Volume 48
Issue 1 *Dickinson Law Review - Volume 48, 1943-1944*

10-1-1943

The Duty of an Insurer to Act Promptly on Application

Harold N. Green

about the terre-tenant whose deed is not recorded. Presumably revival between the original parties will continue the lien for five years against the land conveyed.

Prior to November 28th, 1943, (within six months from the enactment of the act) judgments may be revived as to terre-tenants whose deeds had not been recorded for five years, unless the five-year period expired within the six months, in which case revival has to be had before the expiration of the five-year period.

The act says nothing about possession giving the same constructive notice as recording of the deed but section 2 does require service of the sci. fa. on all persons occupying the real estate.

It was held in Farmers N. B. & T. Co. v. Barrett, 321 Pa. 273, that the creditor has five years from the recording of the terre-tenant's deed to revive as against him and that he need not be joined in a sci. fa. against the judgment debtor but may be served with a second sci. fa. on the original judgment at any time within the five-year period from the date his deed was recorded, even though his deed was on record when the first sci. fa. was issued.

It was evidently the legislative purpose to change this rule and to enable a terre-tenant, whose deed is on record when a judgment is revived, to feel that his land will be free from the lien of the judgment, if he is not made a party to the original sci. fa.

A judgment is now a lien for only five years, not only as to land of the debtor but also as to land conveyed subject to the lien of the judgment, if the terre-tenant puts his deed on record. Revival before recording or taking possession will extend the lien for five years from the date of the judgment of revival.

THE DUTY OF AN INSURER TO ACT PROMPTLY ON APPLICATION

This problem of whether or not a duty rests upon an insurer to act promptly upon application, although not arising too frequently, does come into the limelight in certain types of insurance, where the agent is not authorized to complete the contract, and where the contract is not completed prior to the decease of the insured. In many types of insurance one deals solely with an authorized agent who is authorized to complete the contract. But in other types the agent is authorized only to transmit the application to the home office of the company. It is in these latter cases where through carelessness or some other factor, a delay has been caused in the delivery of the policy, that our question becomes one of importance. To better understand our problem, let us look at the following hypothetical case:

> "A goes to B, an agent of X Life Insurance Company to take out a health and accident policy. B is not authorized to consummate the contract, but only to transfer the application to the main office of the company. A pays his first premium, and B sends the policy to its destination. But due to B's negligence, the policy travels to 3 or 4 different offices before reaching the main office. During all of this time A has somewhat of an understanding that he is insured. And then something happens to A, prior to the final issuing of the policy. A now sues the Company on the policy."

It is easy for one to see why A, in the above case would be justified in feeling that the company was liable. Anyone in his place would feel that he would have been reimbursed if there had been no delay and therefore why should he, the applicant, be made to suffer the loss.

In the remainder of this article, your author will bring forth the history of this problem, including the most outstanding cases in some of the various states dealing therewith. Furthermore, he will discuss the latest Pennsylvania case on point and show why it should not be followed in the future. But let us first turn to the history of our problem.

In the early cases the applicant brought action against the company in contract on the theory that the long silence of the insurance company constituted an acceptance of the offer contained in his application, or that from the silence the law would presume an acceptance. Actions brought on these theories met with little success. Many lower courts, basing their decisions upon the weight of equities and not upon the sound principles of law, held the insurance companies liable to said applicants. But on appeal, these decisions would be definitely overruled. The rules on this view are set out by Prof. Vance in his book on Insurance, as follows:

> "The mere delay of the insurer, however unreasonable, in acting upon an application for insurance, raises no implication of its acceptance. Nor does such delay estop the insurer from denying the existence of the contract. This rule is sound in principle, as the application is a mere offer which requires some overt act of acceptance by the insurer to change it into a contract. It is also supported by the great weight of authority."

It is important to notice, at this stage in the history, the marked tendency of the courts in desiring to allow recovery. This tendency may be shown by the fact that many courts of original jurisdiction so held, and also by the fact that the justices of the upper courts, although denying recovery, suggest that the insurance company might be liable in some other form of action.

Finally one plaintiff adopted a new course. In 1897 in the case of *Carter v. Manhattan Life Insurance Company*[1] the plaintiff brought an action in tort against

1. Carter v. Manhattan Life Insurance Company, 11 Hawaiian Reports 69.

the company and obtained a verdict. This judgment was affirmed upon appeal. The court held that the agent of the defendant was under a non-contractual duty to forward the application promptly, and that for his breach of duty the company was liable. This decision excited very little comment. The reason for this is aptly expressed by Professor Vance at Page 190 in his book:

> "Probably because the report of this case was not generally available to the bar of the United States, it seems not to have made any impression upon the American cases."

For the next fifteen years, the unsuccessful applicants continued bringing their actions in contract and were continuously defeated. Then when a suit was brought in tort, this case was neither argued by counsel nor cited by the court.[2]

The case that really marks the beginning of the doctrine that an insurance company is liable in tort for the carelessness of its agents in forwarding the application is that of *Boyer v. State Farmers Mutual Hail Insurance Company*.[3] Here an agent held the plaintiff's application for hail insurance three days before he forwarded it, with the result that when the plaintiff's crops were destroyed, no policy had been issued. The trial court found for the plaintiff and this was affirmed upon appeal by Judge Burch. But the opinion in this case made little effort to explain the novel doctrine. It states:

> "There was sufficient danger to the plaintiff to be apprehended from delay in closing the transaction that a reasonably prudent business man, guided by the considerations which ordinarily regulate conduct, would have acted with diligence."

This opinion in no way reveals the reasons for its holding and therefore in and of itself is not a holding on which one may confidentially rely. Judge Burch assumed many of the points to be proved. Therefore this case cannot be considered as an important milestone in the history of our problem.

Perhaps the greatest milestone in the history of this problem, and the case which is in accord with the weight of authority at the present time is *Duffie v. Bankers' Life Association*.[4] The opinion in this case by Judge Ladd of the Supreme Court of Iowa was much more thoroughly reasoned and more conclusive than that rendered in the Boyer case, supra. In this case the evidence clearly established that the applicant was in sound health and otherwise an acceptable risk. He had paid the first premium and done all other things required of him before issuance of the policy. The application, however, was negligently mislaid by the insurer's agent and not sent forward until the accidental death of the applicant some thirty days

---

2.Upon reading the Hawaiian case it is to be noted that the court relied solely upon the dicta in the following cases: Stewart v. Helvetia Swiss Fire Insurance Company, 102 Cal. 218; Trask v. German Insurance Company, 53 Mo. App. 625; and also upon two other cases, one in New York and one in Iowa.

3.Boyer v. State Farmers Mutual Hail Insurance Company, 86 Kan. 442, 121 Pac. 329 (1912).

4.Duffie v. Bankers' Life Association, 160 Iowa 19, 139 N.W. 1087.

after the date of the application. An action in tort was brought by the applicant's widow, suing as beneficiary designated in the application, and alleging that by the negligence of the insurer she had been deprived of the insurance policy that would otherwise have been issued in due course. As administratrix she also filed a petition of intervention. The lower court directed a verdict for the defendant in both proceedings. In the Supreme Court the judgment entered was affirmed as to plaintiff's action as beneficiary, but reversed as to her petition as administratrix. The reason for the above holding may best be given in the words of Ladd J. 139 N. W. 1087 at 1089—

> "But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects and supervises their business. Having solicited applications for insurance, and having so obtained them and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon or suffer the consequences flowing from their neglect so to do. Otherwise the applicant is unduly delayed in obtaining the insurance he desires, and for which the law has afforded the opportunity, and which the insurer impliedly has promised, if conditions are satisfactory. Moreover, policies of insurance ordinarily are dated as of the day the application is signed, and, aside from other considerations, the insurer should not be permitted to unduly prolong the period for which it is exacting the payment of premiums without incurring risk."

In the above quotation it is clearly shown that the court adopted the view that the company was under a duty to act promptly because it held a franchise from the state. This argument is somewhat rebutted by the fact that many other classes of corporations are chartered but it does not follow that the same duty rests upon them; but then this latter argument may also be refuted by pointing out the peculiar structure and organization of an insurance company, in comparision with these other corporations.

Since the Duffie case, there have been other decisions in many other states criticising the holding for various reasons, but in the final outcome the courts find themselves in accord. Therefore, it can be said that the majority of the states are in accord with the Duffie case.

In 1940, almost 20 years later, a case presenting the same problem arose in Pennsylvania, and recovery was denied. This was the case of *Zayc, Admr. v. John*

Hancock Mutual Life Insurance Company of Boston.[5] The facts of this case are as follows: The applicant applied for a 20 payment life insurance policy of $12,000 with a double indemnity provision, on June 25, 1931 and paid $4.00 on the first premium. Due to this application, the applicant did not attempt to take out a policy with any other company. The defendant company, for no apparent reason, failed either to accept or to reject the policy by August 25, 1931, the date on which the applicant was accidentally killed: and did not thereafter offer to return his four dollar deposit. The applicant's administrator then sued in trespass, alleging that by reason of the negligence of the defendant company in failing to advise the applicant within a reasonable time that a policy would or would not be issued, he was deprived of life insurance protection which he otherwise would have had.

The lower court held for the defendant and upon appeal, this decision was affirmed. The opinion, rendered by Mr. Justice Patterson was to the effect that:

> "The neglect or unreasonable delay of an insurance company in acting upon an application for insurance is not tortious, and a trespass action cannot be based upon it because the law places no affirmative duty on an insurance company to act upon an application for insurance within a reasonable time."

A well-written criticism of this opinion is a case note in the Dickinson Law Review.[6] This criticism is to the effect that the court, in establishing the lack of duty, refuses to inspect the equities which the facts of the case present, and which are the primary bases for finding a duty in the pioneering cases. Instead the court tries to show why similar cases in other jurisdictions, oppositely decided such as the Duffie and Boyer cases, are wrong. The main point in this criticism is brought out in the following quotation:

> "Further, though discussing a tort liability, the court makes the following conclusion"—then the writer quotes from the opinion a paragraph to the effect that no contract was formed, and then he continues: "In a suit begun purely on a tort basis, the law of contracts should not be allowed to preclude the possibility of negligence, and a duty should be placed upon the defendant if the facts indicate the risk of its action damaging someone far exceeded the utility of its conduct . . . . . It would seem that the court reached an erroneous result in the present case because it. . . . . assumed that no duty existed and attempted to justify this decision on contract rather than tort principles."

This law review article also brings out another point upon which the answer to this whole problem should be based. That is the point of weighing risk against utility.

---

[5] Zayc, Admr. v. John Hancock Mutual Life Insurance Company of Boston, 338 Pa. 426, 13 A. (2nd) 34.

[6] 46 Dickinson Law Review 205 (1942).

In the Restatement of Torts, sec. 298, comment "a" it is stated: "As in all cases where the reasonable character of the actor's conduct is in question, its utility is a matter to be weighed against the magnitude of the risk which it involves."

If the courts in all cases in which this problem has arisen, would use this test, a fairer result would have been reached. It is very apparent that there is no utility in the defendant's delay, and that the risk which is presented has much weight. Therefore this Pennsylvania case would have been decided differently, had the above test been used.

The history of this problem from the beginning down to the most recent Pennsylvania case, including the most important cases on point which have been the stepping stones in the development of this history, convinces the writer that a duty does rest upon an insurer to answer an application. A quotation from an article by C. W. Funk in the Pennsylvania Law Review[7] to be found in Goble's *"Cases on Insurance"* at page 55 written in 1927, prior to the Zayc case, which shows the early tendency, even in Pennsylvania, to impose this duty upon an insurer, concludes this article.

> "Considering the problem purely on its merits, it is submitted that the rule announced by the Duffie Case is a desirable one. Insurance has come to play such an extensive part in our civilization that the business is recognized as being quasi-public in character; and the insurance contract is treated by the courts in a way different from ordinary agreements. It (the insurer) is seldom subjected to greater liability than it would have incurred had it functioned properly and accepted the proposal. To allow it to benefit as the result of its carelessness, which has so greatly harmed the applicant, seems offensive to all theories of justice . . . It is believed, however, that when the question is presented before the appellate tribunals of the various states of this country which have not yet considered it, the majority of them will be sufficiently influenced by the considerations which have been mentioned to decide that the insurer must be responsible for the loss which the applicant incurred."

HAROLD N. GREEN

---

[7]75 U. of Pa. Law Review 207, 222.