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WAIVER AND ESTOPPEL IN INSURANCE POLICY LITIGATION

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"The tendency on the part of the courts to treat insurance contracts as standing in a class by themselves and to protect against forfeitures invoked in defense of honest claims has led to much subtlety. As Professor Woodruff says . . . 'What do they know of the law of the insurance contract who only the law of contract know?'"

—POUND, J.¹

Indexes to the great nineteenth century insurance texts do not list waiver and estoppel.² But times have changed. The 1951 third edition of *Vance on Insurance* enfolds an excellent and important seventy-six page "Waiver & Estoppel" chapter—about a fourteenth of the book's bulk. What has fostered this growth in the last hundred years? My thesis is that waiver and estoppel are two of several guises that cloak the courts' part in changing insurance from a service safely bought only by sophisticated businessmen to a commodity bought with confidence by untrained consumers. Judges, at the urging of policyholders' advocates, have used waiver and estoppel to convert insurance from a custom-made document designed in part by knowing buyers to a brand-

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1. Satz v. Massachusetts Bonding & Ins. Co., 243 N.Y. 385, 393, 153 N.E. 844, 846 (1926).

2. See, e.g., ANGELL, FIRE AND LIFE INSURANCE (1854); ANNESLEY, MARINE INSURANCE (1808); ARNOULD, MARINE INSURANCE (1848).

name staple sold over the counter by mine-run salesmen to the trusting public.

Seventeenth and eighteenth century marine insurance contracts were handwritten; hull and cargo owners and their brokers knew insurance as thoroughly as the underwriters. When a marine policy buyer entertained a proposal of a warranty, he bargained for important premium concessions and knew the courts would construe the warranty strictly against him.³ American draftsmen-lawyers, sometimes in the hire of fly-by-night companies, proliferated fine print in the nineteenth century fire and life insurance policies. Companies, spurred by competition, debased their product (as the Germans did their linen).⁴ Restrictions on coverage, not noticed or not understood by policyholders at the time of issue, became painfully clear after uncovered losses which policyholders would have paid to cover. The insurance market might have soured had not the law stepped in and afforded consumer protection greater than companies intended to sell.

Of course this process of favoring consumers can be carried too far. Insurance companies need and are entitled to reasonable limits on their responsibilities; the public is prejudiced when company liabilities are by generous caprice stretched over risks that cannot be profitably underwritten at a just premium. By and large, however, the courts have not been overgenerous to the public. Judges have limited their use of the doctrines of waiver and estoppel because of their awareness of important underwriting realities.

Underwriting cannot be discussed intelligently when cases involving unrelated problems are lumped together because of abstract legal similarities. I shall avoid this difficulty by classifying cases according to kinds of insurance, rather than technical types of legal problems.

FIRE INSURANCE

Sole Ownership Clauses

Before 1943 most fire insurance policies stipulated that unless the policy expressly provided otherwise, it was void if the policyholder owned less than an unmortgaged, undivided fee. Of course much insured property is mortgaged, and often a co-owner insures only his interest in property. Ownership warranties became harmless by the

3. See, *e.g.*, *De Hahn v. Hartley*, 1 T.R. 343, 99 Eng. Rep. 1130 (K.B. 1786), in which the court strained at a technicality to find breach of marine insurance warranty—a breach which could not possibly have increased the hazards of the insured voyage.

4. See JHERING, *LAW AS A MEANS TO AN END* 364 (Modern Legal Philosophy Series vol. 5, Husick transl. 1913).

terms of the policy when the interest of the policyholder was accurately described—as it usually was. But laymen are likely to think of “insuring a house;” the idea of “insuring an interest in a house” is legalistic and unnatural to the man in the street. So a policy buyer often did not think to tell the local agent that he had a limited interest or had borrowed money on his property. When property was co-owned by husband and wife, and when the local agent was only an order taker, many a policy afforded no protection; thirty years ago courts often held that insurance companies incurred no liability in this kind of case,⁵ and much insurance on co-owned homes was worthless.⁶

Companies wrote sole-ownership clauses into their fire insurance policies on the theory that part owners and mortgagors were, as a class, less desirable customers than fee owners of clear property. This theory, of course, has something to it; moral hazard can be ruinous to insurance companies. Before 1943 some policies called for payment of the actual cash value of property destroyed⁷—they did not limit coverage (as policies now do) to the value of the insured’s interest.⁸ “Valued policies” (in which the company agrees to pay the face of the policy in event of total loss) are required by law in some states⁹ and may aggravate the moral hazard of a mortgaged or co-owned risk. Those who have less to lose have some tendency to take less care. From the company point of view, the sole-ownership clause tightened up risk selection; it protected companies—automatically—from moral hazard. But the clause killed off much wheat to exterminate a few tares; it often uncovered risks that the company would have gladly taken for the premium charged—risks uncovered by operation of the clause when a clumsy local agent neglected to describe the limited interest of an acceptable customer. Mortgaged, jointly held, and leased properties are the bulk of insured properties; a company taking none of these risks excludes itself from most of the market. A company wanting to take limited ownership into account in its underwriting need only ask about title and mortgages, and then act accordingly. Sole-ownership clauses worked unfairly so often that courts “found” ways to circumvent

5. See, *e.g.*, *Pollack v. Connecticut Fire Ins. Co.*, 362 Ill. 313, 199 N.E. 816 (1936).

6. Goble, *Moral Hazard Clauses of the Standard Fire Insurance Policy*, 37 COLUM. L. REV. 410, 418 (1937).

7. This was fortunately so in the policy in *Merritt v. Farmers’ Ins. Co.*, 42 Iowa 11 (1875). Otherwise the court that allowed a recovery on a policy on property in which insured had only a homestead (life) estate might have had difficulty in giving a judgment that would cover the loss.

8. However, an insured with a limited interest may insure interests of his co-owners for them. Courts are quick to find that the policy is intended to protect interests of all co-owners. See, *e.g.*, *Welsh v. London Assurance Corp.*, 151 Pa. 607, 25 Atl. 142 (1892).

9. See, *e.g.*, KY. REV. STAT. § 298.130 (1948); NEB. REV. STAT. § 44-380 (1943).

them.¹⁰ In 1943 the clause was dropped from the New York Standard Fire Policy, and as other states followed suit, the clause disappeared from fire insurance policies.¹¹ But much viable insurance law of waiver and estoppel was made in sole-ownership clause cases, and the lessons these cases teach are more than historic.

The standard theory of waiver is this: When a contract by its terms provides that a party's liabilities are conditional he may widen his responsibility by telling the other party that he will be bound even though the condition does not come to pass. A buyer agrees to take an automobile if it will fit into his garage; it turns out to be three inches too long; the buyer says he will take it anyway; he may no longer insist on the length condition.

Insurance companies needed a procedure for waiving sole-ownership clauses. They tried to meet this need by saying in their policies that the clause operates only if the policyholder's limited interest is not described in policy blanks or in endorsements. Disputes arose only when a policyholder with a limited interest claimed some other form of waiver. These waivers of limited ownership, not appearing on the face of the policy, were seldom explicit; a local agent intending to write a policy covering a limited interest was likely to do so in the authorized written form. A non-policy waiver which was almost express is illustrated by *Isaac v. Donegal & Conoy Mut. Fire Ins. Co.*¹² In that case a fire policy covered a store building and its contents. Three proprietors were named as insureds. One proprietor's personal furniture was in the building. When a local agent delivered the policy his customers told him about the furniture and their desire to cover it. The agent said the policy did cover the furniture. The court rejected the company defense of breach of the sole-ownership clause on the ground (among others) of waiver. No doubt the company would have been willing to insure the furniture at the premium rate which had been collected. The local agent either thought he was selling such protection or was too lazy to write a proper policy. Nevertheless, he clumsily tried to do business his company wanted to do. Injustice of the company's position probably impelled the court's holding more than did the technical applicability of the doctrine of waiver. In another interesting example, *Hoffman v. Neshannock Mut. Fire Ins. Co.*,¹³ the original insured sold a half interest in the property to his brother.

10. In Texas, *e.g.*, either spouse is a sole and unconditional owner of community property for insurance purposes. 13 TEXAS L. REV. 236 (1935).

11. See PATTERSON, INSURANCE 504 n.3 (3d ed. 1955).

12. 308 Pa. 439, 162 Atl. 300 (1932). See also *Early v. Mutual Fire Ins Co.*, 178 Pa. 631, 36 Atl. 195 (1897).

13. 156 Pa. Super. 13, 39 A.2d 145 (1944).

The policy stipulated that if any change in interest occurred it would become void. The local agent lunk-headedly told the purchasing brother that the policy nevertheless remained in force. The purchasing brother sent a premium to the company's home office with a covering letter telling about his purchase and asking for an endorsement. The company did not answer his letter but kept his money. The house burned a month later. The court called failure to respond a waiver, and gave the customer the protection he deserved.

The holdings in both of these cases were also justified on the theory of estoppel.¹⁴ Standard statement of the estoppel principle runs this way: One who represents a present or past fact to another who relies on that representation is estopped to deny the truth of that representation to the detriment of the relier. A classroom example of the doctrine is the case of a bystander who represents that his own horse belongs to a seller and later tries to assert his title against the buyer who has relied on that representation. The two sole-ownership cases are much like this horse case. Insurance company agents lulled customers into believing they were covered and accepted premiums adequate for coverage. To allow breach of title-warranty defenses after loss seems most unjust. But reliance to detriment on *representations* about coverage of a fire policy limited by a sole-ownership clause only aggravates the evil of the clause—which also denudes customers to whom no such representations are made.

For example, in *Mears v. Farmers Cooperative Fire Ins. Co.*¹⁵ adjusters investigating a loss found out that insured farm buildings were on leased ground. The company immediately denied liability. After their disclaimer the farmer received a premium notice and a request for payment within thirty days. The court took the position that the bill was inconsistent with the disclaimer, and was evidence on which the jury, in absence of explanation, could find a waiver. The court ruled that the company was not entitled to a directed verdict without calling its billing clerks to the witness stand and adducing proof that the notice was sent by mistake. Estoppel cannot be bot-tomed on this assessment notice—the farmer was not prejudiced by receiving it; he had already suffered his loss which was uncovered by breach of the ownership warranty. The court's theory is not that the farmer was misled; it let the jury find that the company relinquished its rights intentionally.¹⁶ Would the court have let the

14. See also *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N.E. 990 (1894), in which a waiver theory would be clumsy and estoppel alone was used.

15. 112 Vt. 519, 28 A.2d 698 (1942).

16. *But see Ryan v. Rockford Ins. Co.*, 85 Wis. 573, 55 N.W. 1025 (1893). Note the early date.

leased-ground stipulation evaporate if that stipulation were in the public interest? Surely proof of the premium notice is meagre evidence of an intention to relinquish the defense; the juror who finds company intention to waive the defense on this proof is not the wisest of reasonable men.

*Perkins v. Century Ins. Co.*¹⁷ is another type of case hard to justify on either waiver or estoppel theories. A policyholder bought a series of annual policies on her dwelling. The mortgage on her property was foreclosed. When her policy year ended she told the local agent not to renew because she had lost the property. He explained her equity of redemption and recommended that she buy a policy written to protect it. She agreed to take such a policy. Nevertheless his clerk merely copied her old policy and, of course, misdescribed her interest so that the ownership warranty was broken. The mistake was discovered after a fire broke out while she was taking steps to redeem. This is not quite a waiver case, because nothing was done by the company to relinquish its rights under the policy as written. It is not quite an estoppel case because no representation was made after the policy was issued—unless it is said that delivery of the policy was an implied representation of coverage. Perhaps the best traditional argument is that mutual mistake entitles the policyholder to relief. Even the company looked on the case as one that might call for reformation and argued that the policyholder could sue on the policy only after an equity court had reformed it. But the union of law and equity had proceeded far enough in Michigan for this argument to lack appeal; the court held the policyholder's case strong enough to go to the jury.

Whenever the local agent knew about limitations on the policy buyer's interest, courts found some way to protect the buyer against the rigors of the sole-ownership clause.¹⁸ Waiver and estoppel were often in the opinions in these cases. Election, another theory more-or-less peculiar to insurance law, was also available to the courts. An election holding runs as follows: A local agent's knowledge of defect in the policyholder's title is knowledge of his company, and if with this knowledge the company keeps the policyholder's premium, the company elects to waive breach of the sole-ownership clause. Per-

17. 303 Mich. 679, 7 N.W.2d 106 (1942).

18. *Spern v. Insurance Co.*, 131 Pa. Super. 595, 200 Atl. 196 (1938); *Welch v. Fire Ins. Ass'n*, 120 Wis. 456, 98 N.W. 227 (1904). *Contra*, *Lindley v. Franklin Fire Ins. Co.*, 152 S.W.2d 1109 (Tex. Comm'n App. 1941), which held that a life tenant was barred by a sole ownership clause in a policy issued with an attached application limiting agent's authority to waive. See also *Home Ins. Co. v. Roberts*, 100 S.W.2d 91 (Tex. Comm'n App. 1937).

haps the most realistic way of looking at these cases is that local agents with knowledge of policy buyers' needs have authority to make implied warranties of fitness of the policies they sell.¹⁹

The final step in judicial destruction of the sole-ownership-clause trap is illustrated by *French v. Patriotic Ins. Co.*²⁰ The policyholder insured a hotel standing on land he did not own. His policies warranted that he owned the land in fee. They were issued on oral application without inquiry about his title. Unanswered questions about the innkeeper's title went forward on the agent's daily reports to some of the insurance companies whose policies were issued. The agent knew nothing about the extent of his customer's interest and left this part of the dailies blank. The court held that since the companies had not asked about the policyholder's interest they could not defend on the ground of breach of warranty of title; they could not take his money for policies so written that he would not be protected if he had less than a fee, lull him into a sense of security by not asking about title, and then assert a sole-ownership-clause defense.²¹

Courts can chip away undesirable defenses at the rate of only one case at a time. Diversity of temperaments of judges and the tradition of judicial reluctance to interfere with private voluntary contracts might have held back the hamstringing of title warranties; the surprise is that courts moved as steadily as they did. But the final chapter was not written by judges. The title warranties have now been taken out of fire insurance policies by insurance commissions and the industry itself. Now a fire insurance company wishing to take into account in its underwriting the extent of the insured's title makes inquiries and looks for its protection to the law of representations rather than to the law of warranties.

19. VANCE, INSURANCE 540 n.21 (3d ed. 1951). In one respect the analogy is not apt. Some fire insurance policies fit the need of buyers when issued, but become worthless by their terms when a buyer later mortgages his property and the sole ownership clause becomes operative. In *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N.E. 990 (1894), a policy holder mortgaged two parts of his farm to different mortgagees. His local agent told him that he needed only an indorsement for the mortgage that covered the part of the farm on which the insured buildings stood. The court held the company estopped to deny this representation. *But see* *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 51 N.W. 555 (1892), in which an agent's knowledge of an uncovering mortgage was held no bar to the company's breach-of-ownership warranty defense. Is the early date of this case significant? Wouldn't the company have continued the risk for the same premium if they had been notified of the mortgage and asked to name the mortgagee as an additional insured?

20. 107 Colo. 275, 111 P.2d 893 (1941).

21. See also *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N.E. 964 (1905); *Murphey v. Liverpool & London & Globe Ins. Co.*, 89 Okla. 207, 214 Pac. 695 (1922); *Allesina v. London & Liverpool & Globe Ins. Co.*, 45 Ore. 441, 78 Pac. 392 (1904); *Philadelphia Tool Co. v. British Am. Assurance Co.*, 132 Pa. 236, 19 Atl. 77 (1890). *But see* *Old Colony Ins. Co. v. Kansas Pub. Serv. Co.*, 154 Kan. 643, 121 P.2d 193 (1942); *Wyandotte Brewing Co. v. Hartford Ins. Co.*, 144 Mich. 440, 108 N.W. 393 (1906).

Other Insurance

Stipulations voiding fire insurance policies when a policy in another company is issued on the same risk have not fared much better than title warranties. Other-insurance clauses are, however, still used. The original form of these clauses voided the policy when other insurance was issued without the company's written permission; today some policies less harshly provide that other insurance may be banned or its amount limited by endorsement—an option companies rarely exercise.

The original theory of the other-insurance clause was (like that of the sole-ownership clause) that it reduced moral hazard. This justification paled, however, when policy stipulations were adopted providing for pro rata loss sharing with other companies covering the same risk and limiting total benefits from all companies to one single indemnity. Only when policies are "valued" can multiple policies foment arson by increasing coverage to more than indemnity.

In early cases courts sometimes held for companies asserting other insurance defenses and against policyholders who had countered with substantial waiver and estoppel replies.²² In another early case the policyholder recovered after proving a classic instance of estoppel. *Mentz v. Lancaster Fire Ins. Co.*²³ was decided by the Pennsylvania Supreme Court in 1876. A canny, though illiterate, policy buyer asked the local agent who sold him policies in two companies about endorsements on each policy permitting the other. The agent (with whom the policies were left for safe keeping) told him proper endorsements were attached to both policies; he relied on the truth of that representation. The court estopped the company from denying its agent's representation. The local agent was negligent or lazy or afraid to let his companies know he was dividing business between them.

When a policyholder has given his company or its local agent notice that he has bought an additional policy and the company has remained silent until after loss, breach of the other-insurance clause is often raised as a defense. Some courts call this silence an acquiescence that estops the company from asserting its defense.²⁴ A more comfortable theory used by other courts is that a company knowing about such a breach must either elect to cancel and return unearned premium or waive its defense.²⁵

22. *Calmenson v. Equitable Mut. Fire Ins. Co.*, 92 Minn. 390, 100 N.W. 88 (1904); *Baumgartel v. Providence Wash. Ins. Co.*, 136 N.Y. 547, 32 N.E. 990 (1893).
23. 79 Pa. 475 (1876).

24. In *Phenix Ins. Co. v. Johnson*, 143 Ill. 106, 32 N.E. 429 (1892), a local agent told a general agent about other insurance and the general agent's silence was held an adequate basis for estoppel.

25. *Phenix Ins. Co. v. Grove*, 225 Ill. 299, 74 N.E. 141 (1905); *Glasscock v. Des Moines Ins. Co.*, 125 Iowa 170, 100 N.W. 503 (1904); *Swedish-Am. Ins. Co. v. Knut-*

New Jersey combined law and equity to give a policyholder his premium's worth in a pair of interesting cases.²⁶ In *New Jersey Rubber Co. v. Commercial Union Assurance Co.*,²⁷ a company had agreed to write a \$25,000 fire insurance policy on an industrial plant with the understanding that the policyholder would get policies for \$75,000 in other companies (who would, of course, share the risk pro rata). When the property burned several months later the policyholder had no other insurance. The loss was less than \$100,000, but more than \$25,000. Some days after the fire the company cancelled and returned the premium accruing after cancellation. The cancellation notice said that the company's withdrawal from the risk was subject to final adjustment of the pending claim. The law court in which the policyholder sued on the policy held that the policyholder's default was at one time a defense, but cancellation was inconsistent with that defense and waived his shortcoming. This holding standing alone would be outrageous; the business-wise policyholder did not furnish a promised important underwriting protection to the company. When the policy was issued the company said in effect, "We are not big enough to carry the whole risk; we'll carry one-fourth of it if you'll get other companies to carry the other three-fourths." At the time of cancellation it said in effect, "Without prejudice to your vested rights or our defenses, we want none of this risk in the future." The company did not forgive past sins and agree to pay four-fourths of the loss. Fortunately the equity court came to the company's rescue and enjoined the policyholder from collecting more than one-fourth of his loss. This decree held the company substantially to the bargain it made; and required it to pay a sum that it had been willing to pay all along. The holding is a triumph of understanding over an inflexible and wild use of the doctrines of waiver and estoppel.

Vacancy

Fire in an occupied house is more likely to be discovered and fought in its early stages than one in an empty house; fire in an unused building often goes unnoticed until it has made considerable headway. Empty buildings attract children and tramps likely to start fires in them in various ways. Empty buildings are often unwanted and their

son, 67 Kan. 71, 72 Pac. 526 (1903). In *Evans v. Metropolitan Life Ins. Co.*, 294 Pa. 406, 144 Atl. 294 (1928), a local agent told an applicant for accident insurance he need not list another policy he already had; the company was estopped from asserting misrepresentation in defense.

26. *New Jersey Rubber Co. v. Commercial Union Assurance Co.*, 64 N.J.L. 580, 46 Atl. 777 (1900); *Commercial Union Assurance Co. v. New Jersey Rubber Co.*, 64 N.J. Eq. 338, 51 Atl. 451 (Ct. Err. & App. 1902).

27. 64 N.J.L. 580, 46 Atl. 777 (1900).

owners may be tempted to burn them for insurance benefits. So vacant buildings, more than occupied ones, are likely to catch fire and be seriously damaged.

Companies tried to eliminate these risks by policy stipulations withdrawing coverage after short periods of vacancy. Older policies permitted periods of vacancy no longer than ten days. Unknowing or forgetful householders who took extended trips without vacancy permits became uninsured shortly after they left home. Even a sophisticated policyholder whose short absence was prolonged by accident lost his protection. Many courts developed antipathy for vacancy clauses; in their eyes policyholders needed the protection withheld by the ten-day vacancy clause and they seemed determined to protect the clause's victims. They gained this end by interpreting the vacancy clause as inapplicable to temporarily absent householders on the theory that a house is not vacant or unoccupied so long as its occupants leave their furniture and intend to return.²⁸ This interpretation was rejected by other courts.²⁹ Perhaps their thinking ran on purely doctrinal lines and they thought this theory an unpermissible twisting of language; perhaps, however, they were impressed with underwriting considerations that led to the adoption of vacancy clauses—considerations of more merit than the other fire policy stipulations discussed earlier.

Even in jurisdictions where courts have not trimmed operation of vacancy clauses, policyholders are less likely to run afoul of them. Since 1943 most companies have enlarged permissible periods of vacancy to sixty days. Many policies stipulate that the property may be vacant for an unlimited period if it is a dwelling in an area served by fire hydrants. Nearly all modern vacancy clauses are "suspensions"—they do not specify that policies become void after a period of vacancy; they merely hold protection in abeyance until the property is reoccupied.

Court respect for the underwriting justification of the vacancy clause may account for modern cases in which company vacancy defenses succeed over substantial claims of waiver and estoppel.³⁰ The form of modern vacancy clauses, however, may have more to do with these holdings than the clause's underwriting appeal. When the clause withdraws protection only during vacancy after the permitted period and resumes protection when the property is reoccupied, little sense can be made of the proposition: A company with knowledge of vacancy waives

28. See, *e.g.*, *Foley v. Sonoma County Ins. Co.*, 18 Cal.2d 232, 115 P.2d 1 (1941).

29. See, *e.g.*, *Kinneer v. Southwestern Mut. Fire Ass'n*, 322 Pa. 100, 104, 185 Atl. 194, 195 (1936).

30. Of the five vacancy clause cases in my sample the two in which companies succeeded are *Home Ins. Co. v. Wilson*, 109 Ark. 324, 159 S.W. 1113 (1913); *Conley v. Queen Ins. Co.*, 256 Ky. 602, 76 S.W.2d 906 (1934).

the vacancy defense unless it notifies the policyholder that the policy is void and returns the unearned premium. Older policies, however, stipulated that vacancy beyond the permitted period ended the company's obligations once and for all and some courts were quick to find an election to waive these clauses based on the local agent's knowledge of vacancy when the policy was issued.³¹ Perhaps these courts were moved by considerations not unlike those that led several others to erode the vacancy clause defense by interpretation—that is, a conviction that the clause is unfair.

*Home Fire Ins. Co. v. Kuhlman*³² is one of those cases in which cancellation after loss proved costly to a company. The insured building burned after having been vacant for several weeks beyond the period permitted by the policy. After the fire the company sent cancellation notice and in three letters urged the policyholder to cash a \$3.90 check for unearned premium. Nothing demonstrated a company intention to waive its vacancy defense other than the technical inconsistency of its attempt to cancel an already void policy. The company's behavior is sensibly explained by saying that it was trying to foreclose any claim for liability arising out of another fire; surely it had no other motive to urge the policyholder to accept \$3.90. The court's willingness to let a jury find an intention to waive on such flimsy proof must have been prompted by its distaste for the vacancy defense.³³

The vacancy defense can be based on sound underwriting principles and operate in the public interest. In some of the older policies the permitted ten-day period was much too short; in cases of protected dwelling houses, uses of any vacancy clause may be unwarranted. But sound underwriting principles formulated with due regard for public interest may call for the use of some kinds of vacancy clauses for some sorts of risks. The courts should move with care in striking down vacancy clause defenses or they may load all fire premiums with a charge that should be borne by a few whose sub-standard risks call for higher rates.

31. *Security Ins. Co. v. Cook*, 99 Okla. 275, 227 Pac. 402 (1924); *Keller v. Hartford Fire Ins. Co.*, 239 Wis. 354, 300 N.W. 471 (1942). The Wisconsin statute, Wis. STAT. § 203.13(1) (1947), on which the court purported to rely in the *Keller* case provides: "Knowledge of an agent of a fire, casualty, or marine insurance company at the time the policy is issued or an application is made shall be knowledge of the company, and any fact which breaches a condition of the policy and is known to the agent when the policy is issued or the application made shall not void the policy or defeat a recovery thereon in the event of loss." Note, the fact known to the agent was vacancy when the policy was issued; the vacancy clause did not operate until sixty days later; the court therefore, went beyond the bare letter of the statute.

32. 58 Neb. 488, 78 N.W. 936 (1899).

33. *But see* *Madden v. Interstate Businessmen's Acc. Ass'n*, 139 Minn. 6, 165 N.W. 482 (1917).

Removal of Property Insured While in a Specified Building

Fire insurance policies on movables often stipulate that the property is protected only while in a certain building. These location clauses are underwriting essentials. Risk of loss often varies with the site—as building materials and surrounding activities vary. Companies chart locations of their risks and reduce shock loss resulting from bunching by cross-ceding or reinsurance. Floater protection that follows the property can be written only at higher rates; it is available for those who need it and will pay for it; it is often issued only on written application including itemized schedules designed to protect the company from inadequate premiums. The public is served by availability of fixed place insurance sold at lower rates and marketed with less bother. Of course, forgetful or unknowing buyers of fixed place insurance suffer occasional misfortunes when they move their insured goods without notice to their insurers. The courts have steadily held that the protection of fixed location policies cannot be stretched to new locations without company consent.³⁴

Policies make no provision for changing the specified location; by their terms removed property is uncovered unless and until it is returned. In practice a policyholder planning a removal tells his local agent about his plans and gets either an endorsement or a new policy protecting his goods at their new location. In two Massachusetts cases the court held that policyholders who relied on local agents' oral assurances that the property would be insured in new locations could not recover on their policies without proving the agents acted with authority.³⁵ This, of course, flaunts the theory of election. In *Cummings v. National Fire Ins. Co.*³⁶ the Supreme Court of Michigan, in 1930, held a removal defense unconscionable, and used the theory that notice to the local agent is imputed to the company and put it to its election either to continue protection or cancel and return unearned premium. Failure to act, therefore, insured the goods at their new site. This holding is proper in a world in which policyholders have been taught to rely on local agents.

34. See, e.g., *Firemen's Ins. Co. v. Alonzo*, 112 Tex. 283, 246 S.W. 82 (1923). Other cases are cited in PATTERSON, *INSURANCE* 479 nn.5 & 6 (3d ed. 1955). See also health insurance policy limitations on coverage only for illnesses unconnected with pre-policy bad health. *Crowder v. General Acc., Fire, & Life Ins. Co.*, 180 Va. 117, 21 S.E.2d 772 (1942), held an application disclosing a prior injury does not affect this limitation.

35. *Parker v. Rochester German Ins. Co.*, 162 Mass. 479, 39 N.E. 179 (1895); *Blair v. National Reserve Ins. Co.*, 293 Mass. 86, 199 N.E. 337 (1936). Was it unfortunate that the 1895 precedent was directly in point when the question arose again in 1936?

36. 251 Mich. 105, 231 N.W. 61 (1930).

The holding in the *Cummings* case is not an attack on the location clause's underwriting value; the clause is an essential limit on company liability advantageous to both the public and the insurance industry. Justification lies in another quarter—the propriety of requiring companies to carry the risk that local agents will not regularize location changes. Non-waiver clauses purport to put this risk on policyholders by disclaiming agents' authority to make oral changes in the policy. Perhaps the real waiver here is an institutional one; the industry has fostered public belief that local agents are trained, skillful, careful and reliable.³⁷ Most of them are, and even business-wise policyholders rely on them to take care of formalities needed to protect them when they move.

When an agent fails to function in writing, his company can discipline him better than can his customers. The company calls for reports, keeps in touch with him and his methods through special agents, and picks up its supplies when too dissatisfied with him. A customer can only take his business elsewhere. Companies required to carry risks of agent misbehavior reflect the cost of that risk in reporting their experience, which in turn affects premium rates. The uninsured policyholder is seldom a good bearer of losses which he has counted on his insurance to cover. In the future more courts will use waiver, estoppel and election rules to protect policyholders who tell their local agents about removals of goods covered by fixed location policies.³⁸

37. In *Time Magazine*, Jan. 7, 1957, p. 51, a full page advertisement of the National Board of Fire Underwriters proclaims: "[W]hen it comes to insurance protection your local broker is an expert. . . . It is the business of a Capital Stock Company agent or broker to see that you get the proper insurance coverage and to help you if you have a claim under your policy. . . . He is handy when you need him fast. . . . He will see that you have the right kind of insurance. . . ."

38. Proof of loss formalities lie in the same category. Ordinarily all a policy holder does is to notify the local agent informally; claim adjusters usually see that satisfactory proof of loss is then prepared. When claim adjusters demand nothing more formal and purport not to be dissatisfied, their conduct should ordinarily be a company waiver. *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N.E. 606 (1895). Automobile claims are treated the same way. *Corporation of Royal Exchange Assurance v. Franklin*, 158 Ga. 644, 124 S.E. 172 (1924). *But cf.* *Phoenix Ins. Co. v. Fleming*, 65 Ark. 54, 44 S.W. 464 (1898), in which adjuster warned policy holder to make proof of loss.

A similar result is to be expected when a policy holder tells a local agent about an increase of hazard. *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 63 N.E. 399 (1902); *Reinhardt v. Security Ins. Co.*, 312 Ill. App. 1, 38 N.E.2d 310 (1941). These holdings may, in part, reflect judges' distaste for the substance of the increase of hazard clause; courts have interpreted this clause so that a policy holder is covered even though he knows the insured property is subject to such dangers as temporary exposure to open vessels of gasoline, *Orient Ins. Co. v. Cox*, 218 Ark. 804, 238 S.W.2d 757 (1951), or conspiracy to burn the insured property, *Ampersand Hotel Co. v. Home Ins. Co.*, 198 N.Y. 495, 91 N.E. 1099 (1910).

Only the non-waiver clause comes in for distaste when a policy holder sells insured property and tries to transfer insurance protection to the buyer. Good fire insurance underwriting is impossible unless identity of the insured is known. Courts are not likely to make exceptions to the theory that fire policies do not insure transferees of those named in absence of notification to the company and its consent. *But see* *Central Union Bank v. New York Underwriters' Ins. Co.*, 52 F.2d 823 (4th Cir. 1931).

Companies should shoulder the risk of local agent misbehavior in cases involving problems other than removal of property covered by fixed location fire insurance. The difference between removal cases and others earlier discussed is this: The agency problem is the only problem in removal cases; in the other cases unjust or impolitic policy restrictions on coverage are equally or more important. In sole ownership clause cases, courts' willingness to impute a local agent's knowledge to his company and hold the company responsible for his assurances is less important than their willingness to disfavor the sole ownership clause. In several other insurance clause cases the insured dealt directly with the home office and the court found a company election based on its silence, rather than its assurances.³⁹ The courts' motivation for finding election (rather than following other cases more favorable to insurance companies) probably lay in their distaste for the other-insurance clause. Similarly, mistrust of the older types of vacancy clause, as well as a desire to make companies stand back of their local agents' assurances, probably motivated decisions favorable to policyholders who have left their homes for longer than the specified periods. Courts, therefore, have two reasons for protecting policyholders. In some cases the courts have tried to improve the insurance companies' product; in others the courts have made companies stand back of their local salesmen's assurances of what the product will do.

Company responsibility, however, is rarely enlarged merely because a company or its local agent suspects that a policyholder may fall afoul of a policy stipulation. Only on title defects have courts held that a fire insurer must either seek information or waive the sole ownership clause defense. Insurers need not forever ask whether or not their policyholders have bought other insurance, vacated their property, or removed their goods from an insured location. Casual information that a policyholder may sometime in the future be guilty of a breach of warranty seldom (in itself) bars a warranty defense.⁴⁰ But clear

Once, however, an agent gives informal consent to the transfer, courts are not likely to be impressed with company argument that transfer must be in writing, especially since agents normally have authority to insure the transferee by a new oral contract. *Andrews v. Equitable Fire Ins. Co.*, 236 N.Y. 573, 142 N.E. 289 (1923); *Manchester v. Guardian Assurance Co.*, 151 N.Y. 88, 45 N.E. 381 (1896). *Contra*, *Margolies v. St. Paul Fire & Marine Ins. Co.*, 125 A.2d 768 (N.H. 1956). For a workmen's compensation case following the fire insurance majority view, see *National Automobile Ins. Co. v. Industrial Accident Comm'n*, 19 Cal.2d 540, 122 P.2d 1 (1942).

39. See, e.g., *Swedish-Am. Ins. Co. v. Knutson*, 67 Kan. 71, 72 Pac. 526 (1903).

40. In *Watkins v. California Ins. Co.*, 296 Ky. 434, 177 S.W.2d 566 (1944), a commercial policyholder violated a clause requiring him to keep his books after hours in a fireproof safe or in a place not exposed to a fire in his store. Insured vainly argued that agent's knowledge that he had no such safe relieved him from complying with the clause. See also *Cockendorfer v. Pendleton County Farmers' Fire Ins. Co.*, 287 Ky. 735; 155 S.W.2d 204 (1941); *Freed's Inc. v. American Home Fire Assurance Co.*, 305 Mich. 89, 9 N.W.2d 923 (1943). *But see* *German Am. Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27 (1908).

notification to a local agent of facts uncovering a risk is likely to result in expansion of fire insurance coverage in the absence of a disclaimer warning the policyholder that he needs to take steps to protect himself.

AUTOMOBILE INSURANCE

Many automobile insurance waiver and estoppel problems are like the fire insurance problems discussed earlier and can be passed over quickly. Automobile policies still warrant sole ownership and unencumbered title. Courts readily find these warranties waived. In one case, for example, a local agent holding an automobile policy for safe keeping ignored his promise of an endorsement permitting a mortgage; his company's breach of warranty defense was held waived.⁴¹ In another case a used car dealer described his complicated financing to a local agent who issued a policy warranting the cars unencumbered; the court held the cars were encumbered by an equitable mortgage but ruled out a breach of warranty defense.⁴² Some courts have held breach of title warranties waived by the agent's failure to inquire about the insured's title when the policy was issued.⁴³ In a variety of other cases the courts have required automobile insurers to stand back of agents' assurances⁴⁴ and have protected policyholders against stipulations on matters on which no questions were asked.⁴⁵ These cases, too, illustrate tendencies to treat insurance like commodities sold with implied warranty of fitness and to strike down company attempts to saddle policy buyers with the risk of local agent misperformance.

Occasionally the courts have overshot. In *Collier v. General Exchange Ins. Corp.*⁴⁶ a collision policy covered the interests of both a car buyer and a finance company. The buyer resold the car and attempted

41. Corporation of Royal Exchange Assurance of London v. Franklin, 158 Ga. 644, 124 S.E. 172 (1924).

42. Fountain v. Importers' & Exporters' Ins. Co., 214 Wis. 556, 252 N.W. 569 (1934). Again the court relied on a Wisconsin statute similar to that quoted in note 31 *supra*.

43. Pacific Fire Ins. Co. v. Cash, 81 Ga. App. 102, 57 S.E.2d 708 (1950); Bird v. Central Mfrs.' Mut. Ins. Co., 168 Ore. 1, 120 P.2d 753 (1942). *Contra*, Globe & Rutgers Fire Ins. Co. v. Segler, 44 So. 2d 658 (Fla. 1950).

44. Cappaert v. Emmco Ins. Co., 304 Mich. 130, 7 N.W.2d 244 (1943) (policy warranted truck would be used in a 150 mile radius; insured notified an assenting local agent with whom he had dealt for ten years that he planned to make hauls longer than 150 miles); Robinson v. Empire Fire Ins. Co., 380 Pa. 499, 112 A.2d 146 (1955) (policy holder told clerk that policy misdescribed his second-hand trailer as new). *But see* Drennan v. Sun Indemnity Co., 271 N.Y. 182, 2 N.E.2d 534 (1936) (lack of authority held fatal to an agent's oral extension of the term of a liability policy).

45. Davern v. American Mut. Liab. Ins. Co., 241 N.Y. 318, 150 N.E. 129 (1925) (policy bought by mail warranted no claims for injuries or damages inflicted by automobile had ever been made against the insured and no company had ever cancelled an auto policy issued to him).

46. 58 Ariz. 122, 118 P.2d 74 (1941).

to assign his insurance to the new owner. The policy specified that it became void on assignment or transfer before loss. The new owner paid off the encumbrance and notified the finance company (closely affiliated with the insurer) of the facts. The finance company wrote to the new owner and told him the policy could not be assigned and warned him to get other insurance; the letter suggested that the new owner send the policy to them for cancellation and recovery of unearned premium. The assignee responded by saying again that he would like the insurance continued and transferred to him, and asking just how much premium was unearned at the time he bought the car. The reply said for a second time that the policy's protection could not be transferred; the letter went on to say that the insurance company would figure unearned premium from the day on which the company got back the policy. The car was smashed up after the last letter was written but before it was delivered. The court held the company liable for this loss. The court's reasoning was: Company insistence that the policy continued to earn premium until delivered up barred it from asserting that protection expired earlier. The company tried to overreach the new owner. But the underwriting theory back of non-transferability of automobile insurance without company consent is a sound one; companies should have some rights in selecting their customers and should not be required to accept any substitute a policyholder proposes. But the penalty for trying to collect too much premium is not rationally set at the amount of damage an unaccepted substitute happens to suffer. This holding transcends the doctrines of waiver and estoppel; there was no agreement on the part of the company to insure the new owner and he had no basis for believing he could rely on the company for protection. Adaptation of automobile insurance to consumer needs does not call for this extreme decision.

Automobile Liability Insurance

In *Gouch v. Halperin*⁴⁷ a policyholder reported an accident to his local agent. In the policyholder's presence the agent passed on the report by long distance telephone to the company's home office. The agent then told the policyholder he need make no further report. The court held the agent's assurances waived policy stipulations calling for detailed written notice of accident; the company was required to pay a judgment recovered against the policyholder. The policy stipulation for a written detailed report is a wise one; such reports often protect both policyholder and company against unjust or exaggerated claims;

47. 306 Pa. 230, 159 Atl. 447 (1932).

companies seldom are willing to forego their right to require the policyholder to make an early, detailed, written statement. Nonetheless, untrained insurance buyers are not likely to appreciate the value of a written report. They look to local agents to tell them what to do. Companies foster this trust and cultivate public belief that local agents are reliable friends of policyholders in distress. Under these circumstances the public is best served by holding insurance companies to assurances like the one made by the local agent in the *Gouch* case—even when policies expressly and unconditionally specify that the insured must file a written report and stipulate that local agents may not waive this requirement.

In *Goldstein v. Bernstein*⁴⁸ a company warned its policyholder several times that it would withdraw from defense of a suit against her if she were not in court when the trial started. Her rights and duties were fully explained to her and she was inexcusably absent. Had she paid the judgment entered against her and sued the company on the policy, she had no shred of a chance for a holding that the company had given up (or barred itself from asserting) its non-cooperation defense. The cooperation requirement is in the public interest; without it liability insurance premiums increase and cooperative customers must then pay costs of others' non-cooperation. The injured third party in the *Goldstein* case argued that the company was estopped from asserting non-cooperation against him. When a company is estopped from asserting a policy defense against the policyholder, most courts hold that the policyholder's rights inure to the third party. But this was not the case here; the third party had to establish a company waiver or estoppel to himself. The court saw no basis for finding one and said the company incurred no liability even though it had begun to defend the suit.⁴⁹ Some legislatures have protected third parties from financial irresponsibility of policyholders by enacting statutes withholding some policy defenses from companies otherwise liable to third parties.⁵⁰ These statutes usually entitle the company to reimbursement from the policyholder—a right of doubtful value when the third party has already had difficulty in collecting his judgment from the policyholder.

A liability insurer is put to a difficult choice when it thinks it may have a policy defense. If the company withdraws, and the policyholder does a poor job of defending himself and the policy defense collapses,

48. 315 Mass. 329, 52 N.E.2d 559 (1943).

49. See also *Clark Motor Co. v. United Pac. Ins. Co.*, 172 Ore. 145, 139 P.2d 570 (1943); *Allegretto v. Oregon Automobile Ins. Co.*, 140 Ore. 538, 13 P.2d 647 (1932); *Antone v. New Amsterdam Cas. Co.*, 335 Pa. 134, 6 A.2d 566 (1939).

50. See *e.g.*, *Fallon v. Mains*, 302 Mass. 166, 19 N.E.2d 68 (1939). Though the *Goldstein* case was also a Massachusetts case, the statute was inapplicable because claimant was a guest in insured's car, a class of claimants expressly excluded from the statute's operation.

the company will pay out more than if it had given the policyholder a skillful, vigorous defense. On the other hand, if the company knows facts which may constitute a policy defense, but nevertheless undertakes to defend a suit against the policyholder, it may waive that defense.

The best escape from this dilemma is between its horns; when the company proposes to defend the policyholder only if he agrees that the company thereby will lose none of its rights, and the policyholder accepts this proposal, the company can oppose the third party vigorously and yet lose no defense it may have.⁵¹

Some policyholders will not accept the reservation of rights. Occasionally a company defends without an accepted reservation of rights and escapes a claim that it has waived its policy defenses. In *Clark Motor Co. v. United Pac. Ins. Co.*⁵² a policyholder refused to agree to a reservation of rights. He did nothing to defend himself, and entered no objection when the company unsuccessfully defended for him. The injured third party sued the company and contended that the company lost its policy defenses by its conduct. The court said the company's actions were not inconsistent with the later assertion of a policy defense since they had in no way misled the policyholder; the court noted the policyholder's failure to procure counsel, and found an implied consent to the reservation of rights. This company sailed pretty close to the line. In *Gerka v. Fidelity & Cas. Co.*⁵³ the policyholder rejected a reservation of rights and said he would hire his own lawyer and hold the company liable for any judgment he had to pay. The company made no offer to give him the papers in the action and continued his defense. As in the *Clark Motor* case the policyholder made no further objections. Nevertheless the court found that the company's conduct raised a question of estoppel for the jury. This holding inured to the benefit of the injured third party.

Liability insurers' policy defenses vary in strength. Sometimes a court that holds a company has waived a policy defense is brushing away a mere straw, and one suspects that weakness of the company's policy defense influences the holding more than strength of proof of waiver.⁵⁴ In other cases the policy defense is clear, and false

51. See, e.g., *Allegretto v. Oregon Automobile Ins. Co.*, 140 Ore. 538, 13 P.2d 647 (1932).

52. 172 Ore. 145, 139 P.2d 570 (1943). See also *Beatty v. Employers' Liab. Assurance Co.*, 106 Vt. 25, 168 Atl. 919 (1933).

53. 251 N.Y. 51, 167 N.E. 169 (1929).

54. In *Beatty v. Employers' Liab. Assurance Co.*, 106 Vt. 25, 168 Atl. 919 (1933), the company defended by claiming that insured's agreement with his mother to pay expenses of a trip resulted in carriage for hire not covered by the policy. Court found waiver in company's furnishing a defense after son refused to agree to a reservation of rights.

friendliness of adjusters who pull their companies out at the last moment—while they pin down proof needed for a policy defense, or wait to see just how serious the claim may be—so embarrasses the policyholder's defense that estoppel seems eminently proper.⁵⁵

An insurance company, by staying in a case, may stiffen the claimant's persistence. Since a claim countenanced by an insurance company has a nuisance value it might not have if the company pulled out, prejudice to a policyholder can result from company participation. Furthermore, few policyholders have the independent counsel they need unless and until their liability insurers withdraw. A company intending to withdraw, or to defend only if its reservation of rights is accepted, does not have the same incentive to guard its policyholder's interests that it has when recognizing its own liability. Perhaps courts are, therefore, wise in readily finding waivers of policy defenses when a company does not withdraw early and thereby warn the policyholder to protect his own interests.

Desire to compensate injured third parties influences some courts in deciding waiver and estoppel issues in liability insurance cases. Liability insurance originally was only a contract of indemnity; it looked solely to protection of the man who bought and paid for it. Legislatures and insurance commissions, however, now are likely to want to extend the protection of some liability policies to the policyholder's victim even when the policyholder is unable to pay the claim and therefore has no need for indemnity. For example, the "bankruptcy clause" in automobile policies extends company liabilities to judgment creditors of their impecunious policyholders. The bankruptcy clause is no help to an injured man when the company has a policy defense against the policyholder.⁵⁶ But the equity of bankruptcy-clause statutes is served whenever a policyholder's rights are enlarged by a company's loss of a policy defense. When courts use waiver or estoppel to deprive companies of policy defenses they move in the same direction as that taken by legislation or administrative action in enhancing the social value of liability insurance.⁵⁷

LIFE INSURANCE

Delivery in Good Health

Life insurance policies often stipulate that they take effect only after delivery in good health. Courts usually hang back when a

55. See *Mancini v. Thomas*, 113 Vt. 322, 34 A.2d 105 (1943).

56. *Hyding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P.2d 999 (1932).

57. *But see Farm Bureau Mut. Automobile Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949), in which the court so interpreted a provision of the Virginia Safety Responsibility Act withdrawing policies defenses from companies sued by third parties as applying only to policies filed after an accident to comply with the act.

beneficiary tries to offset the insured's poor health by proof that the delivering agent knew the insured was sick and nevertheless handed over his policy. Beneficiaries try this tactic only when the policyholder dies shortly after delivery; when premiums have been paid for a couple of years or more the incontestable clause puts an end to the delivery in bad health defense and the beneficiary has no need to offset it with a waiver or an estoppel reply.

Life insurance salesmen and medical examiners are not authorized to write policies; they merely perfect applications and forward them to home offices. The public knows that local representatives are not authorized to make life insurance contracts. The public also knows that the seriously ill are not insurable—that only by misleading home office underwriters can local representatives get policies for sufferers from heart disease, cancer, tuberculosis and the like. These facts weigh against a beneficiary of an insured in bad health on delivery. In *De Ford v. National Life and Acc. Ins. Co.*⁵⁸ the applicant had a bad heart, syphilis and a newly patched hernia. He told the soliciting agent about his bad health and said he was on the way to the hospital for out-patient treatment; the salesman walked along with him and made his pitch: "A man in your condition surely needs insurance." Both insured and beneficiary knew insurance companies usually turned down the applications of ill people. The court was not impressed with the argument that the agent's knowledge should be imputed to his company and that policy issuance should be held a waiver of the delivery in good health clause. The court said that the agent, eager for his commission, had a motive known to the applicant to conceal his knowledge from his company; therefore the applicant knew the agent was likely to suppress the facts. Most courts hold policies invalid in cases so close to collusion.⁵⁹ Even more honest applicants who know or should know that they are uninsurable are seldom excused from compliance with the delivery in good health clause on the ground that local agents were told about their illnesses.⁶⁰

58. 182 Tenn. 225, 185 S.W.2d 617 (1945).

59. See, e.g., *Mudge v. Supreme Court, I.O.F.*, 149 Mich. 467, 112 N.W. 1130 (1907); *John Hancock Mut. Life Ins. Co. v. Luzio*, 123 Ohio St. 616, 176 N.E. 446 (1931).

60. *Metropolitan Life Ins. Co. v. Alterovitz*, 214 Ind. 186, 14 N.E.2d 570 (1938); *Metropolitan Life Ins. Co. v. Coddington*, 131 N.J. Eq. 430, 26 A.2d 41 (1942); cf. *Koin v. Mutual Benefit Health & Acc. Ins. Ass'n*, 41 P.2d 307 (Colo. 1935). See also *Satz v. Massachusetts Bonding & Ins. Co.*, 243 N.Y. 385, 153 N.E. 844 (1926), a burglary insurance case in which policy warranted that no other company had cancelled or rejected application for insurance; insured tried unsuccessfully to excuse breach of this warranty by showing the company's knowledge of the facts at time of issue. *But see Goldstein v. Metropolitan Cas. Ins. Co.*, 10 N.J. Super. 291, 77 A.2d 51 (1950), in which application showed heart disease and company nevertheless issued a policy; held the company waived.

The same courts that often impute the knowledge of local agents of fire or automobile insurance companies to their principals have reasons for different rulings when life insurance is involved. A revealing pronouncement was made in *Boucowlas v. John Hancock Mut. Life Ins. Co.*⁶¹ Insurance was written on the life of an uninsurable applicant who died soon after. The beneficiary proved that the illiterate applicant answered health questions scrupulously but the local agent (to garner his commission) wrote the answers falsely. The court ruled the applicant's good faith immaterial and held for the company. In rejecting the argument that the company—rather than its customers—should bear the risk of disloyalty because it had appointed a dishonest agent with authority to prepare applications, the court stated:

“Whatever may be the situation with respect to policies of fire insurance . . . where almost any property may be insured at some premium, this argument . . . fails when applied to policies of life insurance. The reason for this is that it regards the plaintiff's [beneficiary's] loss of a benefit to which he was not entitled as though it were a detriment to him. This is not so. The only real loss sustained by the insured consisted in the sums paid by him as premiums and these sums the insurer has tendered back. To give the beneficiary the face of the policy would not be to reimburse the insured, it would be to confer a gratuity upon the plaintiff; it would serve to make the insured better off than if no fraud had been committed. . . .”⁶²

Most courts take quite seriously life insurance application and policy provisions limiting local agents' authority when insurance is written on uninsurable lives⁶³—though similar provisions are brushed aside when,

61. 90 N.H. 175, 5 A.2d 721 (1939).

62. *Id.* at 179, 5 A.2d at 723.

63. See, *e.g.*, *Great Nat'l Life Ins. Co. v. Hulme*, 136 S.W.2d 602 (Tex. Comm'n App. 1940) (existence of heart disease told to agent who suppressed this fact in application).

The force of court understanding of public needs is illustrated strikingly by *Abbott v. Prudential Ins. Co.*, 281 N.Y. 375, 24 N.E.2d 87 (1939). The New York legislature enacted an “entire policy” statute calling for life insurance policies that contain the entire contract between the parties and forbidding incorporation by reference unless a copy of the document referred to is attached to the policy when issued. The court, nevertheless, held that an unattached application could be proved to show notice to the applicant that local agents had no authority to waive the policy's delivery in good health clause.

Earlier the court used this statute to ignore proof that policyholder's correct answers were falsified by local agents who filled in the application blank for his signature. *Minsker v. John Hancock Mut. Life Ins. Co.*, 254 N.Y. 333, 173 N.E. 4 (1930). The court said the statute outmoded a long line of cases reaching the opposite result. In *Minsker* the court did not know affirmatively that the policyholder was uninsurable, but the beneficiary pulled the curtain of privilege over his ills by objecting to proof of the nature of his illness—which the beneficiary probably would not have done were the policyholder insurable. *But see Perry v. John Hancock Mut. Life Ins.*

for instance, a fire insurance agent knows and fails to report that his customer already has insurance in another company on the same risk, or an automobile insurance agent knows of an unlisted encumbrance.⁶⁴ By so doing the courts protect life insurance premiums from an increase redounding to the benefit of uninsurables.

Unfortunately the courts have gone too far in recognizing limits on life insurance agents' authority. These limits should undo insurance written on the lives of uninsurables, but insurable applicants deserve better treatment. In *Prevete v. Metropolitan Life Ins. Co.*⁶⁵ an illiterate applicant told the local agent about a back injury which put him in the hospital for five days followed by out-patient treatment for three months. The agent falsified his application so that it said he had no recent illnesses and no recent workmen's compensation benefits. The court held the policy void. Had the applicant connived with the agent, the result would be defensible; life insurance companies are entitled to applicants' candor. Had the applicant been uninsurable, the result would be defensible; even candid uninsurables deserve only repayment of premiums plus interest. But where should risk of agent disloyalty rest when an insurable applicant foregoes chances to deal with other companies and is scrupulous in his dealings with the agent of the company to whom he applies? It is a risk that policy buyers are not able to carry. It is a risk that insurance companies are prepared to carry and one that companies can properly reflect in their premiums.⁶⁶ Companies encourage prospects to rely on local agents in perfecting life insurance applications; doctrines of waiver and estoppel are wisely used to require companies to stand back of their agents' implied representations that applications are in proper order.

Customer-protecting legal doctrines developed in fire and automobile insurance cases are adaptable for protection of deserving life insurance buyers. They were used by the Colorado Supreme Court in *New York Life Ins. Co. v. Fukushima*,⁶⁷ a case in which a non-English speaking applicant's interpreted answers were falsified by a local agent. Report of the case does not show whether or not the applicant was uninsurable; it states merely that falsity of the application was material

Co., 143 Mich. 290, 106 N.W. 860 (1906), in which local agent's knowledge that applicant was a prostitute plus acceptance of premiums was held to be a waiver of the truth of a representation that she was a housewife.

64. This protection of life insurance companies against waiver of delivery in good health clauses extends to cases in which the agent after the policy has been issued learns of breach and tries to assure the policyholder that his contract is valid. *Metropolitan Life Ins. Co. v. Cridelle*, 68 Ga. App. 353, 22 S.E.2d 771 (1942).

65. 343 Pa. 365, 22 A.2d 691 (1941).

66. *But see* *Drilling v. New York Life Ins. Co.*, 234 N.Y. 234, 137 N.E. 314 (1922).

67. 74 Colo. 236, 220 Pac. 994 (1923).

to the risk. The court refused to apply application and policy clauses stipulating that the applicant is responsible for the agent's misdeeds.

But here is another chance for courts to overshoot and allow un-insurable applicants to benefit when agents are disloyal. This happened in *Oredson v. Woodman of the World Life Ins. Soc'y*,⁶⁸ in which an applicant, turned down three times because of heart disease, relied on a smooth talking agent who falsified his fourth application. The court ignored (1) proof that the policy was delivered with the falsified application attached, (2) policy warranties of correctness of the health representations, and (3) policy and application disclaimers of local agents' authority to bind the company to terms other than those specified. The court said the doctrine of estoppel cuts away artful devices designed to saddle applicants with responsibility for agent misconduct. The opinion has a high sound and would convince if the court were trying to justify a return of premiums plus interest. Company liability for a local agent's misconduct can be satisfied by requiring compensation for harm done; it does not necessarily call for payment of undeserved benefits. The *Oredson* case was decided by a divided court. The minority would hold with most courts who honor application and policy provisions when agents write uninsurable risks.⁶⁹

Lapsed Policies

Life insurance companies are eager to keep in force policies on lives of insureds in good health.⁷⁰ Reinstatement provisions evidence company willingness to excuse late premium payments under some circumstances. If companies excused all tardiness without paying any attention to health, they would, of course, get a ruinous selection of risks; they would do a brisk business with sick delinquents; delinquents in good health and long in default would buy new policies available on terms more favorable than reinstatement costs.

Reinstatement is not the only route to waiver of late payment. There are cases of express or implied extensions of time for payment made by officers with unquestioned authority to grant them.⁷¹ There

68. 211 Minn. 442, 1 N.W.2d 413 (1941).

69. *But see* Bible v. John Hancock Mut. Life Ins. Co., 256 N.Y. 458, 176 N.E. 838 (1931), which for all practical purposes seems overruled by Abbott v. Prudential Ins. Co., 281 N.Y. 375, 24 N.E.2d 87 (1939), discussed in note 63 *supra*.

70. In earlier times policyholders had no equity in reserves as they now do; perhaps then some companies reached for the profits of lapses resulting in substantial forfeitures.

71. See, *e.g.*, Barbera v. John Hancock Mut. Life Ins. Co., 127 N.J.L. 122, 21 A.2d 222 (1941); Graham v. Security Mut. Life Ins. Co., 72 N.J.L. 298, 62 Atl. 681 (1905). For an unusual floater policy case involving home office implied consent to late payments, see Ellis-Jones Drug Co. v. Home Ins. Co., 158 Tenn. 237, 12 S.W.2d 707 (1929).

are also cases in which beneficiaries make unsuccessful, far-fetched arguments that payment on time was waived or time for payment was extended.⁷²

Placement of the risk of unauthorized extension by local agents is difficult. Agents usually have a personal interest in keeping policies in force—they continue to get commissions so long as premiums are paid on the policies they sell. Loyalty usually induces them to insist on their company's rights in case of lapse, but when they exceed their authority the policyholder's position is precarious.

When a policyholder allows life insurance to lapse, usually he does not have the money to pay his premiums. If he cannot borrow it or raise it by scrimping on other expenditures, an unauthorized extension can be repudiated without doing him more harm than he would have suffered without the extension—that is, he would have lost his policy anyway. In these cases reliance cannot be to detriment and no estoppel reason requires the company to honor its agent's unauthorized extension.⁷³ Of course, waiver can be established without proof of reliance to detriment, as illustrated by *Knickerbocker Life Ins. Co. v. Norton*.⁷⁴ In that case the local agent unquestionably was authorized to grant some extensions. The issue raised was whether or not ambit of his authority covered an extension after a default on a premium note. The court held the proof adequate to carry this issue to the jury and support its verdict for the beneficiary. The case was decided in 1878—when lapses still could result in harsh total forfeitures; perhaps harshness of such a forfeiture disposed the court toward the beneficiary's case. The important point for us is, however, that the court found proof of the agent's authority to relinquish voluntarily his company's rights, rather than proof of an estoppel barring the company from asserting its rights. In such a case authority to waive is the heart of dispute. A local agent's attempt to waive his company's right to prompt payment was clearly proved in *Metropolitan Life Ins. Co. v. Hall*⁷⁵ but a finding that he was unauthorized was fatal to the beneficiary's case.

Even though an agent's grant of an extension is unauthorized, circumstances may warrant holding his company estopped to repudiate his representation that later payment will be satisfactory. In *Metro-*

72. See, e.g., *Vernon v. Equitable Life Assurance Soc'y*, 15 Wash. 2d 94, 129 P.2d 801 (1942).

73. In *Vernon v. Equitable Life Assurance Soc'y*, *supra* note 72, home office in answer to policyholder's inquiry overstated slightly the amount due and mistakenly told him he could not reinstate without meeting certain medical requirements. The court said the beneficiary's proof showed no reliance by the policyholder on these company statements, and to assume reliance would be bare conjecture. Therefore, no estoppel was established.

74. 96 U.S. 234 (1878).

75. 104 Va. 572, 52 S.E. 345 (1905).

politan Life Ins. Co. v. Hall proof tended to show detrimental reliance on a short extension proffered by a collecting agent. The beneficiary—the policyholder's mother—said she had money to pay the premium but wanted to take care of her rent and pay the premium the next day. The collecting agent agreed. The insured fell sick that night. The court held that the company, in absence of proof of authority, was not bound. If this 1905 case were tried today some courts might find the beneficiary reasonably relied on the extension and then use either an estoppel or apparent authority theory to reach the opposite result. This may be another of those cases in which insurance companies should be required to carry the risk of misbehavior of their agents in whom ordinary consumers are likely to put trust.

My theory that public need should be a measure of agents' powers should be no help to some policyholders claiming waivers or estoppels. In *Southland Life Ins. Co. v. Lawson*⁷⁶ quarterly premiums were payable at the company's home office and the local agent had no authority to appoint another place of payment. Nevertheless, the local agent accepted cash for five premiums and forwarded his personal check for each to the home office. The company sent receipts directly to the policyholder. When the policyholder tendered a sixth premium the agent, tired of wet nursing the policyholder, refused it and told him to send it to the home office. The policyholder had time to comply, but made no further attempt to pay this or the next premium. The beneficiary argued that the company had permanently waived home office payment and therefore the unaccepted tender to the local agent kept the policy in force until the insured died (four months later and after another premium had fallen due). The court saw no sensible basis for the insured's supposition that he was privileged to continue to ignore terms of the policy and held that the policy had lapsed. The court pushed too far, however, and said that waiver is always a form of estoppel binding on an insurance company only when disavowal would defraud a trusting policyholder. Insurance companies can (and occasionally do) intentionally forgive policyholders' shortcomings. Even though such acquittance works a boon on a policyholder who would otherwise have no way of keeping his policy in force (and therefore does not rely to detriment) the company cannot retreat from such a waiver. The theory of voluntary waiver is misapplied only when a court holds a company has waived its rights without adequate proof of company intention to relinquish those rights.

76. 137 Tex. 399, 153 S.W.2d 953 (1941). See also *Palumbo v. Metropolitan Life Ins. Co.*, 293 Mass. 35, 199 N.E. 335 (1935).

Inviting or Permitting Proof of Loss

Beneficiaries occasionally argue that life insurance companies lose those defenses of which they have knowledge if they nevertheless insist on proof of death. In *Knights and Ladies of Columbia v. Shoaf*⁷⁷ the insured was pregnant when her policy was issued and that fact had been disclosed in her application. The company issued the policy only after she agreed that no benefits would be payable if death resulted from that pregnancy. She did die from this excepted cause. The beneficiaries argued that nevertheless the company was liable on the policy because with knowledge of the facts the company required the beneficiaries to submit proof of death, have a guardian appointed for a minor beneficiary, and travel to meet with a company officer. The court held that the company's acts constituted neither a waiver of defenses nor a representation which the company was estopped to deny.⁷⁸ Companies should be deterred from putting claimants to annoying, costly, worthless trouble, but the appropriate deterrent is not expanded life insurance coverage. Protection of ordinary consumers does not require such drastic penalties against companies whose institutional arrangements sometimes result in asking for proof of death from claimants whose claim is known to be worthless to some employe other than the one who suggests filing of proof of death. It will not be surprising, however, when a court strikes down a defense it wishes to disfavor on the ground that an insurance company invitation to make a proof of loss constitutes a waiver or an estoppel.

CONCLUSION

If this paper throws new light on the law it does so because of its narrow focus—resulting from classifying cases on the basis of underwriting problems, rather than on the basis of purely legalistic resemblances. The cases are a buzzing confusion when different kinds of insurances are talked about at the same time. Many, though of course not all, of the inconsistencies disappear or become understandable when the cases are classified in terms of business functions. I believe that a lawyer who is interested in evaluating a waiver or estoppel issue should be especially interested in finding cases closely in point. If he views a melange of authorities he is likely to be misled; if he tries to use them in argument he may find himself surprised and bested.

77. 166 Ind. 367, 77 N.E. 738 (1906).

78. See also *Ruddock v. Detroit Life Ins. Co.*, 209 Mich. 638, 177 N.W. 242 (1920), in which the beneficiary's case was even weaker. For a similar holding in a fire insurance case, see *Draper v. Oswego County Fire Relief Ass'n*, 190 N.Y. 12, 82 N.E. 755 (1907).

This does not mean that there are no main intellectual currents that cut across the law of waiver and estoppel. On proof that a company acting through clearly authorized agents unequivocally gave up a policy defense, virtually all courts will rule that the defense has been waived. On proof that a company official acting unquestionably within the scope of his employment made a clear representation of past or present fact to an insured who relied on that fact to his detriment, virtually all courts will hold the company estopped to deny that representation. But real cases rarely fall into such well-defined patterns, and justice is not captured in this area by looking only to black letter definitions of waiver and estoppel. Policy stipulations that produce injustice are in fact more vulnerable to claims of waiver and estoppel than policy stipulations that limit company liability in the public interest. Courts are more likely to find that agents have acted with authority or within the scope of their employment when to do so deprives the company of an unjust defense than they are when to do so extends company liabilities beyond risks properly underwritten for a just premium. Courts are likely to respect limits on agents' authority and the scope of their employment when the company is justly entitled to cast the risk of their own agents' misbehavior on the public, but the limits on agents' functions described in application and policy fine print will seldom protect an insurance company against risks it should bear in a world in which most insurance is sold to non-experts as a commodity—especially since companies themselves have urged the public to rely in various ways on their local agents. The lawyer who looks at the agency law of these cases only as examples of more general law of master and servant and principal and agent, is likely, again, to find black letter uncomfortable and misleading.

All state legislatures have put some checks on policy writers: Statutes ban or dictate various policy stipulations; insurance commissioners have been given powers to control insurance contracts in the public interest. Perhaps legislative and administrative protection of policyholders will some day so occupy the field that judicial participation will be unwarranted and presumptuous. Certainly legislators and administrators can make wider studies of public needs and insurance company capacities than can the courts. But in the last hundred years the courts have played an important role in thwarting some impolitic inroads on policy coverages—quite a different role from that of eighteenth century judges who looked on policy buyers with glowering severity.

Modern courts have adapted insurance coverage to public needs in a variety of ways. Clauses called warranties in the eighteenth century are often held non-contractual in the twentieth. Modern courts often

construe warranties so that eighteenth century breaches are twentieth century conformities. Some breaches that would have relieved eighteenth century coffee-house underwriters from liability are not twentieth century defenses. The body of this paper has been concerned with none of these, but with one other route to adaptation—court holdings that a company has so acted that it has lost a defense it could otherwise have asserted. It has been this paper's thesis that in this last respect twentieth century courts have tended to act wisely; that they have generally respected the public needs both in expanding liability and in refusing to go further than they have done. Of course this is only true of the main stream of judicial decision; it would be too much to expect that all eddies would run clear and never overflow.

The insurance industry itself has often seen that its interests do not diverge from the public interest; new policy stipulations have often widened coverage. Companies have extended both service performed for the public and the profits earned for themselves. The industry should not be criticized for taking reasonable steps to protect its funds and its customers' interests from risks that cannot be properly underwritten and justly reflected in the premiums collected. The courts should protect the public by not extending coverage too far, as well as by extending it far enough.