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Recovery Greatly in Excess of Original Cost of Automobile Allowed in Kentucky Under Actual Cash Value Provision of Insurance Policy

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RECOVERY GREATLY IN EXCESS OF ORIGINAL COST OF AUTOMOBILE ALLOWED IN KENTUCKY UNDER ACTUAL CASH VALUE PROVISION OF INSURANCE POLICY

It was formerly held in an action on an automobile loss and damage insurance policy[1] that the actual selling price, less depreciation, should determine the amount of recovery when the insurer is obligated by the policy to pay the "actual cash value."[2] Thus, it readily appears that under normal conditions, if a person purchases a new automobile and uses it for a period of six months, the effect is a depreciation in the value of the automobile as that term is used in the insurance contract. If a car has been insured at the time of its purchase for its "actual cash value," is it possible for the amount of recovery within the terms of the insurance policy to exceed the price originally paid and on which the premium rate was based?

When normal conditions exist in the used car market, the answer to the foregoing query will probably be in the negative. However, the Kentucky Court of Appeals recently decided this question in the affirmative. A consideration of the used car market conditions at that time will demonstrate the wisdom of the decision. In *State Auto. Mut. Ins. Co.* v. *Cox*,[3] the insured had purchased an automobile for $1,398.93, and had later insured it, *inter alia*, against theft with the defendant insurance company. The policy was obtained for the "actual cash value" of the automobile and this phrase was written into the policy on a blank space, as is the usual practice in Kentucky. Approximately six months later the car was stolen and in an action by the insured to recover on the policy, a verdict was rendered for the insured in the amount of $2,082.12. Only $82.12 of this was expense incurred by reason of deprivation of the car; the remaining $2,000 constituted the "actual cash value."

On the surface, this amount appears excessive, but the Court of Appeals of Kentucky in a well-reasoned opinion affirmed the action of the lower court. The Appellate Court recognized that the abnormal conditions of the automobile market in the past decade had caused " a tremendous boost in the market value of used cars under the old law of supply and demand and it is a matter of common knowledge that many slightly used cars sold for up to twice the dealer s retail price of new cars."[4] The amount of the verdict had been based on the testimony of experts as to the price for which the car could have been sold in the used car market at the time it was stolen, and the Court affirmed because it was of the opinion that "actual cash value" was the price the automobile would bring in the market regardless of the price that insured had paid for it.

The Insurance Company had contended to no avail that liability should be limited to the price of the automobile when it was new, since the policy used was developed during a period when the original purchase price was the greatest

[1] General Exchange Ins. Corporation v. Kinney, 279 Ky. 76, 129 S.W. 2d 1014 (1939).
[2] *Id.* at 84, 129 S.W. 2d at 1018.
[3] 309 Ky. 480, 218 S.W 2d 46 (1949).
[4] *Id.* at 484, 218 S.W. 2d at 48.

value of the automobile, and since this was the value on which its premium rate was fixed.[6] The Court stated that inasmuch as the changed market conditions were in existence at the time the policy was issued, and were no doubt known by the *insurer*, that it would have been easy for it to limit its liability by writing in a few qualifying words. The Court is consistent, for in a previous decision it stated, "It is not unreasonable to require the insurance company to limit liability, if it so desires, by clear and unambiguous language."[7] And it has further been established by other decisions of the Court of Appeals that an insurer can insert in its policies as many provisions to limit the liability thereon as is deemed proper provided such provisions are not unreasonable or contrary to public policy.[8]

The insurer, in the instant case, rather than limiting its liability in clear and unambiguous language, used such language to extend it. The phrase "actual cash value" which was written into the blank space on the policy has an established meaning supported by many decisions,[9] as the Court demonstrates. The many cases interpret the phrase to mean the cash market price at the time and place of the happening of the insured event. Thus, with knowledge that used cars were being quoted at a higher price than new cars, the insurer used a phrase in its contract covering a new car which gave the insured the benefit of the higher used car price. Courts must construe the insurance contract as it is written,[10] according to its plain meaning[11] and in case of doubt it is the general practice to construe it against the insurer.[11] If an insurance company continues to issue policies without modification after judicial construction of certain provisions, it is in an unfavorable position to claim that the policies do not cover risks they have been adjudicated to cover in the previous decisions concerning such provisions.[12]

The principal of indemnity is the basis of the contract of insurance on property.[13] The insurer contracts to indemnify the assured, that is, to place him in as good a condition despite the happening of the insured event as he would have enjoyed had no loss occurred. If conditions of the used car market had been normal and the car had depreciated by subsequent use, then, as has been mentioned previously, the actual cash value would have been the actual selling price less depreciation. The amount so arrived at should equal or closely approxi-

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Id. at 485, 218 S.W 2d at 48.

[6] Independence Ins. Co. v. Jefferies Admr, 294 Ky. 690, 696, 172 S.W 2d 566, 569 (1943).

[7] General Exchange Ins. Corporation v. Kinney, 297 Ky. 76, 129 S.W 2d 1014 (1939); Equitable Life Assurance Society of the United States v. Adams, 269 Ky. 726, 83 S.W 2d 461 (1935); Bahre v. Travelers Protective Ass'n, of America, 211 Ky. 435, 277 S.W 467 (1925).

[8] 2 WORDS AND PHASES, p. 221 *et seq.* (Perm. Ed.).

[9] New Amsterdam Casualty Co. v. Pickrell, 230 Ky. 354, 19 S.W 2d 955 (1929).

[10] Equitable Life Assurance Society of the United States v. Hall, 253 Ky. 450, 69 S.W 2d 977 (1934).

[11] John Hancock Mut. Life Ins. Co. v. Tabb, 273 Ky. 649, 117 S.W 2d 587 (1938); General Accident, Fire & Life Assurance Corp. v. Louisville Home Telephone Co., 175 Ky. 96, 193 S.W 1031 (1917); Farmers' Mutual Equity Insurance Society v. Smith, 158 Ky. 459, 165 S.W 675 (1914); Phoenix Ins. C. v. Spiers & Thomas, 87 Ky. 285, 8 S.W 453 (1888).

[12] Prudential Insurance Co. of America v. Harris, 254 Ky. 23, 70 S.W. 2d 949 (1934).

[13] VANCE, INSURANCE sec. 30 (3rd ed. 1930); McAnarney v. Newark Fire Ins. Co., 247 N. Y. 176, 159 N.E. 902 (1928).

mate the market value of the automobile,[14] with which sum the insured could replace the automobile if he so desired. Considering that indemnity is the legitimate purpose of the insurance contract, should the insurer be heard to complain because the market has now advanced to his disadvantage? Or as the Court in the case under discussion queries:

> "Assuming that he, the insured, had to go into the market to buy a car for his immediate use to replace the stolen car, was not the inflated market price the price he would have had to pay rather than some theoretical price at which he might have obtained a car when, as and if, he could have obtained one from a dealer at some unknown distant date?"[15]

The Court in this case stated that the exact question involved here had not been passed upon in Kentucky, nor had the Court been cited to any decisions of other jurisdictions in regard to the question. Two explanations are submitted for the dearth of precedents. In the first place, although conditions existed during World War II which might have advanced the price of slightly used cars beyond the price of the new cars, the Emergency Price Control Act[16] prevented such advances by fixing prices. It is common knowledge, however, that the dealer's list prices of the new automobiles did not represent the true cash values of the automobiles inasmuch as most new car dealers engaged in illegal conduct commonly denominated "black marketeering." In this regard, dealers would require a used car to be "traded in" on a new car and would credit the purchaser with little or nothing on the price of the new car.

Although the War Powers Act fixed and determined the list prices of automobiles, it did not, as one case has pointed out,[17] attempt to regulate or control adjustments for insurance loss. Thus, it appears that if a court during price regulation had found that the sale price of an automobile included not only the cash actually paid, but also the loss sustained on the traded-in automobile, it is possible the insured might have recovered in excess of the ceiling or list price. But it is doubtful that many courts could or would have taken judicial notice of the illegal transaction in the "black market" or allowed proof of such a transaction to be the basis of a finding by the jury that the actual cash value of an automobile was more than the purchase at list price. To do so would have approximated a judicial sanction of the illegal practices which would have been contrary to both the spirit and purpose of price fixing. However, in *State Auto. Mut. Ins. Co.* v. *Cox*, in the absence of Price Control, the Court was able to acknowledge that the loss realized on the trade-in was as much a part of the cost of the automobile as the cash paid.

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[14] In Gibson v. Glen Falls Ins. Co. 111 Neb. 827, 197 N.W 950 (1924) market value was the criterion for determining recovery under auto theft policy when auto had been stolen; *cf.* L. A. Haussler v. Indemnity Company of America, 227 Ill. App. 504 (1923).

[15] State Auto. Mut. Ins. Co. v. Cox, 309 Ky. 480, 484, 218 S.W 2d 46, 48 (1949).

[16] SECOND WAR POWERS ACT sec. 101 *et seq.*, 50 U.S.C.A. *App.* sec. 631 *et seq.*

[17] *See* General Exchange Ins. Corporation v. Tierney, 152 F. 2d 224, 225 (C.C.A. 5th 1945) where an insured who had purchased an automobile prior to price control was permitted to recover in excess of the ceiling price under auto fire policy insuring for purchase price.

Secondly, it is suggested that the probability that the assured would lose more by going to court than by settling was conducive to settlement with the insurance company rather than resort to litigation. After attorney's fees and other expenses of the action (excluding court costs probably borne by the defendant) are deducted from the gross recovery, it is possible that assured's financial position will be slightly, if any, better than if he had accepted the amount offered by the insurer. Although it is difficult to conceive how the court could have arrived at any other proper conclusion under the circumstances in the principal case, nevertheless, until this adjudication actually acquired the status of a precedent, insured parties might well have been reluctant to expend money and time on litigation when a favorable decision and financial gain were so uncertain.

By establishing what is believed to be a valid precedent, the Kentucky Court of Appeals fixed the rights of the parties in a salutary manner which serves to reduce uncertainty in an important field of contemporary commerce.

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