SMU DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 5

1951

A Promise to Waive a Debt as Insurance

Calvin W. Holder

Follow this and additional works at: http://scholar.smu.edu/smulr

Recommended Citation
Calvin W. Holder, *A Promise to Waive a Debt as Insurance*, 5 Sw L.J. 113 (1951)
http://scholar.smu.edu/smulr/vol5/iss1/10

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

Whether the policy underlying Article 5531 is wise or not would seem to be within the province of the legislature, which undoubtedly intended for such limitation to apply to any suit for specific performance. But the courts have seemingly stripped the article of a large portion of whatever policy the legislature meant to establish when it was enacted.

Completely aside from the distinction in terminology between "equitable title" and "equitable right," and regardless of the term by which the vendee's interest in an executory contract is labeled in various situations, it is submitted that with respect to questions of descent and distribution, transmission of property by will, separate and community property, risk of loss, insurance coverage, and questions of similar import, the rule applying to the vendee as owner of equitable title in other jurisdictions should be applied to the "equitable right" of the Texas vendee.

Richard E. Batson, Jr.

A PROMISE TO WAIVE A DEBT AS INSURANCE

A GREAT factor in the development of our world civilization has been the business of insurance. The history of insurance has been traced to a time before Christ. In the field of English and American jurisprudence insurance developed, in its early stages, in marine law. An early writer has said, "Insurance gives great security to the fortunes of private people, and by dividing amongst many that loss, which would ruin an individual, make it fall light and easy, upon the whole society."[1] Today, insurance is one of the largest business activities in the world.

With the vast development of insurance and its importance to the public welfare came the many complex statutory regulations, designed primarily for the protection of the public. Fully realizing the importance of the business of insurance, one is surprised

[1] PARK'S INSURANCE (1800) ii.

to find that there is no definition of insurance in the Texas statutes. Lack of such definition may prove unfortunate.

In a recent case a Texas court of civil appeals held that the following contract was not one of insurance. *D* desired to borrow money from *W*, who was engaged in the business of making loans. In the loan contract there was a provision for the payment of a stated consideration in return for the agreement of *W* to cancel the debt in the event that *D* died; to cancel payments during total disability of *D* due to illness or accident; and to suspend payments during inability of *D* to work due to inclement weather. Reversing the lower court, the court of civil appeals held this contract to be one of waiver rather than for usurious interest, and enforceable as such. The court said:

> "Broadly defined, insurance is a contract by which one party for a consideration assumes particular risks of the other party and promises to pay him or some one named by him a certain or ascertainable sum of money on a specified contingency. . . . Since the agreement of the appellant and appellee does not provide for the payment of a sum of money in the event of death, sickness, etc., it obviously is not a policy of insurance; and the parties stipulated in the agreement that the contract was not to be construed as a policy of insurance."[2]

It is believed that the court failed to give a proper interpretation of policy and precedent dealing with the problem of what is insurance. There being no statutory definition of the term "insurance," it would seem to be admitted, absent any indication to the contrary by the legislature, that the common law definition of insurance is in effect in Texas.[3] Blackstone is cited as having defined insurance as "a contract by which the insurer undertakes, in consideration of a premium equivalent to the hazard run, to in-

[2] Denton v. Ware, 228 S. W. 2d 867, 870 (Amarillo Civ. App. 1949) *rehearing denied* (1950). It is to be noted that both Denton and Ware operate loan businesses in Dallas, Texas, and that the case was submitted to the trial court on an agreed statement of facts.

[3] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1.

demnify the person insured against certain perils or losses, or against some particular event."[4]

It will be noted that this definition does not limit indemnification solely to the payment of an ascertainable sum of money. But in an early Massachusetts case there was engrafted upon the common law definition the requirement of the payment of an ascertainable sum of money.[5] Texas subsequently adopted the definition stated in the Massachusetts case.[6] Texas has consistently required the payment of a sum certain in money,[7] save in one instance. In the case of *National Auto Service Corporation v. State*[8] the court defined insurance in substance as an agreement by which one party, for a consideration, promises to pay money or its equivalent or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest. This definition is believed to cover all the types of insurance now in vogue. The definition is in substance the same definition as that adopted in Massachusetts by statute.[9] It has been stated that the definition does not differ in any essential from the common law definition.[10]

A brief review of authorities from other jurisdictions shows that payment of an ascertainable sum of money is not essential to an insurance contract. In a contract by which a buyer was protected from defects in an article and certain other contingencies not inherent in the article, the court, after defining insurance as requiring a promise to pay an ascertainable sum of money, said,

---

[4] PARK'S INSURANCES (1800) ii.

[5] Commonwealth v. Weatherbee, 105 Mass. 149 (1870).

[6] Legion of Honor v. Larmour, 81 Tex. 71, 16 S. W. 633 (1891); Farmer v. State, 69 Tex. 276, 7 S. W. 220 (1888).

[7] Legion of Honor v. Larmour, 81 Tex. 71, 16 S. W. 633 (1891); Farmer v. State, 69 Tex. 561, 7 S. W. 220; Phillips v. State, 136 Tex. Crim. Rep. 430, 125 S. W. 2d 585 (1939); American National Insurance Co. v. Brawner, 93 S. W. 2d 450 (Tex. Civ. App. (1936) *er. dism'd.*

[8] 55 S. W. 2d 209 (Tex. Civ. App. 1932) *er. dism'd.*

[9] MASS. GEN. LAWS (Ter. Ed. 1932) c. 175, § 2.

[10] Atty. Gen. *ex rel.* Monk v. C. E. Osgood Co., 249 Mass. 473, 144 N. E. 371, 372 (1924), 88 A.L.R. 275 (1934).

"... [T]o constitute insurance the promise need not be one for the payment of money, but may be its equivalent or some act of value to the insured upon the injury or destruction of the specified property."[11]

An undertaking on the part of one selling merchandise on the installment plan to cancel the debt in case the buyer dies before satisfaction is insurance within the meaning of a statute prohibiting the making of insurance contracts except by companies, and in a manner, authorized by law.[12] A contract to furnish an attorney without cost to the owner of an automobile in court proceedings growing out of the operation of his automobile is a contract of insurance.[13] A contract for the sale of land which provides that on death of the purchaser the balance of the installments shall be cancelled, and the deed to the lot delivered, is a contract of insurance.[14] One case involved a contract similar to the one in the instant case and reached a unique solution. The court in effect stated, the contract was devised to evade either the insurance or usury laws. Taking plaintiff at his word that it was not a contract of insurance, the court held it was a usurious contract.[15] Thus, there is ample authority that the common law definition of insurance includes indemnification by means other than the payment of money.

Aside from the authorities cited, there is an indication that the Texas Legislature did not intend that a contract of insurance be restricted to one containing a promise to pay an ascertainable sum of money. Certain terms defined under the insurance statutes indicate a broad definition of insurance:

---

[11] State *ex rel.* Duffy v. Western Auto Supply Co., 134 Ohio St. 163, 16 N. E. 2d 256, 259 (1938), 119 A. L. R. 1236 (1939).

[12] Case cited *supra* note 10.

[13] Allin v. Motorist's Alliance, 234 Ky. 714, 29 S. W. 2d 19 (1930), 71 A. L. R. 688 (1931).

[14] Arlington Cemetery Co. v. Baldridge, 19 Del. Co. Rep. (Pa.) 625 (1929). To the same effect *see* Krumseig v. Missouri, K. & T. Trust Co., 71 Fed. 350, *aff'd*, 172 U. S. 351 (1899) (determining question of usury); State v. Beardsley, 88 Minn. 20, 92 N. W., 472 (1899); Barna v. Clifford County Estates, 143 Misc. 813, 258 N. Y. S. 671 (1932).

[15] Missour, Kansas & Texas Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560 (1894).

> "Terms defined.—A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or *other thing of value,* conditioned on the continuance or cessation of human life.... An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or *other thing of value,* conditioned upon the injury, disablement or death of persons resulting from traveling or general accidents by land or water. A health insurance company shall be deemed to be a corporation doing business under any charter involving the payment of any amount of money, or *other thing of value,* conditioned upon loss by reason of disability due to sickness or ill-health. . . ."[16]

In defining life, accident, and health insurance companies, the legislature chose to describe the business of insurance, which of necessity must consist of the making of contracts of insurance. It would be very difficult to see how the legislature could more aptly describe the business of making contracts of insurance than by including therein what it considers to be, at least in part, the substance of an insurance contract. At the very least, this statute is indicative of an intent that insurance is not restricted to the payment of a sum certain in money upon a specified contingency.

In further support of the proposition that the contract in question is one of insurance, consider the result if the situation had been this: *D* borrows money from *X*, and *W* promises for a consideration that in the event of *D's* death or disability within one year from the date of the loan, the installments having been paid regularly by *D*, *W* will pay the balance of the loan. Such a contract involves a payment of a sum certain in money, contingent upon cessation of human life, and a court undoubtedly would hold it to be one of insurance. But can it reasonably make any difference that *W* in the case stated performs both the functions of *X* and *W* in the above instance and, instead of promising to pay money, promises to waive or cancel the debt? It cannot be doubted that in both instances there is a promise to do an act of value

[16] TEX. REV. CIV. STAT. (Vernon, 1948) art. 4716. Emphasis added.

contingent, or conditioned upon, the cessation of human life or the occurrence of total disability.

It would seem a far better test, in determining whether a contract is one of insurance, than the one that was applied in the principal case is to ask the following question: is there a promise to pay money or do something of value conditioned upon the happening of some specified contingency, such as death, poor health or accident? This test follows the indicated intent of the legislature and is in accordance with common law authority and statutory development.

There is further argument for applying this test. Just recently the Texas Legislature has passed what is known as the Credit Life Insurance Act.[17] In Section 1. B. (1) several terms are defined:

> " 'Credit Life Insurance', and 'Credit Health and Accident Insurance' means personal insurance in which the insured are borrowers of sums of money not exceeding One Thousand ($1000.00) Dollars from lenders who retain an interest in the insurance as security to the loan, and any other personal insurance written in connection with or as part of such loan transaction. 'Credit Health Insurance' and 'Credit Health and Accident Insurance' as used in this Act shall never be taken to mean or refer to any contract insuring performance of any undertaking or agreement, and are expressly limited in their coverage to the contingencies of death, or loss resulting from sickness and accident."

It seems apparent from this statute that the type of contract under consideration would not come within the meaning of the act, unless the contract can be or is declared, in the first instance, to be one of insurance; because the legislature used the term "insurance" throughout and did not define the term. In Section 4 of the act the legislature declared its purpose in passing the act, which was in substance to give the borrower an option in the purchase of insurance, to prohibit coercion, and to give to the borrower the right to choose his insurer and his insurance agent. With regard to the type of contract under consideration, according to

[17] Acts 1949, c. 81; TEX. REV. CIV. STAT. (Vernon, 1950) art. 4764c, §§ 1-16.

principal case, the borrower is not protected as the legislature desired. The requirement that the promise be to pay a sum certain in money contingent upon death, *etc.*, has furnished an altogether too easy method of evading both the usury statutes and the statutes regulating insurance. The purpose of the statute mentioned above is defeated, and loan companies are permitted to do a flourishing business, uncontrolled in the issuance of the so-called waiver contract.

In order to remove the doubt that exists and to eliminate confusion, the legislature should define the term "insurance." The following type of definition is suggested. A contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent or to do some act (passive or active) of value to the assured upon destruction or injury of something in which the assured has an insurable interest.

For the aforementioned reasons it is believed that the contract involved in the instant case is one of insurance, whether it be called a waiver contract or something else. It is hoped, should our courts be presented with this question again, that they will find that as a matter of policy, as well as precedent, a contract of insurance should not be confined only to those instances where there is a promise to pay an ascertainable sum of money in the event of the occurrence of a specified contingency.

Calvin W. Holder.