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Insurance Applications As Evidence

LEGISLATION

INSURANCE APPLICATIONS AS EVIDENCE

Another example of legislative protection extended to an insured in his dealings with insurance companies is contained in the recent amendment to Section 142[1] (formerly Section 58)[2] of the New York Insurance Law. It concerns life, health and annuity insurance and provides that: "No application for the issuance of any such policy or contract shall be admissable in evidence unless a true copy of such application was attached to such policy when issued".

While early in the history of insurance it was the insurer who needed "protection", it soon became apparent that the insured also required a shield to guard against overreaching by the insurer.[3] The amendment in question is but another step in the legislative path of protective statutory regulation which began in this state as far back as 1886.[4] The effect of this amendment is to prevent the admission in evidence of any application for an insurance policy if a copy is not attached to the policy in suit. Simple though this may seem, the amendment has had a varied and interesting background.

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1. N. Y. Laws 1940, c. 94, § 142 (1), effective March 6, 1940.

2. N. Y. Laws 1906, c. 326, § 16: "Every policy of insurance issued or delivered within the state . . . by any life insurance corporation doing business within the state shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void". Statutes regulating insurance companies have been held constitutional. German Alliance Ins. Co. v. Lewis, 233 U. S. 389 (1913).

3. Patterson, *Administrative Control of Insurance Policy Forms* (1925) 25 COL. L. REV. 253, 254. This attitude of "protecting the insured" is not limited to the legislative sphere. The policy of many courts is to resolve all doubt or uncertainty in the construction of an insurance contract in favor of the insured. Smith v. Nat'l Fire Ins. Co., 175 N. C. 314, 95 S. E. 562 (1918). But when the legislatures prescribed a "standard" form of insurance contract the reason for the rule of construction failed and some courts thereafter refrained from construing insurance policies against the insurer in cases of ambiguity. Gallopin v. Continental Casualty Co., 290 Ill. App. 8, 7 N. E. (2d) 771 (1937); Solomon v. United States Fire Ins. Co., 53 R. I. 154, 165 Atl. 214 (1933). Nevertheless, some courts and writers rejected this exception and held to the proposition that all doubt was to be resolved in favor of the insured. Levinton v. Ohio Farmer's Ins. Co., 267 Pa. 448, 110 Atl. 295 (1920); RICHARDS, INSURANCE (4th ed. 1932) 115-116; VANCE, INSURANCE (2d ed. 1930) 691-693. The reason for construing all doubt in favor of the insured, even under the "standard" policy, is thus stated by Vance, *supra*: "It is also apparent from an examination of the instruments themselves, as well as the history of their adoption, that their terms were really chosen by the underwriters with particular reference to their own interests." See also O'Neil v. American Fire Ins. Co., 166 Pa. 72, 30 Atl. 943 (1895). For a comment on the construction of statutory clauses in insurance policies see (1938) 72 U. S. L. REV. 361.

4. N. Y. Laws 1886, c. 488. The first state to standardize an insurance policy was Massachusetts in 1873. For the different types of this "statutory regulation" and their history see Patterson, *supra* note 3.

Warranties and Representations

Prior to 1907, when Section 58 of the Insurance Law became effective, the breach of a warranty,[5] appearing in an application for insurance, was a good defense to any claim upon the policy. This was so although the warranty related to matters which were, in fact, immaterial.[6] On the other hand, a misrepresentation[7] contained in the application was good as a defense only if it concerned a material matter,[8] and only if it were found that the representation was substantially untrue. The effect of Section 58, which required all statements by the insured, *in the absence of fraud,* to be deemed representations and not warranties, was to abolish the harshness of the results which naturally followed if a breach of warranty were found to exist.[9] A breach of warranty of an immaterial fact would not void the policy,[10] and of course a misrepresentation did not do so unless it likewise concerned a material matter.[11] A further step in

5. N. Y. INS. LAW (1939) § 150 (1) provides that a warranty is " . . . any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent to the insurer's liability thereunder" the existence or non-existence of a fact which tends to diminish or increase the risk of loss. See also VANCE, INSURANCE (2d ed. 1930) 384-386.

6. Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 76 N. E. 914 (1906); Gaines v. Fidelity and Casualty Co., 188 N. Y. 411, 415, 81 N. E. 169, 170 (1907), ("It is a general rule . . . that the materiality . . . is of no consequence"). See also Foot v. Aetna Life Ins. Co., 61 N. Y. 571, 576 (1875); 1 MAY, INSURANCE (4th ed. 1900) § 156. The same rule was applied in other jurisdictions. Bennett v. Agr. Ins. Co., 50 Conn. 420 (1883).

7. N. Y. INS. LAW (1939) § 149 (1). A representation is a statement as to a past or present fact made to the insurer by or by the authority of the applicant as an inducement to making of such contract. A misrepresentation is a false representation. See VANCE, INSURANCE (2d ed. 1930) 359 to the effect that a representation is a statement made to give information to the insurer and otherwise induce him to enter into the insurance contract.

8. See Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 113, 76 N. E. 914, 916 (1906). The basis for such a distinction in result between a breach of warranty and a misrepresentation was that a representation was merely *collateral* to the contract whereas a warranty, regardless of its materiality, was a *part* of the contract and had the force of a condition precedent. *Ibid.* See also 1 MAY, INSURANCE (4th ed. 1900) §§ 181, 184.

9. Kasprzyk v. Metropolitan Life Ins. Co., 79 Misc. 263, 140 N. Y. Supp. 211 (Sup. Ct. 1913); E. D. P. Dye Works Inc. v. Travelers Ins. Co., 234 N. Y. 441, 138 N. E. 401 (1923). It will be noted that when the Insurance Law was recodified the phrase "in the absence of fraud" was omitted from section 142.

10. Rakov v. Bankers' Life Ins. Co., 164 App. Div. 645, 150 N. Y. Supp. 55 (3d Dep't 1914). See concurring opinion of Smith, P. J., *id.* at 649, 150 N. Y. Supp. at 58. "It seems clear to me that the object intended to be accomplished by this legislation was to protect the policyholder from the rule of law that had theretofore been held that a warranty of an immaterial fact, if untrue, voided the policy."

11. E. D. P. Dye Works, Inc. v. Travelers Ins. Co., 234 N. Y. 441, 138 N. E. 401 (1923); Murphy v. Colonial Life Ins. Co., 83 Misc. 475, 145 N. Y. Supp. 196 (Sup. Ct. 1914), *modified,* 163 App. Div. 875, 147 N. Y. Supp. 565 (1st Dep't 1914). See also Minsker v. John Hancock Mut. Life Ins. Co., 254 N. Y. 333, 338, 173 N. E. 4, 5 (1930), where the court stated that "since the enactment of section 58, a statement by the insured, though incorporated

"watching over the insured" was made when the recodification of the Insurance Law, effective January, 1940, provided that Section 142 would apply not only to life insurance but also to policies of accident and health insurance and to contracts of annuity.[12]

The most important provision in Section 58, the predecessor of what is now Section 142 of the Insurance Law, was the requirement that the policy was to contain the entire contract and no application or extraneous writing was to be incorporated therein by reference unless such other writing was attached to or indorsed upon the policy when issued. It is this provision in Section 58 that has sorely vexed the courts and the present amendment was adopted to "lift the veil of confusion" enveloping the section.[13]

Protecting the Insured

Until Section 58 was adopted a contract of insurance could, by reference, incorporate into itself the constitution, by-laws or rules of the insurer and any writings or other instruments of the insured which the policy itself did not contain,[14] and which the insured had never seen or even knew to exist. These references thus made a part of the contract, were held to be warranties,[15] the breach of which avoided the policy.[16] It is a matter of common knowledge that the purchaser of insurance seldom reads the policy and application in its entirety, either because he relies on the insurance agent to set out the facts properly in the application[17] or else because he cannot understand its detailed and technical terms.[18] The picture was well painted by Chief Justice Doe when

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into the policy, will be interpreted as a representation rather than a warranty, at all events in the absence of fraud, and so, even though erroneous, will not vitiate the policy *unless material to the risk*" (Italics inserted).

12. N. Y. LAWS 1939, c. 882, § 142 (1) (3). Section 58 had formerly been held only to apply to life insurance. Baumann v. Preferred Accident Ins. Co., 225 N. Y. 480, 122 N. E. 628 (1919).

13. N. Y. L. J., February 15, 1940, p. 716, col. 3, letter by Murray L. Watt, Associate Counsel, Joint Legislative Committee for the Re-Codification of the Insurance Law.

14. Cushman v. United States Life Ins. Co., 63 N. Y. 404 (1875) (policy provided that the application for insurance and the statements contained therein constituted part of the contract); Clemans v. Supreme Assembly Royal Society of Good Fellows, 131 N. Y. 485, 30 N. E. 496 (1892); Gill v. Manhattan Life Ins. Co., 11 Ariz. 232, 95 Pac. 89 (1908).

15. Dilleber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182 (1877); Gaines v. The Fidelity and Casualty Co., 188 N. Y. 411, 81 N. E. 169 (1907); Baker v Home Life Ins. Co., 64 N. Y. 648 (1876). It was a matter of general knowledge, of legislative knowledge and of judicial knowledge that all statements which are either warranties or representations are contained alike, generally, in the paper designated the application." Archer v. Equitable Life Assur. Soc., 218 N. Y. 18, 23-24, 112 N. E. 433, 435 (1916).

16. See note 6, *supra*.

17. "Little used to business or business forms, it is quite easy to see that he may be disposed to place almost entire credence in the statements made by the agent" O'Farrell v. Metropolitan Life Ins. Co., 22 App. Div. 495, 498, 48 N. Y. Supp. 199, 201 (2d Dep't 1897). See also Fitchner v. Fidelity Mut. Fire Ass'n, 103 Iowa 276, 72 N. W. 530 (1897).

18. "The contracts are ignorantly made and are only voluntarily entered into because

he said that numerous provisions inserted in the complicated policies and forms of application " . . . were of such bulk and character that they would not be understood by men in general. . . ."[19] What often resulted when the beneficiary attempted to collect the insurance was the interposition by the insurer as a defense the breach of some warranty made by the insured in his application. As was said by the Supreme Court of Pennsylvania, ". . . an insurance company would offer a by-law, or the application of the insured, in evidence, for the purpose of impaling the plaintiff upon some technical point".[20] More than likely the insured, as a part of his contract, did not have a copy of the statements he made in the application and he could not, by reading the policy, know what the statements were.[21] The first important case to construe Section 58 pointed out this evil,[22] and stated that in order to prevent any "hidden jokers" from springing up to perplex the insured or his beneficiary, the historic Section 58 of the Insurance Law was enacted.

Following the enactment of Section 58, it was repeatedly held that the legislature intended that the policy should *physically* contain the entire contract. All of the statements constituting the contract were to be placed ". . . through the delivery of the policy, in the possession of and be and remain accessible to the insured. . . . Therefore, all those statements, which are on their face warranties, must be incorporated in the policy, either directly or by indorsement or attachment, or be abandoned as warranties".[23] Henceforth, "the defense that the insured made false statements inducing the issuance of the policy ceased to constitute a valid defense"[24] unless those statements were attached to the policy.

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not understood". O'Farrell v. Metropolitan Life Ins. Co., 22 App. Div. 495, 499, 48 N. Y. Supp. 199, 202 (2d Dep't 1897). (Italics inserted). In Abbott v. Prudential Ins. Co. of America, 281 N. Y. 375, 384, 24 N. E. (2d) 87, 91 (1939), the court said the interpretation of Section 58 has been such as to reject all unincorporated statements and writings "which the insured may have made or signed *without fully understanding their purport or effect*". (Italics inserted).

19. De Lancey v. Rockingham Farmers' Mut. Fire Ins. Co., 52 N. H. 581, 587 (1873). In a masterly presentation, the Chief Justice has painted a graphic picture of the conditions which gave rise to the necessity of legislative intervention. The student of political science in studying the cause of public antagonism to corporations and "big business" may well consider the early behaviour of the insurance companies.

20. Norristown Title Trust & Safe Deposit Co. v. John Hancock Mut. Life Ins. Co., 132 Pa. 385, 391, 19 Atl. 270, 271 (1890).

21. Lampke v. Metropolitan Life Ins. Co., 279 N. Y. 157, 162, 18 N. E. (2d) 14, 16 (1938); Norristown Title Trust & Safe Deposit Co. v. John Hancock Mut. Life Ins. Co., 132 Pa. 385, 391, 19 Atl. 270, 271 (1890).

22. Archer v. Equitable Life Assur. Soc., 218 N. Y. 18, 23, 112 N. E. 433, 435 (1916).

23. *Ibid.* at 23, 112 N. E. at 435 (1916). See also Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 464, 176 N. E. 838, 840 (1931) where Cardozo, C.J. stated that Section 58 required " . . . the whole contract to be stated in the policies, and not . . . pieced out by documents included by mere reference. . . . "

24. Lampke v. Metropolitan Life Ins. Co., 279 N. Y. 157, 162, 18 N. E. (2d) 14, 16 (1938).

Sauce for the Gander

Although the primary purpose in enacting Section 58 was the relief and protection of the insured rather than the insurer[25] and though the courts gave the statute a broad construction to carry out that purpose,[26] situations nevertheless arose where the statute worked a hardship on the insured. One such instance was the case of *Minsker v. John Hancock Mut. Life Ins. Co.*,[27] where the insured gave truthful answers concerning his past health to the agent and medical examiner of the insurer who recorded erroneous answers without the knowledge of the insured. Pursuant to Section 58, the application containing the incorrect answers was attached to the policy and thus, by statute, became a part of the contract. The beneficiary contended that since the agent and medical examiner of the insurer had full knowledge of the facts (*i.e.*, the past health of the applicant), the insurer was estopped from invoking the false statements contained in the application as a defence. Prior to 1907, it was well settled that if the agent of the insurer was notified of facts which "under the terms of a policy would make it void if not noted upon it, the company could not avail itself of the defense that such facts were not stated in the policy, the underlying principle being that it would be a fraud upon the insured to accept pay for a policy which the company *through its agents* knew was void when delivered."[28] The court in the *Minsker* case by refusing to give the plaintiff

25. The purpose of Section 58 "was the protection of those insured and of the beneficiaries claiming under them." Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 464, 176 N. E. 838, 840 (1931).

26. Abbott v. Prudential Ins. Co. of America, 281 N. Y. 375, 384, 24 N. E. (2d) 87, 91 (1939).

27. 254 N. Y. 333, 173 N. E. 4 (1930).

28. Minsker v. John Hancock Mut. Life Ins. Co., 254 N. Y. 333, 336-337, 173 N. E. 4 (1930) (italics inserted) citing Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13, 62 N. E. 763 (1902). The *Sternaman* decision was a leading case on the subject of estoppel and was frequently cited. There the application stated that the medical examiner was the agent of the insured and not of the insurance company. The court held the insurer could not make its agent the agent of the insured and, since the agent had knowledge of the facts concerning the applicant's health, the insurer could not subsequently interpose those facts as a defense. "It could not take the money of the insured while he lived and, when he was dead, claim a forfeiture on account of what it knew at the time it made the contract of insurance, for that would be a fraud." *Id.* at 23, 62 N. E. 763, at 766. See also Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392, 295, 74 N. E. 224 (1905); Miller v. Phoenix Mut. Life Ins. Co., 107 N. Y. 292, 296, 14 N. E. 271, 273 (1887). The federal courts formerly applied the same rule of estoppel to the insurer when its agent at the date of issuance of the policy had full knowledge of the facts now relied on as a defense [Insurance Co. v. Wilkinson, 13 Wall. 222 (U. S. 1871)], but the Supreme Court later adopted a different view and held parol testimony inadmissible to show that the insurer through its agent had knowledge of the facts. Northern Assur. Co. v. Grand View Building Ass'n, 183 U. S. 308 (1901). The latter rule is followed in Massachusetts [Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493 (1905)] and New Jersey [Dewees v. Manhattan Ins. Co., 35 N. J. L. 366 (1872)] on the ground that the insured's evidence would violate the parol evidence rule.

relief, held the statutory rule (Section 58) superseded the judge-made rule[29] when a copy of the application was attached to the policy,[30] and that the insured or his beneficiary in such a case could not claim an estoppel against the insurer. The insured must accept any detriment flowing from the rule, as well as any benefits. Just as *Archer v. Equitable Life Assur. Soc.*,[31] held the insurer could not rely on any statement in an application not attached to the policy, the *Minsker* case, fourteen years later, held the insured to the same requirements and stated that since the application was attached to the policy, it was the *duty* of the insured to read it and correct any mistakes appearing therein.[32] While the latter decision has been criticized as straining "the statute to the breaking point",[33] such criticism apparently overlooks the purpose of the statute which was to give the insured something he seldom had previously, *viz.*, possession of *all* statements which might affect the insurance contract. True, the statute was enacted for the benefit of the insured but this was so only in the sense of protecting him from statements which did not appear in the contract of insurance and when those statements were put in his possession he received the full protection the statute intended to give him. If the insurer is estopped when the application is not attached, why not hold the insured to the same level of liability when the application is attached?[34] The ruling in the *Minsker* case, which was unanimous, has been frequently cited and continues to be the law of New York. The reenactment of the Insurance Law and the amendment under consideration do not affect the decision in any respect.

Briefly, then, as a result of the cases construing Section 58, extraneous state-

29. Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13, 62 N. E. 763 (1902); see note 28, *supra*.

30. After the enactment of Section 58, "the case of Sternaman v. Metropolitan Life Ins. Co. and others to the same effect, ceased to be authority upon the question . . . when a copy of the application was endorsed upon or attached to the policy . . . " Minsker v. John Hancock Mut. Life Ins. Co., 254 N. Y. 333, 337, 173 N. E. 4, 5 (1930).

31. 218 N. Y. 18, 112 N. E. 433 (1916).

32. N. Y. L. J., July 26, 1938, p. 224, col. 1, article by Irving Moldauer. "The plaintiff is bound by the answers as written, since the application was physically annexed to the policy of insurance, . . . " Minsker v. John Hancock Mut. Life Ins. Co., 254 N. Y. 333, 339, 175 N. E. 4, 5 (1930). The court thus applied general contract law. RESTATEMENT, CONTRACTS (1932) § 70 provides: "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation". The courts, however, by putting insurance contracts in a class by themselves have hesitated to apply the above principle of contract law to such contracts. VANCE, INSURANCE (2d ed. 1930) 215.

33. Comment (1931) 29 MICH. L. REV. 344, 345. See also (1931) 15 MINN. L. REV. 595; (1931) 16 CORN. L. Q. 235.

34. Bollard v. New York Life Ins. Co., 98 Misc. 286, 294, 162 N. Y. Supp. 706, 710 (Sup. Ct. 1917), *aff'd*, 168 N. Y. Supp. 1102 (App. Div. 1st Dep't 1918), *aff'd*, 228 N. Y. 521, 126 N. E. 900 (1920). See also Stanulevich v. St. Lawrence Life Ass'n, 228 N. Y. 586, 127 N. E. 315 (1920); Satz v. Massachusetts Bonding & Ins. Co., 243 N. Y. 385, 153 N. E. 844 (1926).

ments not attached to the policy were not available to the insurer as a defense; if the statements were attached to the policy they were available as a defense; but in the absence of fraud, they were deemed representations and not warranties. On the insured's side of the picture, if the extraneous statements were attached to the policy, he was bound thereby and could not introduce parol evidence to show mistake, or knowledge of the true facts by the insurer.

Estoppel Applied to the Insurer

The cases which prepared the foundation for the amendment to Section 142 were those involving waiver or estoppel. As pointed out above, if the application was not attached and the insurer knew the true facts, such conduct on the part of the insurer estopped it from using those facts as a defense.[35] But the question only arose when the agent had the authority to waive conditions. If the agent was authorized not only to solicit applications but also to make delivery of the policies and collect the premiums, he was held to have apparent authority to waive conditions and the company was bound by such waiver.[36] Usually the policy or application contained provisions to the effect that the agent could not waive any terms or conditions thereof. The next step, therefore, was to determine whether the applicant had notice of the limitations upon the agent's authority. True, the policy gave such notice but that was only received when the policy was delivered and consequently such provision only charged the insured with notice that the agent could not *thereafter* waive conditions in the policy.[37] In other words, to prevent a waiver or estoppel the insurer, *before the contract was made,* had to notify the applicant of the agent's limited authority. If the application was attached to the policy the notice of limitation would be conclusive and binding upon the insured. That was obvious from the wording of Section 58.[38] But if the application containing the notice limiting the agent's authority was not attached to the policy, could it be used to show receipt of notice by the insured? Strangely enough, that precise question did not arise until November, 1939, almost thirty-three years after the statute became effective, and the answer given to that question was the primary cause for

35. See note 28, *supra.*

36. McClelland v. Mutual Life Ins. Co., 217 N. Y. 336, 111 N. E. 1062 (1916); Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 176 N E. 838 (1931). For cases holding that under the facts the agents could not bind the company, see Knobel v. London Guarantee Accident Co., 181 App. Div. 870, 169 N. Y. Supp. 79 (1st Dep't 1918); Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6 (1918). See also Brady v Metropolitan Life Ins. Co., 14 N. Y. S. (2d) 581 (Sup. Ct. 1939) to the effect that the power of an agent to waive provisions of the policy depends upon the rank and status of the agent and the nature of the matter which he attempts to waive.

37. Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 176 N. E. 838 (1931); Lampke v. Metropolitan Life Ins. Co., 279 N. Y. 157, 18 N. E. (2d) 14 (1938); Abbott v. Prudential Ins. Co. of America, 281 N. Y. 375, 24 N. E. (2d) 87 (1939).

38. Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 176 N. E. 838 (1831). This was so although the applicant did not read the application or know of its contents. Abbott v. Prudential Ins. Co. of America, 281 N. Y. 375, 380, 24 N. E. (2d) 87, 90 (1939).

amending Section 142. That was the case of *Abbott v. Prudential Ins. Co. of America.*[39]

Policies of insurance were issued to an applicant who was a bad risk, and who died twelve days after the last policy was issued. The agent of the insurer had full knowledge of the applicant's poor health. Each policy was made subject to a condition that the insured, at the time of delivery, was in good health. Further, each policy and application contained a provision that the agent had no authority to waive any conditions in the policy. The administratrix of the insured claimed a waiver of the requirement of sound health on the familiar ground of knowledge by the insurer of the true facts when it issued the policy. The insurer, to show that notice had been given to the applicant of the limitations on the agent's authority, introduced in evidence the signed application containing the notice. Although the application had not been attached to the policy, the court, in a four to three decision, held it admissible in evidence. The court pointed out that it concerned a "matter extrinsic to the contract" (*i.e.* notice to the insured) and distinguished between offering an unattached application to show misrepresentations as to health and one to prove notice to the insured of the limits placed upon the agent's authority to waive a condition. The majority considered the signed application as an admission that notice had been received, whereas the minority argued that it amounted to an incorporation into the contract of an extrinsic writing by mere reference, the specific thing Section 58 prohibited.

Present Weight of Abbott Decision

Any discussion as to the relative merits of the two opinions in the *Abbott* case would unduly extend this article since the effect of the amendment of Section 142 will be to nullify completely the decision. The *Abbott* case said an unattached application could be used to show notice to the insured. The amendment says an application, a copy of which is not attached, can not be used *at all.* This is the practical effect of the amendment since it provides that no application "shall be admissible in evidence" unless a true copy was attached to the policy when issued. Therefore, under this amendment the *Abbott* case would be decided differently because the application, no copy of which was attached to the policy, could not be introduced in evidence to show notice to the insured of the limitations upon the agent's authority. Since, as the entire court in the *Abbott* case agreed, proof of notice to the insured of the limitations on the agent's authority can be shown by any statement, oral or written, of the insured admitting the receipt of such notice, the wisdom of the legislature in removing from the insurer the use of the signed application to show such notice may appear to be carrrying to an extreme the policy of "protecting the insured." However, if one bears in mind the conditions that brought about the enactment of Section 58, the amendment can easily be justified. Although

39. 281 N. Y. 375, 24 N. E. (2d) 87 (1939). For a critical view of the decision, see (1940) 40 COL. L. REV. 333. For interpretations of somewhat similar statutes in other jurisdictions, see New York Life Ins. Co. v. Fukushima, 74 Colo. 236, 220 P. 994 (1923); Olsson v. Midland Ins. Co., 138 Minn. 424, 165 N. W. 474 (1917).

insurers have undoubtedly improved their original tactics, human nature has not altered; the insured seldom reads the application before or after signing.[40] It was this failure of the applicant to read his application, together with other circumstances, that lead to the passage of Section 58. There is no more reason to believe that the applicant reads and understands his application today than there was in 1906. Despite the apparent futility of getting the insured to read his application it is, nevertheless, proper to require the insurer to attach a copy thereof to the policy. Of course it may well be argued that the legislature should not be asked to cover up the shortcomings of the applicant for insurance. Such a contention is weighty but the legislature undoubtedly took a practical view of the subject and treated applicants for insurance "as they are and not as they should be". The amendment does not encourage laxity; it merely recognizes facts as they exist. And for this the applicants alone are not to blame; the insurers must also shoulder the responsibility for the situation since they have complete control over the selection of their agents who are sent out in the field "to sell" insurance and it is to be doubted that such agents are completely allergic to the use of "high pressure salesmanship". In short, it is better that our representatives legislate for insurance applicants as they actually behave and not as they would behave in an insurance Utopia where all would read and understand their applications.

Applications for Reinstatement

The legislature, therefore, is to be commended as far as it has gone. The only regret is that it did not go far enough. The amendment is confined solely to applications for the *issuance* of a policy. It would have been more desirable if it extended to all applications so as to include applications for the *reinstatement* of a lapsed policy. Since Section 58 said, "Every policy of insurance *issued* . . . ", it was naturally held to be applicable only to applications for the issuance of a policy and not to applications for the reinstatement of a lapsed policy,[41] because the reinstatement of a policy is simply a contract for the *continuation* in force of a former policy and is not the issuance of a new policy.[42] Hence if the insurer sought to cancel the reinstatement of a policy on the grounds of misrepresentation of material facts made in the application for reinstatement, it was no defense that the application was not attached.[43] If Section 58 did not

40. As late as 1930, Professor Vance wrote: "it is only rarely that even careful business men do in fact read insurance policies delivered to them". VANCE, INSURANCE (2d ed. 1930) 215.

41. New York Life Ins. Co. v. Rosen, 227 App. Div. 79, 236 N. Y. Supp. 659 (1st Dep't 1929).

42. Mutual Life Ins. Co. v. Dreeben, 20 F. (2d) 394 (N. D. Tex. 1927). See also Reidy v. John Hancock Mut. Life Ins. Co., 245 Mass. 373, 376, 139 N E. 538, 539 (1923) where the court said the applications for the reinstatement of the policy were not applications for a *new* contract of insurance but rather applications for the *revival* of a contract of insurance. For a similar interpretation, see Linder v. Metropolitan Life Ins. Co., 148 Tenn. 236, 255 S. W. 43 (1923).

43. New York Life Ins. Co. v. Rosen, 227 App. Div. 79, 236 N. Y. Supp. 659 (1st Dep't 1929).

apply to applications for reinstatement, then it might be supposed that the insured could interpose the common law rule of estoppel which existed prior to Section 58.[44] However in *Axelroad v. Metropolitan Life Ins. Co.*[45] the Court of Appeals held the theory of estoppel did not apply to the reinstatement of a policy even though the proof was offered on the same theory on which similar proof was offered prior to Section 58, *viz.*, "the knowledge of the agent was the knowledge of the insurer." As a result of that decision the insurer can avoid payment on a reinstated policy by showing a material misrepresentation in the application for reinstatement but the insured can not claim he gave truthful answers to the agent who erroneously recorded them in the unattached application.[46] The *Axelroad* case has created a situation which harkens back to the days of Chief Justice Doe. Paradoxically enough, the same court which nurtured the rule of estoppel in the issuance of a policy and gave protection to the insured long before Section 58 was adopted, now turns a deaf ear to the plaint of the insured that it was the agent who deluded the insurer when the application for reinstatement was filled out. Here is fertile ground for legislative action to protect the insured. If the application for the issuance of a policy is seldom read, what facts exist for believing the insured acts differently when he applies to have his policy reinstated? Why should the fact that his initial policy has lapsed indicate that he has become a stickler for reading later insurance applications? But most important, even if he did read his application he is still unprotected because he continues to be bound by any false answer inserted in the application by the agent. Probably the first inkling which he has that the agent acted wrongfully is when the insurer seeks to cancel the reinstated policy. That condition could be alleviated somewhat by requiring the insurer to attach a copy of the application for reinstatement to the policy.[47] In this connection it may be noted that on the re-codification of the Insurance Law, Section 142 was enlarged to provide that if a copy of the application for reinstatement is not delivered to the insured upon his request, the insurer can not introduce such application in evidence in any action based upon the policy.[48] If the insured does not request a copy, will such application still be admissible? As between the *Axelroad* case (which admitted the application) and the provision in Section 142 expressly denying its use in a particular situation, the better view seems to be that it will still be admitted. Though this requirement of Section 142 is a step in the right direction, it is not entirely satisfactory. If applications and policies are seldom read, it is rather unlikely that an insured will go to the additional trouble of *requesting* a copy of his application for reinstatement.

44. See note 28, *supra*.

45. 267 N. Y. 437, 196 N. E. 388 (1935). There the insurer pleaded that the application for reinstatement contained misrepresentations in regard to material matters, though the agent of the insurer was the one who inserted such false answers without the knowledge of the insured.

46. Axelroad v. Metropolitan Life Ins. Co., 267 N. Y. 437, 196 N. E. 388 (1935).

47. See N. Y. L. J., February 27, 1940, p 890, col. 3, letter by Irving Moldauer, and N. Y. L. J., July 26, 1938, p. 224, col. 1, and N. Y. L. J., July 27, 1938, p. 234, col. 1, containing articles contributed by Irving Moldauer.

48. N. Y. Laws 1939, c. 882, § 142 (5), effective January 1, 1940.

Suggested Amendment

That the legislature is not entirely satisfied with the re-codification of the Insurance Law is evidenced by the many amendments that have been made since the beginning of the current year.[49] It is desirable, therefore, that the legislature take the same practical view of the situation which it exhibited when it enacted the present amendment, by further amending Section 142 to require a copy of the application for the reinstatement to be attached or indorsed upon the policy in order that such application be admissible in evidence.

49. According to a survey made by the Insurance Federation of the State of New York, of the 3,600 bills introduced up to about the middle of March, 408 measures had either directly or indirectly affected the business of insurance. N. Y. Herald Tribune, March 17, 1940, sec. II, p. 15, col. 6.