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Contracts—Insurance Policy Interpretation

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of his day in court. The rationale was simple; allowing a decree to be entered on consent made the defendant a party to the restraining order, therefore, he had not made reasonable effort to prevent the interference.[47]

The fact which makes the defense fall is the consent decree. It was indicated by Judge Fuld that there might possibly be a different result had the injunction been issued otherwise. The reasoning in the case should be examined in the light of the fact that the defendant was faced with an anti-trust suit in which its position was untenable. In order to save costs and time litigation was avoided by allowing the order to be issued against them uncontested. Now, it finds it is faced with a suit on the very contract it has been enjoined from performing. The corporation is told, however, that it may still defend on the basis of illegality in order that the promisee will have an opportunity to try the merits of the contract in court. Yet, even if the decision of this court is rendered in favor of the plaintiff, the defendant would still be lawfully enjoined from carrying out the terms of the contract.

Furthermore, the defense of illegality does not always present the same relief as impossibility. The former leaves the parties where the court found them and paid in consideration may not be recouped.[48] The latter allows for the recouping of consideration paid in over that allocable to that part of the performance which has been executed.[49]

Insurance Policy Interpretation

Two insurance policies beset the Court of Appeals this term with problems of interpretation.

In *Wagman v. American Fidelity and Casualty Co.*[50] the court specifically adopted the "complete operation doctrine"[51] as a guide for construing problems involving "load and unload" provisions[52] of "use" clauses normally included in automobile lia-

47. "However willing defendants may have been to relinquish their own rights under that contract, however ready to absolve themselves from liability, they certainly had no authority or power to extinguish Analine's claim." *supra* note 46 at 484, 113 N. E. 2d at 847.

48. See *Van Schaick v. Manhattan Sav. Inst.*, 273 N. Y. 37, 6 N. E. 2d 88 (1936); *O'Mara v. Dentinger*, 271 App. Div. 22, 62 N. Y. S. 2d 282 (4th Dep't 1946); RESTATEMENT, CONTRACTS § 598.

49. 6 WILLISTON, CONTRACTS § 1974 (Rev. ed. 1938); RESTATEMENT, CONTRACTS § 468; RESTATEMENT, RESTITUTION § 108 (c) (1937).

50. 304 N. Y. 490, 109 N. E. 2d 592 (1953).

51. E.g., see Note, 160 A. L. R. 1251 for a complete analysis of the doctrine.

52. *A* agrees to defend and indemnify *G* against claims for damages for accidental injury or death arising out of the ownership maintenance or use of *G's* trucks. *The use of the trucks includes the loading and unloading thereof.*

bility policies issued to common carriers. The purpose of the "load and unload" provision is to furnish coverage for injuries arising beyond the actual "use" of the auto.[53] The doctrine has been approved of in New York[54] prior to the instant case and adopted by most jurisdictions.[55] It imparts a wider scope to "load and unload" provisions by permitting recovery against the insurer for all injuries which are closely connected in point of time, place, or circumstance with the use of the vehicle in the loading and unloading process.[56] The doctrine is contrasted with the narrower view which terminates liability for injuries resulting beyond the immediate process of placing the goods on the truck.[57]

The *Wagman* case points out the breadth[58] of the "complete operation doctrine." A carrier, insured by a policy containing a "load and unload" provision, was engaged in picking up merchandise from Bond's store. It was brought from the Bond's store to the curb by Bond's employees and then loaded onto the truck by the carrier's employees. The plaintiff, an employee of Bond's, checked the merchandise as it was being put onto the truck. In returning to the store to check other goods he injured a pedestrian. This suit was brought for a declaratory judgment, to determine whether the plaintiff should be protected under the policy issued by the defendant to the carrier. The court concluded that one of the plaintiff's activities was "supervising" the loading process, and by adopting the broader doctrine of construction found that the plaintiff was covered by the policy.

The lone dissenter, assuming an inclination in this State toward the "complete operation" theory, would not allow recovery on the basis that the plaintiff's acts were not related to getting the goods out of the store and onto the truck. The "line of demarcation must be drawn;" the plaintiff was merely checking inventory

53. 2 RICHARDS, INSURANCE §294 (1952); Gowan, *Liability Insurance, Loading and Unloading,* 345 INS. L. J. 745-757 (1 Oct. 1951).

54. See *Zurich Gen. Accident & Liability Ins. Co. v. Eagle,* ___ Misc. ___, *aff'd,* 279 App. Div. 574, 107 N. Y. S. 2d 552, *motion for leave to appeal denied,* 303 N. Y. 1016, 102 N. E. 2d 841 (1951); *B. & D. Motor Lines v. Citizen Cas. Co. of N. Y.,* 181 Misc. 985, 43 N. Y. S. 2d 486 (1943), *aff'd,* 267 App. Div. 955, 48 N. Y. S. 2d 472 (1944); *Krasilovsky Bros. Trucking Corp. v. Maryland Cas. Co.,* 54 N. Y. S. 2d 60 (N. Y. City Ct. 1945).

55. See note 51 *supra* for a complete listing of these cases.

56. *Ibid.*

57. Coming to Rest Doctrine: loading and unloading is deemed to be complete when the actual removal or lifting the article or articles onto or off of the truck had actually come to rest, or when every connection of the vehicle with the process of loading or unloading had ceased. See note 51 *supra.*

58. One writer feels that "[T]he broad application of this theory might very well cause insurers to endeavor to place some limitations upon the extention of such clauses beyond what is reasonably contemplated in the writings of their policies." 27 N. Y. U. L. Q. REV. 1059 (1952).

for his employer. This activity could have been carried on at a time completely detached from the loading operation.

Although the "complete operation doctrine" extends the scope of "load and unload" provisions there is still, apparently, some necessity for a causal relationship to exist between the use of the insured vehicle, as such, and the resulting accident.[59] This is indicated by the fact that the majority of the Court found that at least a part of the plaintiff's activity was "supervising" in loading of the truck.

Liability insurance such as "Owner, Landlord and Tenant's" policies are drafted to limit risks of liability for injuries resulting from the careless maintenance of buildings.[60] They are extensively written and may vary widely in their scope and terms. Often times the insurer is confronted with a claim effectively testing the draftsman's efficaciousness.

In *Morgan v. Greater New York Tax. M. I. Ass'n.*,[61] the insurer issued an "O.L.&T." policy to co-partners individually. The policy contained an exclusion clause for assaults "committed by or at the direction of the Assured." One of the partners (Leventhal), without direction or consent of his co-partner (Cronin), assaulted the plaintiff who subsequently won a judgment against the partnership. The plaintiff brings this suit claiming the non-participating partner's (Cronin) right of idemnification under the policy.[62] The insurer disclaims liability relying on the definition section which defines the word "Assured" as including the named "assured" (Cronin) and also any partner of the named "Assured." The insurer contends that the assault committed by the "additional assured" (Leventhal) would thus exclude coverage to the named assured. The Court of Appeals reversed the Appellate Division and held the defendant liable on the policy, commenting that the true meaning of the definitions section was to serve as an inducement to purchase insurance by affording coverage to others, in addition to the applicant, without the burden of added premiums. A construction that broadens the scope of the exclusion clause and narrows the defendant's obligations distorts the true meaning of the section.[63]

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59. See note 51 *supra*.

60. 1 RICHARDS, INSURANCE § 17.

61. 305 N. Y. 243, 112 N. E. 2d 275 (1953).

62. INS. LAW § 109; "The rule is well settled that a creditor enforcing such a policy, stands in the shoes of the insured, and forfeits the insurance if there has been a breach of its conditions." *Weatherwax v. Royal Indemnity Co.*, 250 N. Y. 281, 165 N. E. 293 (1929); *Devitt v. Continental Casualty Co.*, 269 N. Y. 474, 199 N. E. 765 (1936).

63. *Wenig v. Glens Falls Indemnity Co.*, 294 N. Y. 195, 201, 61 N. E. 2d 422, 445 (1945).

Judge Dye dissented, and maintained that the plain words of the policy excluded plaintiff from coverage because the judgment was had against the partnership.

An insurer is liable only for those risks which it assumes in the policy[64] and they may limit their liability by the insertion of any exclusion clauses which are thought proper.[65] On the basis of public policy insurers are usually excused from liability for criminal acts of the insured whether or not they are explicitly exempted in the agreement.[66] But, contracts which indemnify an assured for unlawful acts of his agents, and in which he was in no way associated, are lawful.[67]

In finding that the exclusion clause was merely intended to apply to the named assured, the court in the instant case interpreted its meaning in the light of sound public policy. This is the meaning an average policy holder of ordinary intelligence, as well as the insurer, would attach to it.[68]

The Court of Appeals has thus made it clear to insurers that even though there exist very little ambiguity they should spell out explicitly the limits which they intend to place on their obligations. The construction given under such circumstances will be in favor of the assured since the insurer is the draftsman.

Statute of Frauds

The Statute of Frauds set about to remedy the abuse of oral contracts and declared that certain agreements would be void unless some note or memorandum thereof is in writing and signed by the party to be charged.[69] The purpose of the memo is to prevent the enforcement of contracts that were never made.[70]

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64. 6 COOLEY, BRIEFS ON INSURANCE 5618 (2d ed. 1928); *Devitt v. Continental Casualty Co.*, 269 N. Y. 474, 199 N. E. 765 (1936); *Gates v. Prudential Ins. Co. of America*, 240 App. Div. 444, 270 N. Y. Supp. 282 (4th Dep't), *appeal denied*, 265 N. Y. 510, 193 N. E. 296 (1934).

65. "The purpose of the exclusion clause is to exclude certain risks or probabilities of injury which the insurer considered too great to cover." *Standard Surety and Casualty Co. v. Maryland Casualty Co.*, 281 App. Div. 446, 119 N. Y. S. 2d 795 (4th Dep't 1953).

66. "Liability insurance does not indemnify the insured for his own wanton assaults, or assaults committed by his agents if directed by him. There are two reasons for this. Firstly, the injuries sustained by a person assaulted by the insured are not accidentally suffered, but result from wilful conduct. Secondly, public policy forbids an agreement indemnifying against wanton and criminal conduct." 1 RICHARDS, INSURANCE § 17.

67. 1 RICHARDS, INSURANCE § 17; *Taxicab Motor Co. v. Pacific Coast Cas. Co.*, 73 Wash. 631, 639, 132 P. 393, 396 (1913).

68. *See Burr v. Commercial Traveler Mutual Accident Ass'n.*, 295 N. Y. 294, 301, 67 N. E. 2d 248, 251, 166 A. L. R. 462 (1946).

69. PERS. PROP. LAW § 31.

70. 2 CORBIN, CONTRACTS § 498.