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CONTRACTS - BENEFICIARIES - INJURED PARTY AS BENEFICIARY OF PUBLIC LIABILITY INSURANCE POLICY

CONTRACTS — BENEFICIARIES — INJURED PARTY AS BENEFICIARY OF PUBLIC LIABILITY INSURANCE POLICY — Plaintiff recovered judgment against the insured for injuries received in an automobile accident. The judgment being unsatisfied, plaintiff sued the insurer on its public liability policy. *Held*, the policy by implication intended a benefit to the injured person and he may sue as a creditor-beneficiary. *Ohio Casualty Ins. Co. v. Beckwith*, (C. C. A. 5th, 1935) 74 F. (2d) 75.

After a somewhat turbulent evolution, the right of a third party beneficiary to sue on a contract is generally recognized in modern law.[1] The question whether a given contract confers a benefit on a third party which he personally may enforce must be answered by ascertaining the intent of the parties from a construction of the whole instrument.[2] Insurance policies have been technically classified as "indemnity" policies and "liability" policies. In the former, actual payment of the judgment by the insured is a condition precedent to the insurer's liability; in the latter, judgment alone is the condition precedent.[3] While the authorities are in conflict, the better view is in accordance with the instant court's holding that reservation by the insurer of the right to defend the suit against the insured causes the insurer's obligation to become due as soon as the liability of the insured is determined by a judgment.[4] The insurer's liability thus being fixed, the important issue is whether the injured person is in fact a third-party beneficiary under the contract, in the absence of express provision.[5] Here the court points out that while the policy provided that "no action" should be brought against the insurer unless the claim had been fixed by judgment against the insured,[6] there was omitted any limitation as to *who* might sue when that condi-

[1] 1 WILLISTON, CONTRACTS 694, 712 (1931). That the right is legal rather than equitable or quasi-contractual as held in some jurisdictions is contended by Professor Corbin, "Contracts for the Benefit of Third Persons," 27 YALE L. J. 1008 at 1020 (1918).

[2] St. Louis v. G. H. Wright Contracting Co., 202 Mo. 451, 101 S. W. 6 (1906). The benefit must be direct, not merely incidental or potential, although the primary purpose of the parties may be to benefit themselves. Byram Lumber & Supply Co. v. Page, 109 Conn. 256, 146 Atl. 293 (1929). But it is not necessary that the third party be known or know of the contract at the time it was entered into; it is sufficient that he can be identified and is able to establish the fact that he is a beneficiary. Whitehead v. Burgess, 61 N. J. L. 75, 38 Atl. 802 (1897).

[3] SUNDERLIN, AUTOMOBILE INSURANCE 417 (1929).

[4] 48 L. R. A. (N. S.) 184, note (1914), and see authorities cited in principal case; also Laube, "The Social Vice of Accident Indemnity," 80 UNIV. PENN. L. REV. 189 (1931). In the principal case the conclusion that the policy involved was a "liability" policy was strengthened by the fact that the insurer agreed to pay interest on any judgment recovered against the insured until such time as the insurer should pay the amount of its obligation into court.

[5] The practice of expressly providing that the injured person may sue is becoming widespread; and see note 10, infra. For a similar problem in relation to surety bonds, see Corbin, "Third Parties as Beneficiaries of Contractors' Surety Bonds," 38 YALE L. J. 1 (1928).

[6] The usual provision in the "indemnity" policies is to the effect that no action shall lie against the insurer until the insured has suffered loss by reason of having paid the judgment of the injured person. On such a clause diverse results have been reached

tion had been fulfilled. This seems an application of a rule of construction analogous to that in the law of suretyship which resolves all doubts against a professional surety.[7] But more broadly than this, it would seem that in any case of "liability" insurance, as distinguished from mere "indemnity" insurance, the real intent of the parties is to place the proceeds of the policy more fully within reach of the injured person.[8] If this is so, then, in accord with the modern development observed at the outset, the law ought to give him a directly enforceable right.[9] This result seems desirable. It is welcomed with enthusiasm by the person injured, and it is agreeable to the insured because it relieves him of the worries of collecting from his obligor; finally, the insurer ought not to complain because he owes the debt anyway and it should make no difference to whom he pays it. The right of the injured person has been expressly provided for in many states by statute;[10] it is gratifying nevertheless to note that the same result may be reached by the application of purely common law principles.[11]

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where the insured was insolvent. See Griffin v. General Casualty & Surety Co., 231 Mich. 642, 204 N. W. 727 (1925).

[7] The contract ought to be construed strictly against the professional insurer by whom it was drawn. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281 (1912).

[8] In the principal case, as in most "liability" cases, it was intended that the insurer pay, up to the limit of its obligation, the amount due on the judgment against the insured directly into court, the insurer being bound for interest on the judgment until such payment was made. See note 4, supra.

[9] American Law Institute, RESTATEMENT OF THE LAW OF CONTRACTS, Sec. 136 (1932); 81 A. L. R. 1271, 1279 (1932); and see note 1, supra.

[10] SIMPSON, AUTOMOBILE INSURANCE, 2d ed., 317 (1928).

[11] In the situation of the principal case the usual procedure against the insurer is by garnishment. Some policies expressly authorize suit where the insured is insolvent. Apparently, under the Texas procedure, which would be followed in the federal circuit in which the principal case arose, if the technique worked out by the court is adopted, the injured person may join the insurer as defendant in his action against the insured. American Auto Ins. Co. v. Struwe, (Tex. Civ. App. 1920) 218 S. W. 534.