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Insurance

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cided trend of courts to aid reaching a fugitive father by equitable proceedings of contempt in a sister state to which he has fled, there is no assurance that he can be reached or that the process will not be lengthy and delayed. Now, between states which have enacted this reciprocal law, the process is quick and sure and inexpensive.

The Act was first promulgated in 1950 by the National Conference of Commissioners on Uniform State Laws. All states which have adopted the Law have done so since 1951. The speed with which 34 jurisdictions⁴⁴ have availed themselves of this reciprocal legislation attests to the need existing for it. It would seem to be desirable not only to the one dependent for support but to the community at large, for if support is not given and enforced as the obligation exists, the dependent may become a public charge.

Armine C. Ernst.

INSURANCE

PREMIUM PAYMENT UNDER INSTALLMENT PLAN

Arkansas. In *Arkansas Inspection and Rating Bureau v. Insurance Co. of North America*¹ the Arkansas Insurance Commissioner entered an order permitting the insurance company to use the Installment Premium Endorsement Plan. This plan requires the insured under a fire insurance policy to pay, in addition to the full term premium, a charge to compensate the company for the cost of deferring collection of the premium and for providing that the insurance coverage of the policy shall not be reduced by the payment

⁴⁴ Alabama, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kansas, Maine, *Maryland, *Massachusetts, Michigan, *Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, *Washington, Wisconsin, and Wyoming. (Asterisks indicate that the Uniform Act has been adopted substantially or with modifications.)

¹Ark....., 238 S. W. 2d 929 (1951).

of a loss. This order was contested on the ground that the plan was a deviation from the custom of the prepaid term rule.

The Arkansas Supreme Court affirmed the Commissioner's ruling, however, saying that the Plan is not a deviation but merely a variation from the custom of the prepaid term rule. The plan merely allows the insured to do directly what he would otherwise do indirectly by securing a loan to pay the premiums.

The court pointed out that there is no requirement of Arkansas law which prevents the use of the Installment Premium Endorsement Plan, and that installment plans are customary in virtually every type of insurance other than fire insurance. Further, it was pointed out, the evidence did not show that the rates involved were either excessive or inadequate.

Although in fire insurance policies the premium payable becomes a debt as soon as the risk attaches,² such a policy delivered on the insured's promise to pay the premium in installments is valid, where cash payment is not required in the policy.³ Here the court's decision seems reasonable since, although cash payment of a premium may be customary, an insurance policy is effective upon insured's promise to pay the premium in the future.⁴ Further, if it is permissible for an insured to borrow from a bank to pay the premiums, it does not seem to be any material deviation from the custom of the prepaid term rule to allow the insurance company to make the loan.

WAIVER OF PROVISION AGAINST ORAL WAIVERS

*Arkansas. In Service Fire Ins. Co. v. Payne*⁵ the Universal C. I. T. Credit Corporation financed a part of the purchase price of a truck purchased by insured. C. I. T. required that the truck be insured by defendant company, and both the financing and insurance coverage were handled and controlled by defendant. Insured had nothing to

² VANCE, INSURANCE (3d ed. 1951) § 50.

³ 14 APPLEMAN, INSURANCE LAW AND PRACTICE (1944) § 7955.

⁴ *Id.*, § 8006.

⁵Ark....., 236 S. W. 2d 1020 (1951).

do with procuring the insurance on the truck. He paid all premiums through defendant's agent and C. I. T. The fire insurance policy provided that it did not apply while the automobile was subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in the policy. It further provided that notice to or knowledge of any agent should not effect a waiver or estop the company from asserting any right under the policy.

Shortly after the policy was issued, insured sold a one-half interest in the truck, after consulting the manager of defendant company, who in turn discussed it with the manager of C. I. T.'s local office. Neither party made any objection to the sale. A few months later insured made a conditional sale of his remaining interest in the truck, but at the time the fire loss had not been paid anything on this one-half interest. When the truck was destroyed by fire, the insurance company paid C. I. T. the balance due it but denied liability because of breach of policy provisions.

The Arkansas Supreme Court held that although the policy provided that no waiver of terms would be effective except by endorsement issued to form a part of this policy, such provision may be waived orally. Any condition inserted in a policy for the benefit of the insurer may be waived by it. The court also attached significance to the fact that defendant treated the policy valid insofar as C. I. T. was concerned.

The case follows the general rule that a stipulation against oral waivers and requiring any waiver to be in writing and attached to the policy is, like any other policy provision, itself subject to waiver. Such stipulation is for the company's benefit and may be waived by it.⁶ This rule was followed by the Texas Supreme Court in *Wagner v. Westchester Fire Ins. Co.*⁷

⁶ 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* (1944) § 9210.

⁷ 92 Tex. 549, 50 S. W. 569 (1899).

REQUIREMENT OF DELIVERY IN SOUND HEALTH

Oklahoma. In *Farmers & Bankers Life Ins. Co. v. Lemon*⁸ a policy was issued on defendant's life when he was two years old. The policy contained a supplemental contract that in event of the death of the purchaser, defendant's father, future premiums payable on the policy would be waived. Within a year after the policy was delivered, the purchaser died, and the insurance company brought suit to cancel the waiver of premium provision. The company alleged that the applicant made false and fraudulent answers and representation as to his health when he stated that he had no ailment of the brain or nervous system or of the heart or lungs. Allegation was made that the applicant had had a series of heart attacks during the two years preceding his death.

The Oklahoma Supreme Court denied the relief sought saying that if the applicant is going about his daily labor and has no reason to believe, and in good faith does not believe, that he is afflicted with any serious malady, and he has no reason to know and does not know of any serious impairment to his health, then he is justified in representing himself to be in good health. In such case he is not guilty of fraudulent or wilfully false representation, even if it were then true that he was actually afflicted with a serious malady. In the court's view the evidence did not sustain the company's charge of false representations in the application for the insurance.

The policy contained a condition that the company was not liable unless the policy was delivered while both the insured and the purchaser were in good health and while their health was as described in the application. However, the court held that the plaintiff did not rely upon this provision at all, but elected to base its action on fraud and wilful misrepresentation.

In the majority of states if a serious disease is present and the insured is not in sound health, regardless of his belief, the insurer is not liable under "delivery in sound health clause." Sound health is a condition precedent to the existence of a valid policy contract.⁹

⁸ ____ Okla. ____, 228 P. 2d 634 (1951).

⁹ 1 APPLEMAN, INSURANCE LAW AND PRACTICE (1941) § 154.

But the Oklahoma courts have held to the contrary and have said that the "sound health" clause is not violated by latent defects which are unknown to the applicant.¹⁰ This rule adopted by Oklahoma may help to explain the holding against the insurance company in the instant case.

COLLISION WITH FLOOD WATERS

Texas. In *Providence Washington Ins. Co. v. Proffitt*¹¹ the insured's automobile was driven onto a causeway across a river which normally flowed over the causeway at a depth of six or seven inches. But since the river was in a stage of flood, the water was deeper on this occasion, and the car hit it with a "splash" and came to a halt with the right wheels off the causeway. The driver was unable to extricate the car, and it was washed from the causeway and damaged beyond repair. Defendant insurance company admitted that the events constituted a collision and upset within the meaning of the collision policy. But it was contended that a new and independent cause — the floodwaters — interrupted the causal connection between the collision and the loss of the car and itself became the proximate cause of the loss.

The Texas Supreme Court ruled that even though the automobile had come to rest after its original collision with the water, only to be washed away thereafter, the insurance company was still liable under the terms of the policy. The court said that the force of the floodwaters against the automobile was a collision within the meaning of the collision coverage and that the collision was the proximate cause of the damage. Water in motion collides with that with which it comes in contact, and the collision of the water with the automobile set in motion the unbroken series of events which led to the destruction of the automobile.

The comprehensive insurance clause in the policy provided that

¹⁰ *National Aid Life Assn. v. Persing*, 178 Okla. 522, 63 P.2d 35 (1936); *United Ben. Life Ins. Co. v. Knapp*, 175 Okla. 25, 51 P.2d 963 (1935).

¹¹*Tex.*....., 239 S. W. 2d 379 (1951).

loss caused by windstorm, hail, water, flood, etc., should not be deemed loss caused by collision or upset. The court interpreted this as enlarging the coverage under the comprehensive clause and not as limiting the coverage under the collision clause. It was pointed out that if the insurance company had intended to limit its liability under the collision clause, it should have repeated the words used in the comprehensive clause so that loss caused by flood could not be deemed loss caused by collision or upset.

This same court in another 1951 case said it was proper to consider all of the coverages in determining the rights and obligations of the parties.¹² But there both clauses were identical, covering damage resulting from certain listed causes such as windstorm, hail and earthquakes with the exception that one included the phrase "flood or rising waters." So it was obvious that the two clauses were intended to be selected in the alternative by the insured, whereas in the instant case the coverages were mutually exclusive.

In finding that the events involved here constituted a collision the court followed what appears to be the modern trend of authority.¹³

DOUBLE INDEMNITY PROVISION COVERING ACCIDENTS IN CONNECTION WITH PASSENGER VEHICLES OF THE PLEASURE TYPE

Texas. In *Pennell v. United Ins. Co.*¹⁴ a health and accident policy provided for double indemnity payments in the event of insured's injury "while driving or riding within any private passenger automobile exclusively of the pleasure type." The supreme court said that these words were unambiguous and that the double

¹² *Glen Falls Ins. Co. v. McCown*, _____Tex.,_____, 236 S. W. 2d 108.

¹³ *Harris v. American Casualty Co.*, 83 N. J. L. 641, 85 Atl. 194 (1912); *Ringo v. Automobile Ins. Co. of Hartford*, 143 Ore. 420, 22 P. 2d 887 (1933); *Long v. Royal Insurance Co.*, 180 Wash., 360, 40 P. 2d 132 (1935); 5 APPLEMAN, INSURANCE LAW AND PRACTICE (1941) § 3205.

¹⁴ _____Tex.,_____, 243 S. W. 2d 572 (1951).

indemnity provision did not apply to automobiles that are constructed and intended to be used for carrying freight or for agricultural or industrial purposes, even though also intended to be used for pleasure. Consequently, the court ruled that the insured could recover only single indemnity for injuries sustained while riding in a Willys jeep, which was described as an all-purpose car intended for hard service rather than pleasure.

In *Union Pacific R. Co. v. United States*¹⁵ it was held that the wartime jeep was primarily a passenger car and was correctly so classified for freight rate purposes. But the Texas Supreme Court did not accept that decision as authority that the jeep is a passenger automobile exclusively of the pleasure type. Its opinion was based on the apparent purpose for which the type of car was built rather than on the purpose for which the particular vehicle was used.

It seems that because of the wide variety of body styles produced by manufacturers of automobiles the criterion adopted by the Texas court may lead to a great deal of confusion. How would the majority of the court apply the rule to station wagons or automobiles with a back seat that folds forward to provide more carrying capacity? It appears that when used by large families purely for transportation or by vacationers and sportsmen to carry luggage and sporting equipment they are automobiles exclusively of the pleasure type. But if the same car is used for agricultural or industrial purposes, the opposite is true. Apparently, under the ruling of the court only single indemnity may be recovered for an injury suffered while riding in a jeep used exclusively as a family car, while double indemnity could be recovered for an injury received in an ordinary passenger car which is supplied by a company to its agent. Which one is exclusively of the pleasure type?

The preferable view seems to be that taken by the dissenting justices, who accepted the jury's finding that this jeep, which was

¹⁵ 117 Ct. Cl. 534, 91 F. Supp. 762 (1950).

used as a family car and to deliver rural mail, was an automobile exclusively of the pleasure type. They said that the policy should be construed and applied in the light of the facts of the case and that ambiguous terms in a policy are to be construed in the insured's favor. This latter principle has been adopted by a majority of the courts even as to double indemnity features of accident policies which, it is sometimes thought, should not be construed so strictly against the insurer as in the case of the single indemnity feature.¹⁶

In the instant case, although the insurer was held not liable for double indemnity payments, it could not set off double indemnity payments, made under a mistake of law and before it contested liability, against single indemnity payments that were still due. The court held that money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered merely because the payor was ignorant of or mistook the law as to his liability. This part of the court's decision is in accord with the general rule.¹⁷

GROUP INSURANCE

*Texas. In Board of Ins. Com'rs. v. Great Southern Life Ins. Co.*¹⁸ the Bankers Association entered into an agreement with a Trustee whereby each participating bank would contribute money from its own funds or from funds jointly provided by it and its participating employees, with which the Trustee was directed to purchase life insurance for each participating employee and to pay the premiums thereon. Title to every such policy was vested in the Trustee, who was given broad powers to exercise most of the rights, options or privileges of the owners. The Insurance Company agreed to accept, without selection, those employees eligible, provided that none was selected who was over 60 years and 6 months

¹⁶ VANCE, INSURANCE (3d ed. 1951) 962.

¹⁷ See authorities collected in 40 AM. JUR., Payment, § 205.

¹⁸Tex....., 239 S. W. 2d 803 (1951).

of age. It was also stipulated that there must be at least 500 applicants or at least \$1,000,000 of insurance before the plan would become effective. A separate policy was issued for each applicant and delivered to the Trustee, and a certificate of beneficial interest was delivered to the employee.

The Board of Insurance Commissioners declared that those policies which were issued to employees of banks having less than 25 employees were issued in violation of the statute controlling group insurance. The Insurance Company, however, said that this was not group insurance, since a policy was issued to each employee, whereas the statute contemplated a single policy for the entire group.

The Texas Supreme Court upheld the Board's ruling, saying that in the series of instruments which comprised the entire contract could be found most of the indicia characteristic of group insurance. The policies insured the lives of the employees for the benefit of persons other than the employer; all employees under 60 years and 6 months were eligible; the premiums were paid either wholly by the employer, in which case all employees were required to participate, or jointly by the employer and the employees, in which case 80 per cent of the employees were required to participate (the group insurance statute requires 75 per cent membership in such instance); the employees were precluded from paying the entire premium; and the amount of each policy was determined by a plan which precluded individual selection by the employees. Further, looking to the intent of the parties, the court said that it was obvious that the Insurance Company would not have issued, without evidence of insurability, ordinary life insurance policies if it had not been assured of a spread of risks among a group.

The supreme court also said that the statute prohibiting the writing of group insurance covering a group of less than 25 persons was not unconstitutional, since it was a reasonable exercise of the legislature's power to regulate the writing of life insurance.

The decision seems to be correct since it appears clear that the parties to the transaction contemplated a group insurance plan, and a reading of the instruments involved substantiates this conclusion.

USE OF CRIMINAL COURT DECISION TO INTERPRET PROVISION OF THEFT POLICY

Texas. In *Bomar v. Insurance Indemnity & Ins. Co.*¹⁹ a purported purchaser of insured's car induced the belief that a check given for the purchase price would be paid when the title cleared with the State Highway Department. He thus obtained possession of the automobile and a certificate of title and appropriated the property to his own use and benefit. Insured carried with defendant a comprehensive policy of insurance, including the "broad form" of theft coverage, insuring against loss by theft except "loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance."

The supreme court overruled the lower court and held for the insured. The court said that under the decisions of the Texas Court of Criminal Appeals the purchaser's actions amounted to theft, inasmuch as the distinction between the crimes of swindling and theft is no longer recognized. The court cited *De Blanc v. State*²⁰ as refusing to follow the doctrine that the passing of title as well as possession is the difference between swindling and theft. Since the offender obtained title and possession of the automobile by a fraudulent scheme, he was guilty of the crime of theft as known to the laws of Texas. Consequently, the exceptions enumerated in the policy did not apply, and the insured was allowed to recover. It appears that the Texas Supreme Court does not agree with the reasoning of Judge Cardozo when he said that the statutes of a state defining larceny, embezzlement, etc., do not govern but that

¹⁹Tex....., 242 S. W. 2d 160 (1951).

²⁰ 118 Tex. Crim. Rep. 628, 37 S. W. 2d 1024 (1931).