North Carolina Central Law Review

Volume 3 | Issue 2 Article 12

4-1-1972

The Insurance Contract and Policy in General as It Relates to North Carolina

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the prior record of the juvenile was entered into evidence against the better interest of the youth. The youth or his counsel could say that this is self-incrimination and against the better interest of the youth, and should not be admissible as evidence against the youth.

5. *Escobedo Ruling*—This case was an Illinois case which stated that persons under the due process clause of the sixth and fourteenth amendments to the Constitution of the United States should be given their right to counsel and representation before and during trial and should be apprised of their constitutional rights so that they will not put themselves in jeopardy against their better interest. It is the author's firm opinion that all youths should be given their constitutional rights and human rights and the needed due process protection, just as adults, if not more so, because they are not as aware of the implications.

Conclusion

Sweeping reforms are needed in handling juvenile offenders. There should be an initial program of probation without a finding for first offenders. All juvenile records should be impounded and opened only upon the showing of good cause to be determined by a hearing. Opening of a juvenile's file should not be granted *ex parte.*

All decisions in juvenile court should be appealable. All out-of-court admissions or confessions from the adjudicatory stage of juvenile proceedings denied in court should be excluded.

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The Insurance Contract and Policy in General as it Relates to North Carolina

Introduction

A contract of insurance as taken from N.C. Gen. Stat. § 58-3, is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for, the destruction, loss, or injury of something in which the other party has an interest.

A contract of insurance can further be defined as a method to indemnify the assured for loss. It is that portion of a contract under which a company agrees to indemnify the assured for loss or damage from perils therein defined, with provision for subrogation of the company to the right of assured against third persons. However that part of the contract

under which the company obligates itself to pay to any shipper or consignee claims for which the insured would be liable by provisions of a statute, with stipulation that the insured should reimburse the company for any such payment, is a surety contract.

Generally an insurance premium, as found under 43 Am. Jur. 2d Insurance § 530 (1967), may be defined as the agreed price for assuming and carrying the risk; in other words, the consideration paid an insurer for undertaking to indemnify the insured against a specific peril.

Unless payment of premium is waived, it is a condition precedent to insurance coverage, as noted in *Engleberg* v. *Home Insurance Company*[1] where the agent mailed notice of cancellation for failure of insured to pay premium to become effective within ten days. Two months later Engleberg was involved in an automobile accident, with no coverage on his vehicle. Also of importance is the fact that the cancellation notice is only required to be mailed to the address of the insured as set out in the policy.

When a contract of insurance is finally complete, customarily it is embodied in a formal written instrument, termed a policy. This instrument merges all prior agreements touching the transactions, and by accepting it the insured is conclusively presumed in the absence of fraud to have given his assent to all of its terms. In *State Distributing Corp.* v. *Travelers Indemnity Company*,[2] the insured applied for both robbery and burglary insurance, and the insurance binder gave such protection. However, the formal policy subsequently issued covered robbery only, and the insured's retention of the policy without objection for more than five (5) months constituted an acceptance of the policy as written, thereby precluding recovery against the insurer for loss from burglary.

As stated in *Sanders* v. *Charlotte Liberty Mutual Insurance Company*,[3] an insurance company generally has the right to fix the conditions upon which it will become liable, and the patron has the right to accept or refuse them. It was held in the *Sanders* case, *supra*, that when the policy provided for double indemnity if death were to result from visible bodily injuries through external, violent and accidental means and no signs of violence were found on decedent's body and the coroner testified that the decedent died by smothering, the insurer was not liable under the double indemnity clause to pay such a type of benefit.

[1] 140 S.E.2d 818 (N.C. 1959).
[2] 30 S.E.2d 377 (N.C. 1944).
[3] 157 S.E.2d 614 (N.C. 1963).

Statutory provisions in force at the time of the issuance of a policy of insurance become a part thereof as though expressly incorporated therein, and the statutory provisions will prevail over conflicting provisions of the policy. While the parties may contract for fuller coverage than that provided by the statutory forms, provisions having the effect of making the policy more restrictive than the standard statutory form are void. However, if the limits of coverage are consistent with the statute, additional coverage beyond the specifications of the policy will not be implied.

Under N.C. Gen. Stat. § 58-28, all contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein, and all contracts of insurance the applications of which are taken within the state shall be deemed to have been made within this state and are subject to the laws thereof.

Also of importance is N.C. Gen. Stat. § 58-29, which provides that there is no insurance contract except under this chapter. It is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this state, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this chapter.

The previous statements are in general a complete coverage of contracts of insurance in North Carolina as stated.

BINDERS

A binder in the field of insurance, or a binding slip, is merely a written memorandum including the most important terms of a preliminary contract of insurance intended to give temporary protection pending the investigation of the risk by the insurer or until the issuance of a formal policy, and by intendment it is subject to all conditions in the policy to be issued.[4]

A binder is an insurer's acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued or until the insurer gives notice of its election to terminate the contract. In order to be valid, a binder need not be a complete contract, since it is merely a memorandum of the most important terms of a preliminary contract of insurance, and where the contemplated policy is required by statute, the binder is deemed to incorporate all of the terms

[4] 30 S.E.2d 377 (N.C. 1944).

of the statutory policy, and no specific form or provision is necessary to constitute a valid memorandum. Construction of alleged insurance binders and their legal effect are questions for the court, and not the jury, and determination of these questions by the Supreme Court of North Carolina upon a prior appeal is conclusive.

In order for a binder to constitute a valid contract of insurance, the agent who issues it must have actual authority from the insurance company to issue the binder on its behalf. The extension of credit to the insured for the premium does not destroy the effectiveness of a binder. In *Wiles* v. *Mullinox*,[5] it was held that insurance agents in an action for negligent failure to provide compensation coverage were entitled to argue that they had procured the insurance and that it was in effect at the time of the injury. Also they should be allowed to read pertinent statutes and court decisions upon questions in point, where there was evidence upon which a jury might base its findings.

It should be noted further that the insured may accept the benefits of a binder even though he had no knowledge that the insurance broker had issued the binder for his protection. Also, delivery of the binder to him is not essential.

In an action against an insurance agent for breach of duty to exercise due diligence to provide compensation insurance and for failure to notify the proposed insured of his failure to procure such insurance, testimony of a defendant agent that he had authority from the insurer to issue a binder and that some twenty-six days prior to the loss he had forwarded to the insurer a document constituting a binder covering a period of one year beginning some eleven days prior to the loss in question, is sufficient to support a finding that there was a valid binder in force on the date of the loss. This was held sufficient notwithstanding advice by the insurer to the agency nine days before the loss in question that the insurer would not accept the risk. The fact that a valid binder for workmen's compensation insurance cannot be terminated except by giving thirty days' notice to the insured is the reason insurer would not accept the risk.[6]

Insurable Interest and Public Policy

In a case where the insured has no insurable interest in the subject matter of the policy, the policy is void as being against public policy.

[5] 155 S.E.2d 246 (N.C. 1967).
[6] *Id.*

An insurable interest is some interest such as the law will recognize and protect. In the case of *United States Fidelity & Guaranty Company* v. *Regan*,[7] it was held that the named insured who lacked insurable interest in the automobile covered by fire and hail policy, voluntarily permitted the proceeds of the policy to be paid for repair of the automobile and therefore it was not any defense to insurer's action to recover payment from him. Furthermore, an action to recover money paid under mistake of fact is one in assumpsit, and is permitted on the theory that by such payment, the recipient has been unjustly enriched at the expense of the party making the payment and thusly is liable for money had and received.

Where the insured has no such interest, the fact that a person who does have an insurable interest lends his consent to the transaction, does not lend validity to the policy of insurance.[8]

Laws That Govern

A contract of insurance based upon an application made while the insured was residing in this state must be construed in accordance with the laws of this state rather than the laws in force at the time of the inception of the contract in the state in which the insurer is incorporated. In the case of *Pace* v. *New York Life Insurance Company*,[9] it was held that when an application for a 20-year dividend accumulation life policy provided that on payment of premium and delivery of policy, that the policy should relate back and take effect as of the date of the application. Further the policy which was issued and delivered ten days later provided that it took effect as the date of application. Subsequently a second policy was issued on the same application, and some sixteen years later insured failed to pay premiums and the value of the policies after deducting loans was applied by insurer to purchase paid-up term insurance in accordance with the terms of the policies. The period of paid-up term insurance was properly calculated by insurer from the date of application and not from the date of delivery of the policies.

A provision in the policy that it should be governed by the laws of the state of the domicil of the insurer is void insofar as the courts of this state are concerned. It was noted in *Cordell* v. *Brotherhood of Locomotive Firemen and Enginemen*[10] that when a beneficial association as-

[7] 122 S.E.2d 774 (N.C. 1961).
[8] 44 C.J.S. Insurance § 175 at 869.
[9] 14 S.E.2d 411 (N.C. 1941).
[10] 182 S.E.2d 141 (N.C. 1935).

sumed absolute obligation to pay benefits for total permanent disability, provisions that decisions of its own tribunals upon claims for benefits should be conclusive, was held not binding upon a member, when the rejection of a member's claim by the association's tribunals was arbitrary and unreasonable.

In North Carolina, insurance policies issued by foreign corporations, applications for which are taken within the State of North Carolina, are to be construed in accordance with the laws of North Carolina, and not the foreign state of the Home Office of the insurance company. However, when a contract of insurance is negotiated and executed in the state in which the insured is a resident, then it will be construed in accordance with the laws of that state in an action in this state (North Carolina). This was the case in *Roomy* v. *Allstate Insurance Company*[11] where it was held that even though the automobile liability policy which was issued in New York, and contained no provision for coverage because of the death of, or injuries to insured's spouse, the policy had to be interpreted in accordance with the New York law in determining the insurer's liability for injuries sustained in North Carolina.

The Reformation of Policies

A policy of insurance like any other written instrument may be reformed for mutual mistakes or for mistakes induced by fraud, or inequitable conduct of the adverse party; and parol evidence is competent to establish the right to such equitable relief, but the proof must be clear, strong, and convincing. It was held in *McCollum* v. *Old Republic Life Insurance Company*[12] that when an eighty-three year old woman failed to read the effective date of her term policy, it would not as a matter of law bar an action for recovery or for reformation. The complaint in the case above in which the effective date was not in accord with the intent of the parties therefore stated a cause of action for reformation.

To further this explanation, it was held in *McCollum* v. *Old Republic Life Insurance Company*[13] that an action to reform a certificate of insurance issued under a group policy on the lives of borrowers, where evidence that the premium was paid for a twelve month period, and that the effective date of the certificate as typewritten thereon, antedated the time the loan was actually made by three days, together with evidence

[11] 125 S.E.2d 817 (N.C. 1962).
[12] 131 S.E.2d 435 (N.C. 1963).
[13] 137 S.E.2d 164 (N.C. 1964).

of prior customs between the parties, was held sufficient to overrule the insurer's motion to nonsuit.

The Policy Construction and Operation

It has been noted in *Stanback* v. *Winston Mutual Life Insurance Company*[14] that where a $300.00 policy contained a preliminary provision—

> If after this policy takes effect, death should occur during the first six months and the insured is ten years of age next birthday or over, no greater amount than one-half of the insurance provided herein shall be paid as a death benefit; if the age of the insured at the date of this policy is less than ten years next birthday, the amount payable will be according to the Infantile Table except as provided on the following pages . . .

and the following pages contained the limitation that if death of the insured occurred during the first twelve months from pneumonia, one fourth of the amount otherwise payable will be paid to insured within six months. Here it was held that the beneficiary was entitled to $37.50 since the clause "except as is provided on the following pages" related to all that had preceded it in the preliminary provision. The reason is that although the rules of punctuation may be used to assist in determining the intent of the parties, punctuation or the absence of punctuation in a contract or deed is ineffective to control its construction as against the plain meaning of the instrument.

An insurance contract is to be construed in accordance with the intention of the parties, the objective being to ascertain the intention of the parties as expressed in the language used, without disregarding any of its words or clauses or inserting words or clauses not used.

A policy of insurance will be construed as a whole with the purpose of giving effect to the intention of the contracting parties, except insofar as a statute or authorized administrative order requires a different construction, and each word and clause will be given effect if possible by any reasonable construction. In ascertaining the intent of the parties, consideration may be given to the circumstances of the parties and the hazards involved.

Policies of insurance having been prepared by the insurer will be liberally construed in favor of the insured, and strictly against the in-

[14] 17 S.E.2d 666 (N.C. 1941).

surer. An exception from liability is not favored. Subordinate conditions and provisions limiting and restricting the primary objective of the policy to afford protection upon the happening of certain contingencies, should be strictly construed against the insurer.

If the language is ambiguous, or reasonably susceptible to two interpretations, the courts will give it that interpretation which is most favorable to the insured, in other words in favor of coverage. However, the rule of liberal construction does not justify the courts in enlarging the terms of the policy beyond the meaning of the language of the policy. It was held in *Skillman* v. *Acadia Mutual Life Insurance Company*,[15] that the plaintiff's right to recover if the insured came to death, directly and independently of all other causes, from injuries sustained solely through external, violent and accidental means as opposed to death from existing illness or disease cooperating with and contributing to accidents, was proper as instituted under the Accidental Benefit Agreement, which was supplementary to ordinary life insurance policies which provide for payment of additional amounts equal to the face amounts of the policies. If the terms of a policy are plain and unambiguous the court must give effect to them, construing the policy according to its terms. The courts may not rewrite it and therefore make a new contract between the parties, nor may the court under the guise of construction, insert provisions not contained therein when there is no ambiguity in an insurance contract. It was held in *Anderson* v. *Allstate Insurance Company*[16] that where deceased while a passenger in an automobile designated as number one was killed in a collision caused by the driver of automobile number two and deceased's administratrix paid the funeral expenses and executed a release to the negligent driver of the second automobile, therefore she lost her right to recover funeral expenses under the policy of the owner of the automobile number one which provided for funeral expenses. The policy also provided that insurer should be subrogated to the rights of recovery of persons receiving payments, deceased insurer, which had issued the policy providing for payment of funeral expenses up to $2000.00, but providing that insurance with respect to the unowned automobile shall be excess insurance, was liable only for funeral expenses in amount of $373.25 because of destruction by administratrix of her claim against the driver of the second automobile, thereby losing $1000.00.

Whether the terms of the policy are conflicting or ambiguous is a

[15] 127 S.E.2d 789 (N.C. 1962).
[16] 145 S.E.2d 845 (N.C. 1966).

question of law for the court, and where the ultimate and controlling facts are not in dispute, the construction of a policy becomes a matter of law. The policy was construed as a matter of law in *Parker* v. *State Capital Life Insurance Company*[17] where the insured seeking recovery under a policy which contained a limitation requiring hospitalization within 30 days from the date of the accident in order to provide coverage under the policy's special indemnities and hospital indemnity provision, entered the hospital for treatment and later removal of a kidney was necessary as a result of the fall in which the kidney had been injured and was not covered by the policy even though medical testimony established that the insured should have been hospitalized within 30 days after the accident. The kidney was removed 51 days after the accident.

The terms of an insurance contract must be given their plain, ordinary, and accepted meaning unless they have acquired a technical meaning in the field of insurance, or unless it is apparent that another meaning was intended. Where a term is defined in the policy, such definition will ordinarily be applied to the term wherever it is used in the contract. However, the term must be given the meaning as defined in the policy, regardless of whether a broader or narrower meaning is customarily applied to such word, since the parties are free to contract and give words embodied in their agreement the meaning they see fit.

Where technical terms are used which have a known meaning in the business, parol evidence is competent to inform the court and jury as to their exact meaning. However, parol evidence is not competent to explain such terms, as was noted in *Owens* v. *Reserve Loan Life Insurance Company*,[18] where the insured failed to pay the ninth premium due, and he therefore wrote to the company for a 90 day extension in order to pay his premium. One day after the insured's death, the insurance company unknowingly wrote a letter agreeing to extend the time upon certain conditions. It was held that the cash surrender value of this life policy became effective only on written request of the insured and on valid surrender of the policy; therefore, the beneficiary could not recover the cash or loan value of the policy where such provisions had not been complied with.

Now where an insurer receives an additional premium for amending the policy by substituting another word for a word used in the original

[17] 130 S.E.2d 36 (N.C. 1963).
[18] 175 S.E. 203 (N.C. 1934).

policy, the parties must necessarily intend that the substituted words should cover a larger field of liability.[19]

RIDERS

In the case of a rider, a rider must be construed with the policy and harmonized therewith if possible, and the rider will not be held to alter the provisions of the policy except to the extent that its provisions are in subsitution of those of the original policy or in creation of a new and different contract. In the case of irreconcilable conflict, the provisions of the rider prevail as in the case of *Mills* v. *State Life and Health Insurance Company*[20] where it was held that the death of the insured who was deliberately shot by a third person without provocation of the insured resulted "directly and independently of all other causes from accidental bodily injuries" within coverage of the policy and that the policy and the rider provided coverage for employer without reference to whether he was engaged in any duty pertaining to his occupation or self-employment.

CONCLUSION

In conclusion, a policy of insurance will be construed with regard to the main purposes of the contract, to guarantee the payment of premiums to the insurer and to secure the policy against fraud and imposition; also to give the insured the protection and benefits for which he pays. Literal construction of procedural requirements will not be adopted when such construction would defeat a primary purpose of the contract and compliance therewith is made impossible through no fault of a party to the contract by a circumstance later transpiring which could not have been contemplated by the parties at the time of the execution of the contract. Each clause must be given effect if this can be done by reasonable construction and differing clauses must be harmonized.

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[19] York Industrial Center, Inc. v. Michigan Mutual Liability Company, 155 S.E.2d 501 (N.C. 19).

[20] 135 S.E.2d 586 (N.C. 1964).