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TIRE MANUFACTURER—CONSIDERATION OF PURCHASE—AGREEMENT TO REPAIR OR REPLACE — DAMAGE BY WEAR AND TEAR AND INJURIES BY ROAD HAZARDS—SUBSTANTIALLY AMOUNTS TO INSURANCE—SECTION 665, GENERAL CODE.

SYLLABUS:

When a company in Ohio, in consideration of the purchase of tires, agrees within a certain fixed period of time to repair without cost or replace on the basis of the remaining part of the fixed period any tire which is rendered unfit for further use or service due to ordinary wear and tear and injuries caused by blow-outs, cuts, bruises, rim cuts, under inflation, wheels out of alignment, faulty brakes or any other road hazard, the transaction is a contract substantially amounting to insurance under the terms of Section 665, General Code.

COLUMBUS, OHIO, March 23, 1938.

HON. ROBERT L. BOWEN, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: I received your letter of recent date which reads as follows:

> "Will you kindly give us an opinion on the following question:
>
> Does the copy of the agreement set forth below substantially amount to insurance as provided in Section 665, General Code?
>
> 'The S. Oil Company
> (An Ohio Corporation, No. 37371)
> GUARANTEES
>
> Keep This Guarantee Do Not Run This Tire Flat
> Designate "PASS." or "COMM."..... Month.....
> Day ..... 193..... To.....
> Street No. ..... City.....
> ATLAS Tire Serial No..... Size .....
> Ply ..... State .....
>
> For a period of twelve months from date of purchase for passenger car service, or six months from date of purchase for commercial car service against any condition that may render the tire unfit for further service, where such condition is due to ordinary wear and tear or injuries thereto, caused by blow-

outs, cuts, bruises, rim cuts, under inflation, wheels out of alignment, faulty brakes, or any other road hazard.

The liability of the S. Oil Company (Ohio) under this guarantee, is strictly limited whether to repairing the tire at no cost to you or to replacing it with a new ATLAS TIRE at its option. If so replaced you are to be charged and agree to pay 1/12 of the current retail price if in passenger car service, or 1/6 of the current retail price if in commercial car service, for each month or fraction thereof, which has elapsed since the date of purchase. The new tire will be fully covered by this Service Guarantee for 12 months, if in passenger car service, and for 6 months, if in commercial car service, except when a cross appears in any of the following boxes:

Faulty Brakes ☐; Improperly Mounted ☐; Wheels Out of Alignment ☐; Overloaded (on trucks) ☐.

the cross indicating the tire listed above has been sold as a replacement, and is only guaranteed subject to correction of the mechanical defect hereinabove indicated.

This guarantee does not cover punctures, tires ruined in running flat, fire or theft, clincher tires, tubes used in any form, or tires used in taxicab or common carrier bus service.

This guarantee does not cover consequential damages.

In addition ATLAS TIRES are covered by the Manufacturers' Standard Warranty as follows:

"Every ATLAS pneumatic tire bearing the name ATLAS and serial number is warranted by us against defects in material and workmanship during the life of the tire to the extent that if any tire fails because of any such defect, we will either repair the tire or make a reasonable allowance on the purchase of a new tire."

THE S. OIL COMPANY (OHIO)
By .....
Vice-Pres. In Charge of Sales.

ISSUED BY—STATION STAMP OR DEALERS NAME AND ADDRESS.

.....

.....

Adjustments on ATLAS TIRES can be secured wherever ATLAS TIRES are sold, but this guaranty must be presented when making claim.

—ERASURES OR ALTERATIONS RENDER THIS GUARANTEE VOID—' "

The foregoing agreement, in addition to the customary warranty as to material and workmanship, contains a "road hazard warranty" by which a seller of a tire guarantees for a period of time "against any condition that may render the tire unfit for further service, where such condition is due to ordinary wear and tear or injuries thereto, caused by blow-outs, cuts, bruises, rim cuts, under inflation, wheels out of alignment, faulty brakes, or *any other road hazard.*" In the event the tire becomes unfit as a result of any of the above enumerated hazards, the liability of the company is limited to repairing the damaged tire or replacing it with a new tire. In the event the damaged tire is replaced, the owner is required to pay one-twelfth of the current retail price if the tire is used in passenger car service or one-sixth of the current retail price if used in commercial car service for each month or fraction thereof elapsing between the date of the purchase of the damaged tire and the date the claim is made. The contract runs for a period of twelve months from date of purchase if the car is used for passenger service and a period of six months if used for commercial car service.

A reading of the provisions of the contract clearly indicates that the contract is either one substantially amounting to insurance or an express warranty under the provisions of Section 8392, General Code.

There is no reference in the contract to the sale of the article in question and with the exception of the customary warranty as to material and workmanship, the contract contains no statement relating to the quality or fitness of the tire. It will be observed that the agreement does not guarantee that the tire is of such quality or workmanship to run for a fixed period of time or for a number of determined miles under ordinary conditions, but the tire seller undertakes to repair or replace tires damaged or destroyed as a result of certain road hazards. Thus, the liability of the company does not depend upon the failure of the tire by reason of a defect in the quality of the material but does depend upon and relates to events or occurrences unknown at the time of the purchase and having absolutely no relationship to the quality or workmanship of the tire. Rather significant is the proviso in the contract wherein a tire sold as a replacement "is only guaranteed subject to the correction of the mechanical defect" causing the damage to the original tire. Obviously, the company recognizes that the damage to the tire was not caused by any defect in the quality of the tire but by an event not related to the tire, namely, a mechanical defect, as faulty brakes, wheels out of alignment, etc. It is reasonable to assume therefore that the company, in issuing the contract guaranteeing the original tire, recognized that it was undertaking to save harmless the tire owner from damages caused by events not related to the product sold rather

than from loss due to defects either in workmanship or quality of material.

A warranty is defined in *Sturgis and Co.* vs. *Bank of Circleville,* 11 O. S. 153, as "Any affirmation of words sustained by a consideration showing an undertaking that the quality or title of the thing sold is such as represented."

Again, in *Stranahan Bros.* vs. *Coit,* 55 O. S. 398, "An affirmation of a material fact intended to be relied on and in fact relied on in a warranty."

Section 8392, General Code, defines an express warranty as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

There can be no question that the promise evidenced in the agreement is made to induce the buyer to purchase the tire and is relied upon. However, under the terms of the above section, the natural tendency of the promise to induce the buyer to purchase is not sufficient in itself to constitute an express warranty. Otherwise *any promise,* no matter how objectionable, made in connection with the sale of goods and to induce the buyer to purchase could be defended as being an express warranty. It is to be noted that under Section 8392, supra, there must be "affirmation of fact" or the promise must be one "relating to the goods." If this were not the intention of the legislature, it would have been sufficient to say "Any promise * * * is an express warranty." Clearly, it was not the intention of the legislature when it adopted Section 8392, supra, to authorize the making of a "promise" to insure the buyer against all possible risks to which the goods might be exposed or to which he would be normally exposed while using them. To impute such an intention to the legislature would be to assume that it was its purpose to repeal by implication the laws relating to the business of insurance to the extent necessary to permit the seller of goods to include in an "express warranty" any promise or undertaking he might see fit, provided it is made in connection with the sale of goods. Generally speaking, repeals by implication are not favored and are never to be inferred.

It must be borne in mind that the language contained in Section 8392, supra, pertains to sales of merchandise and it was the intent of

the legislature to protect purchasers only to the extent of statements or promises made in connection with the sale of goods where such statements or promises relate to goods sold. In other words, the legislature was concerned with promises that pertain to the articles themselves and not to events or conditions entirely extraneous to the articles.

In construing Section 8392, supra, consideration must be given to sections of the Uniform Sales Act, relating to implied warranties. Under Section 8393, General Code, there is an implied warranty that (1) the seller has a right to sell the goods, (2) the buyer shall have and enjoy quiet possession of the goods, and (3) the goods shall be free from any charge or encumbrance. The implied warranty under Section 8395, General Code is that (1) the goods shall be reasonbly fit for the purpose sold, (2) the goods shall be of merchantable quality, (3) * * *, (4) * * *, (5) quality or fitness for particular purpose may be annexed by usage of trade, (6) * * *.

A reading of the above sections clearly indicates that the warranties both expressed and implied are for the protection of buyers from defects either in workmanship, merchantability or quality of material, rather than from risks or loss occurring from events not related to workmanship, merchantability or quality of material.

The courts of Ohio have recognized that every promise made in connection with the sale of goods does not necessarily amount to an express warranty. In the case of *Stambaugh* vs. *Cantwell Hardware Co.,* 23 N. P. (N. S.) 297, the court held that a sale of a merchant with the express understanding that "It would have to do the work or the purchaser would not have to keep it," is a sale on approval without a warranty but with a condition precedent to the completion of the sale.

In the cast of *Manufacturing Co.* vs. *Maitland,* 92 O. S. 201, the court held that a promise by the seller of certain articles that "If they do not do this work, we will make them good with money" or with other articles, is not equivalent to a warranty that the articles are new, free from defects, sound and serviceable and that they will answer the purpose for which they are intended to be used by the buyer.

Inasmuch as nothing is said in the contract regarding the sale of tires, it is reasonable to assume that the tire sales are complete, that is, the title passed to the buyer, the price was paid and nothing further remained to be done in respect to the sale itself. As a general rule, the risk of loss passes with the title. Section 8402, General Code, provides in part as follows:

> "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods

are at the buyer's risk whether delivery has been made or not, * * *."

The company under the terms of the contract assumes the risk which by law the owner of the tire is required to bear, and while the contract under consideration is in a sense collateral to the contract of sale, yet it is independent of and survives the contract of sale. It is clear that the company does not retain the risk of loss as a part of the contract of sale itself, but enters into a new contract presenting none of the elements of the contract of sale but all of the elements of a contract of insurance. There is nothing in the implied warranty created by statute or by the terms of the customary standard warranty included in the contract which impose upon the seller liability for anything but defects in the tire itself. It obviously does not extend to injuries to a tire otherwise free from defects which are due to accidental causes. This agreement under consideration is clearly intended to cover a field in which the ordinary warranty of quality, express or implied, has no application.

Edwin W. Patterson, Professor of Law, Columbia University, in an article appearing in the Journal of American Insurance of January, 1928, after a review of decisions affecting means of including insurance within a sales contract, lays down two tests which separate contracts of insurance and warranties. He says:

> "Two tests it is believed will separate one from the other. In the first place if the seller assumes liability for damages due to events * * * which are caused by defects in the articles sold, he is not engaged in the insurance business. If, however, he assumes liability for events not so caused, he is. * * * The second test is narrower. Do the existing insurance statutes authorize the formation of insurance companies * * * for the purpose of assuming such a risk as the one in question * * *? If so, the merchant is 'doing an insurance business'."

It would seem that the agreement under consideration would be insurance under either of the above tests. Under the first test, it is reasonable to assume that no pneumatic tire can be so manufactured as to be positively free from the damage which occurs by the events provided for in the contract. The protection of the purchaser from events or results that might occur from defects in workmanship and material may be said not to constitute a contract of insurance as the term is understood or used. However, for a person to agree to protect a purchaser from events or accidents that do not arise or bear any definite

relation to defective workmanship and material would and does constitute the writing of insurance.

There are, of course, numerous insurance companies doing business in this state which indemnify owners of automobiles for damage done to said automobiles which also includes tires, as well as other parts, so that under the second test the company, in assuming the risk for damage to the tires from events not relating to the tire itself, is competing with insurance companies which are actually licensed to assume such risks and by reason thereof, is doing an insurance business.

In this state, companies engaging in the insurance business are required to comply with the laws relating to insurance. Section 665, General Code, provides as follows:

> "No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

Under the terms of the provisions of the above section, a company which is not licensed under the insurance laws of Ohio is prohibited from engaging either directly or indirectly in the business of insurance. It is apparent that the legislature intended to require a license of any company, corporation or association that engaged in not only the writing of insurance contracts but also any type of contract that substantially amounted to insurance.

The Supreme Court of Ohio, in the absence of a statutory definition of insurance, in the case of *Ohio Farmers Insurance Co.* vs. *Cochrane,* 104 O. S. 427, defined an insurance policy as follows:

> "An insurance policy is a contract between the insured and the insurer, whereby for an agreed premium one party undertakes to compensate the other for loss on a specified subject by specified perils."

In the case of *State, ex rel,* vs. *Laylin,* 73 O. S. 90, at page 97, the court said:

> "By indemnity is meant that the party insured is entitled to be compensated for such loss as is occasioned by the perils

insured against, in precise accordance with the principles and terms of the contract of insurance."

Although there is no express provision for the payment of a premium in the agreement under consideration, there can be no doubt that the price paid by the buyer for the tire is the consideration for the issuance of the guarantee by the seller and consequently is the payment of a premium as in the case of ordinary insurance contracts. It is readily apparent that under the term "insurance" as defined by the Supreme Court of Ohio, the agreement under consideration, although called a contract of guarantee, is in fact a contract of indemnity against loss or damages to the purchaser resulting from specified hazards enumerated in the agreement, and contains all the elements of an insurance contract. The contract specifically provides that the guarantee does not cover punctures, tires ruined in running flat, fire or theft, clincher tires, tubes, tires used in taxicab or common carrier bus service, and further provides that it does not cover consequential damages. Clearly, the reason for excluding the above is that they are too hazardous to include. However, by the terms of the contract, injuries to the tire caused by "blowouts, * * * or any other road hazard" are included.

"Hazard" is defined in Webster's Dictionary as "An unforeseen disaster, an accident, damage, risk, peril."

Bouvier defines a hazardous contract, as one in which the performance of that, which is one of its objects, depends on an uncertain event.

There can be no question that road hazards as used in the contract include any peril or accident to which normally the owner of a tire is exposed. The risk which the seller assumes may arise from the fault or negligence of the user, the fault or negligence of others or unavoidable accidents. All such risks are ordinarily assumed by the owner of the tire and when the tire seller undertakes to assume such risks it is engaging in the insurance business.

This office has held that the provisions of Section 665, supra, are not to be limited to contracts of strict insurance but apply to any contract which substantially amounts to insurance. Thus, in Opinion No. 168, rendered by this office under date of February 27, 1937, it was held:

"A company, which in the conduct of its business, issues and sells a contract to owners of motor vehicles whereby, in consideration of a certain sum of money, it undertakes for a definite period of time to repair motor vehicles damaged as a result of an accident or agrees to furnish towing services to

contract holders whose automobiles are disabled by reason of an accident, is entering into a contract substantially amounting to insurance under the provisions of Section 665, General Code."

The contract under consideration in this opinion is similar to the terms of the contracts considered in the above opinion where it was held that the contract was substantially a contract of insurance. The present contract provides for the indemnification of one party by another, that is, one party to the contract agrees that if certain loss or damage occures, it will be assumed by one party on the happening of certain events and conditions not necessarily caused by defects in the workmanship or material of the article sold. The fact that the issuance of the contract under consideration is only incidental to the primary business of selling tires does not exempt the tire seller from the provisions of Section 665, supra.

It is not the purpose of this opinion to say that a tire company may not enter into a contract warranting the quality or fitness of the goods it manufactures and sells, for it may with safety make such contracts, and even though such contracts may look like insurance, yet if the contract really warrants the fitness and quality of the goods, it would not be insurance. Thus agreeing to protect a purchaser of a tire from events that can and might result from defects in workmanship or quality of material can be said not to constitute a contract of insurance.

It is therefore my opinion that when a company in Ohio, in consideration of the purchase of tires, agrees within a certain fixed period of time to repair without cost or replace on the basis of the remaining part of the fixed period any tire which is rendered unfit for further use or service due to ordinary wear and tear and injuries caused by blowouts, cuts, bruises, rim cuts, under inflation, wheels out of alignment, faulty brakes or any other road hazard, the transaction is a contract substantially amounting to insurance under the term of Section 665, General Code.

Respectfully,
HERBERT S. DUFFY,
Attorney General.