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Friscia to Scarola: Changing New York Case Law on Insurable Interest in Stolen Automobiles

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toward fulfilling these goals. Thus a grave paradox exists. A single claimant with several distinct, independent claims against a defendant will find it possible to aggregate his claims to invoke federal jurisdiction while two or more claimants with substantially similar claims are in the awkward position of having to litigate such claims against the same individual separately, if unable to meet the jurisdictional amount in controversy requirements. The logic behind such a dichotomy is certainly debilitating to even the keenest procedural stalwart. Though plaintiff's seeking to vindicate their injuries in a federal court will find themselves forumless, the results of *Zahn* will be less harsh in those states that have provisions for class actions.[43] It should be noted that the plaintiffs in *Zahn* intended to continue their suit separately if their class action status was terminated.[44] When asked why the suit was not brought in state court originally, the reply was that the alternative did not exist at that time.

In retrospect, with the decision in *Zahn* followed by the result reached in *Eisen*, there appears to be little hope for the large scale class actions once envisioned. Perhaps such a class action procedure was never meant to be. But, as it stands now clearly the price tag on such actions is beyond the reach of most litigants. Consequently small claims will go unvindicated unless potential plaintiffs do their forum shopping in state courts.

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Friscia to Scarola:

Changing New York Case Law on Insurable Interest in Stolen Automobiles

INTRODUCTION

In view of the incidence of car theft in the United States, it is apparent that many automobile theft insurance policies are purchased by bonafide purchasers of stolen cars. If such an automobile is subsequently stolen from the innocent purchaser and the insurer discovers that the insured buyer possessed a stolen vehicle, a troublesome ques-

43. N.C. GEN. STATS. 1A-1, Rule 23, provides in part:
(a) Representation—If persons constituting a class are so numerous as to make it impractical to bring them all before the court, such of them one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.
44. 42 U.S.L.W. 4233 (October 1973).

tion arises: *Does the bonafide purchaser acquire an insurable interest in the stolen vehicle*?[1]

Many state courts have reviewed this problem frequently as the status of the automobile has grown into the primary means of transportation in the United States. The resulting decisions are divided among these jurisdictions as to whether or not such insurance contracts are sustained by an insurable interest.[2]

In New York a divergence of opinion on the issue has developed in the lower courts of the state over the past several years. Before 1968 not one case had been reported that pursued the question of insurable interest and stolen automobiles.[3] In the following four years there were at least six reported suits initiated by insured persons in various state courts. Although all had similar fact patterns, the decisions failed to provide a uniform response. Then in 1972 the Court of Appeals, over a vigorous dissent, resolved the question in favor of the insured motorist in *Scarola v. Insurance Co. of North America.*[4]

A. Insurable Interest as an Expanding Concept

Before attempting to evaluate the significance of *Scarola* and the accompanying lower court cases, a general review of the development of several conceptual foundations for "insurable interest" is appropriate. This review will be coupled with a brief inspection of the codification of a definition of the term in New York State Law. The purpose of this section is only to provide adequate perspective from which the decisions of New York State Courts may be viewed.

Traditionally, public prejudice against insurance has been engendered by the failure of insurers and the law to require an insurable interest in the subject insured. As early forms of insurance contracts frequently could not be distinguished from mere wagers,[5] a strong public policy developed against the wagering posture of insurance. Thus, "insurable interest" became the element which would allow a distinction to be drawn between an insurance contract and a wager.

Professor William R. Vance explained the historical perspective of

1. Friscia v. Safeguard Ins. Co., 57 Misc. 2d 759, 760, 293 N.Y.S.2d 695, 697 (N.Y.C., Civ. Ct. 1968).

2. Representative cases from several jurisdictions are collected in Annot., 33 A.L.R.3d 1417 (1970).

3. Rossi, *Insurance, 1969 Survey of N.Y. Law*, 21 Syracuse L. Rev. 587, 598 (1969).

4. 31 N.Y.2d 411, 292 N.E.2d 776, 340 N.Y.S.2d 630 (1972).

5. Salzman, *Law of Insurable Interest in Property*, 1966 Ins. L.J. 394. This article provides an adequate review of the historical development of insurable interest including English decisions and interesting American statutory material.

insurable interest as a concept that developed as a result of legislative and judicial reaction to the wagering phenomenon.

> In England by statute and in the United States by judicial decision, mere wagers that affect the existence of property or persons are contrary to public policy and void. The term "insurable interest" in its broadest sense, is applied to that "interest" which the law requires a person making a contract of insurance to have in the thing or person insured in order that the contract creating rights and duties so highly dependent upon chance may escape the condemnation visited upon wagers.[6]

More specifically Professor Vance differentiated between an interest in property and that in a person. Relating insurable interest to property insurance he wrote

> The interest in property which the law will allow to be insured must be composed of such valuable relations with respect to the property as the law will recognize and enforce. The contract must provide indemnification for possible loss of a legal interest susceptible of pecuniary valuation. Nothing less will take the contract out of the class of forbidden wagers.[7]

Writers on the subject generally agree that it is now a fundamental rule that an insurable interest in property insured is a requisite to the validity of an insurance contract.[8] An analysis of case law by such commentators has shown that there are as many as four general conceptual bases upon which an insurable interest may be grounded.[9] They are property rights, contract rights, potential legal liabilities and factual expectation of damage.[10]

The property rights of the insured appear to be the most common and clear basis for an interest. Such rights include not only legal and equitable title, but also lesser interests such as a lien and mere possession. The insured must show some measurable rights either legal or equitable, to have an interest.[11] Interests may also arise *ex contractu*. In some instances the contract will confer an insurable interest even though there is no legal or equitable property right shown. Further

6. W. VANCE, HANDBOOK ON THE LAW OF INSURANCE, 156 (3d ed. 1951) (hereinafter cited as VANCE).

7. *Id.*

8. 1 G. RICHARDS, INSURANCE 327 (5th ed. 1952); 2 J. APPLEMAN, INSURANCE LAW AND PRACTICE, 761 (1941).

9. Stockton, *An Analysis of Insurable Interest Under Article Two of the Uniform Commercial Code*, 17 VAND. L. REV. 815, 816 (1964) (hereinafter cited as Stockton). *See generally* Harnett and Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of Legal Concept*, 48 COLUM. L. REV. 1162, 1165-75 (1948); Note, *Insurable Interest in Property: An Expanding Concept*, 44 IOWA L. REV. 513, 513-22 (1959); Vukovich, *Insurable Interests: When it Must Exist in Property and Life Insurance*, WILLIAMETTE L.J. 1, 2-20 (1971).

10. Stockton, *supra* note 9, at 816. See supporting cases therein.

11. *Id.*

flexibility and innovation can be found in the recognition of a potential liability that may be suffered by an insured substantiating an insurable interest where no property or contract interest can be found.

The broadest and perhaps the most progressive basis is the factual expectation of damage concept of insurable interest. Under this theory an insurable interest is present if the insured, independent of the insurance policy, "will gain economic advantage from the continued existence of the insured property, or will suffer economic disadvantage on damage of the property."[12]

As exponents of this theory have written, a connection exists between the property interest and the factual expectation concept.

> The property right conception is analytically not separate from the factual expectation of damage. It is more accurately a grouping of individuals who are most likely to suffer damage; their factual expectation is high. But, as previously indicated, while the physical owner is the most probable loser, others may similarly suffer pecuniary setback upon the destruction of the insured property, and often to a greater extent than a nominal owner. Recognition of this has led to an expansion of the property right concept to include all those having enforceable in rem right in the insured property unit.[13]

It has been stated by these proponents of the factual expectation of damage theory that the New York State statute defining insurable interest substantially adopts that concept of insurable interest.[14] However, a careful reading of the New York statute leaves questions. The statute states

> No contract or policy of insurance on property made or issued on property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. The term "insurable interest," as used in this 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.[15]

It is clear that this language supports the factual expectation theory in some respects. Surely, "substantial economic interest in the safety or preservation of property" suggests this approach. However, a question arises in consideration of the word "lawful". This term may be

12. Harnett and Thornton, *Insurable Interest in Property: A Socio-Economic Re-evaluation of a Legal Concept*, 48 COLUM. L. REV. 1162, 1171-75 (1948) (hereinafter cited as Harnett and Thornton).

13. *Id.*

14. *Id.* at 1175 n.83. *See also* Note, *Insurable Interest in Property: An Expanding Concept*, 44 IOWA L. REV. 520 (1959).

15. N.Y. INS. LAW § 148 (McKinney 1966). Emphasis is supplied. Similar difficulties in statutory construction have been met in applying statutes concerning definitions of insurable interest. *See* ARIZ. REV. STAT. § 20-1105(B) (1956); REV. STAT. OF NEB. § 44-103(b) (1968); W. VA. CODES § 33-6-3(b) (1966).

construed to provide justification for requiring some legal basis for the interest in addition to the "substantial economic" requisite. Yet, in the alternative, "lawful" may be included only to prohibit bad faith or illegality on the part of the insured in representing the property he wishes to insure. A second question of construction arises in the interpretation of the word "substantial" and will be addressed in an analysis of the dissenting opinion in *Scarola*.[16]

The historical development of the insurable interest concept both under existing case law and statutory authority has been checkered with a variety of foundations for the justification of such an interest. However, a more precise construction of a definition of the term which avoids the ambiguity of vague or conflicting language has not become uniform due to the intermingling of conceptual theories of varying influence all seeking to substantiate an insurable interest.

Judges, whom we all know as natural alchemists, are left frantically struggling to expand a can of worms into a linear function—an exercise resulting in what is often described as an "expanding legal concept."

B. CASES BEFORE *Scarola*

In 1968 in the case of *Friscia v. Safeguard Insurance Co.*[17] the plaintiff bought a Cadillac and insured it against theft with the Safeguard Insurance Company. She had purchased the automobile through the agency of an auto mechanic. Three months later the car was stolen. Safeguard refused to compensate her for the loss because the insurance company discovered that at the time the car was transferred to Ms. Friscia it was a stolen car with an altered vehicle identification number and was owned by a person other than the transferor. Subsequently the carrier claimed that Ms. Friscia, a bonafide purchaser for value,[18] had no interest in the stolen vehicle.

When this plaintiff brought her complaint to the Civil Court of New York City in August 1968, it was conceded in the briefs of counsel for both parties that there was an absence of both law and statutory authority on point. When the defendant's policy was introduced into evidence, counsel for the defendant cited cases originating in other jurisdictions which the court said involved the interpretation of policy provisions not contained in the plaintiff's policy. There was no elaboration on this point, the implication being that the defendant's argument had diminished force. Nevertheless, the court ruled for the defendant

16. See note 59 and accompanying text.
17. 57 Misc. 2d at 759, 293 N.Y.S.2d at 695.
18. *Id.* at 759-60, 293 N.Y.S.2d at 695-96.

insurer based on its own interpretation of § 148 of the New York Insurance Law.[19]

The court noted that the character of an insurable interest need not be legal or equitable title, but merely such an interest as the insured would gain advantage by the existence of the property, or suffer loss by its destruction. Such language seems to reflect the factual expectation of damage theory which recurs in subsequent cases. However, it was the opinion of the court that Ms. Friscia did not have a "substantial" economic interest under the statutory guidelines. Though the true owner was nowhere to be found at the time of trial, the court reasoned that the vehicle could be taken from the plaintiff at any time by that original owner, should he ever appear and make a claim. The court maintained that such "tenuous" possession gave the plaintiff no substantial economic interest under the New York insurance statute.[20]

The judge rebutted the theory of estoppel urged by the plaintiff on the grounds that the defendant had accepted premiums which it had not offered to refund, and that the evidence on which it relied at trial was as available when the policy was procured. The Court struck a familiar image distasteful to insurers.

> The personification of the carrier so created - plump and placid collecting premiums on cars whether stolen or not, and then galvanized into lean, resolute action when a claim is filed—does in fact appeal to the court's sense of injustice. But no estoppel is thus created. Legally, the insurer is under no obligation to investigate the title to its policyholders' cars; and in the absence of such a duty, no estoppel can be created by the failure to so investigate.[21]

Friscia was a case of first impression for the New York court. Judge Martin B. Stecher's opinion incorporated several cases supporting and interpreting Insurance Law § 148[22] but none appeared which directly paralleled the fact situation and issue raised in *Friscia*. In effect the court was left to decide whether or not the bona fide purchaser in possession of property, absent the true owner, could sustain an insurable interest. Judge Stecher decided not to expand the insurable interest concept.

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19. *Id.* at 760, 293 N.Y.S.2d at 696.

20. *Id.* at 761-62, 293 N.Y.S.2d at 697. *Cf.* Reif v. Insurance Co. of North America, 33 Misc. 2d 961, 223 N.Y.S.2d 101 (1961). The court also noted that this case is distinguished from that of the finder of lost property where an insurable interest has been held because the finder's right may mature into title under New York Statute.

21. Friscia v. Safeguard Ins. Co., 57 Misc. 2d at 761, 293 N.Y.S.2d at 697.

22. *Id.* at 761, 293 N.Y.S.2d at 696. *See* Nieschlag and Co. v. Atlantic Mut. Ins. Co., 43 F. Supp. 797 (S.D.N.Y.), *aff'd*, 126 F.2d 834 (2d Cir.), *cert. denied*, 317 U.S. 640 (1942); Curacao Trading Co. v. Federal Ins. Co., 50 F. Supp. 441 (S.D.N.Y.), *aff'd*, 137 F.2d 911 (2d Cir.), *cert. denied*, 321 U.S. 765 (1944) interpreting Insurance Law § 148.

The Court failed to review the practical difficulty of finding the true owners under conditions where cars are stolen and transported far from the point of theft, altered for sale, and transferred to unwitting buyers. Nor did the court view the price paid by the plaintiff and his inconvenience in being without a vehicle as a loss of a "substantial economic interest" under the law. Noting that "possession is, in effect, title," the court said the probability, however remote, of the true owner appearing made the possession too "tenuous" to support an interest.[23] Judge Stecher's ruling merely affirmed the general rule of property law that one purchasing stolen property acquires no better title than the seller, even when that person is a bona fide purchaser.[24]

Here is an example of the intermingling of bases for an interest. In its opinion the court in *Friscia* supports the broad interpretation of the statute which reflects the factual expectation of damage concept. Yet, in its holding the court retreats to a more traditional rule of property that the possibility of the appearance of the true owner or the possibility of his being discovered supersedes any interest of the innocent purchaser.

In October 1968 a similar case appeared in Supreme Court, Kings County New York.[25] The factual situation is very much the same as *Friscia*. Plaintiff, Mr. Leonard Lindner, was the innocent purchaser of a late model Cadillac which he insured for the purchase price of $5300 with the defendant, Hartford Fire Insurance Company. One month later the car was stolen. Thereafter the insurer discovered that the car that Mr. Lindner had purchased had been stolen from its original owner who could not be found. The court decided in direct opposition to the *Friscia* case and in favor of the insured plaintiff, holding that an innocent purchaser of a stolen automobile had an insurable interest therein.[26]

The court either overlooked or ignored the contrary decision in *Friscia* as Judge Kern noted counsel's reliance on cases in other jurisdictions and their use of secondary sources to support their positions.

Lindner emphasized that neither legal nor equitable title is essential to a finding of an insurable interest. Citing abundant authority the court said that all that need be shown by the defendant is an economic interest in property,

23. Friscia v. Safeguard Ins. Co., 57 Misc. 2d at 769, 293 N.Y.S.2d at 696.

24. *See* Herrington v. American Security Ins. Co., 124 Ga. App. 617, 184 S.E.2d 673 (1971); Hessen v. Iowa Auto Mut. Ins. Co., 195 Iowa 141, 190 N.W. 150 (1922). *See also* Annot. 33 A.L.R.3d 1417 (1968).

25. Lindner v. Hartford Fire Co., 58 Misc. 2d 86, 294 N.Y.S.2d 422 (Sup. Ct., Kings Co. 1968), *rev'd on other grounds*, 33 App. Div. 2d 686, 306 N.Y.S.2d 255 (2d Dep't 1969).

26. *Id.*

> . . .by the existence of which (the insured) will gain an advantage or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon possession of the property itself.[27]

The court noted that this plaintiff had possession at the time the policy was written and just before the time of loss. On this basis the court reasoned that an innocent purchaser for value could successfully defend his possession of the vehicle against all but the true owner and that such a possessory right was sufficient to give the plaintiff an insurable interest. Further, it was suggested that the insured might never have been called upon to defend his possession and that the expectation of benefit derived from the protection and preservation of property was therefore within the statutory meaning of "substantial economic interest."

However, the lower court's judgment was reversed in 1969.[28] The Appellate Division ruled that the evidence established that the plaintiff was not an innocent purchaser for value and did not have an insurable interest in the car. The appellate court made it clear that it was not ruling directly on the issue of insurable interest in stolen vehicles by stating:

> In view of this determination, we neither reach nor decide the question whether an innocent purchaser of a stolen car has an insurable interest in it.[29]

The Appellate Division ruling established what was already clear, that there must be a purchase in good faith, but the problem of insurable interest in stolen property would remain unsettled. In *Lindner* the Court strongly supported the factual expectation of loss test by interpreting the statute and determining the existence of an interest. Perhaps some of the zeal of the lower court for an expansive view of the concept of what constitutes an insurable interest should have been applied to the facts regarding innocence of purchase.

Since *Lindner* at least four additional cases involving the insurable interest issue have been reported prior to *Scarola*. *Pistoia v. Empire Mut. Ins. Co.*[30] was heard in Civil Court of the City of New York, Brooklyn County in March 1969. The result was a verdict for the defendant insurer, and no appeal was taken. In February 1969 in a court of similar jurisdiction in Richmond County, a verdict was rendered for

27. *Id.* at 88, 294 N.Y.S.2d at 424. *See* Fulwiler v. Traders and Gen. Ins. Co., 59 N.M. 366, 285 P.2d 140 (1955); Riggs v. Commercial Mut. Ins. Co., 125 N.Y. 7, 25 N.E. 1058 (1890); Rohrback v. Germania Fire Ins. Co., 62 N.Y. 47 (1875); Modern Music Shop v. Concordia Fire Ins. Co., 131 Misc. 305, 226 N.Y.S. 630 (1927); Tischendorf v. Lynn Mut. Fire Ins. Co., 190 Wis. 33, 208 N.W. 490 (1926).

28. Lindner v. Hartford Fire Co., 33 App. Div. 2d 686, 306 N.Y.S.2d 255 (1969).

29. *Id.* at 686, 306 N.Y.2d at 256.

30. (Brooklyn Cir. Ct., March 1969) in 161 N.Y.L.J. 18 (March 12, 1969).

the plaintiff in *Perrotta v. Empire Mut. Ins. Co.*[31] This judgment was reversed as was *Lindner* on the grounds that the plaintiff was not an innocent purchaser for value.

The facts in *Pistoia* bear similarity to those in *Friscia* and *Lindner* with some notable exceptions. The identity of the true owner of the vehicle was known, which made the plaintiff's possessory right vulnerable as a basis for an interest. Also, the plaintiff in *Pistoia* gave two different addresses of the person from whom he allegedly bought the automobile in question. Both addresses were non-existent.[32]

After mentioning *Friscia* and *Lindner* and noting the reference in the *Lindner* opinion to the position expressed by Professor Vance that the better view would allow an interest based on the qualified possessory right of an innocent purchaser of a stolen automobile,[33] the court distinguished *Pistoia* on the grounds of a lack of good faith and the presence of the true owner.

Lack of good faith aside, the court appeared willing to hold that an insurable interest existed if the true owner could not be found under the qualified property right concept. Alternatively, the court did not seem to weigh the plaintiff's economic interest in the car at all. It is interesting to note that the court never mentioned the factual expectation of damage concept which was the substance of the *Lindner* opinion, though the court discussed the case at some length.

As in *Friscia*, there was comment in *Pistoia* on the theory of estoppel as an argument for recovery for the plaintiff. The court stated that an insurer had the right to rely on a statement made in the application for a policy, that the applicant or insured was the owner of the property sought to be insured. "No investigation is required by the insurer to check such ownership or allegation of ownership."[34] The court continued by presenting the following analogy to refute the argument of estoppel.

To hold that the defendant in the case before this court is estopped

31. 62 Misc. 2d 925, 310 N.Y.S.2d 393 (App. T 2d Dep't 1970), *rev'd on other grounds*, 35 App. Dir. 2d 961, 317 N.Y.S.2d 779 (2d Dep't 1970).

32. Pistoia v. Empire Mut. Ins. Co. (Brooklyn Civ. Ct., March 1969) in 161 N.Y.L.J. 18 (March 12, 1969).

33. Lindner v. Hartford Fire Co., 58 Misc. 2d 86, 294 N.Y.S.2d 422 (Sup. Ct. Kings County 1968), *rev'd on other grounds*, 33 App. Div. 2d 686, 306 N.Y.S.2d 255 (2 Dep't 1969). *See* VANCE, *supra* note 6, at 171. He states: Inasmuch as one having possession of a chattel, although acquired by theft or otherwise wrongfully has a possessory right good as against all the world except the true owner or one having a prior right of possession, there is no reason why this qualified possessory right should not give him an insurable interest. So where the insured in good faith purchases an automobile from a thief, the better view recognizes his interest therein, though there is authority to the contrary.

34. Pistoia v. Empire Mut. Ins. Co. (Brooklyn Civ. Ct., March 1969) in 161 N.Y.L.J. 18 (March 12, 1969).

> from the defense of no insurable interest because of the acceptance of a premium, is like insuring one's life with a fraudulent misrespresentation in the application, of a most serious nature, and then stating that the collection of a premium is a waiver of the defense of fraud.[35]

It is clear from both *Friscia* and *Pistoia* that there is no support for the argument of estoppel without some obligation resting with the insurance company to review property ownership. The mere size and resources of these institutions as against the practical difficulties facing a detailed check of title by an individual may provide the basis of an argument for legislation requiring review of title prior to insurance on an automobile by an insurer. Perhaps it may even be argued that there exists an obligation to return premiums if the claim is made by the insurance company that there is nothing to insure.[36]

Two cases were mentioned in an opinion issued by an intermediate court which considered *Scarola* on its way to the Court of Appeals.[37] They illustrate the increasing need for a high court ruling on the issue of insurable interest and stolen vehicles.

In *Rogers v. Early*[38] the plaintiff Ms. Rhoda Rogers, brought action in Civil Court to recover the value of a refurbished 1960 Corvette from her insurer, Allstate Insurance Company and from her immediate vendor, Benjamin Early. Mr. Early impleaded his vendor which eventually resulted in joinder of four successive vendors as parties-defendant. In the investigation of the stolen auto by the carrier's representative, it was discovered that the visible engine block serial number was different from a concealed number on the under side of the engine block. The two numbers were used to facilitate accurate identification. The investigator saw the visible number but took the word of police as to the concealed number. The insurance company alleged that the car was not owned by Mr. Early when sold and therefore Mrs. Rogers had no insurable interest.

It was conceded that Ms. Rogers and all the vendors in the action were bona fide purchasers. As in the cases discussed above, the court noted the requirement of an insurable interest and the plaintiff's burden of proof thereof. Yet, the court seemed to believe that the insur-

35. *Id.*

36. Annot., 33 A.L.R.3d 1417, 1419 (1968).

37. *See* Scarola v. Insurance Company of North America, 67 Misc. 2d 437, 323 N.Y.S.2d 1001 (App. T. 1st Dep't 1971), *aff'd*, 38 App. Div. 2d 1012, 331 N.Y.S.2d 340, *aff'd*, 31 N.Y.2d 411, 292 N.E.2d 776, 34 N.Y.S.2d 630 (1972). Cases cited are Rogers v. Early (Sup. Ct. Kings County, May 1970) in 163 N.Y.L.J. 19 (May 14, 1970) and Cohen v. Gov't Employees Ins. Co. (Brooklyn Cir. Ct., March 1970) in 163 N.Y.L.J. 2 (March 30, 1970). In the latter case the court denied summary judgment to the defendant insurer saying there was a triable issue as to insurable interest in a stolen vehicle.

38. (Sup. Ct. Kings County, May 1970) in 163 N.Y.L.J. 19 (May 14, 1970).

able interest concept should be expanded in meaning. Though avoiding the specific language, it is clear that the court favored the factual expectation of damage theory as a basis for insurable interest. As in *Lindner*, the court here cited *Riggs v. Commercial Mut. Ins. Co.*[39] as authority for this more progressive view.

The *Rogers* opinion appeared to reflect the reasoning in *Lindner* extensively, but the latter is not cited in that opinion. Instead the court merely stated there was a "paucity of precedent" and that it must regard the question *sub judice* as open in New York. In finding for the plaintiff the court cited a New Jersey Supreme Court case[40] as authority in adopting a position which it felt "justice would dictate as equitable."[41]

The judge emphasized the necessity of his ruling for the plaintiff in the following manner:

> To rule otherwise would be unconscionable; since the defendant carrier has its premiums and promised to extend the protection to the insured under such policy. We must not allow the insurance industry to escape its obligations based upon the mere allegation that the insured car has been stolen. To allow the defendant to collect such premium and disclaim liability when the event insured against occurs, would be travesty on justice as well as unjust enrichment.[42]

There must have been some reluctance to rely on the merely persuasive authority of the New Jersey case and equity as the Court continued by saying that it was conceivable that the Court of Appeals would rule on the question of insurable interest and stolen vehicles. There was concern that the lower court ruling would in some way impair any possible holding by the high court. Until that ruling, the court felt compelled to examine the record to ascertain whether the automobile was actually stolen when transferred from Early to Rogers. Conveniently, it was discovered in a review of the record that the representative of the insurer who investigated the theft did not personally see the concealed serial number but only took the word of one Detective Prehn. The investigator had no personal knowledge of the concealed number and the plaintiff had no opportunity to examine the detective. The court held that the evidence regarding the serial numbers was in-

39. 125 N.Y. 7, 25 N.E. 1058 (1890). See note 27 *supra* and material to which it refers.

40. Norris v. Alliance Ins. Co. of Phila., 1 N.J. Misc. 315, 123 A. 762 (1923). This case was also cited in *Lindner*, 58 Misc. 2d 86, 89, 294 N.Y.S.2d 422, 424 (Sup. Ct. Kings County 1968). Norris held, in effect, that possession was proof enough of title to afford an insurable interest.

41. Rogers v. Early (Sup. Ct. Kings County, May 1970) in 163 N.Y.L.J. 19 (May 14, 1970).

42. *Id.*

admissible and that as a matter of law the car was not stolen.[43]

A reading of the cases that appeared prior to the arrival of *Scarola v. Insurance Company of North America* in the New York State Court of Appeals shows that there was a ripe issue to be considered by the court. *Friscia* denied recovery on the ground that there was no insurable interest because of the "tenuous" nature of the property interest. In *Lindner*, a state appellate court took an opposite position on an identical set of facts. In addition, *Lindner* suggested a less strict interpretation of the Insurance Law coupled with a support of factual expectation of damage as a basis for an insurable interest. On appeal the issue of insurable interest was left intentionally unconsidered after the revelation of the plaintiff's bad faith. *Pistoia*, *Perrotta* and *Rogers* only added to the confusion and indecision on the issue. It was an appropriate time for the court of last resort in New York State to carve out a niche in their case law relating to the insurable interest in stolen vehicles.

C. *Scarola v. Insurance Co. of North America*

Scarola provided the opportunity to decide the issue foreseen by the lower court in *Rogers*. Mr. Scarola purportedly purchased a used Cadillac for $4000 from an unknown salesman whom he met through his brother-in-law. At trial the insured failed to produce any documentary evidence that he actually purchased the car in question. Instead Mr. Scarola produced his cancelled bankbook showing timely withdrawal of $2500 and testimony that he had borrowed the balance from his brother-in-law. The car, which had been previously registered in New Hampshire, was then registered in New York and a comprehensive insurance policy was issued by the appellant carrier. Three days after purchase the car was stolen and was not recovered. Upon processing the theft claim the insurer discovered that the insured automobile had a false serial number indicating it was stolen, and the insurer disclaimed liability. The Civil Court of New York held for the insured. The insurer appealed the matter and the case reached the Court of Appeals in December 1972.[44]

In the majority opinion Judge Bergan noted at the outset that it had been affirmed by all courts below that the appellee was a bona fide purchaser.[45] The issue was framed on the assumption that this was true. In affirming the right of Mr. Scarola to the proceeds of the insurance policy, the Court stated that the "plaintiff had a right to possession of the car against any contrary assertion except that of the owner. This

43. *Id.*
44. 31 N.Y.2d at 412, 414, 292 N.E.2d at 778, 340 N.Y.S.2d at 632-33.
45. *Id.* at 412, 292 N.E.2d at 776, 340 N.Y.S.2d at 631.

right under general principles, ought to be regarded as an insurable interest."[46] Judge Bergan cited *National Filtering Oil Co. v. Citizens Ins. Co. of Mo.*,[47] in support of this finding. He noted that the court in *National Filtering* stated

> . . .an interest, legal or equitable in the property burned is not necessary to support an insurance upon it; that it is enough if the assured is so situated as to be liable to loss if it be destroyed by the peril against; that such an interest in property connected with its safety and situation as will cause the insured to sustain a direct loss from its destruction, is an insurable interest; that if there be a right in or against the property which some court will enforce upon the property, a right so closely connected with it and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest.[48]

The court observed that this decision was followed in *Riggs*, cited in *Lindner* above, where it was stated that although a stockholder of a corporation had neither title to corporate property nor equitable title which he could convert to legal title, he was deemed to have sufficient interest in such property to insure it. The example given there was that the property loss might affect dividends. Following this reasoning the court in *Scarola* found that

> [the law] recognizes the right of a purchaser of a car in good faith and for value to possession, it would seem to follow that this right to possession, limited though it may be, is insurable.[49]

Clearly identifiable is the recognition of an expansion of the strict property right concept, wherein the court views those having an enforceable in rem right in the insured subject matter as able to claim an interest which is insurable.[50]

The public policy problem of wagering in insurance is then mentioned. Almost in passing the court explained that the difficulty is whether an insured, having no real economic interest in the subject matter insured, is actually making a wagering contract. The court then cited *Corpus Juris Secundum*[51] to illustrate the wagering principle and in a continued effort to lend credence to an expansion of the insurable interest

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46. *Id.*
47. 106 N.Y. 535, 13 N.E. 337 (1887). Considered here was the question of whether one who assigns patents for a manufacturing process has such an interest as to support insurance of the manufacturing premises and the probable royalties above the minimum payment on the patent by the assignor.
48. 31 N.Y.2d at 412-13, 292 N.E.2d at 776-77, 34 N.Y.S.2d at 631 (1972).
49. *Id.* at 413, 292 N.E.2d at 777, 34 N.Y.S.2d at 632.
50. Harnett and Thornton, *supra* note 12. See quotation to which note refers.
51. 44 C.J.S., *Insurance* § 175, at 870 (1945).

> . . . great liberality is indulged in determining whether a person had anything at hazard in the subject matter of the insurance, and any interest which would be recognized by a court of law or equity is an insurable interest.[52]

The majority opinion in *Scarola* is more a loosely woven compendium of precedent and theories which support an insurable interest than it is an incisive review and judgment concerning the issue presented. The opinion avoids consideration of the statute on insurable interest and finds instead a case law explanation which supports what amounts to the factual expectation basis for an insurable interest. This approach may result from the ambiguity the court may have seen in the statutory definition, or from the possible lack of support for the position the court wished to take. The relationship between an extended property interest and economic value, used in the trial court was not explored at length to find what "valuable relation" may have been struck between the plaintiff and the subject matter of the policy.

The dissenting opinion explains its position with more directness than does the majority. This view promulgates the traditional theory that a purchaser of stolen property, having acquired no interest from the seller, has no insurable interest in the property. Citing *Friscia* as better representing the legislative interest underlying § 148 of the Insurance Law, the dissenting judge took the view that if the interest were to be based on an economic interest, the potential loss to the insured must be "substantial" according to the statute. The dissent held that the plaintiff had no such interest.[53] It further stated that Mr. Scarola's monetary investment was lost at the time of purchase from the thief or other non-owner. Having purchased the vehicle from one without any interest, he acquired only a qualified possessory interest (as against all but the true owner) which, as enunciated in *Friscia*, was so "tenuous" that it might have been terminated at any moment by the true owner. As such, the value of the qualified possessory interest was highly speculative, and a loss thereof can hardly be considered "substantial". If there was a loss it took place at the point of purchase and prior to the issuance of the insurance policy when purchaser had given another his money in return for what at common law amounted to no more than mere possession. Such an argument is persuasive.

The dissent concluded that by granting judgment to the insured the courts were expanding the liability exposure of insurance companies in the state, which the court said was a legislative rather than a judicial

52. Norris v. Alliance Inc., 1 N.J. Misc. 315, 123 A. 762 (1923); Barnett v. London Assur. Corp., 138 Wash. 673, 120 N.W. 498 (1926).

53. 31 N.Y.2d at 416, 29 N.E.2d at 778, 34 N.Y.S.2d at 632.

function. Therefore the dissent recommended an amendment of § 148 to include innocent purchasers of stolen property.[54]

CONCLUSION

Though the issue of whether a bonafide purchaser of a stolen vehicle has an insurable interest where the true owner cannot be found has now been reviewed by the highest court in New York State, the question of whether or not an economic interest alone would sustain an insurable interest where the true owner nullifies the possession interest remains unconsidered.[55] There is support for such a claim in the direction set by the majority in *Scarola*, but the insured plaintiff would clearly have to counter the dissent in its assertion that the pecuniary investment is lost at time of purchase of the vehicle, not at the time of its insurance.

As the decision in *Scarola* indicates, the concept of insurable interest is expanding. Whether or not such expansion is well directed depends upon the point of view of the observers. Insurers must see the change as a disturbing development while policy holders would surely justify the expansion in view of the high cost of premiums. Further, it is doubtful that an insured would view his or her investment as anything less than a "substantial economic interest" and his or her possession as more than merely "tenuous." From the standpoint of practicality it would appear more difficult for the insured to thoroughly investigate the title of his purchase on a one time basis than it would be for an insurance company to do the same continually through an organized method of review. Considering the resources of the insurer and the regularity with which premiums are collected, the insured should arguably be offered such protection. But as the court in *Friscia* indicated, the insurer is presently under no obligation to investigate the title to its policy holder's automobile. The confrontation of the courts with the issue of expansion of what constitutes an insurable interest has resulted in conflicting interpretation among various jurisdictions and has eroded some traditional principles of property law. Perhaps these judicial groppings for a new solid legal conceptualization of what is an insurable interest will bring insurance case law closer to the changing problems facing property owners in society today.

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54. *Id.*

55. *See, e.g.*, Treit v. Oregon Auto Ins. Co., 262 Or. 549, 499 P.2d 335 (1972). Where possession of a trailer by a purchaser had already been discovered by the true owner and an action of conversion had been brought against said purchaser, so that he could not possibly have been benefited by destruction or disappearance of the trailer, the purchaser's economic interest in the trailer was held insurable, regardless of whether he was an innocent purchaser.