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INSURANCE - WHEN IS A PERSON ENGAGING IN THE INSURANCE BUSINESS

Thomas E. Wilson
University of Michigan Law School

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INSURANCE — WHEN IS A PERSON ENGAGING IN THE INSURANCE BUSINESS — Defendant was secretary of a retail grocers association which maintained a so-called "Plate Glass Fund," for members only, administered by the defendant without compensation. The members paid into the fund a certain sum annually, depending on the amount of glass they wanted protected, and in the event of breakage it was replaced. Surplus funds were returned to the members. The certificates of membership expressly stipulated that the fund was not an insurance or indemnity company. Defendant was prosecuted and convicted for conducting an unauthorized insurance business. *Held*, the defendant was engaging in the insurance business, and conviction was sustained. *People v. Roschli*, 275 N. Y. 26, 9 N. E. (2d) 763 (1937).

Statutes¹ and cases² commonly define a contract of insurance as an agreement by which one party for a consideration promises to pay money or its equivalent, or do some act of value, or indemnify the assured upon the destruction or injury of something in which the other party has an interest. Vance³ draws a distinction between a risk-shifting device and a contract of insurance, which is a risk-distributing device, and states that the assumption of risk by the insurer must be part of a general scheme to distribute actual losses among a large group of persons bearing similar risks.⁴ It is suggested that this risk-distributing feature may be of significance in explaining decisions which hold that a transaction which appears to comply with statutory definitions of insurance is not a contract of insurance. It seems to be the basis upon which the single suretyship undertaking may be distinguished from insurance.⁵ And it is similarly applicable to explain

¹ Minn. Stat. (Mason, 1927), § 3314; 2 Mass. Gen. Laws (1932), c. 175, § 2.

² *Commonwealth v. Equitable Beneficial Assn.*, 137 Pa. 412, 18 A. 1112 (1890); *National Auto Service Corp. v. State*, (Tex. Civ. App. 1932) 55 S. W. (2d) 209; *Chicago Bonding & Ins. Co. v. Oliner*, 139 Md. 408, 115 A. 592 (1921). And see *People ex rel. Kasson v. Rose*, 174 Ill. 310, 51 N. E. 246 (1898), and *Physicians' Defense Co. v. Cooper*, (C. C. A. 9th, 1912) 199 F. 576, in which many definitions are gathered.

³ VANCE, INSURANCE, 2d ed., 5 (1930).

⁴ *Ibid.*, p. 2.

⁵ *Home Title Ins. Co. v. United States*, (C. C. A. 2d, 1931) 50 F. (2d) 107, at 110, where the court said: "Insurance differs from guaranty only as the business of insurance differs from a single contract of guaranty, suretyship or indemnity. The

the decisions which hold that a warranty undertaking in connection with the sale of goods whereby the vendor agrees to pay a sum of money or do some other act if the product is not as warranted is not insurance.⁶ Bearing upon the question of the extent to which the risk-distributing factor is essential to constitute insurance is the fact that distribution ordinarily requires a calculation of the risk and a fixing of premiums in relation thereto. The fact that the consideration is not graduated in accordance with the risk involved has been asserted in support of holding that a transaction does not constitute insurance.⁷ A contract of insurance must also be distinguished from a contract to render services upon a contingency. The distinction has been placed on whether the undertaking was to pay a sum of money upon the happening of a contingent event, or to do some other act; and if the latter, it has been held not to be insurance.⁸ But this distinction would not seem to be essential, and it has been held that the promise need not be to pay money in order to constitute insurance.⁹ It is suggested that the extent of the territory in which the promisor makes his offer may be of significance in drawing this distinction. Where the promise is to do something other than pay money and is made only to persons within narrow geographical limits and with whom the promisor already has business dealings, it has been held not to be an insurance undertaking but a contract for services.¹⁰ Similarly, even where the undertaking was to pay money, the fact that it was made to a limited class of persons has been held to militate against the contention that the promisor was engaging in the insurance business.¹¹ Courts have also attempted

business of insurance consists in accepting a number of risks, some of which will involve losses, and of spreading such losses over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." And see *James Eva Estate v. Mecca Co.*, 40 Cal. App. 515, 181 P. 415 (1919) (where brewing company guaranteed performance of lease entered into by one of its customers, held not insurance); and *Calumet & Hecla Mining Co. v. Stafford*, (N. Y. Sup. Ct. 1919) 179 N. Y. S. 672 (in which agreement to procure war risk insurance at a certain figure was held not insurance).

⁶ *Cole v. Haven*, (Iowa 1880) 7 N. W. 383 (agreement by vendor of lightning rods to pay all damages to building occasioned by lightning held not contract of insurance but of warranty); *Evans & Tate v. Premier Refining Co.*, 31 Ga. App. 303, 120 S. E. 553 (1923) (agreement by seller of oil to replace gears in automobiles of customers if they wore out while using said oil held to be contract of warranty).

⁷ *Pirics v. First Russian Slavonic Greek Catholic Benev. Society*, 83 N. J. Eq. 29, 89 A. 1036 (1914); *Commonwealth ex rel. Hensel v. Provident Bicycle Assn.*, 178 Pa. 636, 36 A. 197 (1897); and see dissenting opinion of Lewis, J. in *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396 (1907).

⁸ *Moresh v. O'Regan*, 120 N. J. Eq. 534, 187 A. 619 (1936).

⁹ *State v. Bean*, 193 Minn. 113, 258 N. W. 18 (1934); *National Auto Service Corp. v. State*, (Tex. Civ. App. 1932) 55 S. W. (2d) 209.

¹⁰ *Moresh v. O'Regan*, 120 N. J. Eq. 534, 187 A. 619 (1936).

¹¹ *Beck v. Pennsylvania R. R.*, 63 N. J. L. 232, 43 A. 908 (1899); *State ex rel. Sheets v. Pittsburg, C., C. & St. L. R. R.*, 68 Ohio St. 9, 67 N. E. 93 (1903); *Isaac H. Blanchard Co. v. Hamblin*, 162 Mo. App. 242, 144 S. W. 880 (1912). And see *State v. N. J. Indemnity Co.*, 95 N. J. L. 308 at 316, 113 A. 491 (1921), where the court distinguished *Blanchard Co. v. Hamblin*, cited by the defendant, saying that in that case "the indemnity insurance was confined to a limited number in a particular

to distinguish a contract for services from insurance on the ground that in the latter the promisor undertakes to procure the rendition of services, while in the former case he undertakes to render them himself,¹² and on the ground that in the contract for services the indemnity feature is lacking.¹³ The fact that a contract expressly stipulates it is not insurance is immaterial, if its purpose, effect, and import indicate that it contains all the elements of an insurance contract.¹⁴ Where the purpose of the transaction is not to secure profits but is charitable, or designed to furnish relief to employees or members of a fraternal organization, it has been held not to be insurance.¹⁵ But even though not carried on for profit, if the transaction or plan in effect provides insurance protection at a lower cost than would otherwise be available, it will be held to constitute insurance.¹⁶ Inasmuch as regulation of the insurance business is aimed primarily at protection of policy holders and the insured, the courts are apt to consider the degree of facility with which the transaction lends itself to fraud or over-reaching of the insured in determining whether it constitutes insurance.¹⁷ In conflict with this is the recognition that certain undertakings of an insurance or indemnity character are a legitimate method of stimulating other business activity of the promisor.¹⁸ In every case numerous considerations may enter into the decision.

line of business, and lacked the features of state wide dealing with the general public contained in the case at bar." See also dissenting opinion of Lewis, J., in *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396 (1907).

¹² *Physicians' Defense Co. v. Cooper*, (C. C. A. 9th, 1912) 199 F. 576. See also *Southern Surety Co. v. Austin*, (Tex. Comm. App. 1929) 17 S. W. (2d) 774, in which suretyship was distinguished from insurance on the ground that in the former the guarantor obligates himself to do the act if the principal fails, while in guaranty insurance, the insurer agrees to indemnify the insured for any loss of money sustained by reason of the failure of the principal.

¹³ *Vredenburg v. Physicians' Defense Co.*, 126 Ill. App. 509 (1906); *State v. Laylin*, 73 Ohio St. 90, 76 N. E. 567 (1905). But a comparison of these cases with *Physicians' Defense Co. v. Cooper*, (C. C. A. 9th, 1912) 199 F. 576, where the transaction (agreement to provide attorneys for defense of malpractice suits against physician) was held to constitute the insurance business, will indicate the difficulty in determining what constitutes indemnity.

¹⁴ *National Auto Service Corp. v. State*, (Tex. Civ. App. 1932) 55 S. W. (2d) 209.

¹⁵ *Beck v. Pennsylvania R. R.*, 63 N. J. L. 232, 43 A. 908 (1899); *State ex rel. Sheets v. Pittsburg, C., C. & St. Louis R. R.*, 68 Ohio St. 9, 67 N. E. 93 (1903); *Commonwealth v. Equitable Beneficial Assn.*, 137 Pa. 412, 18 A. 1112 (1890); *Colaizzi v. Pennsylvania R. R.*, 208 N. Y. 275, 101 N. E. 859 (1913), distinguished by the court in the principal case.

¹⁶ *State v. Alley*, 96 Miss. 720, 51 So. 467 (1910).

¹⁷ *Attorney General v. C. E. Osgood Co.*, 249 Mass. 473, 144 N. E. 371 (1924) (sale of furniture on installment plan with cancellation of the debt if the buyer died prior to final payment); *State v. Willett*, 171 Ind. 296, 86 N. E. 68 (1908); *State ex rel. v. Wichita Mut. Burial Assn.*, 73 Kan. 179, 84 P. 757 (1906); *Renschler v. State ex rel. Hogan*, 90 Ohio St. 363, 107 N. E. 758 (1914). In these cases undertakers formed burial associations whose members paid annual dues and upon death were entitled to burial.

¹⁸ 36 MICH. L. REV. 311 (1937).

No comprehensive general rule as to what constitutes the insurance business can be laid down. It is submitted that the principal case might have been decided either way, but in view of the presence of many of the factors commonly regarded as indicating that a person is engaging in the insurance business, it is impossible to say that the court did not reach a correct decision.

Thomas E. Wilson