North Dakota Law Review

Volume 32 | Number 3 Article 9

1956

Insurance - Extent of Liability - Recovery in Absence of Pecuniary Loss

Rudolph R. Rager

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation
Rager, Rudolph R. (1956) "Insurance - Extent of Liability - Recovery in Absence of Pecuniary Loss," *North Dakota Law Review*: Vol. 32 : No. 3 , Article 9.
Available at: https://commons.und.edu/ndlr/vol32/iss3/9

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

The court apparently overlooked an additional reason for holding the communications in question privileged. The defendant's counsel was admitted to practice before the United States District Court of New York to represent his employer in litigation; and the documents in question were directly connected with that action. It is submitted that admission to litigate a case before any recognized and established court of law should be sufficient to qualify counsel as attorney within the scope of the attorney-client privilege for communications directly connected with that action.[14]

JOHN MICHAEL NILLES

INSURANCE—EXTENT OF LIABILITY—RECOVERY IN ABSENCE OF PECUNIARY LOSS.—Plaintiff, insured, sued defendant, insurer, to recover for a loss sustained under a fire insurance policy issued by defendant. The plaintiff occupied the insured premises as lessee, the terms of the lease providing that the lessor would repair any damage to the premises resulting from fire. The contract of insurance between plaintiff and defendant provided that for the purposes of that agreement, the plaintiff was to be considered the sole and unconditional owner. Shortly after the loss suffered under the policy, the lessor repaired the damaged premises pursuant to the terms of the lease. It was *held* that the defendant's liability attached on the happening of the loss and that subsequent restoration without cost to the plaintiff did not relieve the defendant of its accrued liability. *Citizens Insurance Company v. Foxbilt, Inc.*, 226 F.2d 641 (8th Cir. 1955).

The question of whether an insured may recover when he has suffered no pecuniary loss is one of controversy. Fire insurance is generally considered to be a personal contract.[1] The weight of authority requires that there be an insurable interest,[2] and that actual pecuniary loss be sustained,[3] before there can be recovery. Generally, a tenant is said to have an insurable interest in the leasehold.[4] It has frequently been stated by the courts that one may not make a profit on fire insurance.[5] The rule in England is that the insured is considered to have suffered no loss when a person under a contract duty to repair has made good the damage.[6] It is argued in support of the above position that public policy demands such a result to prevent "wagering contracts" and the intentional destruction of property.[7]

14. See Radin *The Privilege of Confidential Communication Between Lawyer and Client* 16 Calif. L. Rev. 487 for a scholarly discussion of the history and present status of the attorney-client privilege.

1. *E.g.*, Traders' Ins. Co. v. Newman, 120 Ind. 554, 22 N.E. 428 (1889); Mack v. Liverpool & London & Globe Ins. Co., 329 Ill. 158, 160 N.E. 222 (1928).
2. 4 Appleman, Insurance Law & Practice § 2121 (1941).
3. *E.g.*, Draper v. Delaware State Grange Mutual Fire Ins. Co., 5 Boyce 143, 91 Atl. 206 (Del. 1914); Beman v. Springfield Fire & Marine Ins. Co., 303 Ill. App. 554, 25 N.E. 2d 603 (1940); Abbottsford Building & Loan Assoc. v. Wm. Penn Fire Ins. Co., 133 Pa. Super. 422, 197 Atl. 504 (1938); Ramsdell v. Ins. Co. of North America, 197 Wis. 136, 221 N.W. 654 (1928).
4. 4 Appleman, Insurance Law & Practice §2193 (1941).
5. *Accord.* St. Paul Fire & Marine Ins. Co. v. Scheuer, 298 Fed. 257 (5th Cir. 1924); Tabbut v. American Ins. Co., 185 Mass. 419, 70 N.E. 430 (1904); Liverpool & London & Globe Ins. Co. v. Bolling, 176 Va. 182, 10 S.E.2d 518 (1940).
6. Darrell v. Tibbitts, 5 Q.B.D. 560 (1880).
7. Liverpool & London & Globe Ins. Co. v. Bolling, 176 Va. 182, 10 S.E.2d 518 (1940); It should be noted that the lower court held that Iowa public policy was not involved in the case, but rather the insured's contract right to recover on the insurance policy. The lower court further stated that if Iowa public policy were believed to be involved, the case would have been remanded to the Iowa state courts courts for decision. 128 F.Supp. 594 (S.D. Iowa 1955).

The court in the principal case, following the so-called New York rule,[8] points out that the defendant contracted to consider the plaintiff as the unconditional owner, and from that contract arose a primary liability to the plaintiff.[9] This liability was said to attach at the happening of the loss. The defendant, through the receipt of premiums, was compensated for acceptence of the risk of loss and if it was now excused from liability it would seem that the defendant would be the recipient of a windfall.[10] The fact that the third-party lessor also assumed the risk of loss, in consideration of increased rent receipts, does not effect the defendant's liability.[11] It is a general principle that parties to an insurance contract may provide any rights and obligations thereunder,[12] which are not unreasonable, illegal, or contrary to public policy.[13] It appears from the decision in the principle case that the desire for freedom in contracting is lending some courts to ignore public policy restrictions.[14]

While the instant case is not criticizable in its application of the law, double recovery should be avoided. In the mortgagee insurance cases, after the insurer has paid the mortgagee, the latter's claim against the mortgagor passes by subrogation to the insurer.[15] By analogy, it may be reasoned that in situations such as the principal case presènts, the Lessee's contract right against the Lessor should pass to the insurer.[16] It has also been suggested that the doctrine of contribution be extended to apply to the third-party obligor and the insurer.[17]

It may be inferred from a decision[18] and a statute[19] that North Dakota follows the majority view in considering insurance to be for indemnity from actual loss only. If a similar fact situation were presented to the courts of this state, their holding would probably be contrary to the instant decision. As an equitable solution in such a case, it is suggested that the insurance policy be considered void because there was no risk, thus entitling the insured to restitution of the premiums paid.

RUDOLPH R. RAGER

---

8. Alexandra Restaurant, Inc. v. New Hampshire Ins. Co., 297 N.Y. 860, 79 N.E.2d 268 (1948); New England Gas & Electric Assoc. v. Ocean Accident & Guarantee Corp., 330 Mass. 640, 116 N.E. 2d 671, 682 (1953) (dictum).
9. Western Assurance Co. v. Stoddard, 88 Ala. 606, 7 So. 379 (1889).
10. See Alexandra Restaurant, Inc. v. New Hampshire Ins. Co., 297 N.Y. 860, 79 N.E. 2d 268 (1948).
11. Foley v. Manufacturer's Fire Ins. Co., 152 N.Y. 131, 46 N.E. 318 (1897); Pink v. Smith, 281 Mich. 107, 274 N.W. 727 (1937); Heidisch v. Globe & Republic Ins. Co. of America, 368 Pa. 602, 84 Atl. 2d 566 (1951).
12. *E.g.* Northern Assurance Co. v. Grand View Building Assoc., 183 U.S. 308 (1902); Bower & Kaufman v. Bothwell, 152 Md. 392, 136 Atl. 892, 894 (1927) (dictum).
13. *E.g.*, Faris v. American National Assurance Co., 44 Cal.App. 48, 185 Pac. 1035 (1919); Haseldon v. Home Ins. Co. 247 Ky. 530, 57 S.W.2d 459 (1933).
14. 36 Geo. L. J. 696 (1948).
15. LeDoux v. Dettmering, 316 Ill.App. 98, 43 N.E.2d 862 (1942); Leyden v. Lawrence, 79 N.J.Eq. 113, 81 Atl. 121 (1911); Stuyvesant Ins. Co. v. Reid, 171 N.C. 513, 88 S.E. 779 (1916).
16. See St. Paul Fire & Marine Ins. Co. v. Chas. H. Lilly Co., 286 P.2d 107, (Wash. 1955) (bailor-bailee); Castellain v. Preston, 11 Q.B.D. 380 (1883) (vendor-vendee). See also 3 Richards, Insurance § 562 (5th ed. 1952).
17. Langmaid, Some Recent Subrogation Problems in the Law of Suretyship & Insurance, 47 Harv. L. Rev. 976, 987 (1934); 33 Minn. L. Rev. 82, 84 (1948).
18. Butler v. Aetna Ins. Co., 64 N.D. 764, 256 N.W. 214 (1934).
19. N.D. Rev. Code § 26-0201 (1943) "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event."