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TORT LIABILITY OF INSURER FOR FAILURE TO ACT PROMPTLY ON APPLICATION

Plaintiffs applied for policies of life insurance for three children and paid the first premiums. Policies were issued on two of the infants but the third was held up because the agent had failed to supply sufficient information and the third infant later died. Plaintiffs brought action in tort against the insurer for the negligence of the agent. *Held*, delay in the issuance of a life insurance policy caused by the agent's negligence does not ground a cause of action in tort against the insurance company. *Chittum v. Commonwealth Life Insurance Company*.¹

It is a well-settled rule that no contract of insurance is created by the failure of an insurer to reject an application for a policy within a reasonable time.² Nevertheless, a few courts have held that silence on the part of the insurer constitutes an acceptance.³ Other courts have found that the delivery of the policy by the home office to the office of the local agent is a constructive acceptance.⁴ The position taken by these courts is opposed to the weight of authority and is difficult to maintain. But they do show an inclination on the part of the courts to give some remedy to disappointed applicants and they demonstrate that the courts would readily give a remedy if they could find some sound legal theory

¹ 177 S. E. 782 (W. Va. 1934).

² *Walker v. Farmers Insurance Co.*, 51 Iowa 679 (1879); *Ross v. New York Life Insurance Co.*, 124 N. C. 395, 32 S. E. 733 (1899); *Royal Insurance Co. v. Beatty*, 119 Pa. 6, 12 Atl. 607 (1888); *Northern Neck Mutual Fire Insurance Ass'n v. Turlington*, 135 Va. 44, 116 S. E. 363 (1923); *Giddings v. Insurance Co.*, 102 U. S. 108, 26 L. Ed. 92 (1880); VANCE, *INSURANCE* (2d ed. 1930) 188; 1 COOLEY, *BRIEFS ON INSURANCE* (2d ed. 1927) 533-537, 595-599 and cases cited.

³ *Preferred Accident Insurance Co. v. Stone*, 61 Kan. 48, 58 Pac. 986 (1899); *Richmond v. Travelers' Insurance Co.*, 123 Tenn. 307, 130 S. W. 790 (1910).

⁴ *Rose v. Mutual Life Insurance Co.*, 240 Ill. 45, 88 N. E. 204 (1909); *Paine v. Pacific Mutual Insurance Co.*, 51 Fed. 689 (C. C. A. 8th, 1905); *Bowman v. Northern Accident Insurance Co.*, 124 Mo. App. 477, 101 S. W. 691 (1907); *Williams v. Atlas Ass'n Co.*, 22 Ga. App. 661, 97 S. E. 91 (1918). The cases permitting recovery on the contract are based on the theory that the delay of the insurance company prevents the securing of insurance elsewhere and creates a legal presumption of acceptance. This has been permitted only where the premium has been paid in advance and the loss has occurred before notification. It is necessary that the insured person have been as acceptable risk and the only cause of the failure to issue the policy has been the delay on the part of the insurer.

upon which to base their decisions. The West Virginia court has long followed the weight of authority on this point.⁵

Many recent cases have upheld a right of recovery in an action of tort against insurers, on the ground of negligence in failing to act upon an application, and there was a subsequent loss not covered by insurance.⁶ This doctrine of tort liability is a rather recent development in the field of insurance law. It was first enunciated in Hawaii in 1897⁷ and appeared in the United States in 1912.⁸ These decisions and the ones following them have been characterized as "ill considered, newfangled and unjust"⁹ and as "interesting and rather surprising."¹⁰ After the introduction of the theory the courts seized upon it as a method of imposing liability upon insurers, giving a number of explanations of the basis of the duty of the insurer promptly to accept or reject applications for insurance. An examination of the many cases permitting recovery shows that they may be placed in three classifications. There are some cases relying on each of the theories advanced but in the majority of the cases mention of two or more of them in the opinion.

1. Contract theory. There is a large group of cases which contain statements suggesting that the duty arises from a contract implied either in fact or in law to accept or reject the application promptly, in consideration of the advance payment¹¹ of the prem-

⁵ McCully's Adm'r v. Phoenix Mutual Life Insurance Co., 18 W. Va. 782 (1881), wherein the court held: "An application for insurance is a mere proposal, which the company can accept, reject or modify, and until the minds of the parties meet by agreement upon all the terms, and all the conditions, required are performed, no contract arises. . . . a contract cannot bind the party proposing it, until the acceptance of the other party is in some way actually or constructively communicated to it."

⁶ Duffie v. Bankers' Life Ass'n, 160 Iowa 19, 139 N. W. 1087, 46 L. E. A. (N. S.) 25 (1913); Boyer v. State Farmers' Mutual Hail Insurance Co., 86 Kans. 442, 121 Pac. 329, 40 L. E. A. (N. S.) (1912); Security Insurance Co. v. Cameron, 85 Okla. 171, 205 Pac. 151, 27 A. L. R. 444 (1922). For complete list of cases see further, Notes (1920) 15 A. L. R. 1026 and (1931) 75 A. L. R. 952.

⁷ Carter v. Manhattan Life Insurance Co., 11 Hawaii 69 (1897).

⁸ Boyer v. Farmers' Mutual Hail Insurance Co., *supra* n. 6. This case reached an independent result without reference to the Hawaiian case.

⁹ Grossman, *Tort or No Tort* (1929) 56 CH. L. N. 366.

¹⁰ VANCE, *op. cit. supra* n. 1, at 190.

¹¹ Kukuska v. Home Mutual Insurance Company, 204 Wis. 166, 235 N. W. 403 (1931); De Ford v. New York Life Insurance Co., 75 Colo. 146, 224 Pac. 1049 (1924); Strand v. Bankers' Life Insurance Co., 115 Neb. 357, 213 N. W. 349 (1927); American Fire Insurance Co. v. Nabors, 48 S. W. (2d) 459, 463 (Tex. Civ. App. 1932).

ium. Others have found the consideration in the applicant's disabling himself from applying elsewhere¹² for insurance during the waiting period, or of submitting to the physical examination. In other words, silence, long continued, gives consent.¹³

2. Tort theory. In this group of cases the courts point out that the delay in acting upon an application subjects the applicant to unnecessary danger of loss and holds that guided by the considerations which ordinarily regulate conduct, a reasonable man would have acted with diligence.¹⁴ Only a few cases have gone so far¹⁵ as to base the liability solely upon so general a principle but they tend to illustrate the view that an insurance contract must be considered in all its parts as different from the ordinary contract.

3. Public Utility theory. This theory originated in the case of *Duffie v. Banker's Life Ass'n*,¹⁶ where the duty to act promptly was based chiefly on the fact that the state had chartered the insurance company and in furtherance of a legislative policy that all who are eligible and desire it should have an opportunity to purchase insurance.¹⁷ The insurance business has been held to be impressed with a public interest and thus different from, and subject to, a greater degree of regulation than ordinary business.¹⁸ Discrimination in rates has been prohibited¹⁹ and the company's freedom of contract has been abridged by statutes curtailing its privilege of inserting stipulations against fraud.²⁰ There is a

¹² *Strand v. Bankers' Life Insurance Co.*, *supra* n. 11.

¹³ *Carter v. Manhattan Life Insurance Co.*, *supra* n. 7 (based on submission to physical examination). Some courts have stated that "the action is founded on contract though nominally laid in tort." *Columbian National Life Insurance Co. v. Lemmons*, 96 Okla. 228, 222 Pac. 255 (1923).

¹⁴ *Boyer v. State Farmers' Mutual Hail Insurance Company*, *supra* n. 6.

¹⁵ *Wallace v. Hartford Fire Insurance Company*, 31 Idaho 481, 174 Pac. 1009 (1918); *Wilkin v. Capitol Fire Insurance Co.*, 99 Neb. 828, 157 N. W. 1021 (1916).

¹⁶ 160 Iowa 19, 139 N. W. 1087 (1913). While the insurance company has an absolute right to accept or reject it must do so within a reasonable time. *Strand v. Bankers' Life Insurance Co.*, *supra* n. 11.

¹⁷ *De Ford v. New York Life Insurance Co.*, *supra* n. 11; *Security Insurance Co. v. Cameron*, *supra* n. 6.

¹⁸ *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612 (1914).

¹⁹ *Equitable Life Assurance Society v. Commonwealth*, 113 Ky. 126, 67 S. W. 388 (1902).

²⁰ *Northwestern Life Insurance Company v. Riggs*, 203 U. S. 243, 27 S. Ct. 126 (1906) (or suicide); *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489 (1907); *Head Camp Woodmen of the World v. Sloss*, 49 Colo. 177, 112 Pac. 49 (1910).

constantly increasing movement to shift the burden of loss due to accident from the individual to the community and while this is usually done by the legislature, as in the case of Workmen's Compensation laws, the courts are inclined to further it through the common law.²¹

In cases like the present one where the delay is caused by the local agent the principal should be liable under the doctrine of *respondeat superior*.²² Once the duty of the principal to act promptly is established the courts have had no difficulty in finding the same duty when the agent was responsible for the delay.²³

The weight as well as the wave of authority is in favor of granting relief in tort actions in this type of case whether the action is based on negligent conduct or upon the breach of a duty imposed by law. The social desirability of ameliorating the situation of unfortunate individuals by the law of probability which is evident in many fields of activity should cause the courts to exact of insurers a responsibility for efficient action far greater than is required in the ordinary business enterprise. There must also be considered the peculiar status of the insurer and the applicant, the insurance contract being one of adhesion,²⁴ which is treated in a way different from an ordinary agreement. These important considerations seem to have been ignored in the decision of the principal case. The court considered itself bound by the dictum of a prior case which rejected the theory largely on the ground that it was an innovation in the law.²⁵ Accordingly the present decision seems regrettable.²⁶

Since the applicant injured by the delay can recover in neither contract nor tort in West Virginia it is suggested that the

²¹ *Dyer v. Missouri State Life Insurance Co.*, 132 Wash. 378, 232 Pac. 1049 (1925).

²² *Royal Neighbors v. Fartenberry*, 214 Ala. 387, 107 So. 846 (1926); *Waller v. Hartford Fire Insurance Co.*, 31 Idaho 481, 124 Pac. 1009 (1918); *Wilkin v. Capitol Fire Insurance Co.*, *supra* n. 15; *Fox v. Insurance Co.*, 185 N. C. 121, 116 S. E. 266 (1923).

²³ *Fox v. Insurance Co.*, *supra* n. 22.

²⁴ VANCE, *op. cit. supra* n. 1 at 201. As such it differs from the ordinary contract between individuals where both parties have the same opportunities for negotiation.

²⁵ *Thornton v. Order of Mechanics*, 110 W. Va. 412, 158 S. E. 507, 509 (1931).

²⁶ It is doubtful if any court would deny recovery in tort for the non-feasance of a railroad company if a shipment were presented with payment and all requirements were complied with and the railroad did nothing for an unreasonable time causing loss to the shipper.

legislature should enact a statute declaring that unreasonable delay would give rise to tort liability for damages to the amount of the face value of the policy applied for, or that the insurer would be bound by the contract unless it notified the applicant within a specified time. Support for the constitutionality of the statute might be drawn from a decision of the Federal Supreme Court sustaining a somewhat similar enactment, relating to certain kinds of crop insurance, as a valid exercise of the police power.²⁷

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²⁷ *Wanberg v. National Union Fire Insurance Co.*, 46 N. D. 369, 179 N. W. 666 (1920) construing § 4902 of N. D. COMP. LAWS ANN. (Supp. 1925) (must pass on hail insurance application within 24 hours), affirmed in *National Union Fire Insurance Co. v. Wanberg*, 260 U. S. 71, 41 S. Ct. 72 (1922).