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CONTRACTS - ANTICIPATORY BREACH - RIGHT TO RECOVER IN ADVANCE ON A UNILATERAL OBLIGATION TO PAY MONEY

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CONTRACTS — ANTICIPATORY BREACH — RIGHT TO RECOVER IN ADVANCE ON A UNILATERAL OBLIGATION TO PAY MONEY — Plaintiff brought suit on an accident insurance policy. He alleged that the defendant insurer wholly repudiated the policy and informed plaintiff that it would not in any event pay him the monthly indemnity according to the terms of the policy even though a doctor of its own choice advised that the plaintiff was permanently disabled. *Held*, that under the Texas law, when one who is obligated by contract to make money payments to another absolutely repudiates and abandons the obligation without just excuse, the obligee is entitled to maintain his action in damages at once for the entire breach. *Williams v. Mutual Benefit Health & Accident Assn.*, (C. C. A. 5th, 1938) 100 F. (2d) 264.[1]

There is no special rule of insurance law governing actions for anticipatory breach of contract; actions for that purpose are governed by the law of contracts generally.[2] It has often been stated that there can be no recovery of anticipatory damages on a unilateral obligation to pay money.[3] This supposed rule seems to find its justification in the reason given for the holding in the often-

[1] Circuit Judge Holmes dissented on the ground that the policy was alive for other purposes which were not renounced. New York Life Ins. Co. v. Viglas, 297 U. S. 672, 56 S. Ct. 615 (1936), there cited, seems to be authority for the proposition.

A further ground of dissent is that the repudiation should be construed merely as a denial of liability on the claim asserted. See Dingley v. Oler, 117 U. S. 490, 6 S. Ct. 850 (1885); Mobley v. New York Life Ins. Co., 295 U. S. 632, 55 S. Ct. 876 (1935); 35 COL. L. REV. 105 (1935).

[2] VANCE, INSURANCE, 2d ed., § 94, p. 327 (1930).

[3] Manufacturers' Furniture Co. v. Cantrell, 172 Ark. 642, 290 S. W. 353 (1927); Fidelity & Deposit Co. of Maryland v. Brown, 230 Ky. 534, 20 S. W. (2d) 284 (1929); Leon v. Barnsdall Zinc Co., 309 Mo. 276, 274 S. W. 699 (1925); Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 A. 464 (1935); Cobb v. Pacific Mut. Life Ins. Co. of California, 4 Cal. (2d) 565, 51 P. (2d) 84 (1935); 5 WILLISTON, CONTRACTS, rev. ed., § 1328 (1937).

quoted case of *Hochster v. de la Tour*.[4] In that case it was said that the reason for allowing an action for anticipatory breach of contract was that the obligee otherwise would have to go through the useless process of keeping himself ready and willing to perform. On that basis, clearly there should be a distinction between bilateral and unilateral obligations. The reason given, however, has been criticized on the ground that there is no need for such a rule to protect the obligee, since repudiation can be held to excuse performance by the other party.[5] On the other hand, it has been said that the best reasons for allowing an immediate action for an anticipatory repudiation are that the repudiation often causes immediate loss in property values, and disturbs the serenity of the promisee, and that to allow the action makes for an early settlement of the dispute and a timely payment of damages.[6] Clearly these reasons apply to unilateral as well as bilateral contracts.[7] The allowance of an action for anticipatory damages ought to be governed by the certainty with which damages can be measured [8] and the hardship on the obligor in each case of paying in a lump sum in the present what he contracted to pay in the future, without regard to whether the obligation is unilateral or not. Certainly a distinction between those policies in which the insured is required to go through some formality from time to time, and those in which he is not,[9] does not help to reach a satisfactory result. In any event, usually without considering any special factors, the courts in a few jurisdictions have allowed recovery for an anticipatory breach of a unilateral obligation.[10] Undoubtedly the court in the principal case was correct in

[4] 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853). See Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780 (1900).

[5] 36 YALE L. J. 263 (1926). See 5 WILLISTON, CONTRACTS, rev. ed., § 1315 (1937).

[6] ANSON, CONTRACTS, Corbin's ed., 482 (1930).

[7] See 31 MICH. L. REV. 526 at 529 (1933) for another comparison. See also 27 MICH. L. REV. 811 (1929); Ballantine, "Anticipatory Breach and the Enforcement of Contractual Duties," 22 MICH. L. REV. 329 at 350 (1924).

[8] But it is said that "The chief objection to the rule seems to be that it advances the time of trial so that in rare instances the plaintiff might recover a judgment for damages for an injury that later developments show that he does not suffer. This is not a very strong objection; it is an objection that applies to all future damages, and yet the recovery of such damages is necessary and desirable. In view of the existing authorities and the very general approval of the doctrine, it seems no longer worth while to attack it." ANSON, CONTRACTS, Corbin's ed., 482 (1930). See 45 HARV. L. REV. 585 (1932).

[9] Federal Life Ins. Co. v. Rascoe, (C. C. A. 6th, 1926) 12 F. (2d) 693; Parks v. Maryland Casualty Co., (D. C. Mo. 1932) 59 F. (2d) 736. In this connection see 5 WILLISTON, CONTRACTS, rev. ed., § 1330 (1937).

[10] Aetna Life Ins. Co. v. Phifer, 160 Ark. 98, 254 S. W. 335 (1923); Equitable Life Assur. Soc. of United States v. Pool, 189 Ark. 101, 71 S. W. (2d) 455 (1934); Illinois Bankers Life Assn. v. Armstrong, 100 Ind. App. 696, 192 N. E. 901 (1934); American Banker's Ins. Co. v. Moore, (Tex. Civ. App. 1934) 73 S. W. (2d) 620. See also Robbins v. Travelers Ins. Co., 151 Misc. 151, 269 N. Y. S. 841 (1934); Equitable Trust Co. of New York v. Western Pac. Ry., (D. C. N. Y. 1917) 244 F. 485.

Federal Life Ins. Co. v. Rascoe, (C. C. A. 6th, 1926) 12 F. (2d) 693, is said

its interpretation of the Texas decisions,[11] which have gone to extreme lengths in such cases in allowing recovery.[12]

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to be overruled by New York Life Ins. Co. v. Viglas, 297 U. S. 672, 56 S. Ct. 615 (1936), but the decision there seems to be on the ground that there was not a complete repudiation as was held in the Rascoe case.

[11] American Banker's Ins. Co. v. Moore, (Tex. Civ. App. 1934) 73 S. W. (2d) 620; Universal Life & Accident Ins. Co. v. Sanders, 129 Tex. 344, 102 S. W. (2d) 405 (1937).

[12] Pollack v. Pollack, (Tex. 1931) 39 S. W. (2d) 853; rehearing denied (Tex. Comm. App. 1932) 46 S. W. (2d) 292, criticized in 45 HARV. L. REV. 585 (1932).