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Insurance - What Constitutes an Insurance Business

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banking act provides for the method of distributing the assets of insolvent national banks. *Spradlin* v. *Royal Manufacturing Co.*, 73 F. (2d) 776 (C.C.A. 4th, 1934); *Grindley* v. *First National Bank of Detroit*, 87 F. (2d) 110 (C.C.A. 6th, 1936); see also, *American Surety Company of New York* v. *Baldwin*, 90 F. (2d) 708. (C.C.A. 7th, 1937).

Officers of the United States, when discharging duties under federal authority pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are being performed. *Ohio* v. *Thomas*, 173 U.S. 276, 19 Sup. Ct. 453, 43 L.ed. 699 (1898). A state court has no power to control by mandamus the official discretion of an officer or agent of the United States and arrest and punish him for an act done or omitted to be done in the performance of his duties. *Ex Parte Shockley*, 17 F. (2d) 133, (D.C. Ohio, 1926). But the mere fact that a person is an officer or agent of the United States charged with the performace of certain duties under that government, will not afford him immunity from prosecution under the laws of the state, if the acts complained of are such as to show that the claimed immunity is a mere subterfuge and that under no fair consideration of his official duty could he have assumed he was acting in his official capacity. *In re Waite*, 81 Fed. 359 (D.C. Iowa, 1897).

It must be conceded that the States are without power to enforce any laws or regulations which directly and materially interfere with the instrumentalities of the Federal government. But on the other hand, the police power of a state is not exceeded when the interference with a federal instrumentality is only indirect or incidental. It is in the application of this "axiomatic" principle, however, where difficulties arise. This is true because the ascertainment by the courts of what is a "direct" and "material" interference as contrasted with that which is an "indirect" or "immaterial" interference is governed by the particular facts and circumstances of each case.

Observing the great increase in the number and importance of federal instrumentalities in recent years, the principal case is indicative of a possible trend by the courts to construe liberally state laws as merely exercising an indirect or immaterial interference with an instrumentality of the federal government and thus within the police power of the states.

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Insurance—What Constitutes An Insurance Business?—Proceeding in quo warranto to oust the defendant from the insurance business with the state of Ohio. The defendant was engaged in the sale of automobile equipment including pneumatic rubber tires. It was charged that he entered into a form of guarantee agreement which constituted a violation of the state insurance laws. There were two distinct forms available. One provided for a quarantee for a specific period against road hazards that might render the tire unfit for further service. In the event of such damage the defendant was to have the option of furnishing a new tire or repairing the damaged one. The other printed form was a guarantee that the tire would wear for not less than a stated period, and that should it fail to do so it would be repaired or replaced with a new tire.

It was contended that these guarantee agreements were made in violation of Section 665 of the General Code: "No company, corporation, or association . . . shall engage directly or indirectly in this state in the business of insurance or enter into any contracts substantially amounting to insurance . . . unless it is

expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

On appeal, *held,* that the agreement was substantially an unconditional promise of indemnity and was therefore such an insurance contract as was governed by the General Code. *State ex rel. Duffy, Atty. Gen.* v. *Western Auto Supply Co.,* 134 Ohio St. 163, 16 N.E. (2d) 256 (1938).

The history of the road hazard guarantee reveals a contest between mass distributors marketing private brand tires, who favor the road hazard guarantee; and tire manufacturers who are opposed to it. In the *Tire Review,* of November 1937, the following statement appeared, "The road hazard guarantee has been under fire since it was originated by Standard Oil in 1931 for Atlas Tires. During the hectic days of the N. I. R. A. manufacturers vigorously protested the wide use of this type of guarantee for by that time most manufacturers had adopted it as a defensive weapon. Manufacturers claim it has cost the industry fully $10,000,000 a year in unfair adjustments and has defeated sale of perhaps millions of new tires." Since the decision in the instant case another article was published in the *Tire Review* of July 1938, which expressed the reception of the decision as follows, "The road hazard tire guarantee, principal weapon of mass distributors marketing private brand tires heard its death knell tolled in Columbus, Ohio, July 13th, when the Ohio Supreme Court, in the country's first test case of its kind upheld the Attorney General and the ruling of the Ohio Superintendent of Insurance that the road hazard guarantee was really tire performance insurance and that tire outlets, including filling stations were not licensed to sell insurance. Tire manufacturers heralded the decision as one of vital importance and declared that the fight would be waged now in all states to have similar rulings." The contest as revealed in the above quoted articles seems to have been effectively brought to a close by the decision in this case which attached the "insurance" label to the road hazard guarantee.

In the instant case the court in considering the definition of insurance chose one that defines insurance to be a contract of indemnity, namely, "A contract to indemnify the insured against loss or damage to certain property named in the policy, by reason of certain perils to which it may be exposed." *State ex rel. Sheets Atty. Gen.* v. *Pittsburgh C., C. & St. L. Ry. Co.,* 68 Ohio St. 9, 67 N.E. 93, 64 L.R.A. 405 (1903); *State ex rel. Physicians' Defense Co.* v. *Laylin,* 73 Ohio St. 90, 76 N.E. 567 (1905).

Contracts of insurance are so completely matters of public interest that it is within the police power of the state to regulate them *State ex rel. United States Fidelity & Guarantee Co.* v. *Smith,* 184 Wis. 309, 199 N.W. 954 (1924). The power given to the legislature with respect to insurance regulation is admittedly very broad. *State ex rel. Time Ins. Co.* v. *Smith,* 184 Wis. 455, 200 N.W. 651 (1924). The far reaching effect of insurance contracts upon the public is the constitutional justification for their regulation. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 34 Sup. Ct. 612, 58 L.ed. 1011 (1914). It is not to be doubted that the business of insurance is one of great public interest and that broad regulatory power is necessary in order to protect public interest. The theory of public interest has been based upon the fact that a large number of persons contributing to a fund in the hands of a single person would be in danger of losing their contributions if the solvency of that one person were not protected and guarded.

The Ohio State Section 665 Gen. Code providing for insurance regulation has placed any "contract substantially amounting to insurance" under the laws

of the state regulating the business of insurance. It can readily be seen that such provision puts teeth in the statute that will reach contracts not definitely or actually insurance contracts, and it is on the basis of that provision that the road hazard guarantee in the instant case is placed within the statute.

In construing, even so broad a statute, in a proper manner, the purpose and justification for regulation of insurance should necessarily be kept in mind for the court may not regulate a contract dependent upon a contingency if the essential element of public interest is not present. If a contract is made for a general purpose other than insurance the mere fact that it contains an incidental provision under which an added benefit may accrue to one of the contracting parties does not make it one of insurance and thereby subject it to regulation under insurance statutes. Thus where a lessor of personal property agreed in the lease to repair or replace the chattel in case of injury or damage by fire it was held that the contract was not one of insurance. *Re. Fire Certificate,* 39 Pa. Co. Ct. 163 (1911). And where one dealing in lightning rods, in order to induce sales, entered a contract whereby he promised to pay all damage to the building from being struck by lightning if his lightning rods were placed thereon it was held not to be insurance. *Cole* v. *Haven,* 55 Iowa 741, 7 N.W. 383 (1880). Similarly, in a case where a Bicycle Association upon receiving a certain yearly membership fee contracted to clean the member's bicycle twice during the year, repair tires or bicycle when damaged by accident and to replace it if stolen unless found within a certain time, it was decided that such association did not constitute an insurance company. *Com. ex rel. Hensely* v. *Provident Bicycle Association,* 178 Penn. 636, 36 Atl. 197 (1897). A dealer in auto lubricants who agreed to replace broken auto gears of cars which used his lubricant was held not to be operating as an insurance company. *Evans & Tate* v. *Premier Refining Co.,* 31 Ga. App. 303, 120 S.E. 553 (1923).

Certain plans which have been instituted to promote business have been frowned upon by the insurance authorities. Among that group are those involving a conditional sale wherein it is promised that in the event of the death of purchaser, the part of the debt remaining unpaid shall be cancelled and full and complete title transfered immediately. Cases similar are those involving mortgages wherein the mortgage is cancelled upon the mortgagor's death. *State* v. *Beardsley,* 88 Minn. 20, 92 N.W. 472 (1902); *Equity Service Corp.* v. *Agull,* 156 Misc. 552, 281 N.Y. Supp. 292 (1935).

The Ohio Court, in making its decision, drew a distinction between a warranty and an insurance contract, holding that a warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself. In the principal case the defendant by undertaking to indemnify the customer against all road hazards in addition to guaranteeing the tire against defects in material and workmanship, has converted the contract from one of warranty to one that substantially amounts to insurance. If so stipulated, however, a warranty may cover future defects and events as well as present conditions. *Osborn* v. *Nicholson,* 13 Wall. (U.S.) 654, 20 L.ed. 689 (1869); *Brown* v. *Nevins,* 84 N.J.L. 215, 86 Atl. 938 (1913); *Gay Oil Co.* v. *Roach,* 93 Ark. 454, 125 S.W. 122, 137 Am. St. Rep. 95, 27 L.R.A. (N.S.) 914 (1910); *Congar* v. *Chamberlain,* 14 Wis. 258, 13 L.R.A. 679 (1861). The parties may warrant as regards to future conditions or performance if an intention to do so sufficiently appears. *Day* v. *Pool,* 52 N.Y. 416 (1873).

Upon a request for an opinion as to whether or not the road hazard guarantee was insurance, the Attorney General of Oklahoma in an opinion dated May

27, 1937 wrote, "The agreement made contemporaneous with and as a part of the tire sale contract and without additional charge, is an agreement whereby the seller represents and warrants to the purchaser that the tires being sold to him are *so constructed and free from defects as to be able to withstand during the designated period* wear and tear or injuries caused by blowouts, cuts bruises or underinflation, same being the usual causes of tire trouble and that hence said agreement is merely a warranty that the tires being sold are constructed and free from defects, as aforesaid and not a contract of insurance." *The Weekly Underwriters Insurance Dept. Service* (1937) Oklahoma, p. 3.

After the decision in the instant case was handed down the Attorney General of Nebraska was also asked to rule on the road hazard guarantee and in an opinion dated August 30, 1938 he wrote in reviewing the decision, "While this decision is informative it in no manner would control the Nebraska department or court for the reason that its basis is a section of the Ohio Code. Under the Nebraska statutes and decisions the business of insurance is impressed with the public use and its regulation and supervision are authorized under the broad police power of the state for the purpose of protecting the buying public. The contracts considered in the opinion are warranties of merchandise either as to quality or as to the length of time which they will serve the purpose for which they were intended. Nothing is contained in the Insurance Code or in the General Statutes which will warrant this Department in taking supervision over purely commercial transactions in which certain warranties are made for the purpose of inducing sales." *The Weekly Underwriters Insurance Department Service* (1938) Nebraska, p. 11.

CHARLES D. O'BRIEN.

Limitation of Actions—Claim by Wife Against Husband.—The defendants, husband and wife, were married in 1916. The wife's father gave her $1,200 in cash as a wedding gift which she loaned to her husband who agreed to pay it back with interest. During the same year, the defendants began farming using the $1,200 borrowed by the husband from the wife as part of the capital. The defendants continued farming, and in 1930 the husband transferred all his property to his father.

In March, 1936, the father conveyed to the husband certain livestock and machinery and a one-half interest in other livestock and machinery. In May, 1936, the defendant-husband conveyed the property to the defendant-wife in consideration of the $1,200 debt, which at that time with interest amounted to $2,150, and the assumption by the wife of certain other debts owing by the husband.

An action was begun in 1937 by three judgment-creditors of the defendant-husband to set aside the conveyance given by him to the defendant-wife. The trial court set aside the conveyance, and the defendants appealed.

On appeal, *held,* judgment reversed and a new trial granted. The trial court may have been of the view that the loan having been made by the defendant-wife in 1916, and no precise time having been agreed upon for repayment, it was payable on demand, and therefore action upon the loan was barred by the statute of limitations, and for that reason the debt was extinguished. In Wisconsin, however, the statute of limitations does not run against a claim by a wife against her husband. *Campbell* v. *Mickelson,* 227 Wis. 429, 279 N.W. 73 (1938).

The rule that the statute of limitations does not run against a claim of a wife against her husband was judicially declared in 1891 by the Supreme Court