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Materiality of Ownership in Auto Liability Policies

VIRGINIA COMMENTS

MATERIALITY OF OWNERSHIP IN AUTO LIABILITY POLICIES

A Virginia statute says that no statement in an application for insurance shall bar recovery upon a policy of insurance unless the statement was untrue and material to the risk when assumed.[1] Where there is a misrepresentation in an application for automobile insurance as to the identity of the real owners of the automobile, the question arises as to how much proof is required of the insurer to show that such a misrepresentation was material.

This problem was presented in *Scott v. State Farm Mut. Auto. Ins. Co.*[2] wherein the Virginia Supreme Court of Appeals reversed a trial court decision and held that the insurer had failed to sustain the burden of proving that the misrepresentation was material to the risk. The insurer sought a declaratory judgment that the automobile liability policy was void because of a misrepresentation made by the insured in an application for insurance that he was the sole owner of the car.

In this case a father and son jointly purchased a used car, but the title to the car was placed in the father's name alone because of the son's minority. The father applied for insurance, representing that he was the sole owner and principal user of the car. The son, however, was in fact the co-owner, but he did not have a permit to drive. A friend of the son drove the car, with and without the son along. While driving when the son was not along, the friend was involved in an accident in which he was killed and two passengers were injured. For a week prior to the accident the friend had kept the car at his home, since the son had previously agreed to sell the car to him and had already been paid for it. This was not known to the father, so title had not been transferred. Immediately after the accident the insurer cancelled the policy and returned the premium to the father. In seeking a declaratory judgment of noncoverage the insurer was seeking to avoid liability to the passengers.

The majority, in allowing recovery, stated that the statute was enacted for protection of the insured and is to be construed in his favor.[3] While pointing out that the materiality of an untrue represen-

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[1]Va. Code Ann. § 38.1-336 (Repl. Vol. 1953).

[2]202 Va. 579, 118 S.E.2d 519 (1961).

[3]See also Sterling Ins. Co. v. Dansey, 195 Va. 933, 942, 81 S.E.2d 446, 451 (1954); 29 Am. Jur. Insurance § 720 (1956).

tation is a question for the court,[4] the majority felt that the untruth of a statement of ownership is not necessarily material, that is, as a matter of law.

Furthermore, judicial notice was not taken of the fact that, due to the higher rates fixed for drivers of certain younger age groups, the insurer, had it known the true facts, would have charged a higher premium for the son or rejected the risk altogether. The court concluded that, since the insurer had presented no evidence as to the materiality of the representation, coverage of the policy could not be denied.

The dissenting judge felt that the misrepresentation was material as a matter of law since it concerned a matter plainly going to the heart of the contract. He would have required no further proof than the untruth of the representation, considering it to be common knowledge that premium rates differ according to the nature of the risk assumed. Moreover, it is obvious that a car owned and used by both father and son is a greater risk than one owned and used primarily by the father.

Since the question of materiality is one for the court, there is no real distinction between the court's holding the misrepresentation material as a matter of law and for the court to take judicial notice of the difference in premium rates for drivers of different ages and then holding the misrepresentation material as a matter of law. The existence of a certain fact may cause a court at attach such significance to it as to reach a conclusion as a matter of law. Indeed, the insurer was seeking to have the misrepresentation declared material as a matter of law because of the factual difference between the risk the insurer thought it had assumed and what the claimants sought to have the policy cover.

The prevailing view is that a misrepresentation of ownership is material to the risk.[5] In the leading case of *Didlake v. Standard Ins. Co.*,[6] relied on by the insurer, the Court of Appeals for the Tenth Circuit took judicial notice of the higher accident rate among persons of a younger age group than the age group of the person who misrepresented himself to be the owner of the insured automobile. It was pointed out that, although an insurer has no knowledge as to the third persons who may drive a car with the permission of the owner, such insurer may reasonably assume that the principal use of the car will

[4]See also Inter-Ocean Ins. Co. v. Harkrader, 193 Va. 96, 102, 67 S.E.2d 894, 898 (1951).

[5]Annot., 33 A.L.R.2d 948, 951 (1954).

[6]195 F.2d 247 (10th Cir. 1952).

be by the named insured. Where identity of the true owner is concealed the insurer does not have an opportunity to discover his age, driving habits, and mental and physical faculties. Thus, a misrepresentation as to ownership is material to the risk.

The Illinois case of *Western States Mut. Auto. Ins. Co. v. May*[7] followed the *Didlake* case and took judicial notice of the difference in rate frequency of accidents between drivers of different age groups.[8] This case overrules an earlier Illinois decision[9] which allowed recovery despite a misrepresentation as to ownership, the court there having said that "the right of the insured to recover does not depend upon his being the holder, in fact, of either a legal or equitable title or interest, but whether he is primarily charged at law or in equity with an obligation for which he is liable."[10]

In line with the *Didlake* and *May* decisions is the Virginia case of *Royal Indem. Co. v. Hook*.[11] There, the knowledge of the insurer's agent as to the untruth of a representation as to ownership barred the insurer from successfully defending against the claim of the named insured. However, the court indicated that, absent the knowledge of the agent, the insured should not have recovered, saying that "it is easy to understand how an insurance company might be willing to issue a policy to A which it would refuse to B. One risk might be good and the other bad."[12] The majority of the court in the principal case dismissed this statement as dictum and not necessary to the decision.[13] The dissent, however, felt that the statement was not dictum since, in the absence of the materiality of the misrepresentation the insured would have had no trouble recovering.[14] The insurer in the present case felt that in view of the *Didlake* and *May* cases, and the *Hook* case in its own jurisdiction, the proof of the untruth of the misrepresentation was sufficient to establish materiality as a matter of law.

An insurance company asks questions in an application and relies upon the truth of the answers in determining whether to assume the risk.[15] Mutual integrity must, of necessity, be the basis of any contract.[16] While it is true that an insurer may prescribe the terms and

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[7]18 Ill. App. 2d 442, 152 N.E.2d 608 (1958).
[8]152 N.E.2d at 611.
[9]Mid-States Ins. Co. v. Brandon, 340 Ill. App. 470, 92 N.E.2d 540 (1950).
[10]92 N.E.2d at 542.
[11]155 Va. 956, 157 S.E. 414 (1931).
[12]Id. at 964, 157 S.E. at 417.
[13]202 Va. at 583, 118 S.E.2d at 522.
[14]Id. at 587, 118 S.E.2d at 525.
[15]Government Employees Ins. Co. v. Powell, 160 F.2d 89, 90 (2d Cir. 1947).
[16]Ibid.

form of a policy with which the insured must comply, the insurer has no control over the truth or validity of statements made by the insured in an application. A misrepresentation is material if it has any effect in inducing the insurer to enter a contract which it would otherwise have declined or for which a higher premium would have been charged.[17] Not only does an insurer have the right to determine what risks it will assume, it also has the right to choose with whom it will contract.[18] Under the holding in the principal case the insurer is held to have agreed with the father not only to assume the risk of the father and those driving with his permission but also, without its knowledge, that of the son and whoever had the son's permission. The discrepancy between what the insurer thought it was covering and what it is being held to have covered makes it apparent that the insurer would have rejected the risk or charged a higher rate if it had known the true facts.

The doctrine of judicial notice is a procedure to be used with great care. There is no general rule to be followed in judicially noticing a fact as true. The usual guide is the notoriety of a fact or the common and general knowledge of a fact by all men.[19] In certain instances courts have included within the definition of common knowledge such terms as the knowledge of "most men,"[20] or "what well informed persons generally know,"[21] or "the knowledge that every intelligent person has."[22]

But a judge may often have to ignore as a judge what he knows as an individual.[23] This is not to say that a judge is to be ignorant in court of what everybody, including himself, is familiar with out of court.[24] Obviously courts differ as to what facts are considered to be common knowledge. One reason for differences in the cases is that courts may notice in specific cases much that they cannot be required to notice by a general rule in advance.[25] In specific instances courts have been found to take judicial notice of such facts as: a tall tree in a thunder shower being a place of greater danger;[26] the probability of

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[17]Vance, Insurance § 106 (2d ed. 1930).

[18]Kelly Contracting Co. v. State Auto Mut. Ins. Co., 240 S.W.2d 60 (Ky. 1951); McClanahan v. State Auto Ins. Co., 21 Tenn. App. 249, 108 S.W.2d 1102 (1937).

[19]1 Jones, Evidence § 120 (5th ed. 1958).

[20]Porter v. Waring, 69 N.Y. 250, 253 (1877).

[21]Brandon v. Lozier-Broderick & Gordon, 160 Kan. 506, 163 P.2d 384, 387 (1945).

[22]Strain v. Isaacs, 135 Ohio St. 495, 18 N.E.2d 816, 825 (1938).

[23]9 Wigmore, Evidence § 2569 (3d ed. 1940).

[24]Ibid.

[25]9 Wigmore, Evidence § 2483 (3d ed. 1940).

[26]Chiulla De Luca v. Park Comm'rs, 94 Conn. 7, 107 Atl. 611 (1919).

lightning striking;[27] the vacancy of a building increasing the risk of loss by fire;[28] variations in prices charged by nightclubs;[29] driving a taxicab in a city as a hazardous occupation;[30] married women trading in real estate and conducting business enterprises.[31]

It seems that the Virginia Supreme Court of Appeals could reasonably have taken judicial notice of the difference in premium rates between drivers of different ages. It is true that in the Virginia cases that have held that a misrepresentation as to a matter material to the risk voids an insurance policy there was positive proof by the insurer that it would have rejected the risk or charged a higher rate.[32] However, such positive proof consisted merely of sworn and unsworn statements to that effect.[33] It is questionable whether such testimony meets the requirement of clear or absolute proof. At the least, an insurance company is tempted to rationalize. The mere requirement of sworn statements by the insurer still leaves unanswered the question as to why the named insured would represent himself as the sole owner and principal user of the car unless he feared rejection of the risk by the insurer if it knew the true facts—that the son, an unlicensed minor, was a co-owner, and in fact, the principal user of the car. It may be true, as the majority in the present case said, that the rates fixed for drivers of certain ages are not common knowledge.[34] To agree with the majority does not preclude agreement with the dissenting judge that:

"One would be surprised to learn that judges of courts of record in Virginia do not know, as men and judges that premium rates for liability insurance differ as to the nature of the risk assumed, and that representations as to ownership, the character of the vehicle, or the purpose for which it is used, are material in fixing the rates."[35]

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[27]State v. Hostetter, 240 Mo. 1155, 104 S.W.2d 671 (1937).

[28]White v. Phoenix Ins. Co., 83 Me. 279, 22 Atl. 167 (1891).

[29]Massell v. Daley, 404 Ill. 479, 89 N.E.2d 361 (1949).

[30]James v. Young, 177 N.D. 451, 43 N.W.2d 692, 693 (1950).

[31]Childress v. Fidelity & Cas. Co., 194 Va. 181, 199, 72 S.E.2d 349, 353 (1952).

[32]Inter-Ocean Ins. Co. v. Harkrader, 193 Va. 96, 100, 102, 67 S.E.2d 894, 896, 898 (1951); Flannagan v. Northwestern Mut. Life Ins. Co., 152 Va. 38, 64-65, 146 S.E. 353, 360-61 (1929); North River Ins. Co. v. Atkinson, 137 Va. 313, 316, 319, 119 S.E. 46, 17, 48 (1923). See also Ambrose v. Acacia Mut. Life Ins. Co., 190 Va. 189, 199, 56 S.E.2d 372, 376 (1949) (dissenting opinion); Maryland Cas. Co. v. Cole, 156 Va. 707, 712, 158 S.E. 873, 874 (1931).

[33]Ibid.

[34]See note 13 supra.

[35]202 Va. at 587, 118 S.E.2d at 525.