

# Insurance - Insurable Interest in Property Condemned by Eminent Domain

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**Insurance — Insurable Interest in Property Condemned by Eminent Domain**—Plaintiffs were owners of a home in an area subject to eminent domain proceedings. Subsequent to the making of an award, but prior to the payment thereof, plaintiffs' home was destroyed by fire. Plaintiff brought action against the defendant insurance company to recover on a fire policy covering said destruction by fire. Defendant contended that insofar as plaintiffs had received a condemnation award, they no longer had an insurable interest in the property and hence they were precluded from recovery on the policy. The trial court granted defendant's motion for judgment on the pleadings and plaintiffs appealed. *Held*: Reversed. The owners of property which had been condemned by eminent domain, but title to which had not as yet passed to the condemnor, had an insurable interest in the property entitling them to recovery under a fire policy for loss by fire even though after the fire, they were paid the full amount of a prior condemnation award and therefore suffered no monetary loss as a result of the fire. *Heidisch et ux. v. Globe and Republic Insurance Co. of America*, 84 A. 2d 566 (Pennsylvania, 1951).

The requirement of an insurable interest in property in order to sustain recovery under a policy of insurance indemnifying against loss of said property had its statutory inception in 1746.<sup>1</sup> Although the legal requirement of insurable interest arose to prevent wagering in the guise of insurance, to minimize the insured's temptation to destroy or damage the insured property, and to limit the amount of indemnity promised by the insurer, it has been held that the requirement should not be extended beyond the reasons therefore by excessively technical construction.<sup>2</sup>

The insurance company in the case under review attempted to argue away its contractual liability by contending that the title plaintiffs held at the time of loss was merely a paper title to secure payment of a condemnation award and was not such as constituted an insurable interest. Although the argument bears some merit, it appears that the courts have been somewhat liberal in their interpretations of insurable interest in property and somewhat reluctant to interpret insurable interest as meaning full legal and equitable title merged in the insured.<sup>3</sup> The United States Supreme Court, in a decision rendered in 1878,<sup>4</sup> held that a property right in the property insured is not always necessary to sustain

<sup>1</sup> BRITISH INSURABLE INTEREST STATUTE, ST. 19 GEO. II, c .37 sections 1, 2 (1746).

<sup>2</sup> *Womble v. Dubuque Fire and Marine Insurance Company*, 310 Mass. 142, 37 N.E. 2d 263 (1941).

<sup>3</sup> One benefited by existence of property or suffering loss by its destruction has insurable interest therein, though without title in, lien on, or possession of it. *Teschendorf v. Lynn Mutual Fire Insurance Company*, 190 Wis. 33, 208 N.W. 917, 45 A.L.R. 856 (1926); *Rice Oil Company v. Atlas Assurance Company*, 102 F.2d 561 (1930).

<sup>4</sup> *Hooper v. Robinson*, 98 U.S. 528, 25 L.Ed. 219 (1878).

an insurance recovery. The court went on to say that a loss from the property's destruction or a benefit from its preservation accruing to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. As broad as this interpretation may tend to be, it has been limited by holdings to the effect that property insurance is valid only when the insured has such a legal relation to the property insured that its destruction will entail upon him a pecuniary loss or liability,<sup>5</sup> and that if the insured has no insurable interest in the property covered by a fire insurance policy, the policy never takes effect as valid insurance on the property.<sup>6</sup> Hence, it would appear that courts will go beyond the requirement of a legal or equitable property right in the subject matter insured and will interpret insurable interest to include any lawful and substantial economic interest in the preservation of property from loss, destruction or pecuniary damage.<sup>7</sup>

Aside from the nature of an insurable interest in property, the main case under discussion gives rise to the additional problem of divided property interests and the respective insurable interests thereof. The problem most commonly arises where property is subject to a contract of sale with both the vendor and purchaser possessing legal and equitable title respectively prior to consummation of the sale by delivery of possession and title. It has been held that where a vendor carries in his own name insurance on the property which he has contracted to sell, and a loss occurs before title is conveyed to the purchaser, the purchaser's right, as against the vendor, in respect of the proceeds of such insurance are determined ordinarily by whether the loss would fall on the vendor or upon the purchaser.<sup>8</sup>

In 1941, the Wisconsin Legislature enacted the Uniform Vendor and Purchaser Risk Act.<sup>9</sup> The act is pertinent to the fact situation under review and states in effect that unless the contract of sale expressly

<sup>5</sup> *Shaefer v. Calvert Fire Insurance Company*, 62 S.E. 2d 699 (W.Va., 1950).

<sup>6</sup> *Supra*, note 2.

<sup>7</sup> CALIFORNIA INSURANCE CODE (1935) § 282 : "An insurable interest in property may consist in: 1. An existing interest. 2. An inchoate interest founded on an existing interest; or, 3. An expectancy, coupled with an existing interest in that out of which the expectancy arises." NEW YORK INSURANCE LAW (1939) § 148: ". . . the term insurable interest as used in the section shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage." In *Lumbermen's National Bank of Menominee, Michigan v. Corrigan*, 167 Wis. 182, 166 N.W. 650 (1918), it was held that a mortgagor who had sold his property to another subject to the mortgage had and insurable interest in the property, since he was liable for payment of mortgage debt. An equity of redemption has been held an insurable interest. See *Meihler v. Phoenix Insurance Company*, 38 Wis. 665 (1875), and *Perkins v. Century Insurance Company, Ltd. of Edinburgh, Scotland*, 303 Mich. 679, 7 N.W. 2d 106 (1942). For a broad application of the "factual expectancy rule" see *Liverpool and London and Globe Insurance Company, Ltd., v. Bolling*, 176 Va. 182, 105 S.E. 2d 518 (1940).

<sup>8</sup> See collected cases, 55 AM. JUR. VENDOR AND PURCHASER § 403.

<sup>9</sup> Wis. Laws (1941), c. 283; WIS. STATS. (1951), § 235.72.

provides otherwise; where neither legal title nor possession is transferred prior to destruction, risk of loss falls on the vendor.<sup>10</sup> While this uniform statute is comparatively new in Wisconsin, the rule is not new.<sup>11</sup> The Uniform Vendor and Purchaser Risk Act codified the rule as laid down in *Appleton Electric Company v. Rogers*.<sup>12</sup> In the latter case, the parties entered into a contract for the sale of property. Prior to consummation of the sale and while the vendor was still in possession, the property was destroyed by fire and the vendor recovered therefore pursuant to his policy of insurance. Even though the property was destroyed, the purchaser elected to complete the contract and then sued the vendor for the insurance proceeds, claiming same as owner of the property. The court in deciding for the vendor held that subsequent to the fire the purchaser was excused from further performance and entitled to rescind the contract because of the material destruction of the property. However, it elected to complete the contract knowing of such damage and the vendor's willingness to repay the deposit. The insurance policy was for the benefit of the vendor, it being a personal contract between the vendor and the insurer and the insurance did not run with the land.<sup>13</sup> Hence it would appear that in Wisconsin, one in possession of property subject to a contract of sale and retaining title thereof, would have sufficient insurable interest to enforce recovery under a policy of insurance where there was destruction of said property prior to transfer.

It may be contended that the fact situation of the case under review presents a unique problem in that it deals with a condemnation proceeding and cannot be compared with the ordinary vendor-purchaser transaction. In a strict, technical sense, a distinction can be drawn, however where the problem of insurable interest is involved, as previously pointed out,<sup>14</sup> the requirement for said interest should not be

<sup>10</sup> WIS. STATS. (1951) § 235.72 "Uniform Vendor and Purchaser Risk Act. (1) Risk of loss as between vendor and purchaser of land. Any contract hereafter made in this state for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise: (a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid. . . ."

<sup>11</sup> Wis. Anno. (1950) § 235.72.

<sup>12</sup> *Appleton Electric Company v. Rogers*, 200 Wis. 331, 228 N.W. 505 (1930).

<sup>13</sup> There is a split of authority in the United States on the above fact situation as to who is entitled to the insurance proceeds. Some courts follow the equitable doctrine holding that the vendor retains the proceeds as trustee for the purchaser with equitable title. Other courts follow the contract doctrine holding that so long as vendor remains in possession, no interest is conveyed to the purchaser who may only elect to rescind due to failure of consideration. See Soref, *Vendor and Vendee: Real Property: Risk of Loss: Insurance*, 14 MARQ. L. REV. 183 (1930).

<sup>14</sup> *Supra*, note 2.

extended beyond the reasons therefore by excessively technical construction. In condemnation proceedings, title is not considered as having passed to the condemnor until the last act necessary to divest the owner of his title is performed and in addition to a final order of condemnation and presentment of an award, title does not vest in the condemnor until payment.<sup>15</sup>

The view has been taken that the condemnation proceedings are no more than a compulsory sale of all the owners interest in the property,<sup>16</sup> and that the condemnor stands towards the owner as buyer towards seller.<sup>17</sup> Under the Uniform Vendor and Purchaser Risk Act,<sup>18</sup> where there is destruction of the property prior to the consummation of sale by delivery of title and possession, the purchaser has an election to rescind. Where there is destruction of property prior to payment of an award, is the condemnor likewise entitled to rescind or is he bound by the award presented? In general, confirmation of an award has been held to rank with judgments for all practical purposes.<sup>19</sup> However, it has also been held that until the condemnor takes possession, or elects, or otherwise binds himself to do so, an award is not a judgment within the definition of that term as the final determination of the rights of the parties.<sup>20</sup> Although an award not appealed from becomes final as to compensation to be paid, the condemnor retains a right of election to proceed thereunder.<sup>21</sup> From the foregoing it would appear that the condemnor is not bound by the mere rendition of an award. Insofar as compensation in eminent domain proceedings is based on market value<sup>22</sup> it would further appear that if there has been destruction of the property subsequent to the making of an award but prior to the payment thereof, the condemnor may elect to disregard the award and commence revaluation anew based on the market value of the property in its damaged condition. With this right of election in the condemnor, the mere confirmation of an award does not insure the owner of payment and hence the owner stands the risk of interim loss.<sup>23</sup> Where irrespective of damage to the property subsequent to the making of an award, the

<sup>15</sup> 18 AM. JUR. EMINENT DOMAIN § 113, *Johson v. Baltimore*, 158 Md. 93, 148 Atl. 209, 66 A.L.R. 1488 (1930). Wisconsin in accord in a very early decision: *LaCrosse and Milwaukee R. Co. v. Seeger*, 4 Wis. \*268 (1855).

<sup>16</sup> See collected cases, 18 AM. JUR. EMINENT DOMAIN § 112.

<sup>17</sup> *Jackson v. State*, 213 N.Y. 34, 106 N.E. 758 (1915).

<sup>18</sup> *Supra*, note 10.

<sup>19</sup> *Campau v. City of Detroit*, 225 Mich. 519, 196 N.W. 527, 32 A.L.R. 91 (1923).

<sup>20</sup> See collected cases, 29 C.J.S. EMINENT DOMAIN § 27.

<sup>21</sup> *Winnetka Park District v. Hopkins*, 371 Ill. 46, 20 N.E. 2d 58 (1939).

<sup>22</sup> 29 C.J.S. EMINENT DOMAIN § 137; *Forest Preserve District of Cook County v. Hahn*, 341 Ill. 599, 173 N.E. 763 (1930).

<sup>23</sup> As a further illustration of the fact that the making of an award does not bind the condemnor to full payment thereof, it has been held that where benefit accrues to the owner as a result of condemnation, said benefit may be set off against compensation to be awarded. *Nowaczyk v. Marathon County*, 205 Wis. 536, 238 N.W. 383 (1931). May this reasoning be extended to allow the set off of an insurance recovery?

condemnor elects to pay same with the result that the insured does not actually sustain a loss, an insurance company cannot escape its contracted liability by anything any third party may gratuitously do for the insured's benefit.<sup>24</sup>

It appears established from the foregoing facts that an owner of property condemned by eminent domain has an insurable interest therein to sustain recovery of a loss taking place subsequent to the making of an award, but prior to payment thereof. For a final consideration of this problem under review an inquiry may be made as to the extent of recovery by an insured presupposing the existence of an insurable interest. On principle, a rule which allows recovery greater than the insurable interest cannot be reconciled with one, so well established, which disallows recovery in the absence of insurable interest.<sup>25</sup> Where the insured has sole and unconditional ownership in fee there appears to be no problem as to the extent of his recovery, insofar as he should be indemnified for his loss to the extent of his policy.<sup>26</sup> The point of inquiry does arise however where the insured has a limited interest in the property insured. Generally, most of the cases considering this point are consistent with the idea that insurance is a contract of indemnity and that an insured with a limited interest is limited to the recovery of his actual interest in the property destroyed.<sup>27</sup> Where full recovery has been allowed to an insured with a limited interest, it usually has been because of some contractual or legal liability imposed upon the insured to account to the real owner for the property destroyed.<sup>28</sup> The Wisconsin Supreme Court<sup>29</sup> allowed a husband full recovery on an insurance policy taken out on his wife's separate property. Although the husband's interest in the property was limited, the court held that there being nothing in the policy indicating that the husband's interest alone was insured, the transaction evinced an intention on the part of the husband to insure his wife's interest on her behalf. Although the Wisconsin court may have manifested a liberal view on the matter, the standard fire policy, adopted in Wisconsin, expressly states that recovery thereunder shall not in any event be for more than the interest of the insured.<sup>30</sup> Cases allowing full recovery by one who has a limited interest in the property insured are usually distinguishable on their facts or

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<sup>24</sup> *Foley et al. v. Manufacturers' and Builders' Fire Insurance Company of New York*, 152 N.Y. 131, 46 N.E. 318, 43 L.R.A. 664 (1887). An insurance company cannot deny an insurable loss because of any gifts made to the insured by third parties. See 63 A.L.R. 1351.

<sup>25</sup> See collected cases, 68 A.L.R. 1344.

<sup>26</sup> See collected cases, 29 AM. JUR. INSURANCE § 1176.

<sup>27</sup> See collected cases, 29 AM. JUR. INSURANCE § 1194.

<sup>28</sup> See collected cases, 29 AM. JUR. INSURANCE § 1193.

<sup>29</sup> *Kludt v. German Mutual Fire Insurance Company*, 152 Wis. 637, 114 N.W. 321, 45 L.R.A. (N.S.) 1131 (1913).

<sup>30</sup> WIS. STATS. (1951), § 203.01.

consistent with principles of equity.<sup>31</sup> As a general proposition, recovery by an insured has been limited to his actual interest in the property destroyed thereby indemnifying him for his actual loss sustained. Until passage of title and acquisition of the property by the condemnor it would appear that the interest of the owner in the main case was sufficient to sustain a full recovery under the policy.

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**Labor Law — Equity — Specific Performance of Arbitration Agreements**—Plaintiff union was the duly selected bargaining agent of the employees of the defendant company. The union and company had a collective bargaining agreement containing a grievance procedure clause which provided for the submission of any grievance to arbitration, should all preliminary methods of settling the dispute fail. In violation of the bargaining agreement, a union member and employee of the defendant was refused re-employment after a leave of absence. After all preliminary negotiations failed, a plaintiff invoked the arbitration clause of their contract but defendant refused to take part in any arbitration of the matter. In a resulting declaratory judgment action brought by plaintiff, the court found a dispute existed and also that there was a valid arbitration agreement in force; this was affirmed by the Supreme Court of Wisconsin.<sup>1</sup> Thereafter, plaintiff brought an action in equity for the specific performance of this arbitration clause. *Held*: Specific performance denied. Agreements between employees and employers for the arbitration of labor disputes are valid but unenforceable in equity. *Local 1111 of the United Electrical, Radio and Machine Workers of America v. Allen-Bradley Co.*, 259 Wis. 609, 49 N.W. 2d 720 (1951).

The decision in the principal case is apparently one of first impression in Wisconsin.<sup>2</sup> The result is, however, in accord with a long line of decisions which are thought to have found their origin in a dictum of Lord Coke in 1609.<sup>3</sup> Since that time courts have quite uniformly held

<sup>31</sup> See collected cases, 29 AM. JUR. INSURANCE § 1195.

<sup>1</sup> *Local 1111, U.E.W. et al. v. Allen-Bradley Co.*, 255 Wis. 613, 39 N.W. 2d 740 (1949).

<sup>2</sup> Earlier Wisconsin cases usually cited as dealing with arbitration agreements actually involve appraisals. See *Hopkins v. Gilman*, 22 Wis. 454 (1868); *Schneider v. Reed*, 123 Wis. 488, 101 N.W. 682 (1904); *Kipp v. Laum*, 146 Wis. 591, 131 N.W. 418 (1911); *Depies-Heus Oil Co. v. Sielaff*, 246 Wis. 36, 16 N.W. 2d 386 (1944). "An 'arbitration' presupposes a controversy or difference to be decided and the arbitrators proceed in a judicial way. On the other hand, an appraisal or valuation is generally a mere auxiliary feature of a contract of sale, the purpose of which is not to adjudicate a controversy but to avoid one." BLACK'S LAW DICTIONARY, 128 (3rd ed., 1933). Under the common law, appraisals are governed by different rules than are arbitrations. 6 WILLISTON ON CONTRACTS, Sec. 1921 A (rev. ed., 1938); STURGES, COMMERCIAL ARBITRATION AND AWARDS, 18-42 (1930).

<sup>3</sup> *Vynior's Case*, 8 Co. 80 a, 816 (1609).