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Insurance

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language which clearly gives the surviving spouse the powers of disposition necessary to qualify for this tax saving technique.

The writer believes that at least as to wills written after the marital deduction was authorized by Congress, the Ohio courts should take this fact into consideration and should not blindly follow earlier Ohio decisions construing wills which were written before there was a marital deduction.

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INSURANCE

Interpreting Scope of the Policy

A retail merchant obtained liability insurance to protect him against obligations to pay claims arising out of "the ownership, maintenance or use" of his business premises. This insured illegally sold B-B shot to a minor who, using it, injured another. The injured party filed suit against the insured who, in turn, brought an action for a declaratory judgment that the insurer be required to defend the action. The court held that the fact that the injury, for which suit is here brought, occurred off the premises of the insured does not relieve the insurer of his responsibility to defend.[1] There was no restriction in the policy as to where the injury must occur. "The accident must arise out of the operation of the premises and it was in the operation of such premises that the alleged unlawful sale of the B-B shot occurred." The court rejected a second defensive contention of the insurer that "products liability" insurance, which insured did not buy, covered the liability here involved to the exclusion of liability under the use of premises provisions. However, it was held that "products liability" insurance was concerned with the situation of breach of warranties and conditions. But the injury here was unrelated to the condition of the B-B shot itself.

Brewer v. DeCant[2] involved a liability policy in which the insurer agreed to pay claims "which the insured shall become legally obligated to pay" arising out of the "ownership, maintenance or use" of automobiles in connection with insured's operation of his automobile dealership. Insured sold and gave title to an automobile on which a chattel mortgage was given to the finance company. When the buyer was unable to meet

1. Lessak v. Metropolitan Casualty Ins. Co. of New York, 168 Ohio St. 153, 151 N.E.2d 730 (1958) *affirming*, 106 Ohio App. 179, 153 N.E.2d 787 (1957).

2. 167 Ohio St. 411, 149 N.E.2d 166 (1958). See also SALES and TORTS sections, *infra.*

the mortgage payments, the finance company repossessed the automobile and delivered it to insured for resale. Title remained in the defaulting buyer. DeCant agreed to buy the automobile, took possession, and authorized insured to obtain title for him. Within twenty-four hours DeCant by the operation of the automobile, injured the plaintiff in the present action. Plaintiff recovered a default judgment against DeCant and filed a supplemental petition against the insurer. The Supreme Court of Ohio held that the insured was liable within the terms of the policy. The definition of hazards covered by the policy included "the ownership maintenance or use of the premise for the purpose of an automobile dealer . . . and all operations necessary or incidental thereto; and the ownership maintenance or use of any automobile in connection with the above defined operations." The clause contemplated many "incidental" activities not performable on the insured's premises. Nor does the definition necessarily exclude an automobile titled to someone else. The finance company had placed the car with the insured for resale which gave him authority to permit its use by others in connection therewith. The "reality of the situation" makes it necessary to conclude that the handling of the car for the finance company was "incidental" to insured's operation of his dealership and thus within the definition of hazards. "Insured," as defined by the policy, included anyone using the car with the permission of the named insured, into which definition the use by DeCant fits. "Until such time as a certificate of title is issued to a purchaser, no title to the automobile passes to him."[3]

Innis v. McDonald[4] involved a policy by which the insured was committed to repay the insurer all sums for which the latter became obligated because of injury to or destruction of property arising out of operations incident to a painting business, but exluded "property in the care, custody or control" of the insured. Insured contracted to paint the outside of the dwelling house of the plaintiff and was to "have free access" to the property until the work was completed. During the progress of the work plaintiff continued to reside in the house just as he did before and after. In scraping and burning off the old paint preparatory to repainting, the insured damaged the siding and window frame of the house. Plaintiff claims that he, as the resident of the house, was completely in "care, custody and control" thereof while the work was progressing and hence, that the insurer is liable for the injury involved. The insurer counters with the contention that the insured had "care, custody or control" of that

3. *Id.* at 415, 149 N.E.2d at 169. *Compare,* Workman v. Republic Mutual Ins. Co., 144 Ohio St. 37, 56 N.E.2d 190 (1944) *and* Garlick v. McFarland, 159 Ohio St. 539, 113 N.E.2d 92 (1953).

4. 150 N.E.2d 441 (Ohio C.P. 1956).

portion of the house on which he was working and which he damaged in the course of such work and that the language was "intended to exclude the risk of attendant on the results of and the quality of the insured's workmanship" that is, the policy "does not cover a situation where the insured is doing the work called for in his contract at the place or places where such work is to be performed and damage results from the manner in which he does the work." Is there a distinction between "care, custody or control" of the house as an entity, and of that portion on which the insured was to perform work? The court concluded that the entire house was in the "care, custody or control" of the resident, or that, at least, the policy did not clearly exclude the portion on which the insured was working, under the principle that an insurance policy is, in case of ambiguity, to be construed against the insurer. The court of appeals adopted the opinion which had been written in the court of common pleas.[5]

Knowledge of Agent Imputed to Insurance Company

In *Pannunzio v. Monumental Life Ins. Co.*[6] the agent of the insurer who solicited life insurance learned that the insured had a heart disease and in filling out the application, which was not read by the applicant, failed to report this information to the insurer. In defending an action by the beneficiary on the policy, the insurer relied not on the falsity in the application but on the provision of the policy which provided that if the insured had been treated for a disease, within two years prior to the issuance of the policy, the insurer could void the contract. The court held that knowledge of the physical condition of the insured which is known to an agent who is authorized to solicit and fill-in application, to deliver policies and to collect premiums, is imputable to the insurer in the absence of fraud or collusion on the part of the insured. Since the insurer, thus, in law, had knowledge of the physical condition, it is estopped to rely on such conditions to avoid the policy.

Failure on Part of Insured to Answer Ambiguous Question Held Not To Void Policy

In *Pioneer Mutual Casualty Co. of Ohio v. Qualls*[7] the plaintiff insurance company sought to cancel an automobile liability policy because of a breach of warranty in a false answer in the application which was included in the policy. The application contained the standard question,

5. Innis v. McDonald, 150 N.E.2d 447 (Ohio Ct. App. 1956).
6. 168 Ohio St. 95, 151 N.E.2d 545 (1958).
7. 104 Ohio App. 15, 146 N.E.2d 612 (1957).

"Has automobile insurance ever been declined, cancelled or has renewal been refused?" to which the insured answered negatively. The insured personally had never been declined insurance but his son, who is included in the present policy, had been excluded from coverage in a policy formerly issued by another company. The court stated the principle that where there is an ambiguity in an insurance contract, the contract will be construed most favorably to the insured, and found that "it certainly is not clear whether the son's exclusion from coverage in a former policy is embraced in this question." Consequently, the court concluded that the refusal to include a member of the insured's family in a policy upon renewal does not constitute a declination, cancellation or refusal of renewal of the policy within the meaning of the policy under consideration. The question being properly answered, there was no fraud and no breach of contract.

Payment of Premiums to Unauthorized Agent — Estoppel Applied

A policy of life insurance in *Scott v. Continental Assurance Co.*[8] provided that premiums were to be paid to insurer either at its home office or to a duly authorized agent. However, for fourteen years the insured had made payment of the premiums to the soliciting agent from whom he had bought the policy who had no authority to receive premiums other than the first. During this time the premiums had been transmitted to the insurer and accepted by them. The agent persuaded the insured also to pay him a sum of money which, it was said, would be transmitted to the insured for a premium deposit fund which would protect the insurer in case of non-payment of regular premiums. This sum was retained by the agent and it is for this that the insured seeks to recover from the insurer. The Supreme Court of Ohio held that he should be allowed to recover. The court relied on the acceptance of premiums which had been transmitted through the agent over the long period of time, and the fact that the agent, at the time the premium deposit payment was made used forms — "spurious or genuine" — purportedly issued by the company and purportedly bearing the signature of a home office official.

It is difficult to understand how such forms, if spurious, could be regarded as binding the insured. Three judges of the court, in a dissenting opinion, while recognizing that an estoppel against the insurer had been created as to premium payments, said, "The separate and independent plan of establishing the premium deposit fund is something else.

8. 167 Ohio St. 515, 150 N.E.2d 38 (1958).

That plan was conceived solely by [the agent], the insurer knew nothing about it and had no good reason to, and it was on a basis not sanctioned by the insurer in the policies or otherwise." It was "a complete fake" and "was suspicious enough to have placed [the insured] on guard"[9] and induced him to make some inquiry.[10]

Failure To File Timely Suit

In *Metz v. The Buckeye Union Fire Ins. Co.*[11] insured had a fire and extended coverage policy which provided that no action should be brought on the policy unless commenced within one year. Following an allegedly covered loss insured did not inform the insurer of the loss until fifteen months after it occurred and did not file suit until nineteen months after the loss. Upon being informed of the loss, the insurer conducted an investigation and made an offer of settlement which offer was refused. It was following this refusal that suit was filed. Insured claims that this conduct of the insurer amounted to a waiver. Does the fact that the claim of waiver arose after the time limitation for bringing the action had expired prevent the waiver from being asserted? The court held that to constitute a waiver the act or declaration relied upon must be done or made during the running of the period of limitation or at least begun during that period. The court also eliminated the possibility of an estoppel because there was no action by the insurer in connection with the investigation or offer of settlement which was detrimental to the insured.

Action for Reformation — Mistake in Insuring Surety Instead of Purchaser of Automobile

Guenther v. Downtown Mercury, Inc.,[12] concerned an attempt to reform three companion documents arising out of the sale of an automobile: the contract of sale, a chattel mortgage and insurance policy on the life of the purchaser-mortgagor. The seller refused to agree to the purchase of the automobile by a son and required some type of financial guarantee by his father. Documents were signed which obligated the father and the son to buy the automobile jointly and obligated them jointly on the mortgage. The insurance application was signed to request insurance on the life of the father and insurance was issued on his life. After the

9. *Id.* at 520, 150 N.E.2d at 41.

10. See: 9 WEST. RES. L. REV. 337 (1958).

11. 104 Ohio App. 93, 147 N.E.2d 119 (1957).

12. 105 Ohio App. 125, 151 N.E.2d 749 (1958). See also CORPORATIONS section, *supra.*

death of the son, the father, claiming that such was the intention of all parties, sought to have the documents reformed to show purchase of the automobile by the son, obligation by the father as surety only, and insurance on the life of the son. The court of appeals held that the father had failed to prove a mutual mistake by the conventional standard of "clear and convincing" evidence. The court added that even had this standard of proof been maintained the insurance policy could not have been sustained because the insurance company was not a party to the mistake but an innocent third party. Although this insurance company routinely insured automobile purchasers to whom credit was extended by finance company here involved, it stood alone and had no knowledge as to the transaction out of which the application arose.

A dissenting opinion in the case found that the mutual mistake was satisfactorily proved. Furthermore, the dissenting opinion would have allowed reformation against the insurance company on two grounds: (1) the company had no interest in the personality of the purchaser but would have automatically issued a policy to the purchaser whomever he might be. (2) The finance company under the direction of which the documents were prepared, was the agent of the insurance company which gave the latter imputed knowledge.

Corporation's Payment of Premiums on Policy Insuring Life of Key Employee

In *Finney v. Hinkle*,[13] William E. Hinkle, son, as general manager and treasurer of Hinkle & Co. took out "key-man" insurance on himself with Chester R. Hinkle, father, president of the company, as beneficiary. The right to change the beneficiary was not reserved. William paid the first premium. Subsequently, an agreement was entered into between Chester and the company whereby, in consideration of payment of the premiums by the company, Chester agreed that he would "endorse and pay over unto" the company "any proceeds or benefits that he may receive or have the right to receive." Upon William's death the receiver for the company sued the insurance company and Chester for the proceeds of the policy. The insurance company paid the proceeds into court and was discharged. The court said there was sufficient consideration for the agreement and that it was not void as an attempt to change the beneficiary contrary to the terms of the policy. It was an attempt to impress a trust on the funds for the benefit of the receiver. The court held that a trust had been so impressed.

13. 106 Ohio App. 89, 153 N.E.2d 699 (1958).