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Insurance -- Burial Associations -- Definition of Insurance

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the benefits of the policy, complied with the wrongful demands. The result reached by the court might possibly be justified by treating the threat to cancel the policy as a threat to breach a contract, such a threat having been held not to constitute duress;[23] however, in order to sustain this reasoning it must appear that the plaintiff's action on the contract of insurance would adequately compensate him[24] and that he would suffer no loss pending the time of the trial of his cause in the event that he should ultimately lose the case.

At any rate, it seems that the court should have considered the doctrine of economic compulsion; and there is little justification for deciding the case on a rule of law[25] which is at most questionably applicable, since the payment of the premiums can scarcely be considered voluntary.[26]

JOHN TAYLOR SCHILLER.

Insurance—Burial Associations—Definition of Insurance.

Defendant funeral home was enjoined from doing an insurance business without complying with the insurance laws.[1] Thereafter defendant sold contracts for $50, payable in monthly installments, which provided that the purchaser would be rendered certain funeral services on death, and that the purchaser's representative would be entitled to funeral merchandise at reduced prices. There was a further stipulation that the exercise of the privileges under the contract would render the unpaid balance due and collectible. Contempt proceedings were instituted by the Insurance Commissioner. *Held*: Since no element of risk was involved the agreements were not insurance contracts and defendant did not violate the injunction in making sales subsequently thereto.[2]

Statutory definitions of insurance are ordinarily couched in such general terms as to be of little value. North Carolina has one of the more widely accepted definitions: "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity for, the destruction, loss, or injury of something

[23] See note 16 *supra*.
[24] See note 17 *supra*.
[25] ". . . money *voluntarily* paid with full knowledge of the facts cannot be recovered back except where it was paid under duress, fraud, or mistake." (Italics the writer's). Ignatovig v. Prudential Ins. Co. of America, 16 F. Supp. 764 (M. D. Pa. 1935).
[26] A settlement of the case was subsequently made. For a recent discussion of this subject see (1937) 3 U. OF PITTSBURGH L. REV. 241.

[1] South Georgia Funeral Homes v. Harrison, 182 Ga. 60, 184 S. E. 875 (1936).
[2] South Georgia Funeral Homes v. Harrison, 188 S. E. 529 (Ga. 1936).

in which the other party has an interest."[3] The broad generalities of the definition are obvious.

Though there is a perplexing problem as to what constitutes insurance, all insurance contracts necessarily contain the following elements:[4] "(1) One party possesses an interest susceptible of pecuniary estimation". This insurable interest requirement is based on public policy which condemns as a mere wager any agreement for insurance on anything in which the parties have no interest. "(2) That interest is subject to some well-defined peril or perils, the happening of which will destroy or impair it, thereby causing loss to the risk bearer." A contract which might otherwise be held insurance is likely to be called an executory sales agreement where there is no element of risk. "(3) There is an assumption of this risk by the other party to the contract." Insurance is primarily considered as a risk-shifting device. "(4) The contract for assuming the risk must be an integral part of a general scheme for distributing a loss that may be suffered by any individual interest owner among a considerable group of persons exposed to similar perils. (5) The insured must make a ratable contribution, called a premium, to the general insurance fund."[5]

However the fact that the above elements are present in a particular instance is not conclusive. The courts in addition devise and apply other tests.

One frequest test is *control.* This is ordinarily applied in regard to indemnities accompanying sales of goods. If the happening of the risk is within the control of the vendor, then the courts hold that the contract is not insurance. Or stated differently, if the warranty includes hazards other than defects in articles sold, it is insurance. Thus a contract to repair plate glass windows and to replace them if broken from any cause is an insurance contract because the breakage is beyond the control of the repairer;[6] a contract to furnish mercantile reports which guarantees their accuracy is not insurance since the credit company can control the accuracy of its reports;[7] an organization which pays

[3] N. C. CODE ANN. (Michie, 1935) §6262. At least 10 other states have almost the identical statute, including Alabama, Colorado, Idaho, Maine, Massachusetts, Mississippi, Nebraska, Oklahoma, Tennessee, Washington. Other states have adopted definitions for particular branches of insurance. For example, GEORGIA CODE (1933) §56-901, "A life insurance policy is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another shall die within the time limited by the policy. The life may be that of the insured or of another in the continuance of whose life the insured has an interest."

[4] VANCE, INSURANCE (2d ed. 1930) §5.

[5] The presence of elements 4 and 5 distinguishes an insurance contract from an ordinary guaranty or warranty. An ordinary suretyship contains elements 1, 2, and 3 but is not considered insurance.

[6] People v. Standard Plate Glass and Salvage Co., 174 App. Div. 501, 156 N. Y. Supp. 1012 (1916). But *cf.* Moresh v. O'Regan, 120 N. J. Eq. 534, 187 Atl. 619 (1936); People v. Roschli, 291 N. Y. Supp. 473 (1936).

[7] People *ex rel.* Daily Credit Service Corp. v. May, 162 App. Div. 215, 147

benefits to its members on marriage is not engaged in the insurance business as there is no risk outside the control of its members.[8]

Another test imposed is that of the *purpose of the contract.* Where benefits, predicated on the occurrence of an event, are but incidental to the main purpose of a contract, the transaction is not insurance. Thus, a contract of a hospital to care for a patient the remainder of her life for a stated sum is not ultra vires as an insurance agreement;[9] an indemnity promise accompanying the sale of lightning rods is not insurance, as the guaranty is incidental to the sale;[10] a contract of a brewing company guaranteeing the payment of rent by a saloon-keeper is incidental to the saloon-keeper's contract to sell only the brewing company's beer;[11] also employee relief funds made up from the employee's wages and administered by the employer are not insurance;[12] nor is an employer's contract to protect employees from violence by strikers an insurance contract.[13]

However many courts do not apply the *purpose of the contract* test and construe incidental benefits within the definitions of insurance. A sale of furniture on the installment plan with a provision that the balance of the installments due would be cancelled in case of death of the purchaser before final payment was held to be insurance.[14] Building and loan associations which contract for extinguishment of a debt in case of death of the debtor have been held to be dealing in insurance.[15] A promise by a newspaper to pay a sum to the estate of any person accidentally killed with a copy of such newspaper in his possession was held an insurance contract and therefore ultra vires of the publishing company.[16]

Concerns organized with the purpose of dealing in risks, or conducting a business or offering a line of service founded on risk, are almost uniformly declared to be insurance companies. Burial associations

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N. Y. Supp. 487 (1914), *aff'd* 212 N. Y. 561, 106 N. E. 1039 (1914). But *cf.* Ops. Att'y Gen. (N. Y. 1921) 235.

[8] Chafart v. Payton, 91 Ind. 202 (1883); State v. Towle, 80 Me. 287, 14 Atl. 195 (1888); *cf.* White v. Equitable Nuptial Ben. Union, 76 Ala. 251 (1884); Garratt v. Baker, 5 Cal. (2d) 745, 43 P. (2d) 828 (1935), *rev'd* 56 P. (2d) 225 (1936).

[9] Sisters of Third Order of St. Francis v. Guillaume's Estate, 222 Ill. App. 543 (1921).

[10] Cole Bros. and Hart v. Haven, 7 N. W. 383 (Iowa, 1880).

[11] James Eva Estate v. Mecca Co., 40 Cal. App. 515, 181 Pac. 415 (1919).

[12] Colaizzi v. Pa. Ry., 208 N. Y. 275, 101 N. E. 859 (1913); State *ex. rel.* Sheets v. Pittsburgh, C., C. and St. L. R. R., 68 Ohio St. 9, 67 N. E. 93 (1903).

[13] Hansen v. Dodwell Dock and Warehouse Co., 100 Wash. 46, 170 Pac. 346 (1918).

[14] Att'y Gen. v. Osgood Co., 249 Mass. 473, 144 N. E. 371 (1924), (1924) 24 COL. L. REV. 802, (1924) 23 MICH. L. REV. 191.

[15] United Security Life Ins. and Trust Co. v. Bond, 16 D. C. App. 579 (1900); State v. Beardsley, 88 Minn. 20, 92 N. W. 472 (1902).

[16] Commonwealth v. Philadelphia Inquirer, 15 Pa. Co. Ct. Rep. 463 (1882).

which offer burial services for periodic payments are ordinarily subjected to insurance regulations.[17] Various attempts to camouflage the real nature of the business under the guise of a service organization have been of no avail. Thus, automobile associations offering contingent accommodation services and legal aid,[18] title guaranty companies,[19] realty corporations guaranteeing the value of auctioned land,[20] a crop insurance company disguising its contracts as sales options,[21] and physicians' defense associations,[22] have all been deemed insurance companies.

A third test is termed the *necessity of regulation.* Is the company of such a type that it should be subjected to insurance regulation? Although this appears to be one of the most satisfactory standards, the problem has been approached in this manner in only a few instances. Benevolent associations are not considered insurance companies because of their philanthropic objects although the usual insurance elements are present.[23] Ordinarily annuity contracts are not considered insurance because they provide for periodic receipts in consideration of the payment of a lump sum to begin at the inception of the contract.[24] Yet annuity contracts are regulated as insurance in some jurisdictions so as to assure the company's ability to pay.[25] Although an ordinary

[17] State v. Wichita Mutual Burial Ass'n, 73 Kan. 179, 84 Pac. 757 (1906); Oklahoma Southwestern Burial Ass'n v. State, 135 Okla. 151, 274 Pac. 642 (1929); State v. Mutual Mortuary Ass'n, 166 Tenn. 260, 61 S. W. (2d) 664 (1933); State *ex. rel.* Reece v. Stout, 16 Tenn. App. 10, 65 S. W. (2d) 827 (1933); *cf.* State v. Gooch, 165 Tenn. 97, 52 S. W. (2d) 143 (1932); N. C. CODE ANN. (Michie, 1935) §6476(z); P. L. N. C. 1937, c. 239, commented on in this REVIEW.

[18] Allin v. Motorist's Alliance of America, 234 Ky. 714, 29 S. W. (2d) 19 (1930); State v. Spaulding, 166 Minn. 167, 207 N. W. 317 (1926); State v. Bean, 193 Minn. 113, 258 N. W. 18 (1934); National Automobile Service Corp. v. State 55 S. W. (2d) 209 (Tex. Civ. App. 1932).

[19] Title Insurance and Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 Pac. 667 (1923); People v. New York Title and Mortgage Co., 346 Ill. 278, 178 N. E. 661 (1931). Accord: Wilson v. Louisville Title Co., 244 Ky. 683, 51 S. W. (2d) 971 (1932).

[20] Commonwealth v. Fidelity Land Value Assurance Co., 312 Pa. 425, 167 Atl. 300 (1933). But *cf.* People v. Potts, 264 Ill. 522, 106 N. E. 524 (1914). *Contra:* Saltzman v. Fairbanks Realty Co., 145 Misc. 478, 260 N. Y. Supp. 334 (1932).

[21] *In re* Hogan, 8 N. D. 301, 78 N. W. 1051 (1899).

[22] Physicians' Defense Co. v. Cooper, 199 Fed. 576 (C. C. A. 9th, 1912); Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396 (1907). *Contra:* Vredenburgh v. Physicians' Defense Co., 126 Ill. App. 509 (1906); State *ex. rel.* Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567 (1905).

[23] Fischer v. American Legion of Honor, 168 Pa. 279, 31 Atl. 1089 (1895); Northwestern Masonic Aid Ass'n of Chicago v. Jones, 154 Pa. 99, 26 Atl. 253 (1893); Comm. *ex. rel.* Att'y Gen. v. Equitable Benefit Ass'n, 137 Pa. 412, 18 Atl. 1112 (1890); *cf.* Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, 91 N. E. 466 (1910).

[24] Rischel v. Pacific Mutual Life Ins. Co. of Cal., 78 F. (2d) 881 (C. C. A. 10th, 1935); Hall v. Metropolitan Life Ins. Co., 146 Ore. 32, 28 P. (2d) 875 (1934).

[25] For example, MASS. LAWS ANN. (1933) c. 175, §118. Applied in Mutual Benefit Life Ins. Co. v. Commonwealth, 227 Mass. 63, 116 N. E. 469 (1917).

surety is not considered as an insurer, when a company makes a business of suretyship it may be subjected to insurance law to protect the public.[26]

Thus it may be seen that predictability as to whether a company will be held to be engaging in insurance is a rather complex problem. Contracts of private[27] undertaking establishments which offer future burial services and sell funeral merchandise in consideration of installment payments (depending on the longevity of the buyer) present a fertile field for the insurance tests. Analytically, an application of the *control* test would necessitate a finding that the contract is insurance, since the risk is beyond the control of the undertaker. The *necessity of regulation* test would lead to the same result, since the undertaker's ability to perform should be safeguarded. However, the risk element is merely incidental to the main purpose of the contract, to promote business. Hence, the *purpose of the contract* test would lead to an opposite conclusion. Since most of the contracts fit the broad statutory definitions of insurance and contain the elements of an insurance agreement, the private undertaking establishments are usually subjected to insurance regulation.[28]

In the instant case[29] the defendant cleverly evaded insurance regulation by removing from the contract the essential element of a risk. This was accomplished by the insertion in the agreement of the stipulation that the exercise of privileges under the contract would render the unpaid balance due and collectible. The court then construed the contract as an exchange of stated value for value. The fact that the defendant might receive interest on that amount of money paid in, the size of which amount was dependent upon the longevity of the purchaser, was a contingency which the court apparently failed to consider. Therefore the court was not accurate in holding that there was no risk involved. Aside from conformity to definitions, small concerns like the defendant are those most needing insurance regulation to make certain their ability to perform. Hence, the interest of the public would have been better served if the court had adopted the

[26] Home Title Ins. Co. v. United States, 50 F. (2d) 107 (C. C. A. 2d, 1931), *aff'd*, 285 U. S. 191, 52 Sup. Ct. 319, 76 L. ed. 695 (1932); Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623 (1910); *cf.* Southern Surety Co. v. Austin, 17 S. W. (2d) 774 (Comm. of Appeals, Tex. 1929).

[27] Not to be confused with burial associations. See note 17, *supra*.

[28] State v. Jones Co., 108 Fla. 613, 147 So. 230 (1933); Renschler v. State, *ex. rel.* Hogan, 90 Ohio St. 363, 107 N. E. 758 (1914); Lukens v. Bair Co., 104 Pa. 280, 158 Atl. 654 (1932); Ruto v. Italian Burial Casket Co., 104 Pa. 288, 158 Atl. 657 (1932); Sgro v. Pa. Burial Co., 113 Pa. 20, 171 Atl. 425 (1934); Sisson, Att'y Gen. *ex. rel.* Nardolillo v. Prata Undertaking Co., 49 R. I. 132, 141 Atl. 76 (1929); State *ex. rel.* Fishback v. Globe Casket and Undertaking Co., 82 Wash. 124, 143 Pac. 878 (1914).

[29] South Georgia Funeral Homes v. Harrison, 188 S. E. 529 (Ga. 1936).

necessity of regulation test and declared that the defendant was carrying on a business which should be regulated by insurance laws.

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Insurance—Defense of Actions—Negligence

Plaintiff, the insured, was sued by *X* for injuries caused by plaintiff's negligently driven automobile. Defendant, the plaintiff's insurance company, defended the suit as required by the terms of the policy, and *X* recovered a judgment considerably in excess of the amount of the policy. Plaintiff sought to recover the difference between the amount of the policy and the judgment recovered against him. He alleged that defendant was negligent in: (1) waiving the defense of contributory negligence, (2) admitting negligence on the part of the insured, (3) relying solely upon the validity of a doubtful release obtained from the injured party, (4) failing to settle the case before trial, or (5) for an amount less than the policy after judgment had been entered. A directed verdict for defendant was reversed and a new trial granted.[1]

Provisions in liability insurance policies requiring the insurer to defend all suits within the protection of the policy are common. Yet, cases alleging a negligent defense of such suits are rarely litigated. The scarcity of this litigation can undoubtedly be attributed to the fact that counsel employed by the insurer are usually of equal, if not higher, calibre than those who would be employed by the insured.

The decisions are uniform in holding that an indemnity insurer who assumes the defense of a suit against the insured is liable in damages to the insured if such defense is conducted in a negligent manner.[2] Good faith alone will not satisfy the insurer's duty.[3] It is said that this duty is that of an agent to exercise reasonable care about his principal's business.[4] A comparable standard of care is imposed upon attorneys, physicians, and other professional men.[5]

Cases establishing liability on the part of the insurer may be classified as follows:

I. For a negligent failure to settle claims.[6] Suppose *A* has indemnity

[1] Ballard v. Ocean Accident and Guarantee Co., 86 F. (2d) 449 (C. C. A. 7th, 1937).

[2] Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co., 240 Fed. 573 (C. C. A. 2d, 1917); Anderson v. Southern Surety Co., 107 Kan. 375, 191 Pac. 583, 21 A. L. R. 766 (1920); Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S. W. (2d) 889 (1920).

[3] Aycock Hosiery Mills v. Maryland Casualty Co., 157 Tenn. 559, 11 S. W. (2d) 889 (1920).

[4] Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co., 240 Fed. 573 (C. C. A. 2d, 1917).

[5] 2 Cooley, Torts (3rd ed. 1906) 1387-1390.

[6] Cavanaugh Bros. v. General Accident Fire and Life Assur. Corp., 79 N. H. 186, 106 Atl. 604 (1919); Douglas v. United States Fidelity and Guaranty Co., 81 N. H. 371, 127 Atl. 708 (1924).