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Insurance

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have to make certain that he has such complete control over his commodities that it would be impossible for non-contracting distributors to obtain them. Distributors who engage in the practice of price cutting never enter into fair trade agreements and have an uncanny ability to obtain fair traded goods from sources other than those controlled by the producer. Should a producer enter into fair trade agreements with his distributors and his products come into the hands of non-contracting price cutters, he would be in the unenviable position of having his normal outlets bound by contract not to lower their prices on goods which are in competition with identical goods selling at a lower price. Few producers would care to take such a risk.

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INSURANCE

Insurance—The Loan Receipt. The question of the validity of a loan agreement between an insurer and his insured was presented to the Washington court for the first time in *Clow v. National Indem. Co.*[1]

Plaintiff (Clow) had insured his personal car with Farmers Insurance Exchange. The policy made Farmers a primary insurer for liability arising from the "ownership, use, or maintenance" of the "described" car or for a newly acquired automobile replacing the described car, provided that notice was given to Farmers within thirty days after its acquisition. The policy also provided that Farmers was secondarily liable on substitute cars used by the insured while the described car was under repair.[2] The car originally insured was a Mercury which Clow traded in as part of the purchase price of a newer Ford. The day after the purchase of the Ford, Clow returned it to the dealer for needed repairs, and the dealer allowed Clow to drive the Mercury. Subsequently (but within thirty days after the purchase of the Ford) Clow, while driving the Mercury, was involved in an accident for which the other driver instituted suit against him. Defendant, who insured the dealer and drivers using "garage" cars with the dealer's permission, denied liability and refused to defend Clow. Clow then tendered the defense of the suit to Farmers, who settled the claim for $3,000, with notice to the defendant. Farmers advanced $3,000 to Clow under a loan agreement which provided that the money was advanced as a loan and was not payment of the claim. Clow agreed to bring an action against either the dealer or his insurer (the defendant), and to

[1] 154 Wash. Dec. 191, 339 P.2d 82 (1959).

repay to Farmers such sum as he should recover in that action. Plaintiff instituted suit against the dealer's insurer, whose attorney admitted that defendant's policy with the dealer covered Clow at the time of the accident, but claimed that plaintiff could not recover since Farmers was the real party in interest to the action.[3] On defendant's motion, the trial court joined Farmers as a party, but subsequently dismissed the action. The rationale of the trial court (as summarized by the supreme court) was that the "loan agreement was a subterfuge, that the action should have been brought by Farmers to recover in its own right; and that, having failed to ask for this relief, it was precluded from recovering in the name of Clow even though it was a party to the action."[4]

The supreme court reversed, holding that the loan receipt was valid, but since Clow had not proved that he gave the required thirty day notice to Farmers, Farmers remained primarily liable on the Mercury.[5] Similarly, the defendant was liable under his policy with the dealer (who held title to the car). Thus, each insurer was held liable for a proportionate amount of the claim as determined by the respective limits of their policies.

Although the *Clow* case is one of first impression in Washington, many other courts and writers have considered the issues presented by the loan receipt.[6] Historically, loan receipts first were used by marine insurers to protect their right of subrogation against a negligent carrier.[7] Since shipping contracts usually gave the carrier the benefit of any insurance on the goods shipped,[8] upon payment of the loss to the

[2] The policy provided that "the insurance with respect to temporary substitute automobiles... shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobile or otherwise."

[3] RCW 4.08.010 provides that "Every action shall be prosecuted in the name of the real party in interest...."

[4] 154 Wash. Dec. 191, 194, 339 P.2d 82, 84 (1959).

[5] Even though title to the Mercury had passed to the dealer, Farmers remained primarily liable since their policy insured the ownership, *use,* or maintenance of the described automobile.

[6] 6 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4006, 4051 (1942); 2 RICHARDS, INSURANCE § 202 (1952); Note, 5 ALA. L. REV. 323 (1952-1953); Note, 46 KY. L.J. 257 (1957-1958); Note, 7 MIAMI L.Q. 582 (1952-1953); Note, 24 N.Y.U.L.Q. REV. 171 (1949); Note, 6 S.C.L.Q. 112 (1953-1954); *Loan Receipt Transaction between Insurer and Insured,* 272 INS. L.J. 528 (1945); *Loan Receipt Transaction between Insurer and Insured,* 273 INS. L.J. 592 (1945); Van Orman, *The Loan Receipt in New York,* 328 INS. L.J. 313 (1950). See also Annot., 157 A.L.R. 1261 (1945).

[7] Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918); Fayerweather v. Phoenix Ins. Co., 118 N.Y. 324, 23 N.E. 192 (1890).

[8] Luckenbach v. W. J. McCahan Sugar Ref. Co., *supra* note 7; Bradley v. Lehigh Valley R.R., 153 Fed. 350 (2d Cir. 1907); Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U.S. 312 (1886).

shipper the insurer lost his right of subrogation against the carrier.[9] The theory was that since the insurance inured to the carrier's benefit, when the loss was paid to the shipper, the carrier was no longer liable. To combat this result, insurers provided that they would not be liable for any loss for which the carrier was liable.[10] However, this meant that the shipper would be without funds until he had secured a judgment against the carrier, since it was not safe for the insurer to pay before the liability of the carrier was determined.[11] This defeated one of the most important purposes of insurance—prompt settlement—and it was to escape from the horns of this dilemma that the loan receipt was born.[12] Under the loan agreement the insurer simply loaned funds to the shipper, who instituted suit against the carrier. Since the insurer had not paid or settled the loss, no insurance had inured to the benefit of the carrier, and the action brought by the shipper was not affected.[13] The shipper then would pay the proceeds from that action over to the insurer in settlement of the loan. Thus, both objectives were accomplished—the shipper received funds with which to carry on his business and the liability of the carrier could still be determined.

Quite apart from the original theory of the loan receipt, it is used nowadays primarily to escape the consequences of subrogation. Since many states (including Washington[14]) have statutes providing that actions can be instituted only by the real party in interest, the insurer who *pays* the entire loss becomes subrogated to the rights of the insured[15] and is usually held to be the real party in interest.[16] When the insurer pays only part of the loss, the insured is considered to be the party in interest aganist the third person.[17] If the insurer merely *loans* the amount of the loss to the insured, he is not subrogated,[18] and he is

[9] Wager v. Providence Ins. Co., 150 U.S. 99 (1893).

[10] Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 148 (1918); Bradley v. Lehigh Valley R.R., 153 Fed. 350, 353 (2d Cir. 1907).

[11] If the insurer paid before the suit between the shipper and the carrier was settled, the payment would inure to the benefit of the carrier and the insurer would have no right of subrogation. Luckenbach v. W. J. McCahan Sugar Ref. Co., *supra* note 10.

[12] Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918).

[13] *Ibid.*

[14] RCW 4.08.010.

[15] Yezek v. Delaware L. & W. R.R., 176 Misc. 553, 28 N.Y.S.2d 35 (Sup. Ct. 1941); Scarborough v. Bartholomew, 22 N.Y.S.2d 635 (City Ct. 1940).

[16] Ellis Canning Co. v. International Harvester Co., 174 Kan. 357, 225 P.2d 658 (1953); Purdy v. McGarity, 262 App. Div. 623, 30 N.Y.S.2d 966 (1941); Barrett v. Matson, 177 Misc. 863, 32 N.Y.S.2d 59 (Sup. Ct. 1942); Yezek v. Delaware L. & W. RR., *supra* note 15; Barnhill v. Brown, 58 Ohio App. 188, 16 N.E.2d 478 (1937).

[17] This is to prevent the splitting up of causes of action, thereby giving rise to two suits against the tort-feasor for the one wrong. Clark v. Hutchinson, 161 F. Supp. 35 (D.C. C.Z. 1957); Kansas City F.S. & M. Ry. v. B. F. Blaker & Co., 68 Kan. 244, 75 Pac. 71 (1904); Solberg v. Minneapolis W-K Co., 177 Minn. 10, 244 N.W. 271 (1929).

[18] First Nat'l Bank v. Lloyd's of London, 116 F.2d 221, 132 A.L.R. 599 (7th Cir.

not required to be a formal party to the action.[19] Thus, the insurer can escape a prejudicial jury attitude toward insurance companies.[20] This makes for a more equitable trial, since in most indemnity cases both parties are insured, but the defending insurer is often immune from disclosure.[21] To correct this situation, insurers have increasingly resorted to use of the loan receipt.

It is the major premise of the above theory that gives the courts difficulty: is the "loan" in fact a loan or is it a payment? This is a very close question, for the amount advanced as a "loan" is usually the exact amount of the loss and to the insured it represents freedom from having to settle out of his own pocket. Usually the policy provides only for settlement and not for a loan,[22] and the loan when made requires neither security nor interest and repayment is conditional upon recovery. Some jurisdictions have enacted statutes resolving the issue,[23] but in those jurisdictions where there is no statute, courts that have considered the problem have evolved different tests to distinguish be-

1940); Merrimack Mfg. Co. v. Lowell Trucking Corp., 182 Misc. 947, 46 N.Y.S.2d 736 (Sup. Ct. 1944).

[19] Gould v. Weibel, 26 So. 2d 47 (Fla. 1952); Newco Land Co. v. Martin, 358 Mo. App. 99, 213 S.W.2d 504 (1948); Kossmehl v. Miller's Nat'l Ins. Co., 185 S.W.2d 293 (St. Louis, Mo. Ct. App. 1945); Thompson Heating Corp. v. Hardware Indem. Ins. Co., 72 Ohio App. 55, 50 N.E.2d 671 (1943); Phillips v. Clifton Mfg. Co., 204 S.C. 496, 30 S.E.2d 146, 157 A.L.R. 1255 (1945).

[20] Butera v. Donner, 177 Misc. 966, 32 N.Y.S.2d 633 (Sup. Ct. 1942). In Merrimack Mfg. Co. v. Lowell Trucking Corp., 182 Misc. 947, 46 N.Y.S.2d 736, 737 (Sup. Ct. 1944), the court said: "[W]hatever reasons there may be of a business character for the insurance company shying away from subrogation, there is one of great significance which manifests itself when the contracting parties appear before a court and jury. Insurance companies by experience find that when their financial interest is discovered by a trial jury in a suit they fare not so well. In their reluctance to reveal their presence in litigation insurance carriers do not stand alone. The courts have decided times without number that the unnecessary disclosure to the jury of the presence of a liability insurance company in a negligence trial warrants a mistrial...." See also note 33 *infra*.

[21] Symons v. Van Every, 46 Wn.2d 101, 278 P.2d 403 (1955); Westby v. Washington Brick, Lime & Mfg. Co., 40 Wash. 289, 82 Pac. 271 (1905). Birmingham Elec. Co. v. Carver, 255 Ala. 471, 52 So. 2d 200, 205 (1951): "[I]n a suit for damages against a defendant it is highly improper for plaintiff's counsel to make any reference in argument to the fact that defendant has liability insurance on account of such claim, and... such remark is so highly prejudicial that its effect cannot be removed by any instruction which the court might make."

[22] Where the policy provides for the loan agreement, the advancement has been upheld as a loan. Gulf C. & S.F.R.R. v. Zimmerman, 81 Tex. 605, 17 S.W. 239 (1891); Pennsylvania R.R. v. Burr, 130 Fed. 847 (2d Cir. 1904). *Contra,* Deming v. Merchants' Cotton-Press & Storage Co., 90 Tenn. 306, 17 S.W. 89 (1891).

[23] *e.g.,* Effective Sept. 1, 1950, the New York Legislature amended Section 10 of the Civil Practice Act to provide: "Action to be brought in Name of Real Party in Interest. Every action must be prosecuted in the name of the real party in interest, except that . . . an insured person, joint stock association or other unincorporated association which has executed to his insurer either a loan or subrogation receipt . . . or other similar instrument . . . may sue without joining with him the person for whose benefit the action is prosecuted." For a complete discussion o the conflict among the New York courts prior to the amendment see Van Orman, *The Loan Receipt in New York,* 328 INS. L.J. 313 (1950); Note, 24 N.Y.U.L.Q. REV. 171 (1949).

tween a payment and a loan. Some courts say that the loan receipt is a valid loan unless there is evidence to the contrary, thus putting the burden of proof on the opposing party.[24] Others rely on the particular facts and circumstances of each case,[25] while some flatly deny the validity of the loan receipt in its entirety.[26]

By the *Clow* case the Washington court adopted the majority view, stating that whether the amount advanced is to be considered a loan or a payment depends on the intention of the parties to the transaction.[27] This appears to be the better view, for if the parties do intend to create a loan, there is no good reason for denying its validity. The loan agreement does not prejudice the defendant, who is not a party to either the policy or the loan receipt. He might argue, as he usually does, that the insurer is the real party in interest, but it is difficult to see how that can hurt him. The New York court in *Merrimack Mfg. Co. v. Lowell Trucking Corp.*,[28] answered this argument as follows:

> His [the defendant's] complaint would find immediate redress if there were fear that a second claim could be urged for the one wrong. The "Loan Receipt" admits of no such injustice. The objective narrows merely to the name of the party in the suit. Defendant's attorney argues that his client should defend against an insurance company by name.... There being no danger of more than one recovery against the wrongdoer, the court is not justified in inquiring into the motives of the parties to the "Loan Receipt."

The Washington court was in accord, stating that:

> The only objection to such agreements... is that they may permit an action to be brought by one who is not the real party in interest. No other reason for denying them their intended effect has been brought to our attention. The defendant does not suggest that it was preju-

[24] Dixey v. Federal Compress & Warehouse Co., 132 F.2d 275 (8th Cir. 1942).

[25] Yezek v. Deleware L. & W. R.R., 176 Misc. 553, 28 N.Y.S.2d 35 (Sup. Ct. 1941), divides the cases into two groups: (1) where the insurer is liable conditionally (as when the policy provides the insurer shall not be liable until the non-liability of the third person has been established) and (2) where the insurer is liable absolutely (even though the third person also might be liable to the insured or, by subrogation, to the insurer). In the latter group the purported loan is held, as a matter of law, to be a payment. But see note 23 *supra*.

[26] "If the transaction . . . could be considered a loan . . . it would be illegal and void, because such a loan is not one permitted to be made, in this state, by insurance companies within the meaning . . . of the Insurance Law." Simpson v Hartranft, 157 Misc. 387, 283 N.Y.S. 754, 757 (Sup. Ct. 1935). *Accord*, Scarborough v. Bartholomew, 22 N.Y.S.2d 635 (City Ct. 1940), *aff'd without opinion*, 263 App. Div. 765, 30 N.Y.S.2d 971 (1941). But see note 23 *supra*.

[27] This is the original view as propounded in Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 149 (1918): "Whether the transfer of money or other thing shall operate as a payment, is ordinarily a matter which is determined by the intention of the parties to the transaction."

[28] 182 Misc. 947, 46 N.Y.S.2d 736, 739 (Sup. Ct. 1944).

diced in its defense by the fact that Clow, rather than Farmers, brought the action.[29]

To the claim that the insured's interest is only nominal, the court answered that "inasmuch as [the plaintiff] ... had already assigned [the proceeds of the action] ... to a third party ... the fact that he had no right to retain them for himself did not deprive him of his cause of action."[30]

The court, in upholding the validity of the loan receipt, relied on and quoted extensively from *Thompson Heating Corp. v. Hardware Indem. Ins. Co.*[31] The *Thompson* case contains an additional answer to the real party in interest argument which the Washington court, by implication, adopted: If the insured cannot maintain the suit (for not qualifying as the real party in interest), the consideration for the loan will have failed and the insured will have a quasi-contractual duty to make restitution, since the loan was executed under a mutual mistake of law.[32] Consequently, the insured does have a real interest in the action. To carry this argument one step further, if the insured does make restitution, certainly he will then be the real party in interest and able to maintain the action, which puts the parties in the same position as if the loan agreement had been held valid. In practice this point is never reached, for the courts that invalidate the loan receipt do so on the ground that the money advanced represents a payment, and, thus, the insurer will not be entitled to restitution since he has merely fulfilled his contractual duty under the policy.

The Washington position, in upholding the validity of the loan receipt is supported by both logic and precedent. As pointed out above, the great majority of the cases uphold such agreements since there is no good reason why they should not. The loan receipt results not only in relieving the insured from litigation before he is compensated for the loss, but in a fairer trial when the issues are eventually determined.[33] As Mr. Justice Cardozo pointed out in *Luckenbach v. W. J.*

[29] Clow v. National Indem. Co., 154 Wash. Dec. 191, 195, 339 P.2d 82, 84 (1959).
[30] *Id.* at 197, 339 P.2d at 85.
[31] 72 Ohio App. 55, 50 N.E.2d 671 (1943).
[32] Automobile Ins. Co. v. Eastern Mach. Co., 63 Ohio App. 203, 25 N.E.2d 954 (1939); RESTATEMENT, RESTITUTION § 48 at 196 (1937).
[33] Butera v. Donner, 177 Misc. 966, 32 N.Y.S.2d 633, 636 (Sup. Ct. 1942): "It is highly incongruous to observe the courts upon the one hand guarding with the direst of sanctions against the injection into a casualty case of the fact, even suggestion, of liability insurance covering the defendant, and on the other hand welcoming with warm hospitality the injection into a casualty case of the fact of collision insurance covering the plaintiff. In both instances, the insurer is the real party in interest; it selects and retains counsel, controls the case and profits or loses by the outcome. The same frailties of human nature that impel a jury to return a large verdict against an insured

McCahan Sugar Ref. Co.[34]: "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

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LABOR LAW

Labor Law—Jurisdictional Conflict between State Courts and NLRB. The United States Supreme Court recently reversed,[1] without opinion, the Washington Supreme Court's decision in *State ex rel. Yellow Cab Serv., Inc. v. Superior Court.*[2] The case involved a labor dispute wherein the issue was whether the state court was precluded from asserting jurisdiction by reason of the terms of the National Labor Relations Act.[3] The Washington Supreme Court held that the state court had jurisdiction in the case.

The relator, Yellow Cab Service, Inc., is a corporation which provides dispatching and administrative services to one hundred-eighteen individual corporations, each of which had purchased one taxicab from the relator under a conditional sales contract. The relator exercised some degree of control and discipline over the operation of these cabs. For the purposes of decision, the court considered the entire system as one entity. The cabs operated in Seattle and the local area only. A portion of the service provided by the system consisted of picking up and delivering persons from points within the city to railroad, airport and dock terminals in the local area, and transporting, under exclusive contract rights held with these terminals, travelers arriving at such teminals to points within the city. Some of these passengers were, of course, either arriving at these interstate carrier terminals from points outside the state, or embarking from the terminals for destinations outside the state.

The operators of the cabs were members of the local teamsters union. Upon the expiration of the contract which the union had with the relator, the union proposed a new contract, which the relator accepted. However, a substantial number of the operators rejected the proposed union contract. The union thereupon picketed the relator's premises

defendant are still present and quite as much at work when a jury discerns that a corporate insurer of the plaintiff is to recoup a claim that it has paid." See also note 20 *supra*.

[34] 248 U.S. 139, 149 (1918).

[1] State *ex rel.* Yellow Cab Serv. Inc. v. Superior Court, 80 S. Ct. 400 (1960).
[2] 53 Wn.2d 644, 333 P.2d 924 (1959).
[3] 49 STAT. 449-457 (1953), 29 U.S.C. §§ 151-188.