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# Insurance -- Soliciting Agent -- Waiver of Initial Policy Provisions

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the insured from liability for that amount due claimants in excess of the obligation of the insurer.

7. The proportionate distribution of the insurance fund shall not relieve the insurer from his duty to defend all suits against the insured, when the policy of insurance so provides.

The writer feels that this addition to our insurance law will bring North Carolina one step closer to better protection of innocent parties from the irresponsible motorist and to realization of equality for all.

BENJAMIN S. MARKS, JR.

### Insurance—Soliciting Agent—Waiver of Initial Policy Provisions

In the case of *Life and Casualty Ins. Co. of Tennessee v. Gurley*,<sup>1</sup> recently before the Fourth Circuit of the United States Court of Appeals, the court was faced with the question of whether a valid insurance contract had come into existence. The applicant had made application<sup>2</sup> for a plan of life insurance calling for a \$99.00 quarterly premium. The premium was paid at the time of application and a receipt<sup>3</sup> given. A policy of the plan applied for was issued, but at a quarterly premium of \$122.00, the applicant having been given a "Class B" rate. The applicant refused to pay the premium increase or accept the policy, and requested the local agent to get the policy issued at the standard rate.<sup>4</sup>

<sup>1</sup> 229 F. 2d 326 (4th Cir. 1956). The district court decision appears in 132 F. Supp. 289 (1955).

<sup>2</sup> The application was signed by the applicant and stated in part, "(3) With the exception of officers of the Company, notice to or knowledge of the agent, medical examiner or any other person is not notice to or knowledge of the Company unless stated in either Part A or B of this application, and none of such persons are authorized to accept risks or pass upon insurability, nor shall any of such persons have the power on behalf of the Company to make or modify any contract on behalf of the Company or to waive any of the Companies rights or requirements." The policy contained the following provision. "ENTIRE CONTRACT . . . only the President, a Vice-President, Secretary, and Assistant Secretary, Actuary, or Treasurer has power on behalf of the Company to make or modify this contract." And on the back of the policy, "NOTICE TO POLICYHOLDERS . . . The Company's agents have no authority to alter or amend the Policy, to accept premiums in arrears, or to extend the due date of any premium."

<sup>3</sup> The receipt stated in part, "If this sum is equal to the first full premium on the policy applied for then if the Company shall be satisfied that at the time of completion of the medical examination or Part B of the application, if no medical examination is required, that the risk was acceptable to the Company under its rules, for the plan and amount of insurance herein applied for at the rate of premium, declared paid, then the insurance shall be in force as of the date of completion of the medical examination, or of Part B of the application if no medical examination is required, but otherwise no insurance shall be in force under said application unless and until a policy has been issued and delivered and the first full premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant. The above sum shall be refunded upon request if the application is declined or if the policy is issued other than as applied for and is not accepted by the applicant."

<sup>4</sup> The district court record reveals that the applicant was at one time a life insurance salesman. Transcript of Record, Page 20, 132 F. Supp. 289 (1955). Question addressed to Mrs. Gurley, wife of applicant. "Q. Mr. Gurley as a matter of fact used to be a life insurance salesman? A. Yes, Sir."

The policy was returned to the company, but was sent back to the agent with the premium rate unchanged. The applicant, knowing the agent was going to Greensboro, requested the agent to speak to company officials. The company again refused to lower the premium rate. Upon returning home the agent telephoned the applicant and informed him of the company's refusal. The applicant then stated that he would take the policy as it was issued. Early the next morning the applicant died.<sup>5</sup> The policy had not been delivered nor had the premium increase been paid.

The case, by virtue of the Erie Doctrine,<sup>6</sup> was based on North Carolina law. The circuit court ruled that a valid insurance contract had come into existence once the applicant had verbally accepted the policy, and held the company liable. In the course of its decision the court stated, "Apparently, a soliciting agent, in North Carolina, has the power to waive certain written conditions and requirements connected with the inception of the insurance contract and the payment of the first premium, though not as to subsequent premiums nor as to the coverage of the policy."<sup>7</sup> As authority for this statement the circuit court cites the North Carolina cases of *Foscue v. Greensboro Mutual Life Ins. Co.*<sup>8</sup> and *Burch v. Provident Life and Accident Ins. Co.*<sup>9</sup>

It is settled law in North Carolina that the local agent of a life insurance company is a *soliciting agent*<sup>10</sup> rather than a *general agent*.<sup>11</sup> The importance of the local life insurance agent today would warrant a close inspection of the North Carolina cases, and especially the circuit court's interpretation of the *Foscue* and *Burch* cases, involving the question of the power of such an agent to waive premium payments contrary to his authority as stated in the policy and application.

<sup>5</sup> The applicant died on September 18, 1952. The Transcript of Record Page 16 132 F. Supp. 289 (1955) reveals that on September 16, 1952, one day prior to the applicant's verbal acceptance, applicant consulted a doctor, was given a cardiogram, and advised, "To stay at home for a few days and see how he would feel."

<sup>6</sup> *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938).

<sup>7</sup> *Life and Casualty Ins. Co. of Tennessee v. Gurley*, 229 F. 2d 326, 330 (4th Cir. 1956). This case also involves interesting questions on constructive delivery, what acts constitute waiver by agent or company, and delivery in good health. This note will be limited to the question of the agent's power to waive premium payments.

<sup>8</sup> 196 N. C. 139, 144 S. E. 689 (1928).

<sup>9</sup> 201 N. C. 720, 161 S. E. 313 (1931).

<sup>10</sup> 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* Sec. 8696 (1945), "A general agent ordinarily passes on risks, issues policies, and may vary the terms of the written contract. A soliciting agent, on the other hand, merely procures application, forwards them to the home office, collects premiums, delivers policies, and is without authority to issue policies." See also 29 AM. JUR. *Insurance* Sec. 96 (1940); 44 C. J. S. *Insurance* Sec. 152 (1945).

<sup>11</sup> *Hicks v. Home Security Life Ins. Co.* 226 N. C. 614, 39 S. E. 2d 914 (1946); *Jones v. Gates City Life Ins. Co.* 216 N. C. 300, 4 S. E. 2d 848 (1939); *North Carolina Bank and Trust Co. v. Pilot Life Ins. Co.* 206 N. C. 460, 174 S. E. 289 (1934); *Thompson v. Equitable Life Assurance Soc.* 199 N. C. 59, 154 S. E. 21 (1930).

In the *Foscue* case, the insured had taken out an accident insurance policy with the defendant in 1925. The policy called for a monthly premium of \$3.40, paid in advance, and stated that the agent did not have authority to extend the time of premium payments. The insured was unable to pay the premium due in August, 1926. Defendant's agent told the insured that if he would take out another policy he, the agent, would extend the time of payment of the premium on the accident policy until the insured's next pay day. The insured was accidentally killed, the premium on the accident policy not having been paid up to his death.

The court, in holding that the insurance company was not liable on the accident policy, stated that waiver could be established by: (1) express agreement, (2) conduct or a course of dealings, or (3) ratification. The decision makes it clear that the acts which constitute the waiver must be acts of the company, not of the agent.<sup>12</sup> The agent cannot, by his own acts, enlarge his power beyond that stated in the policy. The binding effect of the non-waiver provision in the policy was again indicated when the court took notice of the fact that the agent was not an officer of the company, but only a local agent for selling insurance and collecting premiums. Under the non-waiver provision, only executive officers of the company were permitted to change the policy. The only mention of the local agent's power to waive conditions at the inception of the contract, which would include the first premium, was by way of dictum. The court stated, "The restrictions inserted in the contract upon the powers of the agent to waive any conditions unless done in a particular manner cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered the policy and accepted the premium with full knowledge of the situation."<sup>13</sup> The authority for this dictum is a case involving the *general* agent of a fire insurance company.<sup>14</sup> The court thus applies a principle of law developed in a case concerning a general agent to a case dealing with a soliciting agent.

In the *Burch* case, the insured had taken out a policy with the defendant in 1923 covering accidental death by automobile. The insured failed to pay the premium due July 17, 1929, and was killed in an automobile accident on July 31, 1929. There was evidence to the effect that defendant's agent had, in the past, extended the time of premium payments and accepted payment beyond the due date. The plaintiff, by this evidence, was attempting to establish a course of dealings and thereby show waiver by the agent of the condition in the policy calling for pre-

<sup>12</sup> *Foscue v. Greensboro Mutual Life Ins. Co.*, 196 N. C. 139, 141, 144 S. E. 689, 690 (1928), "The powers of the agent as expressed in the policy may be enlarged by usage of the Company, its course of business, or by its consent, express or implied."

<sup>13</sup> *Ibid.*

<sup>14</sup> *Johnson v. Rhode Island Ins. Co.* 172 N. C. 142, 90 S. E. 124 (1916).

payment of premiums. The agent was engaged in the general insurance business, selling automobile liability, accident, health and fire insurance. It is not clear whether the agent was acting as a general or soliciting agent. The court denied the plaintiff's claim, holding that even though a course of dealings between the agent and insured can be shown, it is necessary to prove that the defendant company had knowledge of such dealings.<sup>15</sup> The court pointed out that to establish waiver by ratification, the ratification must be by the defendant company, not by the agent.

Again, the only comment of the court concerning agreements made by the agent at the inception of the contract was by way of dictum. The court states: "At the outset it must be borne in mind that there is a vital and fundamental distinction between liability arising from agreements made by the agent of an insurance company at the inception of the contract and that arising from agreements made by the agent with the insured after the contract has taken effect, resulting in the modification of the terms and conditions of the written engagement of the parties."<sup>16</sup> The authority cited for this dictum is the *Foscue* case.

Summarizing the *Foscue* and *Burch* cases, both deal with the question of an insurance agent's power to waive conditions *subsequent* to the existence of a binding insurance contract; in both cases the only mention of an insurance agent's power to waive conditions at the inception of the contract is by way of dicta and the authority for the dicta is a case involving a general agent of a fire insurance company; and lastly, in only one of the cases is it clear that the agent is a soliciting agent of a life insurance company.

From the foregoing dicta it might appear that should the question of a life insurance soliciting agent's power to waive conditions at the inception of the contract and particularly pre-payment of the first premium, ever come before the North Carolina court, the court would follow the dicta in the *Foscue* and *Burch* cases. That such a result would not be reached is indicated by the case of *North Carolina Bank and Trust v. Pilot Life Ins. Co.*,<sup>17</sup> in which the soliciting agent of the defendant had delivered the policy to the insured for inspection. The premium had not been paid and the agent made it clear that the policy would not be in effect until payment of the premium. When applicant died, he still possessed the policy but had never paid the premium. The court denied the plaintiff's claim, posing itself the following question: Can a soliciting

<sup>15</sup> *Burch v. Provident Life and Accident Ins. Co.*, 201 N. C. 720, 724, 161 S. E. 313, 315 (1931), "It is contended that the evidence discloses a course of dealings between the insured and the agent of the insurer with respect to the payment of the premium, but there is no evidence that the defendant Company had knowledge of such course of dealings other than such knowledge as would be imputed to it through its local agent, nor is there evidence of ratification, as defined by law, on the part of the defendant."

<sup>16</sup> *Id.* at 722, 161 S. E. at 314.

<sup>17</sup> 206 N. C. 460, 174 S. E. 289 (1934).

agent for a life insurance company deliver a policy and waive payment of the *first* premium or extend credit for the payment thereof when both the application and policy provide that the contract of insurance shall not become effective until the first premium has been paid; and further that only executive officers as specified shall have power to alter or modify the contract?<sup>18</sup> (Emphasis added.)

In answering this question, the court cites the *Foscue* and *Burch* cases and states: "Both of these cases hold that the local or soliciting agents, as such, have no authority to extend credit to the insured or to waive the premium provided in the policy or extend the time of payment thereof."<sup>19</sup>

Thus, the North Carolina court either ignores or differently interprets its previous dicta, and comes to a conclusion diametrically opposed to the circuit court in its interpretation of the same two cases.

Considering the *Foscue* and *Burch* cases involving waiver of premiums subsequent to a binding contract, in conjunction with the *Bank and Trust Co.* case involving waiver of the first premium, it would seem that the North Carolina court intends to treat the power of a soliciting agent to waive first or a subsequent premium the same; i.e., a soliciting agent does not have the power to waive payments or extend the time of payment of premiums contrary to the terms of the policy.

A further indication that the North Carolina court will, in the future, hold that a soliciting agent cannot waive payments as prohibited in the policy is found in the North Carolina court's citation in the *Bank and Trust Co.* case of *Curtis v. Prudential Co. of America*.<sup>20</sup>

This case was decided by the fourth circuit and arose in North Carolina, but since it was decided prior to the *Erie Railroad Co.* case, was not based on North Carolina law and was not binding on the circuit court in the *Gurley* case. The facts of the *Curtis* and *Gurley* cases are very much the same. In the *Curtis* case, the insured had paid almost half of the first quarterly premium. On the day prior to the insured's death, the beneficiary offered to pay the remaining premium but defendant's soliciting agent told her it was not necessary, that the policy was in force for another month. The policy had never been delivered. The circuit court refused to hold the insurance company liable, giving binding effect to the provisions in the policy that the policy would not be effective until delivery and payment of the premium. The court said, "The provisions that a policy of life insurance shall not take effect unless the first premium is actually paid during the lifetime of the person insured, is valid and will be enforced according to its terms."<sup>21</sup> To support its position, the court cites a North Carolina case.<sup>22</sup>

<sup>18</sup> *Id.* at 463, 174 S. E. at 300.

<sup>20</sup> 55 F. 2d 97 (4th Cir. 1932).

<sup>19</sup> *Ibid.*

<sup>21</sup> *Id.* at 99.

<sup>22</sup> *Sturgill v. New York Life Ins. Co.*, 195 N. C. 34, 141 S. E. 280 (1928).

At the time, the fourth circuit court defended the result thusly: "We believe this to be a wholesome rule, because it is clearly apparent that the business of life insurance, which is too important a part of our civilization in this latter-day world, could not be carried on were the insurance companies bound by every act or statement of a local agent; especially one whose duty is mainly that of soliciting or collecting. If it were otherwise, great injustice would follow, and a great loss be imposed upon holders of life insurance policies, because of the increased burden upon the companies that would result. While the courts are careful, in every way, to protect the interests of beneficiaries under insurance policies, yet there is a limit which should not be exceeded. The reasonableness of the respective contentions should be the yardstick with which to measure the justice of the matter."<sup>23</sup>

Whether the North Carolina court will now interpret its decisions and dicta as the fourth circuit court of appeals did in the instant case, or will continue to enforce the insurance contract as written, remains to be seen. To the writer it seems that the policy announced by the court in the *Curtis* case is patently sound.

ROBERT M. HUTTAR

### Labor Law—Right to Distribute Union Literature on Company Property

In *NLRB v. Babcock & Wilcox Co.*,<sup>1</sup> the Supreme Court of the United States reversed the National Labor Relations Board in three cases<sup>2</sup> and held that union organizers who are nonemployees do not have the right to distribute union literature on company property where there are other means of communicating with the workers available to the union and there has been no discrimination by the company.

The opinion handed down by Mr. Justice Reed for a unanimous Court said: "The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available."<sup>3</sup>

The plants, in all three cases, were located within one mile of the

<sup>23</sup> 55 F. 2d 97, 99 (1932).

<sup>1</sup> 351 U. S. 105 (1956).

<sup>2</sup> *Babcock & Wilcox Co.*, 109 N. L. R. B. 485 (1954), *enforcement denied*, 222 F. 2d 316 (5th Cir. 1955), *aff'd*, 351 U. S. 105 (1956); *Ranco, Inc.*, 109 N. L. R. B. 998 (1954), *enforcement granted*, 222 F. 2d 543 (6th Cir. 1955), *rev'd sub nom.* *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Seamprufe, Inc.*, 109 N. L. R. B. 24 (1954), *enforcement denied*, 222 F. 2d 858 (10th Cir. 1955), *aff'd sub nom.* *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956).

<sup>3</sup> *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105, 113-14 (1956).