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Insurance--Authority of Agent to Waive Conditions of Policy

C. S. McG.
West Virginia University College of Law

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D was under a duty to use his land in strip mining so as not to damage P's land. His duty was to confine and restrain debris and to place debris in such a position that it could not reasonably be expected to be washed into a stream and on P's land. *Oresta v. Romano Bros.*, 137 W. Va. 633, 73 S.E.2d 622 (1952). D ceased mining operations in 1950, withdrew from the state in 1951, and the debris was not washed onto P's land until more than a year later, in August, 1952. The fact that the cause of action was so long in accruing must have influenced the court's decision. After all, West Virginia is interested in getting more foreign businesses to locate in the state, not drive them away because of the fear that some day in the dim future after leaving the state, they will be held liable to defend a suit in an area where they have severed connections.

P. B. H.

**Insurance—Authority of Agent to Waive Conditions of Policy.**—Action by widow who had been designated as beneficiary in a life insurance policy. The policy application contained a clause that if the premium was paid when application was made, the policy would become effective and protect the applicant when the company approved the application and that otherwise, no insurance would be in force under the application unless and until a policy had been issued and delivered, and the full first premium stipulated in the policy was actually paid to, and accepted by, the company during the life time and insurability of the applicant. However, the company increased the premium after the physical examination and in a telephone conversation with the agent, the applicant agreed to accept the policy with the increased premium and the agent agreed to deliver the policy the next morning. However, the applicant died the following morning before the policy was delivered. *Held*, affirming judgment for P, that there was a constructive unconditional delivery of the policy and that the agent had authority to waive, and did waive, the premium. *Gurley v. Life & Casualty Ins. Co. of Tennessee*, 132 F. Supp. 289 (M.D.N.C. 1955).

It is axiomatic that the provisions or conditions precedent of an insurance policy must be either complied with or waived before a binding contract of insurance is created. The principal case turns on the performance of two such conditions, existing in a factual situation worthy of a law professor's ingenuity. They are: first; the prepayment of the first premium during the life of the insured and, second; the delivery of the insurance policy, and are basic to almost every life insurance policy.
It is apparently well settled that delivery is not necessarily confined to manual transmission of the policy and may be satisfied by constructive delivery, the idea being that what actually controls is the intent of the parties. *Kinney v. Northern Life Ins. Co.*, 200 Wash. 190, 93 P.2d 360 (1939); *Dawson v. Concordia Fire Ins. Co. of Milwaukee, Wis.*, 192 N.C. 312, 135 S.E. 34 (1926); *Hardy v. Aetna Life Ins. Co.*, 154 N.C. 430, 70 S.E. 828 (1911). However, when words “actually delivered” or “delivered and received” are used in the policy, the courts seem unable to make up their minds. See *Powell v. North State Mut. Life Ins. Co.*, 155 N.C. 124, 69 S.E. 12 (1910); *Furlington v. Metropolitan Life Ins. Co.*, 193 N.C. 481, 137 S.E. 422 (1927).

There are three elements which have been held to be essential to a valid legal delivery: (1) the person executing the policy must intend to give it legal effect as a completed instrument; (2) manifestation of the insurer’s intent to put the instrument beyond his legal control by some word or act; and (3) the insured’s acquiescence in this intention. *Kinney v. Northern Life Ins. Co.*, supra; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 39 S.E. 273 (1898); *Folb v. Ins. Co.*, 109 N.C. 568 (1891); *McCully’s Adm’t v. Ins. Co.*, 18 W. Va. 782 (1881). Of these essential elements, only number three would appear to be present in the principal case. In view of this, despite the fact that it might be an “... extreme technicality ...” in the principal case to hold that the telephone conversation did not operate as a constructive delivery, it would appear that the court is writing a new contract between the parties to hold that it did operate as a constructive delivery.

Where an agent who had erroneously accepted $7.55 instead of $8.00 as prepayment of the premium on a life insurance policy, and insured agreed over the telephone to pay the additional premium and sign an amended application the next morning, but died that night, it was held that there was no acceptance or constructive delivery of the policy. *Kinney v. Northern Life Ins. Co.*, supra. And in *Rogers v. Great-West Life Assur. Co.*, 48 F. Supp. 86, 88 (W.D. Minn. 1942), the court said, “It is to no purpose to delve into what might have happened if Rogers had not died but had picked up the policy as he had planned on the next day. We are bound to consider, and are limited to, the status of the contract and the arrangements between the parties which existed prior to the death of the insured.”

In the principal case, whether or not there was a delivery or constructive delivery of the policy is not of itself controlling. The
payment of the premium and the delivery of the policy are mutually dependent on each other and there can be no binding contract of insurance until both conditions are fulfilled. *McKenzie v. Northwestern Mut. Life Ins. Co.*, 26 Ga. App. 225, 105 S.E. 720 (1921).

In view of the express conditions contained in the policy, even admitting there was a constructive delivery, if, as the court holds, the delivery is unconditional and acts as a waiver of the payment of the first premium, the agent must have authority to make such a delivery and waiver. *Carter v. Cotton States Life Ins. Co.*, 56 Ga. 237 (1876). Ordinarily, a soliciting agent cannot waive terms or conditions expressly set forth in the policy. *Southern Life & Health Ins. Co. v. Avery*, 230 Ala. 685, 163 So. 236 (1935); *North Carolina Bank & Trust Co. v. Pilot Life Ins. Co.*, 206 N.C. 460, 174 S.E. 298 (1934). And the court in the principal case so agrees, at page 292. However, the court goes on to cite *Hill v. Philadelphia Life Ins. Co.*, 200 N.C. 115, 122, 156 S.E. 518 (1931); and *Thomas v. Prudential Life Ins. Co. of America*, 104 F.2d 480 (4th Cir. 1939), for the proposition that an agent's authority is determined by the extent and nature of the business the principal permits him to transact, and not solely by the limitations under his employment or those contained in the policy. This abstract statement, of course, is undisputed. But in the *Hill* and *Thomas* cases, *supra*, as a matter of fact, the agents involved were general agents in that their duties were broadly defined, were of a definite supervisory and managerial capacity, and they were referred to as "general agents", "superintendents", and "supervisors" by their companies. Such is not the case here. The court would appear to be indulging in summary conclusions, at page 293, where it says that the agent "... was the company itself doing business through him its will to place the policy as issued, having supplied him with the policy to deliver. ..." The language in the letter to the agent declining to accept the application, the express conditions in the application, the same conditions in the policy, the company's refusal to negotiate upon any other terms; all these factors would seem to show clearly the company's insistence upon compliance with its provisions and the narrow limitation of the agent's authority.

It is true, as stated by the court in the principal case, that the absolute and unconditional delivery of an insurance policy is a waiver of the stipulation for a previous or contemporaneous payment on the first premium. But again there is a question of authority and the cases of *Murphy v. Lafayette Mut. Life Ins Co.*, 167 N.C. 334, 83 S.E. 461 (1914); and *Grier v. Mutual Life Ins. Co.*, 132 N.C.
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542, 44 S.E. 28 (1908), cited by the court as its authority on this point, were both cases where the deliveries and consequent waivers were made by executive officers of the insurance companies involved.

The basic point submitted here is that insurance corporations must necessarily transact their business through agents. VANCE, INSURANCE § 78 (3d ed. 1951). And since this is so, the courts must scrutinize the facts meticulously before applying any rule of law to a situation where such an agent is involved. Under all the facts and circumstances, the decision in the principal case appears to be wrong.

C. S. McG.

INSURANCE—LIABILITY OF INSURER FOR UNAUTHORIZED ACT OF SOLICITING AGENT.—Deceased was accidentally killed after paying first premium for life insurance contract with D. D's agent had assured deceased of the immediate effectiveness of the policy. The receipt for the premium payment included a statement that the policy would not be effective until a medical examination was completed. Such examination did not take place prior to death. The beneficiaries appealed from a decision that no contract existed. Held, that the issue of whether insurer was bound by unauthorized acts of agent in stating that the policy became effective immediately, rather than upon insured's passing a physical examination as indicated in the application, was for the jury if the deceased in good faith relied upon the statement of the agent. Gettins v. United States Life Ins. Co., 221 F.2d 782 (6th Cir. 1955) (2-1 decision).

As was noted in Field v. Missouri State Life Ins. Co., 77 Utah 45, 290 Pac. 979 (1930), there is considerable confusion resulting from decisions of the courts with regard to the powers of soliciting agents of life insurers. It would seem that closer adherence to the basic rules of agency law would result in a change in the decision of the instant case as well as in many of those previously decided.

There is no question "that a contract of insurance can be made by parol, unless prohibited by statute, or other positive regulation. . . . That it is not usually made in this way is no evidence that it cannot be so made." Relief Fire Ins. Co. of N.Y. v. Shaw, 94 U.S. 574, 577 (1876). This validity of oral contracts of insurance coupled with the well known inclination of many courts to construe the contract strongly in favor of the insured has led to decisions confirming as a contract the unauthorized act of a soliciting agent. Modern Woodmen of America v. Lawson, 110 Va. 81, 65 S.E. 509 (1909).