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INDEPENDENT CALLING OF LIFE INSURANCE SOLICITOR UNDER STATE UNEMPLOYMENT COMPENSATION ACTS

By REYNOLDS C. SEITZ*

To date the life insurance companies have been generally fortunate in not having been required to make contributions for the purpose of protecting their commission paid solicitors1 within the scope of Unemployment Compensation Plans. Perhaps the insurance firms have been aided by the influence of the ruling of the Commissioner of Internal Revenue to the effect that agents of insurance companies authorized to solicit applications for life insurance policies or annuity contracts are not employees within the Social Security Act.2 At any rate, the almost universal fact today is that insurance agents paid solely by commission are not looked upon as coming within the coverage of the State Unemployment Compensation Acts.3 In twenty-two states4 there have been specific rulings by the administrative

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1 This discussion deals only with life insurance solicitors of the non-industrial type. It does not deal with general or state agents or state managers of life insurance companies.

2 See Northwestern Mutual Life Ins. Co. v. Tone, 125 Conn. 183, 4 Atl. (2) 640 (1939).

3 The stated rule in many of the jurisdictions to the effect that the insurance solicitor does come within the Act unless the company can prove he is an independent contractor should not be accorded too much weight. In actual practice the companies in most instances conduct business without assuming the burden of proving their independent contractors. They rely upon the fact that the administrative official will not molest them. In those instances where the administrative officers demand proof the company is usually able to establish that commission salesmen are independent contractors.

4 Favorable rulings have been accorded one or more companies in Ariz., Ark., Calif., Del., Fla., Ida., Iowa, Kans., Me., Mont., Nev., N. H., N. M., N. D., Ore., Pa., Tex., Utah, Ver., W. Va., Wisc. and Wyo. There are some states that specifically exempt the commission paid insurance salesmen by the wording of their statutes. Ala., Colo., Ind., Ky., La., Mass., Mich., Nebr., Ohio, S. D., and Va. are in the group. But even though such exemptions exist, the companies organized in such states are interested in the situation in other jurisdictions where they may be licensed to do business. They may also be vitally interested because of the retaliatory tax law. See on the latter point the author's article on "Retaliatory Insurance Tax Laws", 18 Neb. L. B. 150 (1939).
officials in favor of one or more companies. In the various instances litigation has not entered the picture to disturb the administrative status quo.

It is this latter situation and the effect of the decision in *Northwestern Mutual Life Ins. Co. v. Tone* that the various states were not bound to interpret their Acts in accordance with the ruling of the Commissioner of Internal Revenue that has prompted the author to write this article which has as its fundamental purpose the setting forth of a rationale upon which it can logically be established that the life insurance solicitor is not covered by the Acts. It is felt that the discussion will be of more than academic or theoretical value. Up to the present the insurance companies have been active and instrumental in securing rulings in their favor. They have presented the arguments and brought the pressure. As a result of such procedure it is not surprising that the rulings should be in behalf of the companies, and it is not unreasonable to think that unemployment commissioners, would wish to remain passive and thereby create immunity for the insurance firms. A look into the future, however, leads one to wonder if it is too far fetched to suspect that some day agent’s organizations will bring pressure. In the face of a real contest the commissioners and later the courts may not be as uniform in their attitude as seems to be the case at present. If such an eventuality happens the commissioner and judicial tribunals will have to decide the matter on the basis of logic and helpful rules of law.

Acknowledging the supposition, it is submitted that the battle must be fought out on the “independent calling” provisions of the Acts. The remainder of this article, therefore, will be devoted to a discussion of the foundation problems involved.

One of the reasons that the state courts are not bound by the Federal holding can be found in the difference in the wording between the Federal and State statutes. The Social Security Act defined the word employment as “any service of whatever

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5 *Supra*, note 2.
6 See *infra*, note 13 for cases where solicitors were held to not be independent contractors.
7 That there is a real problem involved was brought out as early as 1937 by Professor Buscheck in his article, "Life Insurance Solicitor—Employee or Independent Contractor," 25 Georgia L. J. 894 (1937). It would seem that there the misconception in thinking arises out of the failure to admit that an agent can be an independent contractor.
nature performed within the United States by an employee for his employer." Under the vast majority of the State Acts the word employment is defined as follows:

"Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the director that:

"(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

"(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and

"(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business, of the same nature as that involved in the contract of service."

Before launching directly into the analysis of the problem it seems necessary to bring out the fact that the courts have declared that a prerequisite to exemption from the coverage under the unemployment compensation laws consists in showing a conformity with all of the "unless" clauses just previously quoted. To show that an individual is exempt under one or two of the clauses is of no avail.

Consequently, if the life insurance solicitor is not covered by the type of Unemployment Compensation Act under inspection, it will be because he can work out a factual picture of exemption.

In attempting to work out such picture it is reasonable to begin with the easiest task. Such task seems to be the demonstration that life insurance solicitors are exempt under clause (B) of the Act. The fact that the insurance agent performs his service outside of the places of business of the enterprises for

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*See 26 U. S. C. A., section 1607(c) and historical note to such section (1940).

*The following states define "employment" in a different manner: Conn., Ida., Iowa, Kans., Ky., Minn., Miss., N. Y., Ore. and Tex. Although some of the discussion in this article may not directly apply to problems within the named states, it is of great importance to companies organized within the states for reasons mentioned in note 4.


*Of the type we are analysing.

*Throughout the remainder of the article the term Act will be used to signify the type of statute quoted.
which such service is performed seems a logical deduction. It is, of course, true that the solicitor frequently comes into the home office or agency office of the insurance company. He may confer with his superiors on business matters, he may attend classes of instruction, he may pick up rate books, and he may even make telephone calls to line up appointments with prospects. But essentially, under a construction of language which is not unreal, he is performing his service outside of the place of business of his employer. His fundamental work must be performed outside the premises of the home or agency office. In deciding a similar problem in connection with the coverage of carriers for a newspaper the Washington Court remarked:¹³

“We cannot agree with the contention of the Attorney General that one who would otherwise be an independent contractor becomes an employee under the Unemployment Compensation Act if he transacts any (italics mine) business related to the work at the office of the employer. . . . It would be a strained construction to hold that transactions merely incidental to the main purpose . . . carried on at the office of the respondent company would bring the (individual) within the provision of the statute.”

Such a view is realistic and not new. For as the Washington court¹⁴ further points out, “One of the several common law tests or elements considered in the determination of the relationship between parties is the place where the work is done. If the work is done upon the premises of the employer the inference is strong that the workmen are employees and not independent contractors.”¹⁵

The next step in working out non-coverage under the Act will lead to a scrutiny of clause (A). Even the first glance at such section will reveal that we are involved in the tangle of “control” philosophy so common to the independent contractor cases. To substantiate that this is an elusive field it is necessary to quote only two authorities from among the hundreds who have written on the subject. Professor Steffen has remarked¹⁶ that the “theoretical basis for vicarious responsibility is based upon a curious complex of truths, half truths and mystic

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¹⁴ Id. at 718.
¹⁵ As substantiating the point see 1 Restatement of The Law of Agency, section 220 (1933).
Professor Buscheck has drawn our attention to the truth that "a veritable judicial Solomon could not formulate any general principle or principles which would reconcile all statements as to the status of salesmen because so often based on the vague and nebulous conception of what constitutes a servant, an agent, and an independent contractor."

In the face of such complexity it is not surprising to find that, where opposition has been furnished to offset the pressure of the insurance companies, the courts working behind the facade of concepts have come out with decisions that find that insurance companies do have control over their agents. Three recent cases have so held. Control has been based upon the following evidentiary background: (1) Agents contracts can be terminated at the will of the companies, (2) Agents are furnished with rate books, advertising matter, and letter paper and must use such material unless they get permission to use their own, (3) Agents are confined by restrictions on the application blanks and by other rules and regulations, (4) Agents must give exclusive service, (5) Agents' records and reports belong to the company, and (6) Agents do more than a specific piece of work.

Of course, in the three cases just previously mentioned, the courts make an attempt to remove their work from the haze surrounding the independent contractor doctrine. They contend that the intent of the legislatures in writing the Unemployment Insurance Acts was to include within the Acts many who would be independent contractors at common law. They, therefore, feel convinced that there was enough control exercised to bring the life insurance solicitor within the Acts. At later paragraphs in this article the author will take up the question of the extended coverage, because of the claimed intent of the legislature. At this place he will content himself by attempting rebuttal of the argument that there was enough control, even under com-

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Equitable Life Ins. Co. of Iowa v. Industrial Comm., 95 P. (2) 4 (Colo. 1939); Industrial Comm. v. Northwestern Mut. Life Ins. Co., 103 Colo. 550, 88 P. (2) 560 (1939); Unemployment Compensation Comm. of N. C. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2) 584 (1939). Since the decisions in the Colorado cases the statute has been changed to specifically exempt insurance solicitors working solely on commission. Test suits are pending in Mo., N. Y., N. J. and Okla. In Ga., Ill., Maryland, and Minn. and R. I. the status of insurance solicitors are doubtful.
mon law principles, to warrant the conclusion that life insurance agents come within the preview of unemployment compensation plans. For such is the conclusion of the Colorado court in *Equitable Life Insurance Co. of Iowa v. Industrial Commission.* It is submitted that such reasoning leans heavily upon the theory suggested by Professor Paul Leidy in the Michigan Law Review. It was there brilliantly argued that the control test seemed to fit itself too readily into an ex post facto determination of a relationship. It was demonstrated that from very meagre facts—and facts the same or similar—two courts declared the relationship and then asserted that the defendant "had control" or "did not have control." As Professor Leidy put it, "In view of the fact that, relationship once determined, control would follow, as an implication of law, the possibility of reasoning in a vicious circle is apparent." It was such a picture that caused Leidy to suggest that in salesmanship cases it would be desirable to use, at least in conjunction with the control test, another requirement, that is, one of "independent calling." As support for such test, *Milligan v. Wedge* is cited, in which case the court held the defendant, a butcher, not liable for the negligence of the employee of a licensed drover. The court said: "The party sued has not done the act complained of, but has employed another who is recognized by the law as exercising a distinct calling. The butcher was not bound to drive the beast to the slaughter-house himself—he might not know how to drive it. . . . He employs a drover, who employs a servant, who does the mischief. The drover, therefore, is liable and not the owner of the beast. . . . The mischief was done in the course—not of the butcher's business, but of the drover's." The rest of the article is devoted to the thesis that salesmen who are driving cars as they journey about to stimulate the sale of an employer's products, salesmen-demonstrators who are driving automobiles in attempts to interest prospective purchasers, their employers being automobile agents, and salesmen-demonstrators who are engaged in the demonstration, for purposes of sale, of second-hand cars belonging to individual owners are not engaged in

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20 Supra, note 18. In mentioning that control existed even under common law standards the court by its approval incorporates Industrial Comm. v. Northwestern Mut. Life Ins. Co., *supra,* note 18, which involves a similar set of facts.


independent callings. For as the writer in the Michigan Law Review remarks, "They are just as clearly in the employ of and in the pursuit of the business of the employer as were the apprentice and driver for the drover in our hypothetical case. Reflection upon such reasoning induces the feeling that tribunals were attracted to such logic because of the prominence given "independent calling" within "unless clause" (C) of the Unemployment Act. The mistake, however, in the unemployment compensation cases seems to be that they have unduly stretched Professor Leidy's theories of the positions of the salesmen at common law. His arguments pertained exclusively to the kind of salesman who was directly or indirectly required to use an automobile in the course of serving the employer. Consequently, even though Leidy found control because there was no independent calling, his task was made easier because in a number of the situations he alluded to the employer supplied the instrumentality—the automobile. And at common law and under the modern doctrine of the Restatement one of the tests for determining and independent contractor was whether the employer or the workman supplied the instrumentalities for the person doing the work. That such was actually the thought can be gleaned from Leidy's language, "At a time when courts and legislatures alike seem to be striving to find ways and means to find car owners liable, it would seem unusual to find results obviously counter to the prevailing trend." In the remaining instances it seems that Leidy was imbued with the feeling that the salesman was forced either directly or indirectly (through a job or competition requirement) to use an automobile. That the negligent driving of such automobile would often occur and could not be fully guarded against, that automobiles carelessly driven caused serious damage, and that under such circumstances it seemed most fair to impose liability on the party with the deepest pocket. That such was the attitude seems a justifiable inference from the following language: "In the modern cases, involving automobile accidents, the automobile itself injects a new element; one which makes the control test

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23 Supra, note 21.
24 1 Restatement of Agency, section 220 (1933).
25 Supra, note 20.
26 The whole tone of the article brings out the point.
difficult of proper application." Looking at the matter from such a perspective brings a question to the forefront. Can Leidy’s test of an “independent calling” be applied to all salesmen? Does it stand for the proposition that the traditional “control” test is to be effectively subordinated whenever we find that an employed person is not working at an independent business which is distinct from that of his employer? The obvious answer is in the negative. Even Leidy does not totally reject the “control” test. He agrees that it must be used in conjunction with the “independent calling” formula. And, as has already been illustrated when the philosophy was applied in connection with his assumed background, where the salesmen were all driving automobiles, it was easy, and no one can say illogical, for Leidy to find that the salesman was so clearly not engaged in an independent calling that control was present. The same argument cannot be extended to take all salesmen out of the “independent calling” class. The common law as reaffirmed by the Restatement of Agency gave no hint that if one was not engaged in a distinct occupation or business he could not be an independent contractor. It is true that the fact that one was engaged in such separate occupation or business strongly tended to prove that such individual was an independent contractor. If, however, he was not so engaged there was still the possibility that the other eight tests (among which the “control” dogma occupies a major position) mentioned in the Restatement of Agency would establish an independent contractor relationship. Even Leidy admits that there are innumerable decisions in the salesmen cases which, in spite of the fact that the salesman was not engaged in a distinct business or occupation, found that he was an independent contractor. Such cases forgot about the importance of the “instrumentality” element and placed their holding upon the “control” rule. In this respect, as Leidy inferentially argues, they may have been wrong. But they were not wrong in finding a salesman an independent contractor even though such individual was not operating in a distinct occupation or business. For in the last analysis it must be

27 Supra, note 20.
28 1 Restatement of Agency, section 220 (1933).
29 Supra, note 28.
30 Supra, note 28.
31 Such cases are too familiar and too numerous to require citation.
32 Supra, note 28.
understood that all nine tests existing at common law and approved by the Restatement must be applied with common sense after conscientiously surveying the whole picture. Articles, like Leidy’s,\textsuperscript{32} which attempt to decide the matter by applying a concrete rule usually succeed in helping in only a few factual areas. In other areas they help little to clarify. In spite of an imperative demand for progress and exactness in stating the law, to date in the field of master-servant-independent contractor, no better solution to the problems that exist have been found than is suggested by Professor Harper in the Indiana Law Journal under the title “The Basis of the Immunity of An Employer of An Independent Contractor.”\textsuperscript{33} It is there forcefully and brilliantly brought out that the problems in the particular corner of jurisprudence under discussion should be decided upon a basis of “common sense.” All the tests are of importance, but they must be weighed so as to come out with a “common sense” answer.

Consequently, accepting such statement as logical, it is submitted that under the common law the life insurance solicitor is an independent contractor. The Colorado and North Carolina courts to the contrary\textsuperscript{34} (which as has been demonstrated seem to have attached undue significance to the independent calling dogma in finding control), it does not seem that “common sense” would uphold the viewpoint that the employer exercised significant control over the \textit{details}\textsuperscript{35} of the work of the life insurance agent. Of course, the life insurance solicitor receives advice, instruction and help and, as is only natural in all employments, is restricted by the general rules upon which the life insurance business is conducted. But departing from specious and artificial legalistic concepts it seems sensible to conclude that the life company does not essentially and fundamentally exercise control over the details of the work of its agents. The fact that the company has the right to hire and fire the agents should

\textsuperscript{32} There are others. Two such leading articles are: Steffen, “The Independent Contractor and the Good Life”, 2 Chicago L. R. 501 (1935), and Douglas, “Vicarious Liability and Administration of Risk”, 38 Yale L. J. 584 (1929).

\textsuperscript{33} 10 Indiana L. J. 494 (1935).

\textsuperscript{34} \textit{Supra}, note 18.

\textsuperscript{35} The Restatement, \textit{supra}, note 28, places stress upon the concept covered by the word “details.” So do a large majority of cases.
not be conclusive on the matter of control. Cases in great number have so decided.

Enough has been written to bring out the opinion that insurance agents do not fall within the provisions of the Unemployment Insurance Act because of the application of common law rules to the factual situation. The remainder of this article will concern itself with a discussion as to whether the Act itself has included within its paragraphs a larger group of employees than would be covered if we applied the common law philosophy of the independent contractor.

An inspection of the decided cases on the point will reveal conflict. On the one hand, the philosophy exemplified by the Utah court is observable. It can be summed up in a sentence and a quotation. The only kind of independent contractor one needs worry about under the Act is the kind defined by the three "except" clauses. "A class of individuals, who under a strict common law concept of independent contractorship were other than employees are entitled (to benefits under the acts)." On the other hand the Wisconsin court outlines its position by holding that the status of employee is not to be determined from the language of the Unemployment Compensation Act. It must be determined as such status is determined at common law or under the Workmen's Compensation Act and the status is determined by the same consideration under Workmen's Compensation as under common law.

In stating deductions it would appear that the tribunals on both sides of the legal fence could have reasoned more lucidly.

The followers of the Utah tribunal seem right in assuming that since unless clauses (A), (B) and (C) were specifically set forth and joined with a conjunction the clear intention of the legislature was to place stress on the selected elements. In other words it appears true that under some of the other six tests

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35 Globe Grain and Milling Co. v. Industrial Comm., 91 P. (2) 512 (Utah, 1939).
36 See supra, note 18 for cases that express the same reasoning.
37 Wisconsin Bridge and Iron Co. v. Ramsey, 233 Wis. 467, 290 N. W. 199 (1940). To the same effect see note "Taxable Employer's under the Virginia Unemployment Compensation Act," 23 Va. L. R. 725 (1937).
39 Supra, note 36.
summarized by the Restatement\(^4\) an individual may have been an independent contractor while he cannot be one under the unemployment acts. Nothing appears, however, to indicate that each one of the three "unless" clauses were not to be interpreted as they would be in a case at common law. Consequently, independently established trade, occupation, profession, or business should not have a particularly broad meaning. It has only its common law meaning—a meaning which has been discussed previously in this article and which was not intended to be separated from the control concept.

The followers of the Wisconsin\(^4\) court, among which group is the Washington\(^3\) tribunal as the most forceful and logical spokesman, did not neglect to recognize that the three "except" clauses should receive their common law connotation. They did, however, neglect to present us with a fully reasoned out rationale which would go a long way in establishing the sanity of such an outlook.

In working out such a background it would seem fundamental to recognize that although unemployment insurance can be justified on the basis that unemployment is a trade risk\(^4\) it was not intended to cover that type of worker whose work day and success depended to a major extent upon his own efforts. It is all very well and just to provide that unemployment compensation cover the workers who are constantly under supervision and control and who find it difficult if not impossible to fail to follow routine and come up to standards. When such workers lose their jobs because of the pinch of economic circumstances there exists the kind of a trade risk that can be fairly imposed upon an employer. But, when there exists that class of individual who cannot be fundamentally controlled by the employer, courts and administrative officials are confronted with an entirely different factual picture. They are dealing with an individual who can regulate his own time and effort—a person who may work today and not tomorrow—who may show effort today and relax tomorrow. Actually, it is difficult to determine when such persons are unemployed. The severance

\(^{4}\) Supra, note 28.
\(^{4}\) Supra, note 38.
\(^{4}\) Supra, note 39.

of the bond of employment may not be significant. For it may be that such person has long before and of his own free will made himself into something other than an employee by his indifference to his business. Surely, unemployment compensation was not intended to protect against such happenings. A clue to such conclusion can be found in the usual provision in the Acts\textsuperscript{46} that workers are disqualified if they voluntarily leave work or are discharged for misconduct.

As refutation to part of what has just been outlined it may be argued that a proved consistently hard worker who has encountered troubled days because of a personal production slump should receive unemployment benefits.\textsuperscript{46} A rebuttal to such reasoning might be found in the fact that it would be difficult, perhaps impossible to prove that such individual was still working at top capacity or ability and that it did not seem that the legislature would intend involving parties in such complexities. But, be that as it may, for the sake of argument it will be granted that satisfactory proof of hard work would not be lacking. Even when that is done the individual that confronts us is still not the same as the supervised worker who loses his position because of a decrease in business. Why is that so? The answer is not hard to give. The uncontrolled individual (agent in our discussion) still has the inherent power to make his own living in his present occupation. He still has the power and opportunity to try to sell or perform his particular work. The supervised individual, however, cannot go on with his work. There is little he can do to continue to earn a living at his present trade.

Viewing the problem in such light leads to the conclusion that in the latter case society owes the worker protection while in the former instance it does not. It is, of course, most unfortunate that depressed conditions make it impossible for the uncontrolled individual to earn a living. He is, nevertheless, in no worse position than thousands of employers and

\textsuperscript{*}For a discussion of a typical act on the point alluded to see Orfield, "The Nebraska Unemployment Compensation Law," 16 Neb. L. B. 148 (1937).

\textsuperscript{*}Furthermore, it seems that the ruling of the Illinois Commissioner (Prentice-Hall, State Unemployment Insurance Service, section 27231 (1940), to the effect that an agent was not unemployed if he received no commissions because of a slack period, would express the intention of the legislatures.
independent workers who cannot make ends meet. At present society cannot do anything for such group through unemployment insurance.

There may be some who are quick to rejoin that companies that have a surplus can afford to pay unemployment insurance to uncontrolled salesmen and that the Unemployment Insurance Acts were intended to cover a class of individuals who would be independent contractors under a common law interpretation of the three unless clauses. But for courts to assume such an attitude would amount to judicial legislation under a "soak the rich" philosophy and would be unmindful of the fact that many companies do not have large surpluses. In the area under specific discussion the result of a "soaking" policy may end in the companies being forced to distribute the expense to the average policyholder and may culminate in the widow and orphan receiving protection under a smaller policy. Certainly society does not at present want such outcome. If its intent should change it is reasonable to expect that it will be shown in specific legislation protecting the insurance solicitor. Although we are dealing with a statute we cannot get away from independent contractor concepts and all that Harper said about "common sense." It may have been found expedient and necessary to shift the risk in tort cases to the one best able to pay. In unemployment cases there does not seem to be the same justification. As long as society cannot protect all from business depressions, it appears that the insurance solicitor has no prior claim. He is not in the favorable position of the injured party who can reach back to the employer even though he be remote.

Before concluding this article, one remaining point needs clarification. Whenever state statutes have specifically exempted insurance solicitors from the coverage of unemployment acts they have confined the exemption to those individuals who are paid entirely or substantially by commission. The administrative rulings have followed the idea embraced in the statutes. It is suggested that in the future courts and officials should not become too technically minded in connection with the above matter. Of late beginning agents have received some financial aid from the companies to tide them over the period of inexperience. They have later had the amounts given them.

*Supra, note 4.*
deducted from the commissions they earn. It would be bad if interpretation of the unemployment acts were to induce the companies to abandon a worthy effort to help new men.

If this article has served in setting forth some guiding reasons which will help the courts and commissions in the event of future "pressure" it has done all that was intended. The repercussions from possible pressure will need to be controlled by rational principles.