Hastings Law Journal

Volume 9 | Issue 2 Article 7

1-1958

Automoblie Insurance--Insurer's Liability for Accident Occurring before Making the Contract

Raymond L. Mushrush

NOTES

AUTOMOBILE INSURANCE—INSURER'S LIABILITY FOR ACCIDENT OCCURRING BEFORE MAKING THE CONTRACT

One of the most important features of automobile casualty coverage is its immediate accessibility. Due to the almost universal acceptance of the Standard Policy,[1] available on ready-printed forms, coverage for an automobile can be had by a mere telephone call to one's insurance agent which perfects the contract and binds the parties mutually to payment of premiums and undertaking of the risk. The rights and duties of the parties are fixed by reference to a well-established standard merely requiring the filling in of the pertinent details of the particular transaction.[2]

Recently, however, a serious doubt has been cast on the advisability of insurers making such telephonic "binders" in *National Indemnity Co. v. Smith-Gandy, Inc.*[3]

At 3:15 p.m. on June 7, 1955, Smith[4] telephoned National to secure casualty coverage for a truck belonging to Smith which was then en route from Detroit, Michigan to Seattle, Washington. Smith asked National to date the policy back to the start of the trip, some time earlier, but National declined and stated that coverage would be effective from 3:15 p.m., and asked Smith to confirm this understanding by letter, which was done that day. In the confirming letter Smith stated that the policy was "effective at 3:15 p.m. June 7th, 1955."[5] Unknown to the parties at the time, the truck purportedly covered by this insurance had been in an accident in North Dakota that day at about 2:15 p.m., *one hour before the conversation between Smith and National.*

National, on receipt of the confirming letter the next day (June 8th), and without knowledge of the accident, instructed a secretary to prepare the policy. The policy was prepared on the Standard form, which had *printed on it* in all relevant places, as the time when coverage became effective, "12:01 a.m. Standard Time"; after this was typed the date, "June 7, 1955." Through oversight of all parties the inconsistency between the time coverage was to commence, as agreed over the telephone, and as printed in the policy, was not discovered until later. In the normal course of business the policy was delivered to Smith.

One of the injured parties in the North Dakota accident commenced an action against Smith for $200,000.00 damages for personal injuries. Smith tendered defense of the case to National, which declined and instituted this action under the Uniform Declaratory Judgments Act of Washington,[6] seeking a declaration that the policy was not in force at the time of the accident. Judgment was for the plaintiff insurer in the trial court, it being found that the printed words in the policy,

---

[1] All states now use the Standard Automobile Policy except Texas and Massachusetts.

[2] That the contract in full is complete at the conclusion of the telephone conversation by incorporation of the terms of the Standard Policy, and generally, see 1 VANCE, INSURANCE § 36 (3d ed. 1951).

[3] 309 P.2d 742 (Wash. 1957).

[4] The names of the parties have been shortened for convenience (Smith for the insured, National for the insurer) and the facts simplified, especially by omitting the agents of the parties who actually effected the transaction.

[5] 309 P.2d at 743.

[6] RCW 7.24.010–7.24.144 (9A U.L.A. 3 (1957)).

"12:01 a.m. Standard Time," were of no significance in view of the prior agreement of the parties.

The Washington Supreme Court reversed and remanded with a direction to dismiss the complaint and enter judgment for the defendant, Smith. The effect of this decision is a judicial declaration that *the insurer became liable on the contract for a loss which occurred one hour before the contract came into existence*—one hour before the time when the parties expressly agreed that the risk should start. Such a result is rather startling on its face, and, as will be later considered, represents a substantial threat to the practice of making telephonic binders for casualty liability coverage. It remains to be seen whether any legal justification can be found for the result.

Mr. Justice Schwellenbach, speaking for the court, grounds his opinion in the proposition that

> "[a]t the outset we are confronted with the well-established rule, for which no citation of authorities is necessary, that parol evidence is not admissible to vary the terms of a written instrument."[7]

The parol evidence rule, however, is so riddled with exceptions as to be little "rule" at all, and one need go no further than to a Washington Supreme Court decision of 1951 to discover the well-settled exception which fits this case:

> "Parol evidence is admissible to show mutual mistake. *Nadreau v. Meyerotto,* 35 Wash. 2d 740, 215 P.2d 681 [1950]; *Bacon v. Gardner, supra* [38 Wash. 2d 299, 229 P.2d 523 (1951)]. Thus the true intention of the parties can be determined, and from that intention, existing at the time of the transaction, it will be determined whether a mutual mistake actually existed. If the intention of the parties was identical at the time of the transaction, and the written agreement did not express that identical intention, then a mutual mistake occurred."[8]

The quoted language is particularly applicable to the case under consideration. The parties mutually agreed that coverage was to commence at 3:15 p.m. The written memorandum of this agreement (the policy), through inadvertance, failed to "express that identical intention," and all these matters were set forth in the complaint and not controverted by the defendants. As was said in *Chapman v. Millikan,*

> "That was the mistake of the scrivener of the parties, and therefore a mutual mistake."[9]

The recognized authorities are wholly in accord with the law as just stated.[10]

Furthermore, parol evidence is admissible to show that no contract was in fact made (at 12:01 a.m. or at 2:15 p.m.).[11] Parol evidence is also admissible to vitiate the contract by showing that fundamental assumptions upon which the agreement was based were in fact not true;[12] it seems reasonable to deduce that the parties were contracting for coverage based on the assumption that no accident had in fact yet happened.

---

[7] 309 P.2d at 745.

[8] Bergstrom v. Olsen, 39 Wash. 2d 536, 543, 236 P.2d 1052, 1056 (1951).

[9] 136 Wash. 74, 77, 239 Pac. 4, 7 (1925).

[10] 36 AM. JUR., *Mistake* 455 (1941); 32 C.J.S., *Evidence* § 978 (1942); 3 CORBIN, CONTRACTS § 614 (1951); RESTATEMENT, CONTRACTS § 238 (1932); 9 WIGMORE, EVIDENCE § 2417 (3d ed. 1940); 3 WILLISTON, CONTRACTS § 634 (Rev. ed. 1936).

[11] 3 CORBIN, CONTRACTS § 577 (1951).

[12] *Id.* § 590.

In view of these considerations, it is submitted that the court's conclusion that the parol evidence rule prevented the insurer from showing the true agreement is erroneous. Proper application of one or more of the foregoing exceptions to the rule would have demonstrated the true agreement, and in effect allowed reformation of the contract. This is in accord with the general equitable doctrine that equity will always rewrite a contract to conform to the mutual intent of the parties.[13]

Concluding, therefore, that a proper view of the parol evidence rule on the facts would have resulted in reformation of the policy to reflect the true intent of the parties, it follows that the insurer could have achieved the relief it sought in an equitable bill for reformation. However, since the action in this case was under the Washington Declaratory Judgments Act, the question is presented whether reformatory relief can be had under this proceeding. The point was raised in the briefs of counsel on appeal, but summarily rejected by the court.

It is well established that relief by way of declaratory judgment is in its very nature equitable in substance,[14] and relief of a declaratory nature long antedates the various Declaratory Judgments Acts on the equity side of the court.[15] On purely theoretical grounds, it is difficult to perceive any significant difference between the proposition that a contract can be reformed to read 3:15 p.m. instead of 12:01 a.m. and the proposition that a contract can be declared to be effective at 3:15 p.m. instead of 12:01 a.m.

The authorities in the field of declaratory judgments are in accord on the general proposition that relief in the nature of reformation of a contract can be had under a declaratory judgment action.[16] Only one American case seems to have reached the question directly, and the holding in that case, *RKO Dist. Corp. v. Film Center Realty Co.*,[17] is to the effect that reformation is available under a declaratory judgment action where necessary to a determination of the rights of the parties.

The only Washington case on the point is *Schoenwald v. Diamond K Packing Co.*[18] This was an action under the Act to construe a rather involved contract. The trial judge went so far as to practically rewrite the contract, and was reversed for his excessive zeal in putting in provisions about which the parties had no intent at all. But in this connection the court took the opportunity to make the following statement:

> "In proper cases the court has always had the power to reform contracts, but never the power to make them. In this respect, at least, the Declaratory Judgments Act has not broadened the powers of the court. Under it courts may construe, but not supplement, contracts."[19]

Taken in the context of the action that was before the court, this statement would seem to indicate that the court took it for granted that on a proper showing, reformation, or relief to that effect, could be given in a declaratory judgment action.

---

[13] 3 POMEROY, EQUITY JURISPRUDENCE § 858 (5th ed. 1941).

[14] 1 ANDERSON, DECLARATORY JUDGMENTS § 1 (1st ed. 1940).

[15] *Ibid.*

[16] 1 ANDERSON, DECLARATORY JUDGMENTS § 300 (1st ed. 1940); 1 BORCHARD, DECLARATORY JUDGMENTS 574, 1055 (2d ed. 1941).

[17] 53 Ohio App. 438, 5 N.E.2d 927 (1936).

[18] 192 Wash. 409, 73 P.2d 748 (1937).

[19] 192 Wash. at 414, 73 P.2d at 753.

Several Washington cases support the general proposition that normal equity relief is available under declaratory judgment actions.[20] Furthermore, the Act by its own terms "is to be liberally construed and administered"[21] and the court has power to declare rights "whether or not further relief is or could be claimed."[22]

In view of these considerations, it is submitted that the court ought to have granted the relief asked. The fact that the plaintiff did not ask for reformation in so many words in its complaint should be immaterial. Plaintiff's prayer included a prayer for general relief, and the court had the power to declare the rights of the parties whether or not further relief (specifically, reformation) was claimed.[23]

It remains to consider the practical effect of the decision in *National Indemnity Co. v. Smith-Gandy, Inc.* In marine insurance it is possible to insure a vessel "lost or not lost"; *i.e.,* the insurer undertakes to insure against the loss of a vessel on the high seas even though at the time of the undertaking the vessel (unbeknownst to the parties) may be already lost.[24] Of course, the insurer must specifically undertake such a risk in the policy, and the premium is proportionately higher due to the increased risk. Such an undertaking was permitted by the courts on the theory (now somewhat obsolete) that under the circumstances of marine communications prevailing prior to 1914[25] neither party was likely to know the condition of a vessel on the high seas, and consequently there was little chance of fraud on the part of the insured.

The result in the principal case seems to be to carry this marine rule over into automobile insurance, notwithstanding the obvious differences of risk between naval vessels and land vehicles, and further, to do so without the benefit of a specific undertaking to that effect by the insurer. The insurer in the principal case has been required to insure the truck, "accident or no accident," in clear contravention of the specific intent of the parties at the time the contract was made. The theoretical basis of the marine rule is wholly lacking in the circumstances of automobile insurance. The marine rule, as indicated above, is predicated on the high probability that neither party is likely to know the actual condition of the vessel on the high seas at the time of the transaction. This condition is wholly absent in land transportation taken in conjunction with modern communication facilities.

The broad effect of the case under consideration is to undermine the whole value of the telephonic binder in automobile insurance, and, to that extent, to undermine much of the value of the Standard Policy. The error perpetrated in this case is but representative of a multitude of similar clerical errors which can and undoubtedly do arise out of the use of the Standard Policy and uniform forms for endorsements and riders. For the surrender of this beneficial aspect of automobile insurance the court has traded what can only be characterized as a complete windfall to the supposed insured, a benefit which it never bargained for and never intended to receive until long after the fact.

The insurer ought not to be held to such an incalculable risk, and it is unlikely that insurers will undertake such a risk if this case is followed. Rather, insurers

[20] Hawk v. Mayer, 36 Wash. 2d 858, 220 P.2d 362 (1950) (specific performance); Trinity Ins. Co. v. Willrich, 13 Wash. 2d 263, 124 P.2d 950 (1942) (in the nature of a bill of peace).

[21] RCW 7.24.120 (9A U.L.A. 245 § 12).

[22] RCW 7.24.010 (9A U.L.A. 3 § 1).

[23] *Ibid.*

[24] 1 VANCE, INSURANCE 911 (3d ed. 1951).

[25] The first trans-oceanic wireless telegraph message was not accomplished until 1903; its use was widespread by the date indicated.