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Insurance—Questions in Application—Extent to Which Insured May Rely upon Suggestions of Agent

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INSURANCE—QUESTIONS IN APPLICATION—EXTENT TO WHICH INSURED MAY RELY UPON SUGGESTIONS OF AGENT.—*P*, insured, alleges that to the question, “Has any insurer cancelled or refused to issue automobile insurance to the applicant within the past three years?”, he answered in the affirmative, but that he was told by *D*’s agent that the question would be answered in the negative. *D*, insurer now seeks to avoid payment under the policy on the basis of fraudulent representatives in the application. *Held*, that where applicant for insurance imparts correct information but an agent of the insurer without knowledge of applicant, records answers incorrectly, parol evidence may be introduced to show such facts, and the acts of the agent under such circumstances are binding upon the insurer; but it is otherwise if, as here, the applicant knows that the facts are recorded falsely in the application. *Christian v. State Farm Mutual Automobile Ins. Co.*, 110 S.E.2d 845 (W. Va. 1959).

The view expressed by the West Virginia Supreme Court states with clarity and exactness a concept which had heretofore been hinted at in a number of prior West Virginia decisions. The factual situation in these previous cases generally involved insertion by an agent of answers other than those given him by the insured without the latter’s knowledge. The court held that, in such a situation, the insurance company was estopped to deny liability under the policy. *Shinn v. West Virginia Ins. Co.*, 104 W. Va. 353, 140 S.E. 61 (1927); *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622 (1885).

What the court has done in essence is to annex to the long standing rule in this state, concerning such acts by an agent without the knowledge of the insured, an exception which allows the insurer to avoid the policy where the insured is aware of the falseness of the answer. This exception is apparently the general view in the United States, but one which contains some very important qualifications. *Hadley v. New Hampshire Life Ins. Co.*, 55 N.H. 110 (1875); *Klieger Metropolitan Life Ins. Co.*, 180 Wis. 320, 192 N.W. 1003 (1923); 45 C.J.S. *Insurance* § 732 (1946). In two Ohio decisions the court spelled out basically the same rule as expressed by the West Virginia court, but intimated that there must be present the element of fraud and collusion between the agent and the insured. The Ohio court stated that “in absence of proof that applicant knew or should have known that the insurer was being deceived, insurer cannot escape liability of a subsequently

issued policy.” *Sanders v. Allstate Ins. Co.*, 168 Ohio 55, 151 N.E.2d 1 (1959); *Pannuzion v. Monumental Life Ins. Co.*, 168 Ohio 95, 151 N.E.2d. 545 (1959). The probable minority view was set forth by the Illinois Supreme Court in the case of *Rockford Ins. Co. v. Cline*, 72 Ill. 495 (1897), where it was held immaterial that the insured also knew of the falseness of the answer inserted by the agent.

An interesting line of cases approach the problem from a slightly different angle. In situations similar to the one under discussion, some courts have approached the difficulty with a view toward protecting the applicant. Here the agent of the insurer had interpreted the questions for and suggested answers to the insured. Consequently in *Griego v. New York Life Ins. Co.*, 44 N.M. 330, 102 P.2d 31 (1940), the New Mexico court held that, where the insurer’s agent advises as to the propriety or necessity of recording certain answers, it amounts to an interpretation of the question by the insurer. *Prudential Ins. Co. v. Shumaker*, 178 Md. 189, 12 A.2d 681 (1940), follows this reasoning provided there exists good faith on the part of the insured. The similarity between these cases and the ones upon which the West Virginia holding is based is, to say the least, thought provoking.

Both the Illinois view and the one expressed by the West Virginia court can, if strictly applied, result in hardships upon both insurer and applicant. The former seems to leave the companies open to collusion and fraud between agent and applicant while the latter will require extreme caution in dealings with the agent. The applicant will be at the mercy of agents who, in their zeal to sell a policy, often make “on the spot” decisions as to what is necessary to properly answer the questions set forth in the application. In the instant case it is a fair assumption that most people would realize the importance of that specific question to his chance of acquiring a policy, but many of the inquiries contained in applications are not so patently obvious in relation to their importance. For example, many health and accident policy applications contain a question similar to this: “Have you consulted a Doctor and why, within the last five years?”, the purpose apparently being to determine if the applicant has had any diseases within that period which may affect his later health. If the prospective insured begins to list the assorted small ailments which beset most individuals, and is told by the agent that he need not list the minor ones, what is the applicant to do? It is at once apparent that the applicant’s

position is precarious and uncertain. Further, it requires the applicant to determine what ailment is major and which is minor, a situation which to one other than a physician would be to a large extent conjecture. Probably the least desirable result would be that the applicant would no longer be able to place his confidence in the agent as he should be able to.

It seems to the writer that the rule under which this state has brought itself does not recognize the real nature of an insurance policy. The applicant and the agent are not involved in a bargain and sale type negotiation in which each party tilts with the other in order to obtain the advantage. But they are rather in a relationship of confidence as indicated by the language of one of the major company's advertisements, "Consult your agent as you would your attorney or physician". The extent to which the applicant may rely upon the statement of the insurance company's representatives is not a new question in this state. In 1936 the Supreme Court in the case of *Dickenson v. Pacific Mutual Life Ins. Co.*, 117 W. Va. 812, 188 S.E. 378 (1936), posed the following question: "Does the insured, who relies upon the information and opinion of a company medical examiner, do so at his peril?" Since the point was not briefed, the court supplied no answer, but, if driven to its logical conclusion, the only answer one may discern from this latest pronouncement would necessarily be in the affirmative.

J. G. V. M.

LABOR LAW--UNPROTECTED ACTIVITIES AS AFFECTING REQUIREMENTS OF UNION'S DUTY TO BARGAIN.—The union, representative of insurance agents, while negotiating collective agreements with the employer, sought to bring economic pressure upon the employer by having its agent-members engage in concerted on-the-job activities, such as—refusing to solicit new business, reporting late at offices, and absenting themselves from special business conferences arranged by the employer—designed to harass the employer. The employer charged the union was refusing to bargain collectively; whereupon the Board entered a cease-and-desist order against the union. The circuit court set aside this order. On certiorari, the Court *held* that the union's duty to bargain collectively in good faith did not bar it from bringing to bear on the employer harassing tactics of this nature and that their use by the union was of no evidentiary significance. Justice Frankfurter, concurring, agreed that