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## Insurance–Waiver and Estoppel as Satisfying Condition of Proof of Loss in Fire Insurance Policies

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point. The Rules do not alter or change substantive law. See Rule 17(c) relative to guardians *ad litem*.

A final point of interest in this area was noted in *Glade Mining Co. v. Harris, supra*. There the court, in deciding a question of first impression for West Virginia, held that where a record shows error as to a minor defendant, the judgment will be reversed, even though there was no appeal on the part of the minor. This is demanded of the court, it being the duty of the court, as the guardian of infants, to protect their rights.

*Ralph Charles Dusic, Jr.*

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### Insurance—Waiver and Estoppel as Satisfying Condition of Proof of Loss in Fire Insurance Policies

*Ps*, husband and wife, brought an action to recover against *Ds*, two fire insurance companies, upon one policy insuring *Ps*' dwelling and another policy insuring their household property. Both policies required, as a condition precedent to recovery, a proof of loss, signed and sworn to by the insured. The trial court entered judgment for *Ps*. *Held*, affirmed as to the dwelling insurance as *Ps* "substantially" complied with the proof of loss requirement by submitting to an examination under oath by the insurer's counsel. *Reversed* in the case of the household property policy. The court found as a matter of law that a list of household property lost in the fire, improperly valued at cost, and mailed to the adjuster was not a "proof of loss" notwithstanding: (1) *Ps* were "ignorant and illiterate"; (2) *Ps* lost their policies in the fire which policies were replaced by the solicitor with memoranda showing issuance of the policies but not mentioning the conditions precedent to *D*'s recovery; (3) *Ps* were not apprised of the requirement to submit proofs of loss—on the contrary, both the solicitor and the adjuster allegedly told *Ps* that it would not be necessary to file any papers other than the list of household property and the values thereof which should be, and was, mailed in an envelope provided by the adjuster. Nor were the words and acts of *D*'s agents sufficient to bind *D* by waiver and estoppel as *D*'s agents did not have such authority. *Maynard v. National Fire Ins. Co.*, 129 S.E.2d 443 (W. Va. 1963).

The result of the finding in the personal property policy case appears to be harsh. The court refused the jury finding that the

insurer had waived the defects of the "proof of loss" mailed to the adjuster. The court registered its sympathy with the hapless *Ps*, quoting from *Wade v. Mutual Benefit Health & Acc. Ass'n.*, 115 W. Va. 694, 177 S.E. 611 (1934): "An insured is entitled to the protection which he buys and for which he pays."

The court's ruling is not so harsh, however, when it is noted that West Virginia has held that a "failure to furnish such proof of loss within the given time does not wholly destroy all right of recovery but only delays right of action. . ." where a fire insurance policy requires a proof of loss within a given time, and where the policy provides for its forfeiture for certain causes, but not for failure to furnish such proof of loss. *Munson v. German Ins. Co.*, 55 W. Va. 423, 47 S.E. 160 (1904). The *Munson* case seems to be applicable to the facts of the instant case. The fire was on October 11, 1959, six months later this action was instituted. Had *Ps'* counsel filed the requisite proofs of loss with *Ds* at that time, he could have brought his action sixty days thereafter without having to rely upon proving a waiver and estoppel.

It is suggested that a situation of waiver and estoppel was available as a result of the alleged words and acts of the adjuster in the household property insurance cause. Syllabus point 2 of *Lusk v. American Cent. Ins. Co.*, 80 W. Va. 39, 91 S.E. 1078 (1917), makes clear the distinction between conditions which may be waived in the teeth of a "non-waiver" clause: A clause in a fire insurance policy ". . . forbidding waiver by an agent of 'any provision or condition' except by written endorsement, relates to provisions and conditions which are essential to the validity of the contract and its continuance in force, and "does not refer to stipulations to be performed after a loss has occurred." (Emphasis added.) See, 17 APPLEMAN, INSURANCE LAW AND PRACTICE 593 (1945). This, the court found, is the "great weight of authority." *Lusk v. American Cent. Ins. Co.*, *supra* at 45. The case of *Fitzsimmons v. Alliance Fire Ins. Co.*, 115 W. Va. 303, 175 S.E. 62 (1934), follows and, perhaps, is analogous to the *Lusk* case. The court in the *Fitzsimmons* case held that if the conduct of the insurer, acting through its local agents and an alleged "special agent and adjuster," was such that would "reasonably induce the insured to believe that no formal proof would be required, 'such conduct will operate to excuse non-compliance.'" That the degree of "reasonable inducement" might vary from the instant case is immaterial at this point, as that is fact for the jury.

*Slater v. Williamsburg City Fire Ins. Co.*, 68 W. Va. 779, 71 S.E. 197 (1910), preceded the *Lusk* case. In a petition for rehearing the *Slater* case, the court refused the contention that the non-waiver clause was inapplicable after the loss occurred. In the instant case, the *Slater* case is cited for the proposition that an adjuster “. . . has no authority or power, as such, to waive proof of loss, required by the policy. . . .” But the syllabus goes on to say: “. . . when the policy contains the clause, limiting the authority of agents, found in the standard insurance policy.” It is contended that the more recent *Lusk* case renders ineffective the *Slater* case in so far as the two are inconsistent. The *Slater* case cited as its sole primary authority *Morris v. Dutchess Ins. Co.*, 67 W. Va. 368, 68 S.E. 22 (1910), which held that denial of liability is in legal effect a waiver of preliminary proofs of loss only where the agent or adjuster had express or implied authority to make the denial. The authority of the *Morris* case is substantially impaired, it is suggested, by the ignominious position of the *Slater* case in Annot., 49 A.L.R.2d 186 (1956). The weight of authority has held that a non-waiver provision “. . . is inapplicable to stipulations to be performed after a loss has occurred, such as that requiring proofs of loss to be furnished.” Annot., 49 A.L.R.2d 186 (1956). The *Slater* case is the only case cited contra to the weight in the annotation. A 1918 Georgia decision provides the sole dissent to Annot., 22 A.L.R. 424 (1923) to which the later annotation is a supplement. The adjuster’s requisite “authority” to waive proof by denial was put to a lenient test in *Rucker v. Fire Ass’n*, 120 W. Va. 63, 67, 196 S.E. 494 (1938). The court held that an adjuster was clothed with such authority, and a letter from the insurer stating that the claim had been referred to the adjuster was conclusive evidence of this authority. In the instant case it would appear that the court has changed its position on the applicability of non-waiver clauses to stipulations to be performed after the loss has occurred. As this change is not supported by authority, it would behoove counsel to move with utmost care in this area of waiver and estoppel and to avoid reliance thereon where possible.

*Stephen Grant Young*