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Insurer Liability for Damage to Realty When Payment Would Result in Windfall Recovery

The vendor and the vendee in an executory contract for the sale of improved real estate have the power to determine who shall bear the risk of a casualty loss pending the closing of the contract of sale. In the absence of any such stipulation by the parties, the burden of the risk of loss is determined according to the rule of law in force in the particular jurisdiction and the conditional or unconditional nature of the contract of sale.¹ However, where both parties have procured insurance against a casualty loss, substantial problems are encountered in attempting to fix and measure the insurer's liability to its insured.² Depending upon the provisions of the contract of sale, the insured vendor may be able to enforce the payment of the contract price notwithstanding the casualty loss. In other instances the insured vendee may avoid the contract and recover what he has paid on the contract of sale.

Other real estate agreements raise similar problems of insurer liability for casualty loss. In a lease agreement the lessor and lessee may both maintain concurrent insurance on the property and one of the parties may be under a contractual obligation to rebuild the premises in the event of a casualty loss.³ An insured parcel of real estate may be the subject of an appropriation proceeding with a casualty loss intervening before the formal passage of title, and thereafter the condemnation may be completed without adjustment in compensation due to the loss of or damage to the improvements.⁴

¹ The majority rule is to the effect that, after the making of an unconditional contract for the sale of real property and before a conveyance is made, the buyer is regarded as the equitable owner of the property and assumes the risk of a casualty loss. The rule pre-supposes that the seller is able to convey good title and that the loss is not due to his fault. The minority rule places the risk of loss upon the seller. A third rule, the "New York" rule, places the burden of the risk of loss upon the party in possession. If the contract of sale is conditional, the risk of loss is upon the seller until the condition is satisfied, according to the weight of authority. West Virginia follows the majority rule. See Annot 27 A.L.R.2d 444.

² *McLoid, Allocation of Loss and Property Insurance*, 39 IND. L. J. 647.

³ *Alexandra Restaurant, Inc. v. New Hampshire Ins. Co.*, 71 N.Y.S.2d 515 (1947), *aff'd* 287 N.Y. 858, 79 N.E.2d 268 (1948).

⁴ *Edlin v. Security Ins. Co.*, 160 F.Supp. 487 (S.D. Ill. 1957), *rev'd* 269 F.2d 159 (1959); *Tauriello v. Aetna Ins. Co.*, 14 N.J. Supp. 530, 82 A.2d 226 (1951); *Rosenbloom v. Maryland Ins. Co.*, 258 App. Div. 14, 15 N.Y.S.2d 304 (1939); *Home Ins. Co. v. Dalis*, 206 Va. 71, 141 S.E.2d 721 (1965).

A building may be in the process of construction with both the owner and the contractor insured, and the contractor may be under a binding obligation to rebuild in the event of a loss.⁵ Similarly, the owner may have contracted for the demolition of an insured structure subject to the payment of a stipulated amount of salvage and a casualty loss may intervene before the actual planned destruction is begun or completed.⁶

Each of these examples raises the possibility that the insured may realize a recovery both from the insurer and from a third party based upon separate contracts.⁷ For this reason the insurers have been quick to resort to the courts for relief from the prospect of a windfall recovery by the insured.

Contrasting principles of indemnity have faced the courts in the solution of the problem. On the one hand, the insured claims that the provisions of the contract with the insured makes the value of the property, within policy limits, the measure of the insurer's liability, so that when a loss occurs the rights and obligations of the parties to the contract are established. On the other hand, the insurer argues that it need only pay its insured the amount of the damages arising from the effects of all transactions surrounding the loss, and if, by reason of a related transaction, the insured has sustained no actual monetary loss, there is no liability on the policy. Out of the litigation two divergent views have evolved; the majority "New York" rule favorable to the insured, and the minority "Wisconsin" rule favorable to the insurer.

The New York rule follows the rationale that, in the absence of any contractual agreement to the contrary, a fire insurance policy is an agreement of indemnification, the premiums for which are computed according to the value of the property and the risk involved, so that recovery will not be denied as long as the insured

⁵ *Foley v. Manufacturers Fire Ins. Co.*, 152 N.Y. 131, 46 N.E. 318 (1897); *Glens Falls Ins. Co. v. Sterling*, 219 Md. 217, 148 A.2d 453 (1959).

⁶ *Knuppel v. American Ins. Co.*, 269 F.2d 163 (5th Cir. 1959); *Federowicz v. Potamac Ins. Co.*, 7 App. Div.2d 330, 183 N.Y.S.2d 115 (1959); See also *Board of Education v. Hartford Fire Ins. Co.*, 124 W. Va. 163, 19 S.E.2d 448 (1942).

⁷ For a general view of judicial treatment of "windfall recovery," See Young, *Some "Windfall Coverages" in Property and Liability Insurance*, 60 *COLUM. L. R.* 1063.

⁸ See generally, *Annot.*, 8 *A.L.R.2d* 1408. (1949).

has a valid insurable interest at the time of the casualty, even though he may obtain additional compensation by resort to the contractual liability of a third person.⁹ The Wisconsin rule takes the opposite stand on the question, denying recovery to the insured where by virtue of a related transaction no actual financial loss has been sustained by the insured from the casualty. Under the minority rule the court "looks to the substance of the whole transaction rather than to seek a metaphysical hypothesis on which to justify a loss that is no loss."¹⁰

The courts that espouse the majority rule dismiss the effect of the related transaction which has permitted a double recovery to the insured as of no concern to the insurer.¹¹ The existence of an insurable interest in the insured is generally accepted without serious question or not disputed by the insurer. The only issues determined are those relating to the contractual liability between the insurer and its insured.¹²

The basis of the minority view apparently is the reluctance on the part of the courts to allow double recovery. The premise upon which these courts base their decisions is one of public policy *i.e.*, that before an individual is entitled to be compensated under the terms of an insurance policy it is incumbent upon him to show that he has sustained a loss in the pecuniary sense. This is not to say, however, that the minority view in every instance necessarily precludes recovery on an insurance contract where at the time of the destruction of insured real estate there is a contract of sale

⁹ *Rutherford v. Pearl Assurance Co.*, 164 So.2d 213 (Fla. 1964).

¹⁰ *Ramsdell v. Insurance Co.*, 197 Wis. 136, 137, 221 N.W. 654, 655 (1928), recognized as the primary case establishing the minority view.

¹¹ *Foley v. Manufacturers. Fire Ins. Co.*, 152 N.Y. 131, 46 N.E. 318, (1897).

¹² Cases involving vendors and vendees in relation to the effect of a contract of sale of insured real estate upon the liability of the insurer are numerous. Representative cases included: *Milwaukee Mechanics Ins. Co. v. Maples*, 37 Ala. 74, 66 So. 2d 159 (1953); *First Nat'l Bank v. Boston Ins. Co.*, 17 Ill. 2d 47, 160 N.E.2d 302 (1959); *Board of Trustees v. Cream City Mut. Ins. Co.*, 255 Minn. 347, 96 N.W.2d 690 (1959); *Rosenbloom v. Maryland Ins. Co.*, 258 App. Div. 14, 15 N.Y.S.2d 304 (1939); *Paramount Fire Ins. Co. v. Aetna Ins. Co.*, 163 Tex. 250, 353 S.W.2d 841 (1962). The actual risk of loss, by reason of a separate contract or by operation of law, may be the burden of some person other than the litigating insured. In a contract for the sale of improved real estate, an inquiry would seem to be proper concerning the vendor's interest in the property and the manner in which he will be benefited by its continued existence or suffer a direct pecuniary injury by its loss. The vendor's interest, at most, in the above situation would appear to be the equivalent of a security interest.

which is ultimately consummated. The vendor-vendee cases decided under the minority rule may be distinguished in this sense—that recovery has been denied only in cases where the insured was completely protected by the terms of an existing contract of sale from any possibility of monetary loss. To put it another way, it would seem that minority jurisdictions will not permit an insured to recover where under his contract of sale he has a specifically enforceable right to demand performance of the agreement.¹³

Although the minority rule is founded upon the public policy precept that an insured ought not to be permitted to make a profit out of a casualty loss, its legal justification is a reliance upon the doctrine of equitable conversion for the purpose of relating the effects of a separate agreement between the insured and a third party to the contract of insurance. This is a fundamental weakness in the minority view, since the necessary privity of contract between the insurer and, for example, the vendee does not exist for the application of the doctrine. To use the words of the Illinois Supreme Court, "it transplants the doctrine of equitable conversion into an area where it does not belong."¹⁴ Further, since the effect of the insurer's defense is to go behind the indemnity contract for the purpose of showing that the insured's interest in the property is less than the stated amount of the insurance policy, the minority rule appears to be in conflict with the provisions of the Valued Policy Law.¹⁵

The New York and Wisconsin rules are applied without discrimination or distinction as to the types of facts involved in the par-

¹³ Compare *Paramount Fire Ins. Co. v. Aetna Ins. Co.*, 163 Tex. 250, 353 S.W.2d 841 (1962), with *Glens Falls Ins. Co. v. Sterling*, 219 Md. 217, 148 A.2d 453 (1959). The majority view, on the other hand, does not distinguish between specifically enforceable contracts and those which are not. Compare *First Nat'l Bank v. Insurance Co.*, 17 Ill. 2d 47, 160 N.E.2d 302 (1959), with *Rosenbloom v. Insurance Co.*, 258 App. Div. 14, 15 N.Y.S.2d 304 (1939). Recovery is permitted in either case as long as the insured is found to have a valid insurable interest at the time of the loss.

¹⁴ *First Nat'l Bank v. Boston Ins. Co.*, 17 Ill.2d 147, 150, 160 N.E.2d 802, 804 (1959).

¹⁵ The Valued Policy Law as enacted in most states provides that the face amount of the policy, in the absence of fraud or other special defense, shall be conclusive as to the amount of recovery in case of a total destruction of the insured property. 15 Couch on Insurance 2d § 54.60; *Maynard v. Insurance Co.*, 147 W. Va. 539, 129 S.E.2d 443 (1963), discussing the West Virginia Valued Policy Law as enacted in W. VA. CODE ch. 33, art. 17, § 9 (Michie 1966).

ticular case. The genesis of the New York rule is generally attributed to a case involving the insured owner of a building which suffered a casualty during construction. The contractor was obligated to complete the building.¹⁶ This case has been cited as binding authority for a recovery on behalf of an insured lessee whose lessor was also bound to restore the damaged leasehold improvements and did so.¹⁷ In turn, this second case has been accepted as the leading case laying down the New York rule and has been applied as authority for granting recovery to a vendor whose pre-existing contract for the sale of insured realty was fully consummated after the casualty.¹⁸ In a similar manner, *Ramsdell v. Insurance Co. of North America*,¹⁹ the leading minority rule case, arose out of the claim of an insured lessor for the proceeds of his insurance policy although his lessee maintained concurrent insurance on the damaged leasehold improvements and restored the improvements with the proceeds of his insurance. In spite of the language of the Wisconsin Supreme Court that its ruling was influenced by the fact that both insurers reserved by contract the election to restore the premises in lieu of money damages and that a double recovery would restrict the insurer's right to limit their liability by contract, this case is cited as authority for the proposition of "one building insured, one fire and one loss . . ." by other courts of minority jurisdictions.²⁰

It would seem that use of only one rule, particularly in the minority jurisdictions, is too restricted to cover all types of cases, and that different concepts of risk of loss exist between a vendor and a vendee than those involved in a leasehold agreement or a construction contract. One possible explanation for this uniform application of one rule to many varied situations is that the courts following the majority rule dismiss the related transaction as having no significance, while the courts committed to the minority rule regard the related agreement as crucial to a right of recovery. The majority jurisdictions, on the one hand, examine the factual

¹⁶ *Foley v. Manufacturers' Ins. Co.*, 152 N.Y. 131, 46 N.E. 318 (1897).

¹⁷ *Alexandra Restaurant, Inc. v. New Hampshire Ins. Co.*, 71 N.Y.S.2d 515 (1947), *aff'd* 287 N.Y. 858, 79 N.E.2d 268 (1948).

¹⁸ *Rutherford v. Pearl Assurance Co.*, 164 SO.2d 213 (Fla. 1964).

¹⁹ 197 Wis. 136, 221 N.W. 654 (1928).

²⁰ *Glens Falls Ins. Co. v. Sterling*, 219 Md. 217, 148 A.2d 453 (1959); *Paramount Fire Ins. Co. v. Aetna Ins. Co.*, 163 Tex. 250, 353 S.W.2d 841 (1962). States following the minority rule include Texas, New Jersey, Maryland, Wisconsin and California.

situation before them as it appeared at the time of the casualty when the effect of the related transaction could be predicted but could not be definitely known, while the courts committed to the minority view regard the situation as it exists at the time of the litigation, when the full effect of the related transaction is known. The variance between the two views arises for these reasons. The majority view by prohibiting the assertion of the defense of a consummation of a related contract and the absence of pecuniary loss precludes consideration of the insured's contract with a third party. When the insurance contract is thus approached by the court in isolation, recovery is permitted. However, under the minority rationale, once the defense is asserted and considerations extraneous to the insurance contract are added, the issues of double recovery and "windfall" are necessarily raised, and the policy against "unjust enrichment" prohibits recovery.

Instead of approaching these insurance cases involving related transactions with an eye to distinguishing the majority and minority views, these cases might properly be viewed in the light of jurisdictional definitions of risk of loss and insurable interest. The minority view in particular is difficult to rationalize based upon a given statutory definition of "insurable interest." Perhaps it is for this reason that most of the minority view courts never discuss the interest of the insured in the property at the time of the casualty. It would seem to follow logically that if the insured seeking a recovery in a particular situation comes within the statutory definition of "insurable interest" and the insured property is damaged or destroyed, then the terms of the insurance contract alone should govern the decision. Under the general statutory definition there would appear to be no necessity for showing an actual pecuniary loss. All the insured should be required to show is that which he demonstrated to the satisfaction of the insurer at the time the policy was issued—that he had such an interest in the property that he might be damnified by its damage or destruction; in other words, that he had reason to benefit by the property's continued existence.²¹ Rather than impose upon the insured the burden of rebutting an inference that he has suffered no loss, it would seem more in harmony with the principles of contract law to require the

²¹ The various jurisdictional definitions of insurable interest are similar to that of West Virginia as enacted in W. VA. CODE ch. 33, art. 6 § 3 (Michie 1966), i.e., that an insurable interest exists to the extent that the insured "might be damnified" by the destruction of the property.

insurer to prove a change of circumstances which relieves it of liability. Without resort to the existence or non-existence of a related transaction outside the insurance agreement the insurer could prove that at the date of the alleged loss the insured no longer had an insurable interest. If no insurable interest existed, no recovery would be permitted. If a mere security interest were preserved, the interest of the insured would be limited to an actual loss.

This principle has been recognized in the minority jurisdiction of Texas. In *Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co.*, the Supreme Court of Texas, three judges dissenting, committed that jurisdiction to the minority view.²² In the later case of *Leggio v. Millers Nat'l Ins. Co.*, a lessor brought suit against four insurance companies for a recovery on insurance policies covering his interest in a building which was entirely destroyed by fire.²³ The lease agreement provided that the lessee should have the right to tear down the existing structure and build a new one. Prior to the date of the fire the lessee had elected to tear down the building and the lessor had agreed, although at the time of the fire the original structure remained. After the destruction of the property the lessee built a structure according to his election. The insurer claimed that at the time of the injury to the property the lessor had no insurable interest, and that no recovery should be allowed.

The court discussed its prior holding in *Paramount* that there could be no pecuniary loss when that loss had been satisfied out of a related transaction. Then the court concluded that the *Paramount* rule could not be properly applied until it was determined whether or not, as a matter of law, the lessor had an insurable interest at the time of the alleged loss, a factor not discussed in the *Paramount* case. In the words of the court:

If the option was effectively exercised and accepted before the fire, appellant (lessor) would no longer have any pecuniary interest in the continued existence of the building, and would thus have no insurable interest. If, on the other hand, the option was not exercised and accepted before the fire, appellant would have continued to have

²² 163 Tex. 250, 353 S.W.2d 841 (1962).

²³ 398 S.W.2d 607 (Tex. 1965).

an insurable interest because of his pecuniary interest in the building and the lease contract and there would be no related transaction.²⁴

The court then found that the option was exercised and that the lessor no longer had an insurable interest. Recovery was denied.

The *Leggio* decision involved a lessor-lessee arrangement, but the same rationale would apply in a vendor-vendee or condemnation situation. Where an option has been accepted a binding contract comes into existence and the parties to the contract have mutually enforceable rights. The same applies to a specifically enforceable executory contract of sale. Once the contract is formed, although executory, mutual rights arise and the doctrine of equitable conversion comes into play, transforming the property in the hands of the vendor into a security for the unpaid purchase price. Under the statutory definition of insurable interest, none can exist in the vendor for he has no risk of loss. His purchase price is secure. Thus, absent any provisions in the contract of sale to the contrary, any time the jurisdictional law provides that the vendee bears the risk of loss the vendor has a specifically enforceable contract. Conversely, where by contract stipulation or rule of law the risk of loss falls upon the vendor in the event of a casualty, he stands in very apparent danger of loss. His contract does not affect his insurable interest in the property. Where the jurisdictional definition of insurable interest provides in essence, that for such an interest to exist in property the individual must derive a benefit from its continued existence, one conclusion is readily apparent. Only where a contract of sale is specifically enforceable will the vendor have parted with his insurable interest and be denied recovery on his insurance, even in the minority jurisdictions. One cannot very well have parted with his interest in property and still be deemed to have the risk of loss should the property be destroyed.²⁵

²⁴ *Id.* at 610.

²⁵ A further example of this rationale is *Germania Mut. Aid Ass'n v. Schaeffer*, 275 S.W.2d 137 (Tex. 1955) (Vendor allowed recovery on insurance policy after destruction of the insured realty and consummation of a pre-existing contract of sale.) The court's decision was based on the fact that there could have been no change in his insurable interest because the executory contract of sale was parol and thus unenforceable by statute. To the same effect is *Alexander v. Hanover Ins. Co.* 346 S.W.2d 667 (Tex. 1961), wherein the Texas court stated the proposition that an executory contract not specifically enforceable will not constitute a change in interest so as to preclude a vendor from recovering on his insurance.

The lessor-lessee situations may be approached in the same manner. In the first case decided under the minority rationale, the *Ramsdell* case, the insurable interest of the lessor was admitted, so that there was no discussion on that point.²⁶ But the case may be distinguished in that the basis of the court's decision was the reserved right of the insurer to rebuild. In the case of *Smith v. Jim Dandy Markets*²⁷ the court determined that at the date of the casualty the vendor had parted with all his interest in the property so that recovery was denied. Under California law a vendee in possession bears the risk of loss, since under the Uniform Vendor and Purchaser Risk Act adopted in California in 1941 such vendee is required to perform the contract in spite of the casualty loss.²⁸ In other words, in *Jim Dandy* the vendor was deemed to have a specifically enforceable right against his assignee at the date of the fire.

The rule that where either the lessor or lessee has rebuilt the destroyed premises the other party is denied recovery on his insurance developed out of the English case of *Darrell v. Tibbitts*.²⁹ Those jurisdictions applying the majority rule to the lessor-lessee situations do so against the weight of traditional law in this area and on the strength of their policy not to consider any contract other than that of insurance.³⁰ The New York Supreme Court, Appellate Division, in *Alexandra Restaurant*³¹ discussed the English rule and decided the weight of authority in the jurisdiction was contrary. The court did not discuss the question of insurable interest, but instead stated: "Plaintiff concededly had an insurable interest when the policy was issued and at the time of the loss."³²

When viewed from the standpoint of insurable interest and risk of loss, the lessor-lessee cases and the cases in which a contractor is obligated to rebuild a damaged structure have many characteristics in common. If we postulate a situation where neither the

²⁶ *Ramsdell v. Insurance Co.*, 197 Wis. 136, 221 N.W. 654 (1928).

²⁷ 172 F.2d 616 (1949).

²⁸ West Annot. Civ. Code § 1662. The tendency to accept possession as the criterion of risk has resulted in the Uniform Vendors and Purchasers Risk Act, U.L.A. 9(a), p. 357. To date, the act has been adopted in nine states.

²⁹ 5 Q.B.D. 560 (1880).

³⁰ Annot., 27 A.L.R.2d 444 (1953).

³¹ *Alexandra Restaurant v. New Hampshire Ins. Co.*, 71 N.Y.S.2d 515 (1947), aff'd 287 N.Y. 858, 79 N.E.2d 268 (1948).

lessor nor the lessee is required to rebuild the damaged structure, and compare it with the case where a contractor in the process of constructing a building is not obligated to rebuild at his own cost in the event of a casualty, it is apparent that in both instances the owner of the structure would stand to lose a great deal if a fire occurred. But in an opposite circumstance where lessee or contractor has the obligation to repair, who has the risk of loss? Not the owner, for he is guaranteed a sound building in any event. Even if we determine loss as of the date of the casualty when the building lays in ruins, the owner stands free of any loss. In this sense the minority rule permits the court to look at the interest of the insured separately and independently determine whether at the date of the casualty such interest fulfills the requirements of insurable interest, whereas the majority rule, by talking in terms of which interests traditionally are considered to have that dignity, is compelled to follow these traditional concepts to the granting of recovery.³³

Recently a case involving an insured vendor's right to recover on insurance policies covering improved real estate subject to an executory contract of sale consummated after a casualty loss came before the Supreme Court of Appeals of West Virginia. In this case, *Aetna Ins. Co. v. Cameron Clay Products*, the insured was the owner of a pottery plant and had entered into contracts of insurance totaling sixty-five thousand dollars.³⁴ On September 14, 1964, Cameron entered into an executory contract of sale, whereby until the closing date, which was to be no later than November 30, 1964, the vendee had the option to declare the contract void if the improvements on the property should be destroyed or substantially damaged. On November 15, 1964, the property was totally de-

³² *Id.* at 521.

³³ One case apparently inconsistent with the minority view is *Evans v. Crawford County Farmers' Mut. Ins. Co.*, 130 Wis. 189, 109 N.W. 952 (1909), in which the Wisconsin court permitted a mortgagor to recover on his insurance policy even though at the time the insured property was destroyed there was a parol agreement to surrender the land contract to the mortgagee's assignee for a consideration. The surrender took place after the fire with no diminution of the agreed consideration. In rendering its decision the court stated that a mortgagor had a sufficient insurable interest to support a recovery, and that the insurer could not take advantage of contractual relations between the insured and a third person to escape liability. The court in the *Ramsdell* case treated that case as one of first impression, arguably considering the *Evans* case inapplicable to the narrow facts before it.

³⁴ 151 S.E.2d 305 (W. Va. 1966).

stroyed by fire. Subsequently the vendee elected to perform under the contract, and the sale was consummated with no reduction in the original contract price. The vendor brought suit to obtain recovery on his insurance policies. The insurers defended, alleging that since the contract had been completed with no reduction in price the vendor had suffered no "loss," and therefore was entitled to no recovery.

The court discussed the majority and minority views on the subject of recovery on policies after consummation of an executory contract of sale, but did not base its decision on either. In permitting the vendor to recover on its insurance the court followed two early decisions, one from the state of Virginia before the formation of West Virginia,³⁵ and one early West Virginia case,³⁶ both decided on facts the court stated to be indistinguishable from those before it. The basis for the court's decision came from the rationale of these prior decisions. In the words of the court in *Fire and Marine Ins. Co. v. Morrison*:

[T]he plaintiff is entitled to recover, notwithstanding the contract of sale, and the subsequent performance of it: 1. because the purchaser, if sued in equity for specific execution, might have set up the parol agreement to assign the policy, and thereby entitle himself to an abatement for the loss of the house; 2. because, by the stipulation for a mortgage, the plaintiff retained an insurance interest in the premises, which gave him an immediate right of action against the insurance company upon the happening of the loss.³⁷

The court determined that in the case before it Cameron had not possessed a contract which was specifically enforceable, since the vendee had the option to declare the contract void if the property were destroyed or damaged. Furthermore, the court proceeded to find that at the time of the fire the vendor had a valid insurable interest. The syllabus of the court read as follows:

An executory contract to sell insured real property, although binding the insured to convey upon the perfor-

³⁵ *Fire and Marine Ins. Co. v. Morrison*, 38 Va. (11 Leigh) 352 (1840).

³⁶ *McCutcheon v. Ingraham*, 32 W. Va. 378, 9 S.E. 260 (1889).

³⁷ *Fire and Marine Ins. Co. v. Morrison*, 38 Va. (11 Leigh) 352 (1840).

mance of certain conditions, does not affect the validity of the insurance, and, if a loss occurs before the conditions are performed, recovery may be had by the insured against the insurer even though the sale is afterwards consummated.³⁸

The Supreme Court of Appeals of West Virginia, without committing itself to either the majority or minority views, has recognized the importance of the character of the executory contract in determining whether recovery should be permitted. In addition, it has determined that the mere presence of an executory contract for the sale of insured realty does not by itself extinguish an otherwise valid insurable interest so as to preclude recovery on insurance policies carried on real estate. While espousing neither the majority nor minority view it has pointed out the individual factors to be studied in arriving at any decision concerning the same question involved in both views.

A close scrutiny of both majority and minority views indicates that the difference between them cannot be resolved to the simple statement that one permits the insured to recover while the other does not. As the prior discussion has indicated, the jurisdictional views of the concepts of insurable interest and risk of loss permeate the decisions on both sides. The decision of the West Virginia Court is clarifying for the reason that it points out the importance of who bears the risk of loss in a given situation and proceeds from there to reach its decision. While the wording of the decision indicates that it stands on neutral ground in this so-called split of authority, it points a way for a sound meeting of both sides.

Judith Herndon

³⁸ Aetna Ins. Co. v. Cameron Clay Products, 151 S.E.2d 305 (W. Va. 1966).