons on the sidewalk and then hauled them, five cartons at a time, on a two-wheeled hand truck a short distance down an alley. After removal from the hand truck the cartons were again stacked on the ground alongside an open alley door of the restaurant. Thereafter they were slid down a chute through a trap door located just inside the alley door and again stacked in the basement. The beer manufacturer’s employees then entered the basement of the restaurant and placed the cartons in an icebox. While they were thus engaged, a prospective customer of the restaurant entered the alley door, fell through the open trap door and was seriously injured.

The motor vehicle liability policy issued by Liberty Mutual to U-Dryvit purported to insure the beer manufacturer as lessee of the truck against liability to “pay . . . damages to others for bodily injury . . . caused by the ownership, operation, maintenance, control or use of the motor vehicle.” The policy further provided that “use of the motor vehicle for the purposes stated includes the loading and unloading thereof.” The liability of Liberty Mutual depended upon the scope of the coverage afforded by this provision and the case presented a question of first impression. The Supreme Judicial Court endorsed the “complete operation” rule, i.e., the unloading operation covers not only the removal of goods from the motor vehicle but also

J. ALBERT BURGOYNE is Assistant Vice-President of Liberty Mutual Insurance Company and Instructor in Law at Boston College Law School.

The author wishes to acknowledge the research assistance furnished by Edward F. Harrington and Richard P. Delaney of the Board of Student Editors of the ANNUAL SURVEY.

their delivery to a purchaser; and rejected the more restricted doctrine that unloading has ended when the goods have come to rest after removal from the vehicle. This is probably in accord with the numerical weight of authority. In reaching this conclusion the Court pointed to the use by Liberty Mutual of policy language that had already produced conflicting interpretations and the consequent latent ambiguity of meaning which must be resolved against it. The insured, in the view of the Court, would naturally understand unloading to be a continuous transaction ending with the deposit of the goods in the hands of the purchaser and the drafter of the policy should have expected that the policy provision would be so interpreted.

§16.2. Motor vehicle insurance: Guest occupant exclusion. Pezzuolo v. Travelers Insurance Co. was a bill in equity to reach and apply the defendant insurer's obligation under the compulsory insurance provisions of a motor vehicle liability policy in satisfaction of judgments obtained by the plaintiff and her husband against an insured under the policy. The policy excluded "bodily injury ... of any guest occupant of the motor vehicle" and defined guest occupant in the terms of the compulsory insurance law to mean any person not an employee of the owner or registrant of the motor vehicle nor a passenger for hire in a vehicle registered for carrying passengers for hire. There was evidence at the trial of the negligence action that would support a jury finding that the plaintiff was a business invitee to whom the insured owed a duty of due care, but would not warrant a finding that she was an employee so as to bring her within the exception of the guest occupant definition. The Supreme Judicial Court, reversing the decree of the Superior Court, held that the "guest occupant" exclusion is inclusive not only of those who are "guests" for the purposes of determining the liability of the owner or operator of a motor vehicle but also of those who are business invitees. The insured was liable for the injury sustained by the plaintiffs, but that injury was not within the coverage of the policy.

§16.3. Life insurance: Misrepresentation in application. Lennon v. John Hancock Mutual Life Insurance Co. was an action of contract by the beneficiary to recover the proceeds of a policy of insurance on the life of her husband. There was evidence that on June 26, 1950, a biopsy was performed on the insured as a hospital out-patient; that the biopsy disclosed cancer of the larynx; and that the cancerous growth was excised in an operation performed on July 17. After the biopsy but prior to admission to the hospital for the subsequent operation, the insured applied for a policy of life insurance which was issued by the defendant on July 27. In his application the insured stated that

2 For a review of the cases, see Annotation, 160 A.L.R. 1251 (1946). See also 1959 Ins. L.J. 81.


2 G.L., c. 90, §34A.

he had not been treated for cancer, had not undergone surgery except for a recent hernia, and had not during the previous five years been treated in any hospital. On April 21, 1952, the insured died of cancer of the pancreas. The beneficiary acknowledged that she knew the insured had cancer when the policy was issued, but testified that the insured had no knowledge of the cancerous condition.

A misrepresentation will not defeat a policy unless the misrepresentation is made with actual intent to deceive or the matter misrepresented increased the risk of loss.\(^2\) A misrepresentation of the absence of cancer increases the risk as a matter of law,\(^3\) but a question asking an applicant for insurance if he has ever had a certain disease calls only for an answer to the best of the applicant's knowledge or belief.\(^4\) Here the applicant's assertion of the absence of cancer was an innocent misrepresentation, but his lack of knowledge of his condition did not relieve him of the obligation to report the subsequent operation to the insurance company. This operation, performed between the date of application and the effective date of coverage, in the opinion of the Court, increased the risk as a matter of law. The insured was under an obligation to disclose it, whether or not he knew it was for cancer,\(^5\) and his failure to do so constituted a material misrepresentation that avoids the policy.

\(\S 16.4.\) Bankers blanket bond: Forgery. In \textit{Rockland-Atlas National Bank of Boston v. Massachusetts Bonding & Insurance Co.,}\(^1\) the bank sought to recover from its bonding company under a Bankers Blanket Bond Standard Form No. 24 for a loss sustained as a consequence of its reliance upon a forged financial statement and accountant's letter in agreeing to participate in a loan purportedly made by the Guaranty Trust Company of Waltham to the Nashua Sales Company. An officer of the Waltham bank and an officer of the purported borrower were indicted and convicted "in connection with this transaction for stealing the property of Guaranty." The acceptance by the plaintiff bank of a certified financial statement and the accountant's letter was in accordance with the prior course of dealings between the two banks.

Recovery could be had under the Form No. 24 bond, if at all, only under insuring clause (E) which provides coverage for "Any loss through the insured's having, in good faith and in the course of business . . . given any value . . . on the faith of . . . any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any . . . person signing in

\(^2\) G.L., c. 175, \S186.
§16.5 INSURANCE

any . . . capacity." The Supreme Judicial Court construed clause (E) as encompassing "securities and writings something like securities" and rejected the argument that the word "documents" was intended to include within the clause "any formal writing." In support of this construction the Court pointed to the enumeration in clause (E) of the category of signers whose signatures may be forged, i.e., "any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or . . . any person signing in any other capacity" and read the catchall phrase, ejusdem generis, as meaning "in any other similar capacity." In the Court's view the word "instruments" was the key word in the phrase and brings within the coverage only those writings made and executed as the expression of some act, contract or proceeding and does not include a false certified financial statement.

§16.5. Policy insuring agreements: Defense, settlement, supplementary payments. In Murach v. Massachusetts Bonding and Insurance Co.¹ the plaintiffs sought to hold their motor vehicle liability insurer for its failure to settle a tort claim which resulted in a verdict against them in an amount substantially in excess of their policy coverage. The tort action against the plaintiffs sought damages in the amount of $20,000; the applicable limit of liability under the plaintiffs' policy was $10,000. On the trial the claimant had a jury verdict for $4900, but a motion for a new trial on the ground that the verdict was inadequate was granted unless within ten days the parties agreed to an additur of $7500. When the original suit was filed and again when the new trial was ordered the insurer communicated to its insured the fact of a possible verdict in excess of policy limits and suggested the possibility that he retain personal counsel. In response to the insurer's second communication the insured indicated a belief that the claimant's injuries were feigned and her damages exaggerated and that, in any case, he was judgment proof. Before the second trial the claimant made an offer of settlement to the insurer for $9300, which offer was not disclosed to the insured; on the first day of the second trial the insurer made a counteroffer of $7500, which was rejected. On the new trial the claimant had a jury verdict of almost $30,000.

The policy insuring agreement, providing that "... the company shall . . . defend any suit against the insured . . . even if . . . groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient," gives to the insurer complete discretion in the matter of settlement. In determining the liability of the insurer for failure to settle within the policy limits the Supreme Judicial Court applied the test of "good faith" laid down in Abrams v. Factory Mutual Liability Insurance Co.,² in which it was stated that "something more must be shown than [the insurance company] failing to make a settlement

² 298 Mass. 141, 10 N.E.2d 82 (1937).
which a reasonable person exercising due care 'from the standpoint of
the assured' would have made.”

The obligation of the insurer to exercise good faith requires it to make its decision as to whether to settle a claim within the policy limits or to try the case as it would if there was no limit of liability applicable to the claim. On the evidence reported the Court upheld the finding of the trial judge that the insurer exercised its judgment in good faith and that it had fulfilled its obligation to disclose to the insured his adverse interest. Although its failure to advise the insured of claimant's offer of settlement was of evidential value in determining the good faith of the insurer, it was possible for the trial judge to conclude that the insurer reasonably believed that the insured was not interested in being kept informed of the progress of settlement negotiations.

§16.6. Policy conditions: Assistance and cooperation. During the 1959 Survey year two cases involving the assistance and cooperation clause came before the Supreme Judicial Court. Cassidy v. Liberty Mutual Insurance Co. was a bill in equity to reach and apply the non-compulsory provisions of a motor vehicle liability policy in satisfaction of a judgment obtained by the plaintiff against Smith as a consequence of injury sustained while riding as a guest in an automobile owned and operated by Sullivan, but registered and insured by Smith. Prior to the trial of the tort action Smith repeatedly stated that he was the owner of the automobile, but when the case came to trial he admitted that he did not own the automobile. The insurer thereafter continued the defense under an agreed reservation of rights to disclaim liability. When the plaintiff brought this bill, the insurer set up the defenses of fraud in procuring the policy and non-cooperation in the defense of the tort action. The Court held that when the insured has misrepresented his insurable interest in the automobile in negotiating a policy of insurance with intent to deceive the insurer, his misrepresentation may be deemed material so as to enable the insurer to avoid the policy. Moreover, the intentional furnishing of false information of a material nature either before or at trial is a breach of the cooperation clause. Since the action involved the non-compulsory coverage of the policy, any defense available against the insured is available against the claimant since the latter's rights can rise no higher than those of the insured.

The first case in Massachusetts to raise the question of the insurer's duties under the customary assistance and cooperation clauses was Imperali v. Pica. This was a bill in equity to reach and apply the non-compulsory provisions of the defendant's motor vehicle liability policy in satisfaction of a judgment obtained by the plaintiff as a consequence of injury sustained when he was struck by an automobile owned and

---

8 298 Mass. at 145, 10 N.E.2d at 84.
2 See G.L., c. 175, §186.
operated by the defendant. In the original tort action an appearance was entered for the defendant by a firm of attorneys representing the insurance company. Subsequently, following receipt from the plaintiff's attorney of a demand to admit facts, an attorney of the firm representing the company dictated and signed a letter advising the defendant that he was being represented by the firm, that a demand to admit facts had been received and that he should arrange to come to the office within ten days so that answers could be prepared for his signature. This letter was never mailed. Six days later it was delivered by an employee of the company in person and at the time of delivery was read to the defendant, who agreed to "get in touch right away." The defendant failed to do so and no reply to the demand to admit facts was ever filed and no extension of time within which to reply was either sought or obtained.

An insurer may terminate its liability under a policy if the insured commits a material breach of the cooperation clause, but the insurer will not be relieved when it has not itself exercised reasonable diligence in seeking cooperation from the insured. The cooperation clause imposes reciprocal obligations. The insured must cooperate, but the insurer is obliged to exercise diligence and good faith in bringing this about. Moreover, the attorney undertaking the defense of a case represents both the insured and insurer and owes to each a duty of good faith and diligence in the discharge of his duties, and rights of one cannot be subordinated to those of the other. On the facts of the present case the Court held that the trial judge was not plainly wrong in finding that the insured did not cooperate "in a vital and immediate matter" pertaining to the defense of the tort case. The breach was material, even though the facts in the demand were true, because the company is entitled to the insured's verification of the facts under oath at the time the demand was served. The mere fact that the only consequence of the failure to answer the demand was that facts were deemed admitted would not render the breach of the cooperation clause immaterial.

§16.7. Policy conditions: Other insurance. In Beattie v. American Automobile Insurance Co., the plaintiff sought to reach and apply to the satisfaction of the unpaid half of an execution held by him the obligations of the defendant American Automobile Insurance Co. under a motor vehicle liability policy issued to the lessee of a motor truck and of the defendant United States Casualty Co. under a substantially similar policy issued to a truck renting company. In addition to compulsory insurance, the American policy afforded excess bodily injury liability limits of $100,000 per person and $300,000 per accident and property damage liability coverage limited to $50,000 per accident; the United States Casualty policy afforded $25,000 per person and $50,000


per accident excess bodily injury liability limits and $5000 property damage liability coverage. Both policies contained the "Other Insurance" clause providing that "the company shall not be liable ... for a greater proportion of such loss than the applicable limit of liability stated ... bears to the total applicable limit of liability of all valid and collectible insurance." To this clause in the American policy was added a proviso reading: "provided, however, the insurance with respect to temporary substitute motor vehicles under insuring agreement IV or other motor vehicles under insuring agreement V shall be excess over any other valid and collectible insurance." The Supreme Judicial Court rejected the unexplained finding of the trial judge that the coverage under the American policy was excess over that afforded by the United States Casualty policy, pointing out that a truck used exclusively in the business of the lessee under a long-term lease was neither a "temporary substitute" for a vehicle withdrawn from normal use for repair or servicing nor "any other vehicle" within the Use of Other Motor Vehicles coverage granted under a policy issued to an insured individual. On this record two policies, each requiring proration of the loss, provided coverage, the total loss is within the compulsory coverage of each, and each insurer is therefore liable for one half the loss.

B. LEGISLATION

§16.8. Motor vehicle insurance. The special commission appointed to investigate and study the motor vehicle laws and the insurance laws as they relate to motor vehicles filed its report for consideration by the 1959 session of the General Court. This commission made a thoroughgoing inquiry into the related matters of highway safety and motor vehicle insurance and included in its extensive report a number of legislative recommendations. The legislative changes recommended by the majority of the commission would have strengthened the functions of the State Board of Appeal on Motor Vehicle Liability Policies and Bonds, permitted the writing of so-called "uninsured motorists" coverage, established a Massachusetts Highway Patrol, required mandatory suspension of driving licenses for certain offenses, established "no-fix" traffic law enforcement, provided state-wide driver training in high schools, required re-examination of licensed drivers, restricted driving privileges of operators under eighteen, and permitted the adoption of local pedestrian control (anti-jaywalking) laws. Of these recommendations, all but the authorization of "uninsured motorists" coverage were bypassed and referred to the next annual session.

Acts of 1959, c. 438, enacts a new section in the insurance law authorizing the issuance of motor vehicle liability policies which also un-

2 Senate No. 466 (1959).
3 Adding new §111D to G.L., c. 175.
§16.8 INSURANCE


dertake to pay to an insured under the policy all sums which he is entitled to recover as damages from the owner or operator of an uninsured motor vehicle for bodily injury caused by accident and arising out of the ownership, maintenance or use of the uninsured motor vehicle. This coverage is now generally written in other states and was first developed and has since been widely proposed as a substitute for compulsory motor vehicle liability insurance, a system which, until recently and for more than thirty years, was unique in Massachusetts. The coverage, in effect, puts the innocent victim of the uninsured motorist in essentially the same position as he would have been had the uninsured motorist been insured, but also puts him in the anomalous position of seeking indemnity from his own insurer and assuming the burden of additional premium payments because the uninsured is unwilling to insure. The extension of motor vehicle liability policies to afford this coverage probably makes more sense in Massachusetts than in states without a compulsory insurance law, since the primary need for protection of Massachusetts residents is occasioned by the entry of uninsured motorists into the state.

Because of the coverage requirement that the uninsured motorist be liable for damages and because of the peculiar nature of the coverage which puts the insured in the position of pressing a third party liability claim against his own insurer, the new law requires that provision be made in the policy or in the policy endorsement that entitlement to recovery and the amount of damages shall be determined by agreement or, if agreement cannot be reached, by arbitration. The new law further provides that the Accident and Sickness Policy Provisions Law shall not apply to a policy or endorsement affording this coverage, even though it is a form of accident and sickness insurance. Acts of 1959, c. 438, also amends the section of the insurance law authorizing medical payments coverage under liability policies to authorize the issuance of motor vehicle liability policies which also provide, irrespective of legal liability, accidental death or disability benefits payable on account of injury or death arising out of the ownership, maintenance or use of motor vehicles. This form of accident and sickness insurance, limited to the motor vehicle hazard, has likewise been widely written in other states as a supplement to the standard forms of automobile insurance policies. This coverage can now be written on the Massachusetts motor vehicle liability policy, and the policy need

4 A number of states have made the inclusion of uninsured motorists coverage in automobile liability policies mandatory: California (effective September 18, 1959); New Hampshire (effective September 1, 1957); New York (effective January 1, 1959); Oregon (effective January 1, 1960); South Carolina (effective January 1, 1961); Virginia (effective July 1, 1958).


6 G.L., c. 175, §108.

7 Id. §111C.

8 G.L., c. 90, §34A.
not comply with the provisions of the Accident and Sickness Policy Provisions Law. 9

§16.9. Motor vehicle insurance: Illegal registration. For fifty years a legal anomaly has persisted in Massachusetts in the form of a rule declaring an unregistered or illegally registered motor vehicle to be a trespasser, an outlaw and a public nuisance on the highway. This doctrine was first enunciated in *Dudley v. Northampton Street Railway Co.*, 1 which held that the owner of an unregistered motor vehicle may not recover for personal injury or property damage unless the other party is guilty of willful, wanton or reckless misconduct. Moreover, the owner of the unregistered or illegally registered motor vehicle was held liable for damages suffered by another when neither party was negligent. 2 As recently as 1941 the Supreme Judicial Court in *Malloy v. Newman* 3 imposed liability upon such an owner for damages caused by the negligent driving of one who had stolen the illegally registered motor vehicle, a case which was subsequently overruled by the Court 4 to impose one of the few limitations on the “trespasser on the highway” doctrine.

This harsh rule has been widely criticized and the Court has several times indicated that it no longer favors its retention. 5 However, in a recent case, 6 a majority of the Court specifically refused to overrule the *Dudley* case, pointing out that the rule had stood for forty-six years without repeal by the legislature and that “its termination should be at legislative, rather than at judicial, hands.” The legislature has responded to this invitation in Acts of 1959, c. 259, which amends the statute 7 to provide that failure to register or the improper registration of a motor vehicle will not render the vehicle a nuisance or any person a trespasser on the highway, unless the violation of the registration section was in fact a proximate cause of the injury, death or damage. Such violation will hereafter be deemed only evidence of negligence on the part of the violator.

§16.10. Motor vehicle insurance: Leased vehicles. Under the provisions of Acts of 1959, c. 282, every person engaged in the business of leasing motor vehicles under the “drive-it-yourself” system is required, effective January 1, 1960, to maintain a motor vehicle liability policy or bond or deposit covering not only compulsory bodily injury liability but also property damage liability protection in the amount of $1000. 1 For the 1960 and subsequent registration years property damage liability insurance or equivalent indemnity or protection shall

9 Id., c. 175, §108.

3 §10 Mass. 269, 37 N.E.2d 1001 (1941).
7 G.L., c. 90, §9. For further comment on this amendment, see §3.8 supra.

§16.10. 1 Section 1, amending G.L., c. 90, §32E.
§16.12 INSURANCE

be a prerequisite to the registration of any motor vehicle to be leased under any such system. The definitions of "motor vehicle liability policy" and "motor vehicle liability bond" and the requirements for a substitute security deposit are amended to impose this additional requirement. The penalty provided for the operation of an uninsured motor vehicle shall not apply to a person who operates a leased "drive-it-yourself" motor vehicle without knowledge that the lessor has failed to comply with the compulsory insurance requirements.

§16.11. Life insurance. Acts of 1959, c. 209, amends the definition of group life insurance to permit life insurance to be written on a group basis on those persons to whom policy loans have been granted pursuant to the provisions therefor in life insurance policies. This act also amends the required group life insurance policy provisions section to prescribe that such a policy issued to an insurance company covering persons to whom policy loans have been granted contain a provision that a form will be delivered to each person insured stating that his life is insured and that any death benefit payable shall be applied to reduce or extinguish the policy loan.

Acts of 1958, c. 574, amends the statute permitting payment by the insured debtor of the premium for insurance on his life afforded under a policy of group creditors' life insurance to allow such payment from the proceeds of the loan or otherwise. It further amends this section to provide that such payment shall not constitute a charge upon a loan in violation of the small loans act, if the amount collected from the borrower, irrespective of the amount of the premium charge to the creditor, does not exceed 50 cents per $100 per year of the original loan and charges, or 7½ cents per month per $100 of outstanding indebtedness, or proportionate rates for different periods or amounts of insurance. In the event of prepayment of the loan the borrower is entitled to a refund to be calculated upon the same basis as is prescribed for a precomputation refund under the small loans act.

§16.12. Group insurance: Agents and agency employees. Acts of 1959, c. 261, amends the statute permitting life and accident and health insurance companies to establish a plan of insurance or retirement benefits for their agents and the agents' employees to provide that eligibility requirements and the determination of benefit amounts shall be based exclusively upon the sale of life insurance, accident and health

2 Cf. G.L., c. 90, §1A.
3 Acts of 1959, c. 282, §§2 and 3, amending G.L., c. 90, §34A.
4 Id. §4, amending G.L., c. 90, §34D.
5 Id. §5, amending G.L., c. 90, §34J.

2 G.L., c. 175, §134(4A), as added by Acts of 1955, c. 169.
3 G.L., c. 175, §134, as amended by Acts of 1951, c. 404.
4 G.L., c. 140, §§96-114A.
5 Id. §100.

§16.12. 1 G.L., c. 175, §36A, added by Acts of 1948, c. 496.

http://lawdigitalcommons.bc.edu/asml/vol1959/iss1/20 10
§16.13. Group insurance: Public employees. Acts of 1958, c. 558, amends the Group Insurance Plan for Employees of the Commonwealth to make employees of local housing or redevelopment authorities eligible for insurance, and further amends the Group Insurance Plan for Employees of Counties, Cities, Towns and Districts to terminate eligibility of such employees under the latter insurance program. This change in eligibility became effective on January 1, 1959, but such employees who become insured under the provisions of the earlier enactment will continue to be so insured until the contracts insuring their group insurance benefits expire, and the provisions of the state employees' insurance plan will not apply until such expiration.

Acts of 1958, c. 536, amends the definition of an employee eligible for the Group Insurance Plan for Employees of Counties, Cities, Towns and Districts to require that compensation must be received for the services rendered to the governmental unit, to specify that at least twenty hours be worked during the regular work week, and to exclude seasonal and emergency employees.

Acts of 1958, c. 580, amends the Group Insurance Plan for Employees of Counties, Cities, Towns and Districts to extend eligibility for insurance to employees of a free public library maintained in a city or town, provided the city or town annually contributes at least half the cost of maintaining the library.

§16.14. Policy conditions: Proof of loss. An insured under a Massachusetts Standard Fire Policy is protected by statute against forfeiture of coverage for failure to give proper notice or proof of loss with respect to a loss by fire or by any other hazard insured against under such a policy. If the insured fails to render to the insurer the sworn statement prescribed by the policy, he may, nevertheless, recover if he forthwith gives to the insurer written notice of the loss and thereafter complies with a written request to render the sworn statement; but in the absence of such a written request, the insurer's obligation is fixed and the period within which payment must be made runs from the receipt of the written notice. Moreover, if the insured fails to render the prescribed sworn statement or to give a written notice he may, nevertheless, recover if the insurer sends out a representative to adjust the claim and if the insured thereafter complies with a written request.

4 Id. §5.

§16.14. 1 G.L., c. 175, §99.
2 Id. §102.
§16.15 INSURANCE

183
to render the sworn statement; but in the absence of such a written request, the insurer's obligation is fixed and the period within which payment must be made runs from the time its agent was sent to adjust the claim. Acts of 1959, c. 168, now provides the same protection to an insured who fails to render a sworn statement of loss or damage from any hazard insured against under any policy issued in the Commonwealth.

§16.15. Policy conditions: Subrogation. The principle of law that a bailor who is not himself negligent and who is not bound by the negligence of his bailee may recover from a third person for damage to the property bailed resulting from the concurring negligence of the bailee and the third person was settled in Massachusetts in Nash v. Lang. Relying upon the rule of the Nash case the Supreme Judicial Court in Morris Plan Co. v. Hillcrest Farms, Inc. held that the conditional vendor of an automobile could recover from a third person for negligently damaging the automobile while it was in the possession of a conditional vendee in default, notwithstanding the latter's contributory negligence, at least to an amount not in excess of the sum still owed under the conditional sales agreement. Two cases in 1958 further developed this rule of law favoring the conditional vendor or chattel mortgagee. Bell Finance Co. v. Geffer allowed recovery of the full amount of automobile collision damage even though the conditional vendee at the time of the accident was not in default. Finally, Harvard Trust Co. v. Racheotes allowed recovery in a case in which the chattel mortgagor was contributorily negligent and the amount of damage to the automobile exceeded the unpaid balance of the loan which was not in default. However, to forestall the unjust enrichment of the mortgagor, the Court limited the amount of recovery to the amount of the loan then unpaid.

It was apparent in these latter cases that the real complaining party in interest was the automobile physical damage insurer of the holder of the security interest in the damaged automobile. Through these subrogation actions the property losses are shifted from the physical damage insurers to the liability insurers, thus accomplishing only an uneconomic redistribution of such losses among insurers. Moreover, it is a matter of some concern to insurance companies generally that the captive insurers of the major automobile financing companies are the principal beneficiaries of a rule that subjects an automobile owner to a liability for collision damage which he would not otherwise have simply because a third person has a security interest in the other auto-

3 Adding new §186A to G.L., c. 175.


http://lawdigitalcommons.bc.edu/asml/vol1959/iss1/20
mobile involved in the accident. These captive insurers customarily do not write liability insurance, but limit their underwriting to physical damage coverages on financed automobiles and have acquired a major share of this market. These considerations prompted the successful effort of the insurance companies to obtain legislation rejecting this judicially established rule of law.

Acts of 1959, c. 300,6 adds to the General Laws a new section providing that in an action to recover for damage to a motor vehicle brought in the name of a person holding a security interest in the motor vehicle, any defense available against the registered owner shall be available against the person holding the security interest. Thus a subrogated physical damage claim in the hands of a person having a security interest in the damaged motor vehicle is subject to the same defenses as may be raised against the owner of the vehicle. The holding of Morris Plan Co. v. Hillcrest Farms, Inc. is no longer law; the rule of Nash v. Lang continues unaffected.

§16.16. Insurance companies. Acts of 1959, c. 128,1 authorizes investment by domestic insurance companies in bonds, notes, evidences of indebtedness, or contractual obligations of the United States or any instrumentality thereof, or of any state of the United States, including joint, undivided or participating interests in such obligations.

Acts of 1958, c. 575, provides for the inclusion of annuity considerations in the base for the insurance excise tax imposed upon domestic life companies,2 excluding, however, such considerations paid by an annuitant who is a resident of a state or country to which the company actually pays an excise tax based upon life insurance premiums. Under this statutory change the exclusion is permitted whether or not the company pays to the state or country of the annuitant's residence an excise tax based upon annuity considerations.

Acts of 1959, c. 249,3 extends to July 25, 1961, the authority of insurance companies to make or acquire real estate mortgage loans to veterans guaranteed by the Administrator of Veterans Affairs.

6 Adding new §85E to G.L., c. 231.

§16.16. 1 Amending G.L., c. 175, §63, par. 1.
2 G.L., c. 63, §20, as amended by Acts of 1943, c. 531, §1.