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COMMENTS

BINDING INSURANCE RECEIPTS: RIGHTS AND LIABILITIES ARISING THEREUNDER

In the field of insurance law there are many conflicts as to the rights and liabilities of the insurer and the applicant. The conflict is especially acute where the agent issues to the applicant a binding receipt which ostensibly insures him prior to the delivery of the policy. Whether or not the beneficiary is legally entitled to payment if the applicant dies between the issuance of the binder and the delivery of the policy depends upon many diverse factors.

An application for insurance is an offer by the applicant to allow the company to insure him.¹ As a general rule no contract with the insurance company comes into existence until the company has accepted the application.² As in any contract the intent of the parties is usually controlling, and all conditions precedent must be complied with before the contract becomes a binding obligation.³ The applicant may revoke his offer at any time before it has been accepted,⁴ and if he does so the insurance company loses the money expended in investigating him and in giving him a medical examination.⁵ In order to avoid the potential loss of such expenditures, insurance companies sometimes issue a binding receipt in return for the payment of the first premium when the application is signed⁶ which amount will usually offset the investigation and examination expenses if the applicant revokes his offer. In some instances the applicant is entitled to the return of his first premium if he withdraws his application, but the amount involved is normally too small to make litigation feasible.⁷ Moreover, to preclude even the possibility of a suit to recover the premium, some binders state that the applicant agrees to forfeit the amount of the first premium if he revokes his application.⁸

While the applicant becomes protected at some time prior to delivery of the policy,⁹ it cannot be said that he is always protected during the entire period between the issuance of the binding receipt and the final approval of his application.¹⁰ Whether or not he is insured from the time the binder is issued depends

1. Couch, Insurance § 84 (1929).

2. *Schultz & Co. v. Camden Fire Ins. Ass'n*, 304 N.Y. 143, 106 N.E.2d 273 (1952); *More v. New York Bowery Fire Ins. Co.*, 130 N.Y. 537, 29 N.E. 757 (1892); *Goldberg v. Colonial Life Ins. Co.*, 284 App. Div. 678, 134 N.Y.S.2d 868 (2d Dep't 1954). See also Mulligan, *Does War Excuse The Payment Of Life Insurance Premiums?*, 17 *Fordham L. Rev.* 63, 69 (1948).

3. "Where an application contains a condition precedent, that condition must be performed before the application can ripen into an agreement, binding on the parties. . . ." Richards, Insurance § 386 (5th ed. 1952). Often the contract is conditioned on delivery of the policy. Couch, Insurance § 93 (1929).

4. See note 1 supra.

5. Comment, 44 *Yale L.J.* 1223 (1935).

6. Havighurst, *Life Insurance Binding Receipts*, 33 *Ill. L. Rev.* 180 (1938).

7. See note 5 supra.

8. *Ibid.*

9. Comment, 63 *Yale L.J.* 523 (1954).

10. See note 6 supra.

on the type of binder used, the language of the binder itself,¹¹ and to what extent the court will impinge on strict contract law in order to protect the beneficiary.¹²

Binding receipts fall into two classes, "satisfaction" and "approval." Under the first type, the "satisfaction" type binder,¹³ coverage becomes effective immediately if the applicant is in fact then an insurable risk, subject to being terminated if the company refuses to accept the application because it does not consider him an insurable risk.¹⁴ This form of binder does not give rise to much litigation when the applicant dies between the time the binder is issued and the time the company acts on the application. All that the beneficiary need show in order to recover is that the applicant was in fact an insurable risk,¹⁵ and that the company had not notified the applicant that his application had been rejected.¹⁶ On the other hand, under the "approval" type binder¹⁷ the applicant is not covered until his application is approved by the home office of the insurance company. However, when approval is given, the coverage becomes effective as of the date of issuance of the binder.¹⁸

THE EXISTING CONFLICT

A serious conflict exists in the application of the law pertaining to approval binding receipts.¹⁹ The incongruity of case law arises because courts differ as to how strictly the offer-acceptance principle of contract law should be enforced²⁰

11. *Corning v. Prudential Ins. Co.*, 248 App. Div. 187, 288 N.Y. Supp. 661 (2d Dep't 1936), aff'd, 273 N.Y. 668, 8 N.E.2d 338 (1937).

12. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom Of Contract*, 43 Colum. L. Rev. 629 (1943); 2 A.L.R.2d 1019 (1948).

13. A typical satisfaction type binder reads in part as follows: "Provided the insured be in sound health . . . on the date of said application, the company's liability . . . shall commence as of the date of said application." See *Western & Southern Life Ins. Co. v. Vale*, 213 Ind. 601, 602, 12 N.E.2d 350, 352 (1938).

14. See *Western & Southern Life Ins. Co. v. Vale*, 213 Ind. 601, 12 N.E.2d 350 (1938); *Reynolds v. Northwestern Mut. Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207 (1920); Comment, 44 Yale L.J. 1223 (1935). Fear that the applicant will not be able to pay premiums, or the existence of an epidemic are not grounds for refusal by the company to honor the binder.

15. This can usually be shown by the examining physician's report to the company.

16. Comment, 63 Yale L.J. 523 (1954).

17. A typical approval type binder reads in part as follows: ". . . the insurance shall take effect from the date of the application . . . provided said application is approved and accepted at the Home Office. . . ." See *Corning v. Prudential Ins. Co.*, 248 App. Div. 187, 188, 288 N.Y. Supp. 661, 662 (2d Dep't 1936).

18. See Comment, 44 Yale L.J. 1223 (1935).

19. In *Stonsz v. Equitable Life Assurance Soc'y*, 324 Pa. 97, 187 Atl. 403 (1936), it was said that since the exact terms of the binding receipt vary, no case can be a binding precedent for any other. Each case must be decided by ascertaining the intention of the parties.

20. In speaking of the conflict of authority on this subject it has been stated that, ". . . the existing conflict actually is a reflection of the differences of opinion entertained by the courts as to the extent to which social interest in the freedom of contract and in the security of transactions entered into should be permitted to be outweighed by the interest of society to protect, in a case where the parties to a contract have unequal bargaining power, the one party who, because of his inferior bargaining strength, must either accept what is offered or be deprived of the advantages of the relation, against unduly oppressive or excessive conditions forced upon him by the party superior in bargaining power." 2 A.L.R. 2d 1019 (1948).

when its enforcement will result in inequity and hardship to one of the parties.²¹

One of the earliest cases on the subject was *Insurance Co. v. Young's Adm'r*,²² in which judgment for defendant insurance company was granted on the ground that there was no acceptance of the applicant's offer. In this case a binder was issued, but the company rejected the application by making a counter offer to the applicant *before* his death. Little fault can be found with the rule of this case when it is limited to its facts. However the case has sometimes been erroneously interpreted as standing for the proposition that the company always has the right to reject the application after the death of the applicant.²³

A slightly different problem arises when the company has neither approved nor rejected the application when the applicant dies. The weight of authority denies recovery upon the ground that since the company has not approved the application, there has been no acceptance of the offer, and thus no contract.²⁴ Recovery has also been denied where the company has approved the application subsequent to and in ignorance of the applicant's death, on the theory that the subject matter of the contract, i.e., the applicant's life, has gone out of existence,²⁵ and that there is no offeror with whom to contract.

On the other hand, there have been cases where courts have granted recovery under various theories. Sometimes the court will ignore the condition of approval, rule that the binder is ambiguous, and therefore construe it against the insurer.²⁶

21. ". . . [F]reedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract." Kessler, *Contracts of Adhesion—Some Thoughts About Freedom Of Contract*, 43 *Colum. L. Rev.* 629, 642 (1943). But see *Hughes v. John Hancock Mut. Life Ins. Co.*, 163 *Misc.* 31, 35, 297 *N.Y. Supp.* 116, 122 (*N.Y. Munic. Ct.* 1937) where the court, in ruling that there was no acceptance of the applicant's offer, said: "A contrary interpretation of the language of the receipt would violate the elementary principles of the freedom of contractual rights."

22. 90 U.S. (23 Wall) 85 (1874). Accord, *Mohrstadt v. Mutual Life Ins. Co.*, 115 *Fed.* 81 (8th Cir. 1902).

23. *Braman v. Mutual Life Ins. Co.*, 73 *F.2d* 391 (8th Cir. 1934); *Brancato v. National Reserve Life Ins. Co.*, 35 *F.2d* 612 (8th Cir. 1929); *Beaty v. Southland Life Ins. Co.*, 28 *S.W.2d* 895 (*Tex. Civ. App.* 1930). See also *Havighurst, Life Insurance Binding Receipts*, 33 *Ill. L. Rev.* 180 (1938).

24. *Steinle v. New York Life. Ins. Co.*, 81 *Fed.* 489 (5th Cir. 1897); *Cooksey v. Mutual Life Ins. Co.*, 73 *Ark.* 117, 83 *S.W.* 317 (1904); *Northeastern Mut. Life Ins. Co. v. Neafus*, 145 *Ky.* 563, 140 *S.W.* 1026 (1911); *Corning v. Prudential Ins. Co.*, 248 *App. Div.* 187, 288 *N.Y. Supp.* 661 (2d Dep't 1936), *aff'd*, 273 *N.Y.* 668, 8 *N.E.2d* 338 (1937).

25. *Braman v. Mutual Life Ins. Co.*, 73 *F.2d* 391 (8th Cir. 1934). Cf. *Starr v. Mutual Life Ins. Co.*, 41 *Wash.* 228, 83 *Pac.* 116 (1905), where the court ruled that the offer died with the death of the applicant, but granted recovery on the ground that the parties intended temporary insurance.

26. *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 *F.2d* 599 (2d Cir.), *cert. denied*, 331 *U.S.* 849 (1947); *Hart v. Travellers Ins. Co.*, 236 *App. Div.* 309, 258 *N.Y. Supp.* 711 (2d Dep't 1932), *aff'd*, 261 *N.Y.* 563, 185 *N.E.* 739 (1933). ". . . [I]nsurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion." *Gaunt v. John Hancock Mut. Life Ins. Co.*, *supra* at 602.

Under another theory recovery is granted on the ground that any other finding would be unconscionable.²⁷

Some cases have used a different approach in order to circumvent the necessity for actual approval by the company of the application. These decisions permitted recovery on the basis that the parties intended a temporary contract of insurance,²⁸ as in the case of satisfaction binders. In *Starr v. Mutual Life Ins. Co.*,²⁹ the agent of the company gave the applicant an approval binder in exchange for payment of the first premium, and the home office approved the application a few hours after the death of the applicant. The court admitted that the offer died with the death of the applicant, but ruled that, while the application and binder must be construed together, where they conflict the binder must prevail. The court found that the binder showed that the applicant and the agent intended interim insurance to be in effect until the application was either approved or rejected. The court also held that the agent's lack of actual authority to enter into such a contract was immaterial since the applicant was unaware of such lack of authority.³⁰ In *Albers v. Security Mut. Life Ins. Co.*,³¹ the court implied an intention to grant interim insurance from the fact that the company antedated the policy to the date of the binder, and also that the applicant would not have intended to pay for something he was not getting.³²

In *National Life & Accident Ins. Co. v. Moore*,³³ which involved an approval type binder, the company approved the application after the death of the applicant. Recovery was granted, the court holding: "If the application was approved at the home office . . . then under the terms of the premium receipt the insurance became effective from the date of such receipt. . . . This would be true, although the applicant died before the application was approved, since the insurance became effective from the date of the receipt and not from the date of approval of the application."³⁴ This statement is in direct conflict with the established rule of law that whether or not the contract exists must be determined at the moment of the applicant's death. Once the applicant dies, the subject matter of the alleged contract goes out of existence, and any subsequent acceptance of the offer is ineffectual.³⁵

27. "It would be unconscionable to permit an insurance company, issuing such a receipt and receiving a premium from an applicant, part of which was to pay for protection under its policy from the date of the application to the date of acceptance, to say that it had not bound itself to give anything whatever for that portion of the premium. . . ." *Western & Southern Life Ins. Co. v. Vale*, 213 Ind. 601, 611, 12 N.E.2d 350, 354 (1938); see also *Gaunt v. John Hancock Mut. Life Ins. Co.*, supra note 26 (concurring opinion).

28. *Halle v. New York Life Ins. Co.*, 22 Ky. 740, 58 S.W. 822 (1900); *Albers v. Security Mut. Life Ins. Co.*, 41 S.D. 270, 170 N.W. 159 (1918); *Starr v. Mutual Life Ins. Co.*, 41 Wash. 228, 83 Pac. 116 (1905).

29. 41 Wash. 228, 83 Pac. 116 (1905).

30. *Accord*, *Halle v. New York Life Ins. Co.*, 22 Ky. 740, 58 S.W. 822 (1900).

31. 41 S.D. 270, 170 N.W. 159 (1918).

32. "By the payment of the premium for one year an insured is entitled to insurance for one year." *Albers v. Security Mut. Life Ins. Co.*, 41 S.D. 270, 275, 170 N.W. 159, 160 (1918).

33. 83 Ga. App. 289, 63 S.E.2d 447 (1951).

34. *National Life & Accident Ins. Co. v. Moore*, 83 Ga. App. 289, 291, 63 S.E.2d 447, 449 (1951).

35. *Braman v. Mutual Life Ins. Co.*, 73 F.2d 391 (8th Cir. 1934).

It is virtually impossible to reconcile all of the conflicting decisions of the various courts in this country. Where a satisfaction binder is involved, the beneficiary will recover if he can show that the applicant was an insurable risk, and that the company had not notified the applicant before his death of its refusal to accept his application.³⁶

Where an approval binder is involved, an attempt to predict the outcome of any given case is usually mere speculation.³⁷ If the applicant is in fact an insurable risk, certain courts may grant recovery on the ground of ambiguity or inequity.³⁸ This is not an ideal solution since an insurance company that acts in good faith can never be sure that it will be protected from such a finding.

In jurisdictions where the courts find that the parties intended an interim coverage,³⁹ the company can protect itself to some extent by stating in the application and in the binder that its agent has no authority to make any verbal contract with the applicant. This would be notice to the latter, and should prevent the court from finding apparent authority. However, this would not necessarily preclude the court from holding that the company itself impliedly agreed to temporary coverage, since otherwise the applicant wouldn't have received that for which he had bargained.

On the other hand, the applicant is at distinct disadvantage where the courts strictly enforce the offer-acceptance principle,⁴⁰ an approach to the problem which has one inherent weakness. The application leads to a contract when the company accepts the offer and promises to pay a certain amount upon the death of the applicant. Such contract can come into existence without the issuance of a binding receipt and the prepayment of the first premium. Thus it is natural to conclude that the binder and the first premium, given in consideration of each other, form a contract distinct from the one which will later mature if the company accepts the application. What benefit does the applicant receive in return for the payment of the first premium? We cannot assume that the binder is merely a worthless scrap of paper. Viewing the problem from this approach, we are almost forced to conclude that a contract came into being, providing temporary insurance until the company accepts or rejects the application.

The only other possible answer to the question of what benefit the applicant receives in return for prepayment of the first premium was discussed in *Gaunt v. John Hancock Mut. Life Ins. Co.*⁴¹ The company argued that the applicant received six benefits other than immediate coverage: "(1) The policy would sooner become incontestable. (2) It would earlier reach maturity, with a corresponding acceleration of dividends and cash surrender. (3) It would cover the period after 'approval' and before 'issue'. (4) If the insured became uninsurable between 'completion' and 'approval' it would still cover the risk. (5) If the insured's birthday was between 'completion' and 'approval', the premium would be computed at a lower rate. (6) When the policy covers disability, the

36. See Comment, 63 Yale L.J. 523 (1954).

37. See note 19 *supra*.

38. See notes 26, 27 *supra*.

39. *Starr v. Mutual Life Ins. Co.*, 41 Wash. 228, 83 Pac. 116 (1905).

40. See note 24 *supra*.

41. 160 F.2d 599 (2d Cir.), cert. denied, 331 U.S. 849 (1947).

coverage dates from 'completion'.⁴² The court rejected this argument on the ground that the applicant contemplated immediate coverage and granted recovery on the ground of ambiguity.

Thus we have seen some of the theories under which courts either grant or deny recovery. The obvious uncertainties found in the language of many courts and their zealous attempts to distinguish cases when no distinction actually exists, would lead an observer to believe that the conflict is a social one rather than one of law.⁴³ The disharmony becomes even more apparent when we observe how the decisions conflict even within one state such as New York.

STATE OF THE LAW IN NEW YORK

The law of New York pertaining to approval binding receipts is far from clear.⁴⁴ A leading case is *Hart v. Travellers Ins. Co.*,⁴⁵ in which the applicant died on the day following the insurance of a binding receipt and payment of the first premium. The binder read in part as follows:

"First. If the money for which this receipt has been given is sufficient to pay in full the first premium . . . such insurance shall be in force from the date of this receipt. . . .

"Second. The Company shall have the right to disapprove such application and shall incur no liability thereunder until and unless received and approved by the Company at the Home Office. . . ."⁴⁶

The trial court held that there was no contract since the company never approved the application. The Appellate Division reversed, agreeing with the plaintiff's contention that the true meaning of the receipt was that the applicant was insured from the date of the receipt until either a policy was issued or the company declined to issue such policy. The binder expressly stated that the insurance would be in force as of the date of the binder if the first premium was paid. This would obviously lead the insured to believe that he was covered immediately. It wasn't the applicant's intention to pay for something that he wasn't getting, i.e., full coverage from the date of the binder. To circumvent the provision requiring approval, the court stated that the receipt was ambiguous and must be construed against the company since it was filled out by its agent on a form printed by the company. The Court of Appeals affirmed the decision.

Shortly thereafter, in *Buono v. Prudential Ins. Co.*,⁴⁷ the Appellate Division, in a memorandum decision, reversed a judgment for the company, on the

42. *Id.* at 601. The word "completion" refers to the completion of the application. Thus subdivision four is meaningless since the company would not approve the application if it became aware of the fact that the applicant had become uninsurable subsequent to completion of the application.

43. See note 20 *supra*.

44. "The law of New York is in doubt." *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir.), cert. denied, 331 U.S. 849 (1947).

45. 236 App. Div. 309, 258 N.Y. Supp. 711 (2d Dep't 1932), *aff'd*, 261 N.Y. 563, 185 N.E. 739 (1933).

46. 236 App. Div. at 311, 258 N.Y. Supp. at 712.

47. 240 App. Div. 898, 267 N.Y. Supp. 972 (2d Dep't 1933).

authority of the *Hart* case. In a subsequent case,⁴⁸ this court in attempting to distinguish the *Buono* case from the case at bar stated that it granted a new trial in the former because the length of time that the company held the application without either accepting or rejecting it raised a question of fact as to whether or not it had waived the provision relating to approval.

Four years after its decision in the *Hart* case the Appellate Division, upon similar facts, rendered a contrary decision in *Corning v. Prudential Ins. Co.*⁴⁹ The binder in this case read in part as follows: ". . . if the above payment is equal to the full first premium* on said policy (and not otherwise), the insurance shall take effect from the date of the application, in accordance with the provisions of the policy applied for, provided said application is approved and accepted at the Home Office. . . ." ⁵⁰ The application was rejected by the company which sent to the applicant a different policy requiring payment of a higher premium, but the applicant died before receiving the counter offer. At the trial both parties moved for judgment, and the court granted plaintiff's motion on the authority of the *Hart* and *Buono* cases. The Appellate Division reversed and granted the company's motion for judgment.

The court attempted to distinguish the *Hart* case on the language used in the binder, and seemed to place great emphasis on the fact that the statement that coverage would take effect immediately and the condition of approval appeared in different subdivisions.⁵¹ In speaking of the binder in the case at bar, the court held that ". . . the language of the receipt in the one sentence dealing with the taking effect of the insurance, fortified by similar language in the application, makes it plain that approval by the company is a prerequisite."⁵² Once again the Court of Appeals affirmed without opinion.

The next case to arise in New York was *Arcuri v. Prudential Ins. Co.*,⁵³ in which the home office of the company received, but neither approved nor rejected the application. The trial court found for plaintiff, but the Appellate Division reversed and dismissed the complaint. The latter court cited with approval the *Corning* case and quoted extensively from it. This might be looked upon as an

48. *Corning v. Prudential Ins. Co.*, 248 App. Div. 187, 288 N.Y. Supp. 661 (2d Dep't 1936), aff'd, 273 N.Y. 668, 8 N.E.2d 338 (1937).

49. 248 App. Div. 187, 288 N.Y. Supp. 661 (2d Dep't 1936), aff'd, 273 N.Y. 668, 8 N.E.2d 338 (1937).

50. 248 App. Div. at 188, 288 N.Y. Supp. at 662. The asterisk called the reader's attention to a note at the bottom of the receipt which requested the applicant to notify the company if he failed to receive either the policy or a refund of the premium within six weeks.

51. In speaking of the binder in the *Hart* case the court said: ". . . the receipt contained a number of so-called terms and conditions, the first of which was a clear and unconditional statement that upon payment in full of the first premium the insurance shall be in force from the date of the receipt. Subsequent terms, under different subdivisions, were not reconcilable with this expression at the outset and thus created an ambiguity." 248 App. Div. at 190, 288 N.Y. Supp. at 664.

52. 248 App. Div. at 190, 288 N.Y. Supp. at 664.

53. 248 App. Div. 501, 290 N.Y. Supp. 567 (1st Dep't 1936). In this case the binder provided that ". . . the insurance shall take effect from the date of this application . . . provided this application is approved and accepted at the Home Office. . . ." 248 App. Div. at 502, 290 N.Y. Supp. at 568.

extension of the *Corning* decision, since in that case there was a rejection and counter offer before the applicant died, whereas in the *Arcuri* case the company took no action at all on the application. The *Corning* and *Arcuri* cases were followed in *Hughes v. John Hancock Mut. Life Ins. Co.*,⁵⁴ wherein the Appellate Division affirmed the dismissal of the complaint. The last in this series of cases was *Speronza v. Phoenix Mut. Life Ins. Co.*,⁵⁵ in which the Appellate Division reversed a finding for defendant, and ruled that there was a question of fact as to whether or not the company, by failing to either accept or reject the application, had waived the condition of approval.

As we have seen, there are six cases which represent the law of New York on the subject of approval binders. In three of them, recovery was denied on the ground that there was no acceptance of the applicant's offer.⁵⁶ In the other three a finding for the company was reversed, once on the ground of ambiguity,⁵⁷ and twice upon the ground that whether or not the company had waived, by its inaction, the condition of approval was a question of fact.⁵⁸ The uncertainty of the courts as to the true state of the law becomes even more apparent when we observe that in five of the six cases, the finding of the trial court was reversed.⁵⁹ In order to resolve the problem it becomes necessary to distinguish the *Hart* and *Corning* cases if any distinction exists, because these are the leading authorities, having been affirmed, albeit without opinion, by the Court of Appeals.

Ambiguity, while possibly not the soundest legal approach to the problem,⁶⁰ must be considered as a ground for recovery by the beneficiary in New York. This is so not only because of the opinion in the *Hart* case, but also because of the great lengths to which the same court went in the *Corning* case in an attempt to distinguish the two cases. The court in the *Corning* case ostensibly agreed with the decision by saying that: "If the condition of approval is buried beneath a mass of misleading verbiage, its ambiguity must be decided in favor of the applicant."⁶¹ The court then agreed that there was an ambiguity in the *Hart* case, seemingly basing this interpretation on the fact that the condition

54. 254 App. Div. 570, 3 N.Y.S.2d 899 (2d Dep't 1938).

55. 272 App. Div. 770, 69 N.Y.S.2d 397 (2d Dep't 1947).

56. *Corning v. Prudential Ins. Co.*, 248 App. Div. 187, 288 N.Y. Supp. 661 (2d Dep't 1936), aff'd, 273 N.Y. 668, 8 N.E.2d 338 (1937); *Hughes v. John Hancock Mut. Life Ins. Co.*, 254 App. Div. 570, 3 N.Y.S.2d 899 (2d Dep't 1938); *Arcuri v. Prudential Ins. Co.*, 248 App. Div. 501, 290 N.Y. Supp. 567 (1st Dep't 1936).

57. *Hart v. Travellers Ins. Co.*, 236 App. Div. 309, 258 N.Y. Supp. 711 (2d Dep't 1932), aff'd, 261 N.Y. 563, 185 N.E. 739 (1933).

58. *Speronza v. Phoenix Mut. Life Ins. Co.*, 272 App. Div. 770, 69 N.Y.S.2d 397 (2d Dep't 1947); *Buono v. Prudential Ins. Co.*, 240 App. Div. 898, 267 N.Y. Supp. 972 (2d Dep't 1933).

59. Only in the *Hughes* case was the decision of the trial court upheld on appeal.

60. In urging that recovery be granted on the ground of inequity, rather than that of ambiguity, the concurring opinion in *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 603 (2d Cir.), cert. denied, 331 U.S. 849 (1947), stated: "Hence a result placed not squarely upon inequity, but upon interpretation, seems sure to produce continuing uncertainty in the law of insurance contracts."

61. *Corning v. Prudential Ins. Co.*, 248 App. Div. 187, 190, 288 N.Y. Supp. 661, 664 (2d Dep't 1936), aff'd, 273 N.Y. 668, 8 N.E.2d 338 (1937).

requiring approval appeared in the second subdivision of the binder, while the statement that the insurance would take effect immediately appeared in the first.⁶² The court then stated that there was no ambiguity in the case at bar since the provision for immediate coverage and the condition of approval appeared in the same sentence.⁶³ It is true that these two elements did appear in the same sentence in the *Corning* case, but that one sentence was just as lengthy and complicated as the corresponding two sentences in the *Hart* binder. In addition, the continuity of the *Corning* binder was interrupted by an asterisk which would draw the applicant's attention to an additional instruction at the end of the receipt.⁶⁴

It would appear from the *Corning* case that the Appellate Division had definitely changed its views on binding receipts after writing the *Hart* opinion. The attempt to distinguish the latter case on such a nebulous ground would seem to indicate that the court was merely showing its reluctance to expressly or impliedly overrule itself. This reasoning could also apply to the affirmances without opinion by the Court of Appeals in both cases. This speculation is further strengthened by the fact that the *Corning* case was expressly followed by the *Arcuri* and *Hughes* cases. The *Hart* case has never been followed because the *Buoni* and *Speranza* cases, in which recovery was also allowed, are easily distinguishable in that they involved the issue of waiver of the condition of approval by the company.

Perhaps the *Hart* case would be followed today if a case involving the identical binder were litigated. The Court of Appeals would probably feel bound to write an opinion stating the present law of the state. A strong opinion written by that tribunal would do much to clarify one of the hazy points of insurance law, and to render more certain the position of the parties involved in insurance contracts.

CONCLUSION

The soundest solution to the problem would be the passage of legislation prohibiting the issuance of approval type binders, and requiring that a standardized form of satisfaction binder be used in all binding receipt transactions. Then, if the applicant was in fact an insurable risk, a temporary contract of insurance would come into existence, and would not be terminated until the company notified him that the application had been accepted or rejected. If an insurance company considered such statute adverse to its interests, it could avoid the operation of the statute merely by refusing to issue a binding receipt, thus assuming the corresponding risk of having the applicant revoke his offer.

Elimination of the approval type binder would work to the advantage of both the insurer and the insured. The applicant would be certain that he had coverage at least until the company actually notified him of its rejection. The insurance company, on the other hand, could cease to worry that the court would interpret its actions as unconscionable, or the language of the binder as being ambiguous.

62. See note 51 *supra*.

63. *Corning v. Prudential Ins. Co.*, 248 App. Div. 187, 190, 288 N.Y. Supp. 661, 664 (2d Dep't 1936).

64. See note 50 *supra*.