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

JOHN HUGH WILLIAMS.

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).

insurance for \$5,000.00 and negligently injures *B* who offers to settle his claim with *C* insurance company for \$4,500.00. It is known to *C* insurance company that *B* has an apparently valid claim, yet *C* refuses to settle for this amount. Clearly it would be much to *A*'s advantage if this settlement were effectuated; however, *C* is determined to gamble \$500 by letting the claim go to trial. *B* recovers a judgment for \$10,000.00. It would seem that *C*'s conduct was reasonable and "business like" as it affected its own interests, yet as it affected *A*'s interests it may have been negligent, if not bordering on bad faith. Where there is a good chance that the claimant will recover a judgment in excess of the amount of the policy, but offers to settle for the amount of the policy or a little less, a refusal to settle should clearly raise a rebuttable presumption that the failure to settle constituted negligence. The insured's interests should at all times be treated as paramount. It is said that the insurer must act as would an average man under similar circumstances.⁷

II. For a wrongful refusal to defend as required in the policy.⁸ This is clearly a case of breach of contract. The damages recoverable necessarily include the cost of trial and attorney's fees as such were part of the insurer's undertaking.⁹

III. For a negligent defense when the policy provided that the insurer defend.¹⁰ This is the instant case. While the case might seem hopeless to the insurer (*i.e.* that the claimant is sure to recover at least the amount of the policy) nevertheless there should be no "let up" in the amount of diligence used. The interests of the insured are still at stake, and he is relying on the insurer to protect him to its utmost ability. By the familiar doctrine of agency the agent is required to use due care and good faith in all negotiations affecting his principal.¹¹ Where the policy requires that the insurer either pay the amount of the policy or defend the claim and the insurer elects to do the latter the same duty of reasonable care in conducting the defense is imposed on the insurer.¹²

The following conduct on the part of the insurer, has been deemed negligent: (a) Failure to introduce legal evidence available which would tend to absolve the insured of liability,¹³ (b) Promising to appeal where

⁷ *Cavanaugh Bros. v. General Accident and Life Assur. Corp.*, 79 N. H. 186, 106 Atl. 604 (1919).

⁸ *Western Indemnity Co. v. Walker-Smith Co.*, 203 S. W. 93 (Tex. Civ. App., 1918).

⁹ *Pontious v. American Motorist Ins. Co.*, 158 Wash. 264, 290 Pac. 580 (1920).

¹⁰ *Aycock Hosiery Mills v. Maryland Casualty Co.*, 157 Tenn. 559, 11 S. W. (2d) 889 (1920); *Schwartz v. Norwich Union Indemnity Co.*, 212 Wis. 593, 250 N. W. 446 (1933).

¹¹ MECHEM, *OUTLINES OF AGENCY* (3rd ed. 1923) §§324, 325.

¹² *Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co.*, 240 Fed. 573 (C. C. A. 2d, 1917). Accord: *Wynnewood Lumber Co. v. The Travelers Ins. Co.*, 173 N. C. 269, 91 S. E. 946 (1917).

¹³ *Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co.*, 240 Fed. 573 (C. C. A. 2d, 1917).

apparent error exists but failing to do so,¹⁴ (c) Failure to plead that claimant was violating a statute when injured,¹⁵ (d) Agreeing to restore a case to the docket after a nonsuit had been taken.¹⁶

HARRY LEE RIDDLE, JR.

Lotteries—"Bank Nights."

The use of prize contests as a method of stimulating sales by business concerns is nothing new and is quite legitimate.¹ But when these schemes lose their status as contests and take on the elements of lotteries they become unlawful.

"Bank Night" as a scheme for advertising and increasing the attendance at theatres has been widely adopted in the United States during the past two years.² Under the various arrangements the question when a lottery exists has been brought to the forefront. By statute³ North Carolina made lotteries illegal but this statute, like those of most states, fails to define a lottery. To constitute a lottery three elements must be present: (1) prize, (2) chance, and (3) consideration.⁴ There is no question but what the first two elements are present in "Bank Night" schemes. The difficulty arises in determining if a consideration exists in such schemes.

Where the chances for the prize are limited to those purchasing tickets of admission to the theatre such schemes are unanimously held to be lotteries.⁵ The price paid is considered to cover both the ticket of admission and the chance on the prize. Analogous situations are those where merchants give free chances only to purchasers of merchandise, and such are considered lotteries.⁶

¹⁴ *McAleenan v. Massachusetts Bonding and Ins. Co.*, 219 N. Y. 563, 114 N. E. 114 (1916). But in the North Carolina case of *Wynnewood Lumber Co. v. The Travelers' Ins. Co.*, 173 N. C. 269, 91 S. E. 946 (1917) it was held that a failure to appeal where the insurer so agreed did not of itself constitute negligence in the absence of anything to show that the judgment was erroneous.

¹⁵ *Anderson v. Southern Surety Co.*, 107 Kan. 375, 191 Pac. 583 (1920).

¹⁶ *Aycock Hosiery Mills v. Maryland Casualty Co.*, 157 Tenn. 559, 11 S. W. (2d) 889 (1928).

¹ (1932) 45 HARV. L. REV. 1196.

² *Time Magazine*, February 3, 1936, p. 57; *Literary Digest*, March 6, 1937, p. 36.

³ N. C. CODE ANN. (Michie, 1935) §4428. Statute 10 and 11, Wm. III, c. 17 declared lotteries illegal in England and this statute constituted part of the common law of the United States. Most states now have statutes declaring lotteries illegal.

⁴ *Horner v. U. S.*, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. ed. 237 (1893); *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890); *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340 (1915); *Brevard Manufacturing Co. v. W. Benjamin and Sons*, 172 N. C. 53, 89 S. E. 797 (1916); *State v. Eames*, 87 N. H. 477, 183 Atl. 590 (1936).

⁵ *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise*, 276 Mich. 127, 267 N. W. 602 (1936); *People v. Miller*, 271 N. Y. 44, 2 N. E. (2d) 38 (1936); *Society Theater v. City of Seattle*, 118 Wash. 258, 203 Pac. 21 (1922).

⁶ *U. S. v. Wallis*, 58 Fed. 942 (S. D. Idaho, 1893); *U. S. v. Jefferson*, 134 Fed. 299 (W. D. Ky., 1905); *Davenport v. City of Ottawa*, 54 Kan. 711, 39 Pac. 708