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## THE MAKING OF A CONTRACT OF INSURANCE IN MINNESOTA

BY WILLIAM L. PROSSER\*

ALTHOUGH insurance, once completed, tends to take on many of the characteristics of a status,<sup>1</sup> or a fiduciary relationship,<sup>2</sup> it remains in its inception a contract. As in the case of any other contract, to create an effective agreement of insurance, the minds of the parties must meet and concur as to terms;<sup>3</sup> there must be an expression of mutual assent. Until such an expression can be found, the insurance company has assumed no liability. In connection with the making of the contract of insurance, a rather involved and difficult body of case law has grown up, of which the Minnesota cases afford an interesting cross-section.

Because of the large volume of business transacted, and for their own protection, insurance companies have developed a more or less standardized method of making their contracts.<sup>4</sup> The indi-

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<sup>1</sup>The suggestion that insurance is a status appears to have originated with the comment of Pound, *Spirit of the Common Law* 28, upon the generalization of Sir Henry Maine, that the evolution of law is a progress from status to contract: "Taking no account of legislative limits upon freedom of contract, in the purely judicial development of our law we have taken the law of insurance practically out of the category of contract. . . . What is this . . . but the common-law idea of relation, a relation of insurer and insured . . . and of rights, duties and liabilities involved therein?"

Another sentence much quoted in this connection is that of Professor Woodruff, in his *Cases on Insurance*: "What do they know of the law of the insurance contract who only the law of contract know?"

<sup>2</sup>See for example *Colby v. Life Indemnity & Investment Co.*, (1894) 57 Minn. 510, 59 N. W. 539, where it was held that a misrepresentation by a mutual life insurance company of its right to make assessments entitled the insured to relief, even though the misrepresentation was one of law, since the company occupied a fiduciary position toward its members.

<sup>3</sup>*Wales v. New York Bowery Fire Ins. Co.*, (1887) 37 Minn. 106, 33 N. W. 322; *Heiman v. Phoenix Mut. Life Ins. Co.*, (1871) 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *Olson v. American Central Life Ins. Co.*, (1927) 172 Minn. 511, 216 N. W. 225.

<sup>4</sup>*Patterson, The Delivery of a Life Insurance Policy*, (1919) 33 Harv. L. Rev. 198; Vance, *Handbook of the Law of Insurance*, 2d ed., 174.

vidual who is to be insured is induced, usually by a soliciting agent or some other representative of the company, to sign a formal document, designated an "application," which takes the form of an offer looking toward a contract of insurance. In this application, he is required to answer a number of questions giving the company such information as it may desire concerning the subject of the proposed insurance. The application is filled in on a printed form provided by the company, and drawn by its attorneys, and the applicant seldom is given any opportunity to suggest or change any of the terms of his offer. The application is forwarded by the agent, either directly or through a district office, to the home office of the company, where it is examined carefully by the proper officials. If it is approved, a policy of insurance is prepared upon a printed form, and is executed by the officers of the company. This policy is forwarded to the agent, who hands it over to the applicant. At this time, if not before, the first premium due under the policy is paid by the applicant. At some point along this line of procedure the contract is complete. Of course this method of making the contract is not compulsory, and may be departed from at will,<sup>5</sup> but the number of cases in which it is not followed probably is negligible.

The problems arising in connection with this standardized procedure may conveniently be discussed under the following topics:

1. The completion of the contract by a preliminary agreement, before any formal policy is issued by the company.
2. The acceptance of the application, and the delivery of the policy.
3. The effect of conditions in the application or the policy upon the completion of the contract.
4. The effect of delivery to the insured of a policy which, because of mistake or misconduct on the part of the company's agent, does not provide the insurance applied for.

#### 1. COMPLETION OF THE CONTRACT BEFORE ISSUANCE OF THE POLICY

There is no requirement of the law that an insurance contract must be in writing. Dicta to the contrary in a few early decisions

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<sup>5</sup>For example, the application may be by letter direct to the home office of the company. See *Scheffer v. National Life Ins. Co.*, (1879) 25 Minn. 534.

have been discredited.<sup>6</sup> Provided only that the insurance is to take effect within one year,<sup>7</sup> the statute of frauds has no application to insurance agreements, since the contingency upon which the insurer is to perform may easily occur at once.<sup>8</sup> Even a contract of guaranty or fidelity insurance, which is regarded in some jurisdictions as a "special promise to answer for the debt, default or doings of another,"<sup>9</sup> is held in Minnesota to be an original undertaking on the part of the insurer, and so is not within the statute.<sup>10</sup>

Thus it is entirely possible that a complete contract of insurance may be made before any written policy is issued. The complexity of the ordinary insurance contract, and the length of time for which it is to run will render it very necessary as a practical matter that the agreement be reduced to writing, but the existence of the contract does not depend upon it. It follows that any duly authorized agent may bind the insurance company to such a contract, without the formality of any writing at all.

The decided cases usually turn upon the authority of the agent. In the absence of such authority, either actual or apparent, of course no agreement of an insurance agent can impose any contractual liability upon his company.<sup>11</sup> Actual authority to conclude contracts rarely is given to the agents of life insurance companies,<sup>12</sup> for the reason that the company reserves the right to

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<sup>6</sup>See *Cockerill v. Cincinnati Ins. Co.*, (1847) 16 Ohio 148; *Platho v. Merchants Ins. Co.*, (1866) 38 Mo. 254; *Bell v. Western Ins. Co.*, (1843) 5 Rob. (La.) 423, 39 Am. Dec. 542. Compare *Dayton Ins. Co. v. Kelly*, (1873) 24 Ohio St. 345, 15 Am. Rep. 61; *Henning v. United States Ins. Co.*, (1871) 47 Mo. 425, 4 Am. Rep. 322; *Stockton v. Firemen's Ins. Co.*, (1881) 33 La. Ann. 577, 39 Am. Rep. 277.

<sup>7</sup>See *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, (1883) 30 Minn. 464, 16 N. W. 363.

<sup>8</sup>*Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, (1883) 30 Minn. 464, 16 N. W. 363.

<sup>9</sup>*Wainwright Trust Co. v. United States Fidelity & Guaranty Co.*, (1916) 63 Ind. App. 309, 114 N. E. 470; *Commonwealth v. Hinson*, (1911) 143 Ky. 428, 136 S. W. 912, L. R. A. 1917B 139, Ann. Cas. 1912D 291.

<sup>10</sup>*Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co.*, (1919) 142 Minn. 428, 172 N. W. 693. See also *Pearson v. United States Fidelity & Guaranty Co.*, (1917) 138 Minn. 240, 164 N. W. 919; *W. A. Thomas Co. v. National Surety Co.*, (1919) 142 Minn. 460, 172 N. W. 697. The distinction between a contract of guaranty and a contract of insurance is explained in *Vance, Handbook of the Law of Insurance*, 2d ed., pp. 57-60.

<sup>11</sup>*Guernsey v. American Ins. Co.*, (1871) 17 Minn. 104 (Gil. 83); *Morse v. St. Paul Fire & Marine Ins. Co.*, (1875) 21 Minn. 407; see *Megaarden v. Hartman Furniture Co.*, (1911) 114 Minn. 224, 130 N. W. 1027.

<sup>12</sup>*Patterson, The Delivery of a Life Insurance Policy*, (1919) 33 Harv. L. Rev. 198; see *Neuberger v. Aid Association for Lutherans*, (Wis. 1932) 240 N. W. 885; *Hertz v. Security Mut. Ins. Co.*, (1915) 131 Minn. 147, 154 N. W. 745; *Olson v. American Central Life Ins. Co.*, (1927) 172 Minn. 511, 216 N. W. 225.

Life insurance agents sometimes are given authority to issue "binding"

pass upon the medical report at its home office, and to approve the risk. But fire insurance agents more frequently are given the power to accept the risk and complete the contract—a fact of which the courts occasionally have taken notice.<sup>13</sup> Where such actual authority can be established, an oral agreement made by the agent will be given effect.<sup>14</sup>

The problem of apparent authority offers much greater difficulty, since it may involve a variety of fact situations. It is, of course, clear that there can be no apparent authority of an agent where the applicant for insurance is fully informed that the agent has no power to conclude a contract with him.<sup>15</sup> Nor can apparent authority be established merely by the declarations of the agent himself, unsupported by independent proof.<sup>16</sup> It must rest upon evidence of custom, or upon appearances.<sup>17</sup> If it is to be based on the custom of the insurance company itself, the custom must be proved by evidence of more than a single instance in which it has been followed.<sup>18</sup> If it is to be a general usage of the insurance

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slips or receipts for temporary insurance pending action on the application. See the text at footnotes 32-38 below.

<sup>13</sup>See *Neuberger v. Aid Association for Lutherans*, (Wis. 1932) 240 N. W. 885; *Hertz v. Security Mut. Ins. Co.*, (1915) 131 Minn. 147, 154 N. W. 745.

"It is well known that fire insurance is often effected by parol, with the understanding that a policy will be issued and delivered in the near future, at which time the premium will be paid, or it may be agreed that the premium shall be paid at some future definite time." *Wieland v. St. Louis County Farmers Mut. Fire Ins. Co.*, (1920) 146 Minn. 255, 178 N. W. 499.

In *Paul v. Columbian Nat. Fire Ins. Co.*, (1927) 171 Minn. 118, 213 N. W. 539, the record was held to show that the fire insurance agent had authority to agree to make such entries upon the policy as would protect an assignee.

<sup>14</sup>*Salisbury v. Hekla Fire Ins. Co.*, (1884) 32 Minn. 458, 21 N. W. 552; *Ganser v. Firemen's Fund Ins. Co.*, (1885) 34 Minn. 372, 25 N. W. 943; *Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co.*, (1919) 142 Minn. 428, 172 N. W. 693.

<sup>15</sup>*Scanlon v. Continental Ins. Co.*, (1907) 101 Minn. 537, 111 N. W. 1134.

<sup>16</sup>See *Mitchell v. Minnesota Fire Association*, (1892) 48 Minn. 278, 51 N. W. 608; *Jackson v. Mutual Benefit Life Ins. Co.*, (1900) 79 Minn. 43, 81 N. W. 545.

<sup>17</sup>See *Megaarden v. Hartman Furniture Co.*, (1911) 114 Minn. 224, 130 N. W. 1027; *Hamm Realty Co. v. New Hampshire Fire Ins. Co.*, (1900) 80 Minn. 139, 83 N. W. 41.

<sup>18</sup>"Where custom, habit or practice in business is to be relied upon as tending to establish an alleged fact and such custom, habit or practice are to be established by specific instances, they must be numerous enough to base an inference of systematic conduct. They must also have occurred under substantially similar circumstances, so as to be naturally accountable for by a system only and not as casual occurrences. They must be such as to indicate a general course of conduct. It merely rests upon the basis that a person is likely to do or not to do a thing as his custom, habit or practice. But a single instance cannot give rise to a probability that it would

business, it must be uniform and certain; it must be compulsory, and of binding force, and not optional; and the party to be bound by the usage must be in a position to have knowledge of it.<sup>19</sup> The practice of life insurance companies, by which soliciting agents are given no power to approve risks, is so well known that the fact that such an agent is authorized to solicit insurance gives him no apparent authority to complete contracts.<sup>20</sup> As to whether the contrary practice of fire insurance companies<sup>21</sup> is sufficient to create such apparent authority, there seems to be no definite decision in this state. An early case<sup>22</sup> might be taken to indicate that it is not sufficient; but later cases have contained intimations that a different result may be reached when the issue is presented.<sup>23</sup>

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be carried out in every instance or in most instances. It is the regularity of such instances tending to manifest a uniform mode of dealing that gives probative value." *Union Central Life Ins. Co. v. Star Ins. Co.*, (1929) 178 Minn. 526, 227 N. W. 850.

<sup>19</sup>"The custom may be so general, long-established and notorious that the party is presumed to have knowledge of it, and he may also be engaged in the same line of business himself to such an extent that he may be presumed to have knowledge of its customs." *Nippolt v. Firemen's Ins. Co.*, (1894) 57 Minn. 275, 59 N. W. 191.

In *Merchants' Ins. Co. v. Prince*, (1892) 50 Minn. 53, 52 N. W. 131, 36 Am. St. Rep. 626, a local custom permitting agents to cancel policies issued through them when the agency was cancelled was held to be subversive of the principles on which the law of principal and agent is based, and so without effect.

<sup>20</sup>"Such being the usual way of doing business by life insurance companies, no fault should be found with the finding of the trial court to the effect that this defendant had not clothed its soliciting agent with apparent authority or power to make an oral contract of insurance. There was nothing in defendant's method of doing business generally, or in any prior dealings with the applicant Hertz, or in the business of life insurance as customarily transacted, to require or countenance a finding of apparent authority in the agent to make the alleged contract." *Hertz v. Security Mut. Ins. Co.*, (1915) 131 Minn. 147, 154 N. W. 745.

<sup>21</sup>See footnote 13.

<sup>22</sup>*Morse v. St. Paul Fire & Marine Ins. Co.*, (1875) 21 Minn. 407.

<sup>23</sup>"We need not here determine whether there has been any departure from the rule of the *Morse* case, for the difference in the methods employed in procuring fire insurance risks from the ones used in effecting life insurance contracts, and the necessity for different methods, suggests cogent reasons for holding that apparent authority is much more readily to be inferred in the case of a soliciting agent of fire insurance than in one of life." *Hertz v. Security Mut. Ins. Co.*, (1915) 131 Minn. 147, 154 N. W. 745.

See also *Wieland v. St. Louis County Mut. Fire Ins. Co.*, (1920) 146 Minn. 255, 178 N. W. 499; *Olson v. American Central Life Ins. Co.*, (1927) 172 Minn. 511, 216 N. W. 225. And in *Koivisto v. Bankers & Merchants Fire Ins. Co.*, (1921) 148 Minn. 255, 181 N. W. 580, the trial court attached to its findings a memorandum, saying that the *Morse* case was not in line with the present day holdings. The supreme court opinion mentions the memorandum without comment.

In *Eastern Shore of Virginia Fire Ins. Co. v. Kellam*, (Va. 1932) 165 S. E. 637, it is held that the apparent authority of even a general fire insurance agent to make an oral contract was limited to the time reasonably

The past conduct of the agent, provided that it was known to his company,<sup>24</sup> may be sufficient to clothe him with apparent authority to repeat what he has done before.<sup>25</sup> A single act of an agent, assuming authority, and a clear recognition by his principal, may be sufficient to establish his authority in similar cases.<sup>26</sup> One of the important Minnesota decisions is *Koivisto v. Bankers & Merchants Fire Ins. Co.*,<sup>27</sup> where a finding of authority<sup>28</sup> of a fire insurance agent to make an oral contract of insurance at the time of the application was sustained upon the basis of evidence that it was the practice of the company to antedate its policies to the date of the application, and so to apply part of the premium paid to cover the interval between the application and the issuance of the policy. Since it cannot be presumed that the insurance company intends to deal so unfairly with its patrons as to collect a premium over a period during which there is no insurance, this practice of dating back the policy logically should be interpreted to mean that the insurance is intended to take effect at the earlier date;<sup>29</sup> or, if this intention is negated,<sup>30</sup> the premiums should be payable at proper intervals after the insurance really takes effect, regardless of the provisions of the policy.<sup>31</sup> This seems to be the law in Minnesota.

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necessary to issue and deliver a written policy, plus a reasonable time to cover delays and a short period of grace.

<sup>24</sup>*Morse v. St. Paul Fire & Marine Ins. Co.*, (1875) 21 Minn. 407.

<sup>25</sup>*Ames-Brooks Co. v. Aetna Ins. Co.*, (1901) 83 Minn. 346, 86 N. W. 344; see *Koivisto v. Bankers & Merchants Fire Ins. Co.*, (1921) 148 Minn. 255, 181 N. W. 580.

<sup>26</sup>*Ames-Brooks Co. v. Aetna Ins. Co.*, (1901) 83 Minn. 346, 86 N. W. 344.

<sup>27</sup>(1921) 148 Minn. 255, 181 N. W. 580.

<sup>28</sup>"It is not important whether we call his authority apparent or implied. Apparent authority is not actual authority. Implied authority is actual authority circumstantially proved. It is the authority which the principal intended his agent to possess. It includes all such things as are directly connected with and essential to the business in hand. . . . The evidence that tends to show implied authority may show apparent authority. The distinction is useful, but is not always observed and frequently there has been some confusion. . . . We are not concerned with the correctness of the court's classification of Mattson's authority. The question is whether there was evidence to support a finding that there was authority." *Koivisto v. Bankers & Merchants Fire Ins. Co.*, (1921) 148 Minn. 255, 260, 181 N. W. 580.

<sup>29</sup>*Koivisto v. Bankers & Merchants Fire Ins. Co.*, (1921) 148 Minn. 255, 181 N. W. 580.

<sup>30</sup>In *Olson v. American Central Life Ins. Co.*, (1927) 172 Minn. 511, 216 N. W. 225, a provision in the application that "the insurance hereby applied for shall not take effect until the payment of the first premium thereon, and the approval of this application by the company" was held to show an intention that no contract should exist until acceptance of the application, notwithstanding the fact that the policy was to be antedated.

<sup>31</sup>*Stramback v. Fidelity Mut. Life Ins. Co.*, (1905) 94 Minn. 281, 102

In order to meet this situation, many life insurance companies<sup>32</sup> have adopted the practice of issuing "binding" slips or receipts at the time of the application, provided the first premium is paid in advance. The receipt or the application<sup>33</sup> provides that, upon payment of the premium, the insurance shall be effective at once, if the applicant was at that time an insurable risk as shown by the medical examination.<sup>34</sup> The effect of the binding receipt is to protect the applicant against loss between the date of the receipt and the delivery of the policy, provided the application for insurance is accepted.<sup>35</sup> It is only recently that such contracts have come

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N. W. 731. See also *Olson v. American Central Life Ins. Co.*, (1927) 172 Minn. 511, 216 N. W. 225, citing in support of this proposition the following cases: *McMaster v. New York Life Ins. Co.*, (1901) 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64; *Stinchcombe v. New York Life Ins. Co.*, (1905) 46 Or. 316, 80 Pac. 213; *Chestnut v. Security Mut. Life Ins. Co.*, (1921) 208 Mo. App. 130, 232 S. W. 203; *Halsey v. American Central Life Ins. Co.*, (1914) 258 Mo. 659, 167 S. W. 951. The effect of the date of the policy on the due date of premiums is discussed in notes in (1920) 6 A. L. R. 774 and (1924) 32 A. L. R. 1253, and in 3 Couch, *Cyclopedia of Insurance Law*, sec. 634.

<sup>32</sup>In 1921 John A. Coke, Jr., attorney for the Life Insurance Co. of Virginia, found upon examination of the applications and policies of 125 life insurance companies that 25 of them carried such provisions. Coke, *The Commencement of the Risk in the Case of a Life Insurance Policy*, (May 4, 1921) Paper No. 51, 1 Proceedings of Ass'n of Life Insurance Counsel.

<sup>33</sup>The following provision in the application of the New York Life Insurance Co. is typical: ". . . provided, however, that if the applicant, at the time of making this application, pays the agent in cash the full amount of the first premium for the insurance applied for . . . and so declares in this application and receives from the agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance on the plan and for the amount applied for . . . then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not." See *Lueck v. New York Life Ins. Co.*, (1932) 185 Minn. 184, 240 N. W. 363.

<sup>34</sup>The company may still reject the applicant as not an insurable risk, provided it does so in the "proper" exercise of its rights; and in that event the binding receipt is without effect. *Reynolds v. Northwestern Mut. Life Ins. Co.*, (1920) 189 Iowa 76, 176 N. W. 207. See also *Chandler Bullock, Binding Receipts*, (Dec. 6, 1921) Paper No. 57, 1 Proceedings of Ass'n of Life Insurance Counsel.

<sup>35</sup>*Joyce, Insurance*, 2d ed., sec. 64. See also Coke, *The Commencement of the Risk in the Case of a Life Insurance Policy*, (May 4, 1921) Paper No. 51, 1 Proceedings of Ass'n of Life Insurance Counsel: "Under this particular plan the applicant carries the risk until he gets his policy if he has not paid his first premium, but if he has paid the premium, and it appears that if the risk is a good one the Company carries it from the date of the payment or the date of application or the date of approval as the case may be, though the insured may be ill or even dead before the policy is actually issued and delivered."



before the Minnesota court.<sup>36</sup> In the first case<sup>37</sup> presented, it was held that there was no contract, because the premium was not paid "in cash" as required by the application; but in two later decisions<sup>38</sup> it was held that there might be substantial compliance with such requirements, even though the prescribed procedure was not exactly followed.

*Terms of the Contract.* Assuming that an agent, with sufficient authority, has made an effective contract of insurance prior to the issuance of the policy, what are the terms of the contract? An oral agreement, whether accompanied by a binding slip or not, of course contemplates a formal policy, and by implication includes all the terms of that policy. The rights and liabilities of the parties to such an informal contract are to be determined by the terms of the policy expected.<sup>39</sup> Where nothing is said in the oral contract about conditions, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases.<sup>40</sup> The burden of showing that a particular term or condition is usual rests upon the party who seeks to take advantage of it.<sup>41</sup> If a policy is in fact issued and delivered before any loss occurs, and is retained by the insured without objection, the earlier agreement is regarded as merged in the written policy, and parol evidence cannot be introduced to vary its terms. The remedy in such a case is a suit to reform the contract.<sup>42</sup> But if loss occurs before delivery of the policy, the document actually delivered is not conclusive as to the terms of the contract, and is at best only evidence of what was intended.<sup>43</sup>

<sup>36</sup>Cases involving binding receipts were distinguished in *Olson v. American Central Life Ins. Co.*, (1927) 172 Minn. 511, 216 N. W. 225.

<sup>37</sup>*Zemler v. New York Life Ins. Co.*, (1929) 177 Minn. 273, 225 N. W. 81.

<sup>38</sup>*Lueck v. New York Life Ins. Co.*, (1932) 185 Minn. 184, 240 N. W. 363 (relying upon *New York Life Ins. Co. v. Abromietes* (1931) 254 Mich. 622, 236 N. W. 679); *Fortin v. New York Life Ins. Co.*, (1932) 185 Minn. 523, 241 N. W. 673.

<sup>39</sup>Vance, *Handbook of the Law of Insurance*, 2d ed., 182.

<sup>40</sup>*Salisbury v. Hekla Fire Ins. Co.*, (1884) 32 Minn. 458, 21 N. W. 552.

<sup>41</sup>*Salisbury v. Hekla Fire Ins. Co.*, (1884) 32 Minn. 458, 21 N. W. 552.

<sup>42</sup>*Lundman v. United States Fidelity & Guaranty Co.*, (1925) 163 Minn. 303, 204 N. W. 159; see *Salisbury v. Hekla Fire Ins. Co.*, (1884) 32 Minn. 458, 21 N. W. 552.

<sup>43</sup>"The written policy made out by the defendant after the fire, of course, cannot be conclusive. Indeed, having been made after the liability accrued, it would be no evidence of the contract at all, were it not for its delivery to and retention by plaintiffs. Such delivery and retention may be taken as an admission by plaintiffs that it set forth the terms of the contract as agreed on, which might be rebutted by proof of what the contract actually was." *Salisbury v. Hekla Fire Ins. Co.*, (1884) 32 Minn. 458, 21

Numerous cases<sup>44</sup> in other jurisdictions have held that there can be no effective contract of insurance unless the minds of the parties have met as to all of the essential terms of the contract, including the subject-matter to be insured, the amount of the insurance, the risk covered, the duration of the contract, and the premiums to be paid. But the courts have shown a tendency to be very liberal in finding that there has been implied agreement upon certain essential terms, such as the premium rate, the time of payment, and the duration of the risk.<sup>45</sup> The Minnesota decisions are not very clear, but there are indications of a similar tendency in this state.<sup>46</sup>

In Minnesota, as in many other states, statutory provisions have been enacted setting out standard forms for insurance policies. The use of the standard fire insurance form<sup>47</sup> is compulsory, and there are compulsory clauses which must be inserted in all policies of life<sup>48</sup> and accident and health<sup>49</sup> insurance. The constitutionality of these statutes has been upheld.<sup>50</sup> Where such compulsory forms

N. W. 552; *Ganser v. Firemen's Fund Ins. Co.*, (1885) 34 Minn. 372, 25 N. W. 943.

<sup>44</sup>The cases are collected in notes in 15 A. L. R. 995 and 69 A. L. R. 559. See for example *Whitman v. Milwaukee Fire Ins. Co.*, (1906) 128 Wis. 124, 107 N. W. 291, 5 L. R. A. (N.S.) 407, 116 Am. St. Rep. 25.

<sup>45</sup>See *Aetna Ins. Co. v. Licking Valley Milling Co.*, (C.C.A. 6th Cir. 1927) 19 F. (2d) 177 (premium rate, time of payment, duration of risk and name of company); *J. C. Smith & Wallace Co. v. Prussian Nat'l Ins. Co.*, (1903) 68 N. J. L. 674, 54 Atl. 458 (premium rate); *Cleveland Oil Co. v. Norwich Ins. Soc.*, (1898) 34 Or. 228, 55 Pac. 435 (same); *British Amer. Ins. Co. v. Wilson*, (1905) 77 Conn. 559, 60 Atl. 293 (same); *Schroeder v. Trade Ins. Co.*, (1883) 109 Ill. 157 (duration of risk).

<sup>46</sup>In *Ames-Brooks Co. v. Aetna Ins. Co.*, (1901) 83 Minn. 346, 86 N. W. 344, the defendant was held liable for breach of an agreement to write insurance on all of plaintiff's grain cargoes in 1899 "at the same rates" as in 1898. The court regarded the property to be insured, the amount of insurance, and the premium rates as easily determinable. In *Russell v. O'Connor*, (1912) 120 Minn. 66, 139 N. W. 148, the action was against an insurance agent for breach of a contract to obtain insurance upon plaintiff's building. The case was disposed of on other grounds, but the court said that failure to agree upon the premiums did not prevent the existence of a contract, since there was "an implied obligation on the plaintiff's part, to pay the premium if the policy had been written." See also *Backus v. Ames*, (1900) 79 Minn. 145, 81 N. W. 766; *Eifert v. Hartford Fire Ins. Co.*, (1921) 148 Minn. 17, 180 N. W. 996.

<sup>47</sup>Mason's 1927 Minn. Stat. sec. 3512.

<sup>48</sup>Mason's 1927 Minn. Stat. secs. 3399, 3402. Either the policy forms set out in sec. 3399 or the provisions in sec. 3402 must be used. See *Reagan v. Philadelphia Life Ins. Co.*, (1925) 165 Minn. 186, 206 N. W. 162.

<sup>49</sup>Mason's 1927 Minn. Stat. sec. 3417.

<sup>50</sup>The first Minnesota standard fire insurance policy act was held unconstitutional in *Anderson v. Manchester Fire Assur. Co.*, (1894) 59 Minn. 182, 60 N. W. 1095, 64 N. W. 241, upon the ground that it delegated to the state insurance commissioner the power to prescribe forms. In 1895 the legislature adopted the Massachusetts form of standard policy, with minor

are prescribed, any material<sup>51</sup> variation from the form is illegal;<sup>52</sup> and if a policy is issued containing any such clause, the clause is ineffective, and the rights of all parties concerned are to be determined on the basis of the statutory provisions.<sup>53</sup> Apparently there is nothing in the Minnesota standard policy statutes<sup>54</sup> to prevent an oral contract of insurance;<sup>55</sup> but it seems clear that any such

changes. The constitutionality of the compulsory arbitration provision of this statute has been upheld. *Itasca Paper Co. v. Niagara Fire Ins. Co.*, (1928) 175 Minn. 73, 220 N. W. 425; *Glidden Co. v. Retail Hardware Mut. Fire Ins. Co.*, (1930) 181 Minn. 518, 233 N. W. 310 (discussed in (1931) 15 MINNESOTA LAW REVIEW 708); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, (1931) 284 U. S. 151, 52 Sup. Ct. 69, 76 L. Ed. 214. For the history of standard policy legislation, see Patterson, *Administrative Control of Insurance Policy Forms*, (1925) 25 Col. L. Rev. 253.

<sup>51</sup>"The statute does not prohibit a company from printing in or attaching to the policy terms or conditions not found in the standard form, provided they are not inconsistent with or a waiver of any of the provisions of such forms. So far as the conditions and provisions of the form go, they are controlling, and may not be omitted, changed or waived, though provisions not conflicting with them may be added when necessary to express the terms of a contract of insurance which is authorized by the statute." *Heim v. American Alliance Ins. Co.*, (1920) 147 Minn. 283, 180 N. W. 225.

In *Unton v. Liverpool, London & Globe Ins. Co.*, (1926) 166 Minn. 273, 207 N. W. 625, it was held that the standard fire insurance policy statute did not prevent the issuance of a valued policy covering a leasehold interest.

<sup>52</sup>*Wild Rice Lumber Co. v. Royal Ins. Co.*, (1906) 99 Minn. 190, 108 N. W. 871; *Heim v. American Alliance Ins. Co.*, (1920) 147 Minn. 283, 180 N. W. 225; *Brecher Furniture Co. v. Firemen's Ins. Co.*, (1923) 154 Minn. 446, 191 N. W. 912. Following these decisions, the standard fire insurance policy statute was amended to permit insertion of the provisions held invalid. Minn. Laws 1909, ch. 331; Minn. Laws 1923, ch. 410.

<sup>53</sup>*Aaberg v. Minnesota Commercial Men's Ass'n*, (1919) 143 Minn. 354, 173 N. W. 708.

It has been held that the insurance company may waive standard policy provisions which are for its benefit. *Moore v. Sun Ins. Office*, (1907) 100 Minn. 374, 111 N. W. 260; *Kearns v. North Amer. Life & Cas. Co.*, (1921) 150 Minn. 486, 185 N. W. 659; see *Lake Superior Produce Co. v. Concordia Fire Ins. Co.*, (1905) 85 Minn. 492, 104 N. W. 560.

In *Kollitz v. Equitable Mut. Fire Ins. Co.*, (1904) 92 Minn. 234, 99 N. W. 892, it was held that the standard policy must be construed by the same rules as contracts voluntarily entered into—that is to say, strictly against the insurer.

<sup>54</sup>*Mason's 1927 Minn. Stat. secs. 3402, 3417, 3512.*

<sup>55</sup>In *Salquist v. Oregon Fire Relief Ass'n*, (1921) 100 Or. 416, 192 Pac. 312, and *Munhall v. Travelers Ins. Co.*, (1930) 300 Pa. St. 327, 150 Atl. 645, it was held that the effect of a standard policy statute was to make oral contracts of insurance impossible. The Oregon decision is criticized in (1927) 6 Oregon L. Rev. 172. In other states it has been held that the effect of the statute is not to invalidate oral contracts, but merely to provide compulsory terms which become a part of such contracts. *Lea v. Atlantic Fire Ins. Co.*, (1915) 168 N. C. 478, 84 S. E. 813; *National Liberty Ins. Co. v. Milligan*, (C.C.A. 9th Cir. 1926) 10 F. (2d) 483; *Robertson v. Burstein*, (1928) 104 N. J. L. 218, 141 Atl. 92 (reversed on other grounds 105 N. J. L. 375, 146 Atl. 355); *Milwaukee Bedding Co. v. Graebner*, (1923) 182 Wis. 171, 196 N. W. 533. Apparently the question never has been presented in Minnesota; but in view of the decision in *Koivisto v. Bankers & Merchants Fire Ins. Co.*, (1921) 148 Minn. 255, 181 N. W. 580,

oral contract necessarily must incorporate the compulsory provisions of the statute.<sup>56</sup>

Instead of making a present oral contract of insurance, the agent may agree on behalf of his company to an executory contract to insure. An agent who has authority to make a present contract may, within that authority, make a contract to insure in the future.<sup>57</sup> The distinction is an important one, which sometimes is overlooked.<sup>58</sup> Under an executory contract to insure, the insurance company is obligated to deliver a policy and complete a contract of insurance within a designated time, or within a reasonable time if no time is specified.<sup>59</sup> If the policy is not delivered, the applicant may maintain a suit for specific performance,<sup>60</sup> or an action for damages.<sup>61</sup> If a loss occurs after the insurance should have become effective, the measure of damages is the loss sustained, up to the amount for which it was agreed that the insurance was to be written.<sup>62</sup> The right of action arises out of the breach of the contract to insure, and not out of any contract of insurance.<sup>63</sup> Consequently, the statute of limitations will run from the date when the policy should have been issued.<sup>64</sup>

## 2. ACCEPTANCE OF THE APPLICATION, AND DELIVERY OF THE POLICY

In the usual case, the soliciting agent who takes the application is without authority, actual or apparent, to complete the contract.

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recognizing an oral contract which clearly was within the standard fire insurance policy statute, it may be expected that our court will follow the cases last cited.

<sup>56</sup>Hicks v. British Amer. Assur. Co., (1900) 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; Lea v. Atlantic Fire Ins. Co., (1915) 168 N. C. 478, 84 S. E. 813.

<sup>57</sup>Eifert v. Hartford Fire Ins. Co., (1921) 148 Minn. 17, 180 N. W. 996.

<sup>58</sup>See for example the pleading difficulties in Stewart v. St. Paul Fire & Marine Ins. Co., (1927) 171 Minn. 363, 214 N. W. 58.

<sup>59</sup>Vance, Handbook of the Law of Insurance, 2d ed., 184.

<sup>60</sup>See Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co., (1919) 142 Minn. 428, 172 N. W. 693. In Tayloe v. Merchants Ins. Co., (1850) 9 How. (U.S.) 390, 13 L. Ed. 187, specific performance was granted even after loss had occurred. The court said that the remedy at law was troublesome and difficult, and therefore inadequate.

<sup>61</sup>Eifert v. Hartford Fire Ins. Co., (1921) 148 Minn. 17, 180 N. W. 996; Ames-Brooks Co. v. Aetna Ins. Co., (1901) 83 Minn. 346, 86 N. W. 344. See Everett v. O'Leary, (1903) 90 Minn. 154, 95 N. W. 901; Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co., (1919) 142 Minn. 428, 172 N. W. 693.

<sup>62</sup>See Everett v. O'Leary, (1903) 90 Minn. 154, 95 N. W. 901. Quære, as to the duty of the plaintiff, after a reasonable time, to minimize damages by reasonable efforts to obtain other insurance?

<sup>63</sup>See Everett v. O'Leary, (1903) 90 Minn. 154, 95 N. W. 901.

<sup>64</sup>See Everett v. O'Leary, (1903) 90 Minn. 154, 95 N. W. 901.

He is authorized merely to transmit the application to the home office of the company, for its acceptance or rejection. The application is then merely an offer to contract. It stands upon the same footing as an order taken by any other salesman, for so many boxes of crackers, shoes, or dried fish. Until the offer has been accepted by the home office of the company, there is no contract.<sup>65</sup> If a policy is issued which is not in accordance with the terms of the application, it is a counter-offer, and there is still no contract, until the new policy in turn has been accepted by the applicant.<sup>66</sup>

Since an offer creates no duty in the offeree to accept or to reject,<sup>67</sup> a mere failure on the part of the insurance company to act on the application, no matter how long its silence and inaction may be continued, does not amount to an acceptance, and creates no contract liability.<sup>68</sup> The hardship upon the innocent applicant, who has been led to forego attempts to obtain other insurance, if loss occurs while the company unreasonably delays its decision on the application, has induced a number of courts to evolve ingenious theories<sup>69</sup> of liability in such a case. It has been held that there is a duty imposed upon an insurance company because of its public character and its franchise from the state, requiring it to act promptly upon all applications, rendering it liable in tort if it fails

<sup>65</sup>Heiman v. Phoenix Mut. Life Ins. Co., (1871) 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; Schwartz v. Germania Life Ins. Co., (1872) 18 Minn. 448 (Gil. 404); Wales v. New York Bowery Fire Ins. Co., (1887) 37 Minn. 106, 33 N. W. 322. See Union Central Life Ins. Co. v. Star Ins. Co., (1929) 178 Minn. 526, 227 N. W. 850; Patterson, The Delivery of a Life Insurance Policy, (1919) 33 Harv. L. Rev. 198.

<sup>66</sup>Wales v. New York Bowery Fire Ins. Co., (1887) 37 Minn. 106, 33 N. W. 322. In Wadsworth v. Walsh, (1915) 128 Minn. 241, 150 N. W. 870, the application was accompanied by a note, which gave the applicant the option to increase or decrease the insurance on the first payment. There was no showing that the option ever was exercised. It was held that the issuance and delivery of a policy in accordance with the application was sufficient consideration for the note.

The insurance agent may be authorized to accept a policy issued on behalf of the insured. Hamm Realty Co. v. New Hampshire Fire Ins. Co., (1900) 80 Minn. 139, 83 N. W. 41; Ames v. New York Life Ins. Co., (1922) 154 Minn. 111, 191 N. W. 274.

<sup>67</sup>Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, (1919) 26 Yale L. J. 171.

<sup>68</sup>Heiman v. Phoenix Mut. Life Ins. Co., (1871) 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154. See also footnote 74.

<sup>69</sup>The various theories of liability are discussed in length in Funk, The Duty of an Insurer to Act Promptly on Applications, (1927) 75 U. Pa. L. Rev. 207; Patterson, The Delivery of a Life Insurance Policy, (1919) 33 Harv. L. Rev. 198; Notes in (1921) 15 A. L. R. 1026; (1923) 27 A. L. R. 463; (1920) 33 Harv. L. Rev. 595; (1920) 29 Yale L. J. 673; (1930) 40 Yale L. J. 121; see also (1918) 3 MINNESOTA LAW REVIEW 53; (1921) 5 MINNESOTA LAW REVIEW 224; (1921) 5 MINNESOTA LAW REVIEW 479; (1922) 6 MINNESOTA LAW REVIEW 596; (1931) 15 MINNESOTA LAW REVIEW 833.

to accept or reject a normally acceptable application within a reasonable time.<sup>70</sup> Other decisions have proceeded upon the theory of a duty owed by the insurance agent to the applicant to forward the application promptly;<sup>71</sup> still others have spoken rather vaguely of estoppel,<sup>72</sup> or of quasi-contract,<sup>73</sup> or have said that "silence is acceptance."<sup>74</sup> A small but vigorous minority have refused to find any liability at all.<sup>75</sup> The number of jurisdictions which have decided in favor of tort liability for delay in acting on the application make it clear that the insurance law of the country tends in this direction.<sup>76</sup> In nearly all of the cases in which such liability has

<sup>70</sup>*Boyer v. State Farmers' Mut. Hail Ins. Co.*, (1912) 86 Kan. 442, 121 Pac. 329; *Duffie v. Bankers Life Ass'n*, (1913) 160 Iowa 19, 139 N. W. 1087; *Wilkin v. Capital Fire Ins. Co.*, (1916) 99 Neb. 828, 157 N. W. 1021; *Johnson v. Farmers Ins. Co.*, (1918) 184 Iowa 630, 168 N. W. 264; *Security Ins. Co. v. Cameron*, (1922) 85 Okla. 171, 205 Pac. 151; *Columbian Nat'l Life Ins. Co. v. Lemmons*, (1923) 96 Okla. 228, 222 Pac. 255; *Fox v. Volunteer State Life Ins. Co.*, (1923) 185 N. C. 121, 126 S. E. 226; *Dyer v. Missouri State Life Ins. Co.*, (1925) 132 Wash. 378, 232 Pac. 346.

<sup>71</sup>*Carter v. Metropolitan Life Ins. Co.*, (1897) 11 Hawaii 69.

<sup>72</sup>*Preferred Acc. Ins. Co. v. Stone*, (1899) 61 Kan. 48, 58 Pac. 986; *Richmond v. Travelers Ins. Co.*, (1910) 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. (N.S.) 954. The estoppel theory is rejected by Vance, *Handbook of the Law of Insurance*, 2d ed., 188.

<sup>73</sup>*See Kukulka v. Home Mut. Hail-Tornado Ins. Co.*, (1931) 204 Wis. 166, 235 N. W. 403.

<sup>74</sup>*Preferred Acc. Ins. Co. v. Stone*, (1899) 61 Kan. 48, 58 Pac. 986; *Stearns v. Merchants' Life & Cas. Co.*, (1917) 38 N. D. 528, 165 N. W. 568; *Great Southern Life Ins. Co. v. Dolan*, (Tex. Civ. App. 1922) 239 S. W. 236, rev'd on rehearing (Tex. Civ. App. 1924) 262 S. W. 475. This theory is supported by Patterson, *The Delivery of a Life Insurance Policy*, (1919) 33 Harv. L. Rev. 198, 216, and by the note in (1925) 10 Corn. L. Q. 250. But the weight of authority is heavily against any contract liability in such a case. *Misselhorn v. Mutual Reserve Fund Ass'n*, (C.C. Mo. 1887) 30 Fed. 545; *Alabama Gold Life Ins. Co. v. Mayes*, (1878) 61 Ala. 163; *Stewart v. Helvetia Swiss Fire Ins. Co.*, (1894) 102 Cal. 218, 36 Pac. 410; *Atkinson v. Hawkeye Ins. Co.*, (1887) 71 Iowa 340, 32 N. W. 371; *Handler v. Knights of Columbus*, (1921) 106 Neb. 267, 183 N. W. 302; *More v. New York Bowery Fire Ins. Co.*, (1892) 130 N. Y. 527, 29 N. E. 757; *Ross v. New York Life Ins. Co.*, (1899) 124 N. C. 395, 32 S. E. 733; *Dorman v. Connecticut Fire Ins. Co.*, (1914) 41 Okla. 509, 137 Pac. 262; *Royal Ins. Co. v. Beatty*, (1888) 119 Pa. 6, 12 Atl. 607; *Northern Neck Mut. Fire Ass'n v. Turlington*, (1923) 136 Va. 44, 116 S. E. 363.

<sup>75</sup>*National Union Fire Ins. Co. v. School Dist. No. 55*, (1916) 122 Ark. 179, 182 S. W. 547; *Interstate Business Men's Acc. Ass'n v. Nichols*, (1920) 143 Ark. 369, 220 S. W. 477; *Savage v. Prudential Life Ins. Co.*, (1929) 154 Miss. 89, 121 So. 487. Cf. *Bradley v. Federal Life Ins. Co.*, (1920) 295 Ill. 381, 127 N. E. 191. Insurance counsel of course have attacked the majority rule with great vigor. See for example James C. Jones, *General Counsel American Nat'l Assur. Co.*, "Tort or No Tort," (1924) 2 Proceedings Ass'n of Life Ins. Counsel 389, 56 Chi. Leg. N. 366: "It seems to me that the courts holding that a liability in tort arises from delay in acting promptly on an application for insurance have not considered this fundamental question: Is there any such duty imposed by law? If there is not, there can be no liability in tort."

<sup>76</sup>See cases cited in footnote 70. This tendency is justified by Funk, *The Duty of an Insurer to Act Promptly on an Application*, (1927) 75

been found there has been payment of the first premium in advance at the time of the application,<sup>77</sup> and it may be that a different result will be reached if this is not the case.<sup>78</sup> The Minnesota court has given no indication of what it will do when these questions arise.<sup>79</sup>

The offer contained in the application may be accepted by any act contemplated by the offer as an acceptance.<sup>80</sup> It is of course anticipated when the application is forwarded that the company will first approve the application, then execute a formal policy and forward it to the local agent, who will make the final delivery to the insured. At some point in this process the offer will be accepted, and the contract completed. In other states, there have been various opinions as to the precise act which constitutes acceptance. Some jurisdictions require an actual physical delivery of the policy to the insured before the contract is in effect;<sup>81</sup> others consider that the offer is accepted when the policy is received by the local agent of the company;<sup>82</sup> still others find a contract from the time the policy is mailed from the home office to the agent;<sup>83</sup> one or two consider that the contract is complete when the policy is executed

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U. Pa. L. Rev. 207, 222, as a necessary policy toward a quasi-public business.

<sup>77</sup>Note, (1930) 40 Yale L. J. 121, 126; (1931) 15 MINNESOTA LAW REVIEW 833.

<sup>78</sup>The distinction is made in *Metropolitan Life Ins. Co. v. Brady*, (Ind. App. 1930) 171 N. E. 14.

<sup>79</sup>In the case of *Schliep v. Commercial Casualty Ins. Co.*, District Court of Minnesota, Seventh Judicial District, File No. 9929, tried April 1, 1933, Judge Anton Thompson permitted the question of defendant's tort liability for failure to act on plaintiff's application to go to the jury, refusing to direct a verdict for defendant. The jury returned a verdict for plaintiff, in the sum of \$540. The writer is informed that a motion for new trial is pending.

James C. Jones, "Tort or No Tort," (1924) 2 Proceedings Ass'n of Life Ins. Counsel 389, 56 Chi. Leg. N. 366, suggests that the insurance company may protect itself against liability by a clause in the application providing that it shall have a certain number of days within which to consider the application, after which, if the applicant has heard nothing, the offer shall be considered as rejected. The effectiveness of such a provision seems doubtful. See Funk, *The Duty of an Insurer to Act Promptly on an Application*, (1927) 75 U. Pa. L. Rev. 207, 225.

<sup>80</sup>In *Conley v. Modern Life Ins. Co.*, (1927) 172 Minn. 482, 215 N. W. 836, acceptance was found from the fact that the company, with the applicant's approval, had listed him as an accepted insured in an application to the insurance department for a charter.

<sup>81</sup>*Busher v. New York Life Ins. Co.*, (1904) 72 N. H. 551, 58 Atl. 41; *Horton v. New York Life Ins. Co.*, (1899) 151 Mo. 604, 52 S. W. 356.

<sup>82</sup>See *Gallagher v. Metropolitan Life Ins. Co.*, (1910) 67 Misc. Rep. 115, 121 N. Y. S. 638.

<sup>83</sup>*Mutual Reserve Fund Life Ass'n v. Farmer*, (1898) 65 Ark. 581, 47 S. W. 850; *Rose v. Mutual Life Ins. Co.*, (1909) 240 Ill. 45, 88 N. E. 204.

by the officials of the company at the home office,<sup>84</sup> or even when the application is marked "approved."<sup>85</sup> Minnesota has determined the question quite definitely. In the absence of some controlling condition in the application or the policy itself, the offer is accepted and the contract is complete when the policy is mailed by the home office of the company to its agent, with no other authority or duty than to deliver it to the insured.<sup>86</sup> It has been pointed out<sup>87</sup> that such a result represents a departure from the strict principles of contract law, and an adoption of a more liberal view, which finds an acceptance in any "significant act" or "manifestation of intention," even though it is not communicated. Another possible explanation is the finding of a constructive delivery in any act done with the intention of putting the policy beyond the company's legal, if not physical, control, if the insured has acquiesced in that intention.<sup>88</sup>

If, however, the policy is forwarded into the hands of the local agent of the insurance company with instructions not to deliver possession of it to the applicant until certain conditions have been met—if, for example, the agent is directed to collect the first premium,<sup>89</sup> or to assure himself that the applicant is in good health,<sup>90</sup> before surrendering the policy—then it is apparent that the acceptance is a conditional one, and there is no "delivery" and no final contract until the condition has been met<sup>91</sup> or the policy surrendered.<sup>92</sup> In many cases, therefore, the existence of the contract will

<sup>84</sup>*Van Arsdale-Osborne Brokerage Co. v. Robertson*, (1912) 36 Okla. 123, 128 Pac. 107; see *Robinson v. United States Benevolent Soc.*, (1903) 132 Mich. 695, 94 N. W. 211.

<sup>85</sup>*Kohen v. Mutual Reserve Fund Life Ass'n*, (1886) 28 Fed. 705; see *Kentucky Mut. Life Ins. Co. v. Jenks*, (1854) 5 Ind. 96, 99.

<sup>86</sup>"It is very well settled that where nothing remains to be done by the insured, the mailing of the policy duly executed to the insured or to an agent of the company for delivery to the insured constitutes a delivery. . . . The contract is complete when the application is accepted, and the acceptance signified by mailing the policy." *Kilborn v. Prudential Ins. Co.*, (1906) 99 Minn. 176, 108 N. W. 861; see *Schwartz v. Germania Life Ins. Co.*, (1875) 21 Minn. 215; cf. *Martin v. Business Men's Assur. Co.*, (Minn. 1933) 246 N. W. 882.

<sup>87</sup>*Patterson, The Delivery of a Life Insurance Policy*, (1919) 33 Harv. L. Rev. 198, 208, 214.

<sup>88</sup>Vance, *Handbook of the Law of Insurance*, 2d ed., p. 206 ff.

<sup>89</sup>*Heiman v. Phoenix Mut. Life Ins. Co.*, (1871) 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154.

<sup>90</sup>*Schwartz v. Germania Life Ins. Co.*, (1872) 18 Minn. 448 (Gil. 404).

<sup>91</sup>In *Schwartz v. Germania Life Ins. Co.*, (1875) 21 Minn. 215, it was held that if the policy was forwarded to the agent with no other authority or duty than simply to deliver the policy on payment of the first premium, acceptance was conditional upon such payment alone, and tender of payment satisfied the condition and completed the contract.

<sup>92</sup>The principle is clearly illustrated by the two decisions in *Schwartz v. Germania Life Ins. Co.*, (1872) 18 Minn. 448 (Gil. 404); *Schwartz v. Germania Life Ins. Co.*, (1875) 21 Minn. 215.



turn upon the directions with which the policy is forwarded by the company to its agent.

### 3. THE EFFECT OF CONDITIONS IN THE APPLICATION OR POLICY

The rule that the contract is completed when the policy is mailed from the home office exposes the insurance company to the possibility of loss, or of some change in the risk, before the policy can be handed over to the insured and the first premium collected. Most companies<sup>93</sup> have endeavored to meet this situation by inserting in the application, or in the policy issued, provisions intended to delay the assumption of the risk until the policy reaches the applicant. Such a provision in the application becomes a condition of the offer, which prescribes the mode of acceptance, and no risk is assumed until the condition is satisfied.<sup>94</sup> In the policy, the provision still makes the acceptance conditional, and the company is not liable until its terms have been complied with.<sup>95</sup> The common provisions are the following:

*Delivery to the Applicant.* A provision that the insurance shall not take effect until the policy has been delivered to the applicant obviously is intended to mean that the company shall not be

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<sup>93</sup>In 1905 L. G. Fouse, president of a life insurance company, declared that all of 51 representative companies inserted provisions that the policies should not take effect until they were delivered during the lifetime and good health of the applicant, with actual payment of the first premium. 26 *Annals Acad. Pol. & Soc. Sci.* 209, 220, *Yale Readings in Insurance* (1909) 207, 219. In 1921 John A. Coke, Jr., attorney for the Life Insurance Co. of Virginia, reported that out of 125 applications and policies examined, 87 required both delivery in good health and payment of the first premium as conditions precedent to the commencement of the risk. *The Commencement of the Risk in the Case of a Life Insurance Policy*, (May 4, 1921) Paper No. 51, 1 *Proceedings of Ass'n of Life Insurance Counsel*.

<sup>94</sup>See Patterson, *The Delivery of a Life Insurance Policy*, (1919) 33 *Harv. L. Rev.* 198, 219. Some courts consider that the provision is a condition precedent to the existence of a contract. *Yount v. Prudential Life Ins. Co.*, (Mo. App. 1915) 179 S. W. 749. Others have considered that the contract may be completed in the form of a contract to insure, but the risk does not attach until the condition is satisfied. *Snedeker v. Metropolitan Life Ins. Co.*, (1914) 160 Ky. 119, 169 S. W. 570; *McClave v. Mutual Reserve Fund Life Ass'n*, (1893) 55 N. J. L. 187, 26 *Atl.* 78; *Ray v. Security Trust & Life Ins. Co.*, (1900) 126 N. C. 166, 35 S. E. 246. The distinction, if it exists, is of importance chiefly in connection with waiver of the provision by the insurance company and changes in the risk which may occur between the completion of the contract and the attachment of the risk. The Minnesota court has made no suggestion of any such distinction, unless it be in *Ames v. New York Life Ins. Co.*, (1922) 154 *Minn.* 111, 191 N. W. 274, a very ambiguous case. See (1923) 7 *MINNESOTA LAW REVIEW* 419.

<sup>95</sup>*Wilkins v. State Ins. Co.*, (1890) 43 *Minn.* 177, 45 N. W. 1; *Stramback v. Fidelity Mut. Life Ins. Co.*, (1905) 94 *Minn.* 281, 102 N. W. 731.

liable for losses occurring before the policy is physically transferred into his hands. It has been given this interpretation by many courts.<sup>96</sup> But other jurisdictions have nullified completely the effect of such stipulations by holding that delivery to the applicant is satisfied by the constructive delivery involved in forwarding the policy to the insurance agent.<sup>97</sup> Even a clause providing for "actual delivery"<sup>98</sup> to the applicant, or that the policy shall be "delivered to and received by" him<sup>99</sup> has received the same artificial construction. There are indications<sup>100</sup> that the Minnesota court is inclined toward such an interpretation of these clauses.

*Payment of the First Premium.* It commonly is provided that the insurance shall not take effect until the first premium has been paid. Such a clause is legitimate<sup>101</sup> and will be given full effect; until the initial payment has been made, the company is not liable for any loss that may occur.<sup>102</sup> As soon as payment is made,

<sup>96</sup>*Snedeker v. Metropolitan Life Ins. Co.*, (1914) 160 Ky. 119, 169 S. W. 570; *Bowen v. Prudential Ins. Co.*, (1913) 178 Mich. 63, 144 N. W. 543; *Yount v. Prudential Life Ins. Co.*, (Mo. App. 1915) 179 S. W. 749; *McClave v. Mutual Reserve Fund Life Ass'n*, (1893) 55 N. J. L. 187, 26 Atl. 78; *Oliver v. Mutual Life Ins. Co.*, (1899) 97 Va. 134, 33 S. E. 536; *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, (1881) 18 W. Va. 782; *Chamberlain v. Prudential Ins. Co.*, (1901) 109 Wis. 4, 85 N. W. 128.

<sup>97</sup>*Triple Link Indemnity Ass'n v. Williams*, (1898) 121 Ala. 138, 26 So. 19; *Mutual Reserve Fund Life Ass'n v. Farmer*, (1898) 65 Ark. 581, 47 S. W. 850; *New York Life Ins. Co. v. Greenlee*, (1908) 42 Ind. App. 82, 84 N. E. 1101; *Unterharnscheidt v. Missouri State Life Ins. Co.*, (1913) 160 Iowa 223, 138 N. W. 459; *Gallagher v. Metropolitan Life Ins. Co.*, (1910) 67 Misc. Rep. 115, 121 N. Y. S. 638; *Prudential Ins. Co. v. Shively*, (1913) 1 Ohio App. 238; see *Preferred Acc. Ins. Co. v. Stone*, (1899) 61 Kan. 48, 58 Pac. 986; *Powell v. North State Mut. Life Ins. Co.*, (1910) 153 N. C. 124, 69 S. E. 12.

<sup>98</sup>*Mutual Life Ins. Co. v. Otto*, (1927) 153 Md. 179, 138 Atl. 16.

<sup>99</sup>*Jackson v. New York Life Ins. Co.*, (C.C.A. 9th Cir. 1925) 7 F. (2d) 31; *New York Life Ins. Co. v. Rutherford*, (C.C.A. 9th Cir. 1922) 284 Fed. 707.

<sup>100</sup>See *Kilborn v. Prudential Ins. Co.*, (1906) 99 Minn. 176, 108 N. W. 861 (holding that mailing the policy to the agent is a "delivery"); *Ikenberry v. New York Life Ins. Co.*, (1914) 127 Minn. 215, 149 N. W. 292 (permitting the jury to find that the policy had taken effect, on the basis of written admissions of the agent, notwithstanding a provision in the application that the policy must be "delivered to and received by" the applicant).

<sup>101</sup>Compare the cases involving delivery of the policy to the agent with directions not to surrender it until the premium is paid. *Heiman v. Phoenix Mut. Life Ins. Co.*, (1871) 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *Schwartz v. Germania Life Ins. Co.*, (1872) 18 Minn. 448 (Gil. 404); see *Hoidale v. Cooley*, (1919) 143 Minn. 430, 174 N. W. 413.

<sup>102</sup>*Wilkins v. State Ins. Co.*, (1890) 43 Minn. 177, 45 N. W. 1; *Stramback v. Fidelity Mut. Life Ins. Co.*, (1905) 94 Minn. 281, 102 N. W. 731; *Sawyer v. Mutual Life Ins. Co.*, (1926) 166 Minn. 207, 207 N. W. 307; *Olson v. American Central Life Ins. Co.*, (1927) 172 Minn. 511, 216 N. W. 225; *Zemler v. New York Life Ins. Co.*, (1929) 177 Minn. 273, 225 N. W. 81; *Allen v. Metropolitan Life Ins. Co.*, (1930) 177 Minn. 545, 229 N. W. 879.

even though it be in advance, at the time of the application,<sup>103</sup> the condition is satisfied, and the acceptance of the offer takes effect in the usual manner.

The Minnesota decisions have been concerned chiefly with the question whether there has been payment. The company may, if it chooses, insist upon payment of the premium in cash, before the insurance is to take effect;<sup>104</sup> but, since the provision is for the benefit of the company, it may accept payment in some other form if it sees fit. If the home office of the company, with knowledge that one of its agents has taken a promissory note<sup>105</sup> or a post-dated check<sup>106</sup> in payment, issues a policy and forwards it to the agent for delivery to the applicant, it must be taken to have accepted that particular form of payment as sufficient and to have delivered the policy with the intention that it shall take effect. A subsequent default on the note will not avoid the policy.<sup>107</sup> The authority of the agent to accept such a substitute for payment without consulting the home office presents greater difficulty. It is of course clear that if the agent in the past has made a practice of taking notes in payment, with the knowledge and approval of the company,<sup>108</sup> he will have apparent, if not actual, authority to do so in a particular case.<sup>109</sup> But in *Kilborn v. Prudential Ins. Co.*,<sup>110</sup> a case which has become widely known, the Minnesota court went much further, holding that a soliciting agent of a foreign insurance company, authorized by virtue of our statute<sup>111</sup> to collect premiums, has as a matter of law apparent authority to extend the credit of the company by taking the note of the insured for the first payment.<sup>112</sup>

<sup>103</sup>*Kilborn v. Prudential Ins. Co.*, (1906) 99 Minn. 176, 108 N. W. 861. Cf. *Schwartz v. Germania Life Ins. Co.*, (1875) 21 Minn. 215 (tender of payment sufficient).

<sup>104</sup>*Sawyer v. Mutual Life Ins. Co.*, (1926) 166 Minn. 207, 207 N. W. 307; *Zemler v. New York Life Ins. Co.*, (1929) 177 Minn. 273, 225 N. W. 81; *Allen v. Metropolitan Life Ins. Co.*, (1930) 179 Minn. 545, 229 N. W. 879.

<sup>105</sup>*Union Central Life Ins. Co. v. Taggart*, (1893) 55 Minn. 95, 56 N. W. 579, 43 Am. St. Rep. 474. Cf. *Hoidale v. Cooley*, (1919) 143 Minn. 430, 174 N. W. 413.

<sup>106</sup>*Martin v. Business Men's Assur. Co.*, (Minn. 1933) 246 N. W. 882.

<sup>107</sup>*Coughlin v. Reliance Life Ins. Co.*, (1925) 161 Minn. 446, 201 N. W. 920.

<sup>108</sup>If the company has not known of the agent's practice, there can be no apparent authority. *Jackson v. Mutual Ben. Life Ins. Co.*, (1900) 79 Minn. 43, 81 N. W. 545.

<sup>109</sup>*Godfrey v. New York Life Ins. Co.*, (1897) 70 Minn. 224, 73 N. W. 1.

<sup>110</sup>(1906) 99 Minn. 176, 108 N. W. 861.

<sup>111</sup>Mason's 1927 Minn. Stat. sec. 3757.

<sup>112</sup>"A person of ordinary prudence and knowledge of the usages of the

This decision, which is in line with the weight of authority,<sup>113</sup> is limited by other Minnesota cases. The apparent authority does not protect the applicant where the note is given to the agent in his personal capacity, rather than as agent of the company,<sup>114</sup> or where it is agreed that the premium is to be applied on the agent's personal debt.<sup>115</sup> Nor does it protect him where it is not understood and intended that the note is to be accepted in lieu of payment,<sup>116</sup> or where it is fully explained to the applicant that the company will not accept notes in place of cash.<sup>117</sup> Insurance companies generally protect themselves on this basis by inserting in the application a clause providing that the agent is not authorized to accept anything but money. Such a provision in the application will serve as notice to the applicant, and will prevent any apparent authority to extend credit,<sup>118</sup> at least where the company has not made a practice of ignoring it.<sup>119</sup> But a similar clause in the policy issued can have no effect unless the applicant has seen the policy prior to the time he makes the payment.<sup>120</sup>

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life insurance business, who is solicited by an agent who has authority to collect the first premium, may fairly and reasonably rely upon the assertion of the agent that he has authority to give a short credit for the first premium. Especially is this true when the application which he signs does not state that the first premium is to be paid in cash. It is a matter of common knowledge that this is one of the methods by which such agents procure business. The applicant has the right to believe that the insurance company will not send to him an agent who will assume authority which he does not properly possess, and thus lead him to believe that he is insured when he is not insured. The company selects its agents, and cannot be permitted to throw the entire responsibility for their misconduct upon a person who deals with them in good faith." Elliott, J. in *Kilborn v. Prudential Ins. Co.*, (1906) 99 Minn. 176, 185, 108 N. W. 861.

See also *Ikenberry v. New York Life Ins. Co.*, (1914) 127 Minn. 215, 149 N. W. 292, holding that acceptance of a note in payment was for the jury.

<sup>113</sup>*Tayloe v. Merchants Fire Ins. Co.*, (1850) 9 How. (U.S.) 390, 13 L. Ed. 187; *Mississippi Valley Life Ins. Co. v. Neyland*, (1873) 9 Bush (Ky.) 430; *Franklin Fire Ins. Co. v. Colt*, (1874) 20 Wall. (U.S.) 560, 22 L. Ed. 423; *Baker v. Commercial Assur. Co.*, (1894) 162 Mass. 358, 38 N. E. 1124; *Travelers Ins. Co. v. Benjamin Douglas Co.*, (1917) 198 Mich. 457, 164 N. W. 469. See 2 Couch, *Cyclopedia of Insurance Law*, sec. 537, p. 1645.

<sup>114</sup>*Jackson v. Mutual Benefit Life Ins. Co.*, (1900) 79 Minn. 43, 81 N. W. 545.

<sup>115</sup>*Allen v. Metropolitan Life Ins. Co.*, (1930) 179 Minn. 545, 229 N. W. 879.

<sup>116</sup>*Sawyer v. Mutual Life Ins. Co.*, (1926) 166 Minn. 207, 207 N. W. 307.

<sup>117</sup>*Zemler v. New York Life Ins. Co.*, (1929) 177 Minn. 273, 225 N. W. 81.

<sup>118</sup>*Wilkins v. State Ins. Co.*, (1890) 43 Minn. 177, 45 N. W. 1 (clause in policy, delivered to applicant at the time agent extended credit).

<sup>119</sup>*Cf. Godfrey v. New York Life Ins. Co.*, (1897) 70 Minn. 224, 73 N. W. 1.

<sup>120</sup>*Kilborn v. Prudential Ins. Co.*, (1906) 99 Minn. 176, 108 N. W. 861.

In the absence of a condition in the application or the policy requiring payment of the first premium before the insurance takes effect, a surrender of the policy to the insured will be taken to indicate an extension of credit and an intention that the policy shall go into effect at once.<sup>121</sup> But if there is such a condition, not even delivery of the policy to the applicant will make the insurance effective, unless the premium has been paid, or payment waived by an authorized agent.<sup>122</sup> Possession of the policy by the insured, however, creates a presumption<sup>123</sup> that the contract is complete<sup>124</sup> and that payment has been made or the time extended.

A particularly puzzling Minnesota case is *Ames v. New York Life Ins. Co.*<sup>125</sup> The applicant, age 40, applied for a policy through a soliciting agent named Jennings. He agreed that if the company should be unwilling to issue a policy at the premium rate corresponding to his age, the application should be for a policy at a rate corresponding to the company's valuation of the risk. By the terms of the application, the insurance was not to take effect unless the first premium was paid and the policy delivered during his lifetime. The company rated the risk at age 49, and executed a policy on that basis. The policy was forwarded through the company's branch office, but before it was turned over to the agent Jennings, and before any premium was paid, the applicant became seriously ill. In ignorance of the illness, the branch office sent the policy to Jennings, and received a check for the first premium. The applicant died; and upon suit by the beneficiary of the policy the company contended that failure to disclose the change in physical condition between the date of the application and the date of delivery to Jennings avoided the policy. The opinion first decides that the contract was complete when Jennings accepted the policy on behalf of the applicant, apparently on the theory that the

<sup>121</sup>Kollitz v. Equitable Mut. Fire Ins. Co., (1904) 92 Minn. 234, 99 N. W. 892.

<sup>122</sup>"Where an insurance policy provides that it shall not be effective until the first premium is paid, it does not take effect even although delivered until this provision is complied with." Kilborn v. Prudential Ins. Co., (1906) 99 Minn. 176, 108 N. W. 861; see Sawyer v. Mutual Life Ins. Co., (1926) 166 Minn. 207, 207 N. W. 307.

<sup>123</sup>The presumption is rebuttable. Reagan v. Philadelphia Life Ins. Co., (1925) 165 Minn. 186, 206 N. W. 162. The court leaves open the question whether, if the policy recites that the premium has been paid, the acknowledgment is conclusive in so far as it is necessary to fix the liability of the insurer.

<sup>124</sup>Gardner v. United Surety Co., (1910) 110 Minn. 291, 125 N. W. 464; see Reagan v. Philadelphia Life Ins. Co., (1925) 165 Minn. 186, 206 N. W. 162.

<sup>125</sup>(1922) 154 Minn. 111, 191 N. W. 274.

policy was a counter-offer requiring acceptance.<sup>126</sup> It then proceeds to decide that there was no duty on the part of the applicant to disclose the change in his health, apparently upon the theory that the contract was complete when the policy was sent from the home office to an agent who had no authority except to deliver on payment of the premium.<sup>127</sup> The effect of the payment-of-premium clause is not directly discussed. There would seem to be conflicting elements in the decision which cannot be reconciled.<sup>128</sup>

*Good Health of the Applicant.* Another common provision is that the insurance shall not take effect unless upon a given date, usually that of delivery of the policy, the applicant is in good health.<sup>129</sup> Such a condition has been considered in only two Minnesota cases,<sup>130</sup> in both of which it was enforced. Some courts have

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<sup>126</sup>"It was within the scope of Jennings' authority to accept the policy offered. He says he accepted it when he received it. If he did, there was a completed contract, subject only to the condition that the first premium should be paid in the lifetime of the applicant, and Jennings' acceptance obligated the applicant to pay it. A contract may be formed by accepting a paper containing terms." *Ames v. New York Life Ins. Co.*, (1922) 154 Minn. 111, 114, 191 N. W. 274.

<sup>127</sup>"Unlike most of the cases in which the doctrine has been asserted, the negotiations between the parties were no longer pending, and no deception was practiced to get possession of the policy." *Ames v. New York Life Ins. Co.*, (1922) 154 Minn. 111, 117, 191 N. W. 274.

<sup>128</sup>The case might be interpreted as standing for any of the following propositions:

1. The contract was completed by the acceptance of a counter-offer contained in the policy, by the agent on behalf of the applicant. If this is the decision, the second half of the opinion is incomprehensible.

2. There is no duty to disclose a change in health occurring before the contract is complete. This is contrary to the great weight of authority. *Vance*, *Handbook of the Law of Insurance*, 2d ed., p. 351; (1928) 14 *Corn. L. Q.* 91. The opinion cites *Schwartz v. Germania Life Ins. Co.*, (1872) 18 Minn. 448 (Gil. 404) as opposed to the majority.

3. The insurance took effect when the policy was forwarded from the home office. This would ignore entirely the provision in the application.

4. The contract was complete as a contract to insure when the policy was forwarded, but the risk did not attach until the premium was paid. See footnote 94. This is perhaps the most plausible interpretation. See (1923) 7 *MINNESOTA LAW REVIEW* 419; *Vance*, *Handbook of the Law of Insurance*, 2d ed., 352. But the opinion is by no means clear to this effect; and it is submitted that such a result is contrary to the plain intention of the company, that it shall not in any way be bound until the first premium is paid. The case is criticized on this ground in (1923) 36 *Harv. L. Rev.* 884.

<sup>129</sup>See footnote 93. In *Zemler v. New York Life Ins. Co.*, (1929) 177 Minn. 273, 225 N. W. 81, the provision took the form: the insurance "shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium therefor paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination."

<sup>130</sup>*Murphy v. Metropolitan Ins. Co.*, (1908) 106 Minn. 112, 118 N. W. 355; *Zemler v. New York Life Ins. Co.*, (1929) 177 Minn. 273, 225 N. W. 81. Cf. *Schwartz v. Germania Life Ins. Co.*, (1872) 18 Minn. 448 (Gil.

construed such a clause to apply only to changes in the applicant's health during the interval between the date of application and delivery of the policy, and so allow recovery if his condition at the time of delivery is no worse than when he made application.<sup>131</sup> The weight of authority probably is to the contrary.<sup>132</sup>

*Truth of Statements in the Application.* Almost invariably it is provided that the insurance shall not take effect, or that the policy issued shall be void, if the statements made in the application are untrue. Any full discussion of the avoidance of the contract by misstatements contained in the application is foreign to the scope of this article.<sup>133</sup> Except in the case of fraternal insurance<sup>134</sup> the matter now is governed entirely by statutes, which provide that the application shall not be considered as a warranty, or as part of the contract, except in so far as it is incorporated in or attached to the policy;<sup>135</sup> and that no misrepresentation made by the insured shall avoid the policy, or prevent its attaching, unless made with intent to deceive or defraud, or unless the matter misrepresented increases the risk of loss.<sup>136</sup> Assuming, however, that

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404). In *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207, the company was held estopped to set up such a provision, because of its agent's misconduct in falsifying the application.

<sup>131</sup>*Patterson*, Cases on Insurance 490, citing: *Fidelity Mut. Life Ins. Co. v. Elmore*, (1916) 111 Miss. 137, 71 So. 305; *New York Life Ins. Co. v. Smith*, (1922) 129 Miss. 544, 91 So. 456; *Metropolitan Life Ins. Co. v. Moore*, (1904) 117 Ky. 651, 79 S. W. 219; *Webster v. Columbian Nat'l Life Ins. Co.*, (1909) 131 App. Div. 837, 116 N. Y. S. 404, aff'd in 196 N. Y. 523, 89 N. E. 1114.

<sup>132</sup>*Patterson*, Cases on Insurance 490, citing: *Barker v. Metropolitan Life Ins. Co.*, (1905) 188 Mass. 542, 74 N. E. 945; *Logan v. New York Life Ins. Co.*, (1919) 107 Wash. 253, 181 Pac. 906; *Federal Life Ins. Co. v. Wright*, (Tex. Civ. App. 1921) 230 S. W. 795; 14 R. C. L. 900; Note, 17 L. R. A. (N.S.) 1145.

<sup>133</sup>See Vance, *The History of the Development of the Warranty in Insurance Law*, (1910) 20 Yale L. J. 523; note, (1923) 71 U. Pa. L. Rev. 141; Vance, *Handbook of the Law of Insurance*, 2d ed., 394, ff.

<sup>134</sup>The statutes do not apply to fraternal insurance associations. *Louden v. Modern Brotherhood of America*, (1909) 107 Minn. 12, 119 N. W. 425; *Farm v. Royal Neighbors of America*, (1920) 145 Minn. 193, 176 N. W. 489.

<sup>135</sup>*Mason's 1927 Minn. Stat. sec. 3334*. The application does not protect the insurer unless it is incorporated or attached. *Kollitz v. Equitable Mut. Fire Ins. Co.*, (1904) 92 Minn. 234, 99 N. W. 892; *Coleman v. Retail Lumbermen's Ins. Ass'n*, (1899) 77 Minn. 31, 79 N. W. 588; *Pearson v. United States Fidelity & Guaranty Co.*, (1917) 138 Minn. 240, 164 N. W. 919. In *Wheelock v. Home Life Ins. Co.*, (1911) 115 Minn. 177, 131 N. W. 1081, the court said that statements of the usual kind as to the history, habits or health of the applicant do not avoid the policy unless the application is attached, but suggested that the rule might be different as to unusual representations inducing the insurer to contract.

<sup>136</sup>The leading case interpreting this statute is *Johnson v. National Life Ins. Co.*, (1913) 123 Minn. 453, 144 N. W. 218, where Dibell, J.

the misstatement is of such a character as to give the company the right to avoid the policy, the Minnesota court has held that, regardless of the language used, the contract is voidable only, at the election of the company;<sup>137</sup> and that the condition is a condition subsequent, which does not prevent the completion of the contract, or the attachment of the risk.<sup>138</sup>

#### 4. THE EFFECT OF DELIVERY OF AN IMPROPER POLICY

A surprisingly large number of decisions have dealt with the situation which arises where the policy delivered to the insured does not in fact represent the true agreement of the parties. Upon reading these cases, it is difficult to escape the conclusion, either that insurance agents, as a class, have been astonishingly unreliable in their dealings with applicants, or that false testimony consistently has been brought before the courts in order to evade the terms of the policy. Perhaps the truth lies somewhere between. Two explanations commonly are advanced for the delivery of an improper policy: mutual mistake, and misconduct of the insurance agent. Two remedies customarily are invoked by the insured: the

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divided misrepresentations into three classes: immaterial representations, which do not avoid the policy even if made with intent to deceive; material representations not increasing the risk of loss, which avoid the policy only if made with a fraudulent intent; and representations which increase the risk, which avoid the policy regardless of intent.

As to what representations are "material" or "increase the risk of loss," see (1931) 15 MINNESOTA LAW REVIEW 593; Reynolds v. Atlas Acc. Ins. Co., (1897) 69 Minn. 93, 71 N. W. 831; Cerys v. State Ins. Co., (1898) 71 Minn. 338, 73 N. W. 849; Bruce v. Connecticut Mut. Life Ins. Co., (1898) 74 Minn. 310, 77 N. W. 210; Price v. Standard Life & Acc. Ins. Co., (1903) 90 Minn. 264, 95 N. W. 1118; Mattson v. Modern Samaritans, (1904) 91 Minn. 434, 98 N. W. 330; Johnson v. National Life Ins. Co., (1913) 123 Minn. 453, 144 N. W. 218; Silverstein v. Knights & Ladies of Security, (1915) 129 Minn. 340, 152 N. W. 724; W. A. Thomas Co. v. National Surety Co., (1919) 142 Minn. 460, 172 N. W. 697; Ivanovich v. North Amer. Life & Cas. Co., (1920) 145 Minn. 175, 176 N. W. 502; Ames v. New York Life Ins. Co., (1922) 154 Minn. 111, 191 N. W. 274; First Nat'l Bank v. National Liberty Ins. Co., (1923) 156 Minn. 1, 194 N. W. 6; Shaughnessy v. New York Life Ins. Co., (1925) 163 Minn. 134, 203 N. W. 600; Flikeid v. New York Life Ins. Co., (1925) 163 Minn. 127, 203 N. W. 598; McLevis v. St. Paul Fire & Marine Ins. Co., (1926) 165 Minn. 468, 206 N. W. 940; Mack v. Pacific Mut. Life Ins. Co., (1926) 167 Minn. 53, 208 N. W. 410; Whitcomb v. Automobile Ins. Co., (1926) 167 Minn. 362, 209 N. W. 27; Schmitt v. United States Fidelity & Guaranty Co., (1926) 169 Minn. 106, 210 N. W. 846; Laury v. Northwestern Mut. Life Ins. Co., (1930) 180 Minn. 205, 230 N. W. 648, 231 N. W. 824.

<sup>137</sup>Schreiber v. German-American Hail Ins. Co., (1890) 43 Minn. 367, 45 N. W. 708.

<sup>138</sup>Chambers v. Northwestern Mut. Life Ins. Co., (1896) 64 Minn. 495, 67 N. W. 367.



reformation, in equity, of the policy, and the application, at law, of the doctrine of waiver, or more properly, estoppel.

When a written policy is delivered to the insured, before any loss occurs,<sup>139</sup> and he accepts and retains it, it becomes his contract. His retention renders him liable for the premiums.<sup>140</sup> All previous negotiations and oral agreements are regarded as merged in the written contract, and no action may be brought upon any such agreement, without first reforming the instrument.<sup>141</sup> It is an elementary principle of contract law that one who accepts and retains a written instrument with the understanding that it represents his contract is charged with notice of its contents, and bound by its terms, and will not be heard to say that he has not read it.<sup>142</sup> Accordingly, so long as there has been no mistake on the part of the insurance company, and its conduct has not in any way misled the insured in his acceptance of the policy, it is immaterial, whether the action be at law<sup>143</sup> or in equity,<sup>144</sup> that he did not read it. And he may not introduce parol evidence to vary its terms.<sup>145</sup>

However necessary the conclusive presumption that the instrument has been read may be to the stability of contracts, it obviously is a fiction in the case of insurance policies, since it is common knowledge that the average man does not read his insurance policy,<sup>146</sup> and very probably could not recognize its defects without

<sup>139</sup>If loss occurs before delivery, the policy delivered is only evidence of the contract, which may be rebutted. *Salisbury v. Hekla Fire Ins. Co.*, (1884) 32 Minn. 458, 21 N. W. 552; *Ganser v. Firemen's Fund Ins. Co.*, (1885) 34 Minn. 372, 25 N. W. 943.

<sup>140</sup>*Adams v. Eidam*, (1889) 42 Minn. 53, 43 N. W. 690.

<sup>141</sup>*Collins v. St. Paul Fire & Marine Ins. Co.*, (1890) 44 Minn. 440, 46 N. W. 906; *Lundman v. United States Fidelity & Casualty Co.*, (1925) 163 Minn. 303, 204 N. W. 159.

<sup>142</sup>American Law Institute, *Restatement of the Law of Contracts*, sec. 70: "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing, or of its proper interpretation."

<sup>143</sup>*Wilkins v. State Ins. Co.*, (1890) 43 Minn. 177, 45 N. W. 1; *Parsons, Rich & Co. v. Lane*, (1906) 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N.S.) 231; cf. *Reynolds v. Atlas Accident Ins. Co.*, (1897) 69 Minn. 93, 71 N. W. 831.

<sup>144</sup>*Guernsey v. American Ins. Co.*, (1871) 17 Minn. 104 (Gil. 83); *McFarland v. St. Paul Fire & Marine Ins. Co.*, (1891) 46 Minn. 519, 49 N. W. 253.

<sup>145</sup>*Frost's Detroit Lumber Works v. Miller's Mut. Ins. Co.*, (1887) 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846; *Calmenson v. Equitable Mut. Fire Ins. Co.*, (1904) 92 Minn. 390, 100 N. W. 88; *Lundman v. United States Fidelity & Guaranty Co.*, (1925) 163 Minn. 303, 204 N. W. 159; cf. *Wadsworth v. Walsh*, (1915) 128 Minn. 241, 150 N. W. 870.

<sup>146</sup>"The insured buys 'protection' very much as he would any other commodity. Indeed, in business life, he no more thinks of examining the policy delivered to him by an expert manufacturer of such commodities

legal assistance if he did.<sup>147</sup> The Minnesota court, in common with many other jurisdictions, has refused to adopt such a fiction in two classes of cases. If a suit is brought to reform the policy, upon the ground of mutual mistake, the purpose of the suit is to show that the written instrument does not in fact represent the contract of the parties, and parol evidence is admissible for that purpose.<sup>148</sup> In such a case, the acceptance and retention of the policy may be evidence<sup>149</sup> that the insured has read and assented to its terms, but it may be shown that he did not do so.<sup>150</sup> And if the insured, at the time he accepted the policy, was misled by the conduct of the company or its agent into a belief that it was satisfactory, he may show that he relied upon the company and did not read it.<sup>151</sup> These relaxations of the rule have opened the door to proof that the policy delivered is not the policy applied for by the insured.

The circumstances under which a court will be justified in re-

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than he does of taking down the motor-car that he purchases in order to discover possible defects in its manufacture. And for the ordinary purchaser it would be easier on examination to detect defects in the manufacture of an automobile purchased, than in the manufacture of 'protection' purchased and evidenced by a complicated writing. It is now generally recognized by the public at large, and by some courts as well, that it is only rarely that even careful business men do in fact read insurance policies delivered to them." Vance, *Handbook of the Law of Insurance*, 2d ed., p. 215.

<sup>147</sup>Cf. the classic denunciation of the practices of insurance companies by Doe, J., in *De Lancey v. Rockingham Farmers' Mut. Fire Ins. Co.*, (1873) 52 N. H. 581: "When the premium payer complained that he had been defrauded, it was not, in the opinion of the legislature, a sufficient answer to say that, if he had been wise enough, taken time enough, had good eyes enough, and been reckless enough in the use of them to read the mass of fine print, and had been scholar, business man and lawyer enough to understand its full force and effect, he would have been alarmed, and would not have been decoyed into the trap that was set for him."

<sup>148</sup>*Kelly v. Liverpool & London & Globe Ins. Co.*, (1907) 102 Minn. 178, 111 N. W. 395, 112 N. W. 870, 1019. See also the cases cited in footnote 153.

<sup>149</sup>*Haley v. Sharon Township Mut. Fire Ins. Co.*, (1920) 147 Minn. 190, 179 N. W. 895; *Shake v. Westchester Fire Ins. Co.*, (1924) 158 Minn. 40, 196 N. W. 804.

<sup>150</sup>*Norman v. Kelso Farmers Mut. Fire Ins. Co.*, (1911) 114 Minn. 49, 130 N. W. 13; *Spurr v. Home Ins. Co.*, (1889) 40 Minn. 424, 42 N. W. 206. Cf. *McCarty v. New York Life Ins. Co.*, (1898) 74 Minn. 530, 77 N. W. 426 (rescission).

<sup>151</sup>*Otte v. Hartford Life Ins. Co.*, (1903) 88 Minn. 423, 93 N. W. 608; *Finn v. Modern Brotherhood of America*, (1912) 118 Minn. 307, 136 N. W. 850; *Olsson v. Midland Ins. Co.*, (1917) 138 Minn. 424, 165 N. W. 474; *Zimmerman v. Bankers Casualty Co.*, (1917) 138 Minn. 442, 165 N. W. 271; *Gruberski v. Brotherhood of Amer. Yeomen*, (1921) 149 Minn. 49, 182 N. W. 716; *Shake v. Westchester Fire Ins. Co.*, (1924) 158 Minn. 40, 196 N. W. 804; *Schmitt v. United States Fidelity & Guaranty Co.*, (1926) 169 Minn. 106, 210 N. W. 846.

forming an insurance policy have been stated clearly and directly:<sup>152</sup>

“Before a court of equity will interfere to reform a written instrument, it must appear, substantially as alleged in the pleadings, that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties, that there was in fact a written contract which failed to express such true intention, and that this failure was due to mutual mistake, or to mistake of one side and fraud or inequitable conduct of the other. These facts must be established by competent evidence, which is consistent and not contradictory, clear and not equivocal, convincing and not doubtful. Mere preponderance of testimony is not sufficient. Such relief will be extended to those only who have not, by their own conduct (as laches, negligence or otherwise) put themselves in such a position as to render it unjust to change the situation, especially when such change might injuriously affect the rights or status of innocent third parties.”

Upon this basis, the Minnesota court repeatedly has permitted reformation of an insurance policy on the ground of mutual mistake, in that the policy delivered did not represent the real contract.<sup>153</sup> Failure to read the policy is not such negligence as will prevent relief.<sup>154</sup> The remedy is open to the insurance company, as well as to the insured.<sup>155</sup> But in all these cases, it must be established that there was in fact a real agreement; if the minds of the parties never met,<sup>156</sup> or if the mistake in the terms of the policy was unilateral only,<sup>157</sup> there can be no reformation. The amount of proof required to establish the facts has given some difficulty. The evi-

<sup>152</sup>*Norman v. Kelso Farmers Mut. Fire Ins. Co.*, (1911) 114 Minn. 49, 130 N. W. 13 (quoting from *Fritz v. Fritz*, (1905) 94 Minn. 262, 102 N. W. 705); *Mahoney v. Minnesota Farmers Mut. Ins. Co.*, (1917) 136 Minn. 34, 161 N. W. 217.

<sup>153</sup>*Spurr v. Home Ins. Co.*, (1889) 40 Minn. 424, 42 N. W. 206; *Norman v. Kelso Farmers Mut. Fire Ins. Co.*, (1911) 114 Minn. 49, 130 N. W. 13; *Haley v. Sharon Township Mut. Fire Ins. Co.*, (1920) 147 Minn. 190, 179 N. W. 895; *Mahoney v. Minnesota Farmers Mut. Ins. Co.*, (1917) 136 Minn. 34, 161 N. W. 217; *Sundin v. County Fire Ins. Co.*, (1919) 144 Minn. 100, 174 N. W. 729; *Page v. Rollingstone Mut. Farmers Fire Ins. Co.*, (1926) 166 Minn. 74, 207 N. W. 24; *Hartigan v. Norwich Union Indemnity Co.*, (Minn. 1933) 246 N. W. 477; see *Collins v. St. Paul Fire & Marine Ins. Co.*, (1890) 44 Minn. 440, 46 N. W. 906.

<sup>154</sup>*Norman v. Kelso Farmers Mut. Fire Ins. Co.*, (1911) 114 Minn. 49, 130 N. W. 13. Cf. *Haley v. Sharon Township Mut. Fire Ins. Co.*, (1920) 147 Minn. 190, 179 N. W. 895.

<sup>155</sup>*Haley v. Sharon Township Mut. Fire Ins. Co.*, (1920) 147 Minn. 190, 179 N. W. 895.

<sup>156</sup>*Guernsey v. American Ins. Co.*, (1871) 17 Minn. 104 (Gil. 83); *Seiler v. Commercial Acc. Ins. Co.*, (1921) 150 Minn. 353, 185 N. W. 383.

<sup>157</sup>*Fredman v. Consolidated Fire & Marine Ins. Co.*, (1908) 104 Minn. 76, 116 N. W. 221; *Zenith Box & Lumber Co. v. National Union Fire Ins. Co.*, (1920) 144 Minn. 386, 175 N. W. 894.

dence must be "clear and convincing;"<sup>158</sup> it must be more than a mere preponderance of the testimony,<sup>159</sup> more than is required for a rescission of the contract,<sup>160</sup> but it need not be proof beyond a reasonable doubt.<sup>161</sup> The rule is

" . . . at least a warning to the trier of fact, judge, or jury, that the issue upon which a finding is sought is such that care should be exercised, an issue which is a little out of the usual, for . . . the plaintiff seeking a recovery presents a paper not authorizing it, and asks that it be changed so that he may recover."<sup>162</sup>

The conduct of the insurance agent by which the insured is deceived or misled in his acceptance of the policy may take a number of different forms, but in general the situations presented involve the same essential element. The agent delivers a policy and collects the premium when the agent has knowledge, and the insured does not, of circumstances which will prevent the policy from providing the insurance expected. Two typical cases will serve as an illustration:

(1) The applicant, who owns a building on which there is already fire insurance to the amount of \$500, applies to the defendant company for additional insurance in the amount of \$800. Defendant's agent, with knowledge of the existing insurance, delivers to the applicant defendant's policy, which provides that it shall be void if there is other insurance upon the property. The applicant, relying upon the agent in good faith, accepts the policy and pays the premium. The building is destroyed by fire, and he then reads the policy and discovers for the first time that it provides no insurance. Obviously in such a case the applicant has been misled by the wrongful conduct of the agent.<sup>163</sup>

<sup>158</sup>See *Norman v. Kelso Farmers Mut. Fire Ins. Co.*, (1911) 114 Minn. 49, 130 N. W. 13; *Mahoney v. Minnesota Farmers Mut. Ins. Co.*, (1917) 136 Minn. 34, 161 N. W. 217.

<sup>159</sup>*Remley v. Travelers Ins. Co.*, (1909) 108 Minn. 31, 121 N. W. 230; see *Mahoney v. Minnesota Farmers Mut. Ins. Co.*, (1917) 136 Minn. 34, 161 N. W. 217.

<sup>160</sup>See *McCarty v. New York Life Ins. Co.*, (1898) 74 Minn. 530, 77 N. W. 426.

<sup>161</sup>*Wall v. Meilke*, (1903) 89 Minn. 232, 94 N. W. 688 (overruling on this point *Guernsey v. American Ins. Co.*, (1871) 17 Minn. 184 (Gil. 83)); see *Mahoney v. Minnesota Farmers Mut. Ins. Co.*, (1917) 136 Minn. 34, 161 N. W. 217; *Hartigan v. Norwich Union Indemnity Co.*, (Minn. 1933) 246 N. W. 477.

<sup>162</sup>*Dibell, J.* in *Hartigan v. Norwich Union Indemnity Co.*, (Minn. 1933) 246 N. W. 477, citing 5 *Wigmore, Evidence*, 2d ed., sec. 2498 (3), and *Southard v. Curley*, (1892) 134 N. Y. 148, 31 N. E. 330. 16 L. R. A. 561, 30 Am. St. Rep. 642.

<sup>163</sup>*Cf. Anderson v. Manchester Fire Assur. Co.*, (1894) 59 Minn. 182, 60 N. W. 1095, 64 N. W. 241.

(2) The applicant, who is afflicted with diabetes, applies for a policy of life insurance. He makes oral answers to the questions on the application blank, in which he truthfully states the condition of his health. The agent fills out the application, falsely stating that the applicant has no kidney disease, and has not consulted a doctor within the past three years. The applicant, relying on the agent, signs the application without reading it. A policy is issued, containing the usual provision that it shall be void if the statements in the application are not true. The applicant accepts the policy, and pays the premiums. He dies, and it then is discovered that the company may avoid the policy. Here again it is clear that he has been misled.<sup>164</sup>

In such cases, reformation of the instrument is a possible remedy, since there is mistake on the one side, and fraud, or at least inequitable conduct, on the other.<sup>165</sup> But the difficulty of proving by convincing evidence<sup>166</sup> the actual agreement of the parties, without which the policy cannot be reformed,<sup>167</sup> together with the fact that the suit is in equity and there is no right to a jury trial, have combined to make this remedy comparatively unpopular.<sup>168</sup> Instead, the action is brought at law upon the policy, and the provisions avoiding liability are met by the application of waiver or estoppel.

These terms have been used more or less interchangeably by the courts,<sup>169</sup> with resulting confusion as to their meaning. But in at least one case<sup>170</sup> the Minnesota court has recognized that an important distinction exists between the two. Waiver is the intentional relinquishment of a known right; it is the expression of an

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<sup>164</sup>Cf. *Otte v. Hartford Life Ins. Co.*, (1903) 88 Minn. 423, 93 N. W. 608. This situation is discussed in detail in the note in (1932) 16 MINNESOTA LAW REVIEW 422.

<sup>165</sup>*Kelly v. Citizens Mut. Fire Ass'n*, (1905) 96 Minn. 477, 105 N. W. 675; *Central State Bank v. Royal Indemnity Co.*, (1926) 167 Minn. 494, 210 N. W. 66. Rescission of the contract is also possible, *McCarty v. New York Life Ins. Co.*, (1898) 74 Minn. 530, 77 N. W. 426, but of course this would be of no advantage to the insured after loss has occurred.

<sup>166</sup>See text at footnotes 158 to 162.

<sup>167</sup>*Guernsey v. American Ins. Co.*, (1871) 17 Minn. 104 (Gil. 83) *Seiler v. Commercial Acc. Ins. Co.*, (1921) 150 Minn. 353, 185 N. W. 383.

<sup>168</sup>See (1931) 15 MINNESOTA LAW REVIEW 596.

<sup>169</sup>Compare, in substantially identical cases, *Brandup v. St. Paul Fire & Marine Ins. Co.*, (1880) 27 Minn. 393, 7 N. W. 735 (waiver) with *Bemis v. Pacific Coast Cas. Co.*, (1914) 125 Minn. 54, 145 N. W. 622 (estoppel); also *Otte v. Hartford Life Ins. Co.*, (1903) 88 Minn. 423, 93 N. W. 608 (waiver) with *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207 (estoppel). See also *Hohag v. Northland Pine Co.*, (1920) 147 Minn. 38, 179 N. W. 485; *Ewart, Waiver Distributed*, pp. 31-33.

<sup>170</sup>*Parsons, Rich & Co. v. Lane*, (1906) 97 Minn. 98, 106 N. W. 485.

intention not to insist upon what the law affords. It is consensual in its nature; the intention may be inferred from conduct, and the knowledge may be actual or constructive, but both knowledge<sup>171</sup> and intent are essential elements.<sup>172</sup> Estoppel, on the other hand, is not consensual in character. It is recognized, not to give effect to a presumed intention,<sup>o</sup> but to defeat the inequitable intent of the party estopped. Strictly speaking, an estoppel in pais arises when one party makes, by word or act, a false representation of fact, to induce action, and the other party in good faith reasonably relies upon it to his detriment.<sup>173</sup> The distinction is important in connection with questions of pleading,<sup>174</sup> the parol evidence rule,<sup>175</sup> the authority of particular agents,<sup>176</sup> and the good faith of the insured.<sup>177</sup> The constant interchange of the two terms by the courts has resulted in some uncertainty as to the law. It has been urged, apparently with reason, that the law of insurance would be simplified if both "waiver" and "estoppel" were abandoned, and "election" substituted in the situations considered.<sup>178</sup>

<sup>171</sup>An insurance company does not waive its rights without knowledge of the facts. *Parsons, Rich & Co. v. Lane*, (1906) 97 Minn. 98, 106 N. W. 485; *McFarland v. St. Paul Fire & Marine Ins. Co.*, (1891) 46 Minn. 519, 49 N. W. 253; *St. Paul Fire & Marine Ins. Co. v. Parsons*, (1891) 47 Minn. 352, 50 N. W. 240; *First Nat'l Bank v. Manchester Fire Assur. Co.*, (1896) 64 Minn. 96, 66 N. W. 136; *Murphy v. Metropolitan Ins. Co.*, (1903) 106 Minn. 112, 118 N. W. 355; *Louden v. Modern Brotherhood*, (1909) 107 Minn. 12, 119 N. W. 425.

<sup>172</sup>See *Parsons, Rich & Co. v. Lane*, (1906) 97 Minn. 98, 106 N. W. 485.

<sup>173</sup>The distinction is pointed out in Vance, *Handbook of the Law of Insurance*, 2d ed., pp. 451-458.

<sup>174</sup>Waiver must be affirmatively pleaded. *Bienhoff v. North Amer. Acc. Ins. Co.*, (1922) 153 Minn. 241, 190 N. W. 63. Estoppel, in Minnesota, may be shown under a general denial. *Bemis v. Pacific Coast Cas. Co.*, (1914) 125 Minn. 54, 145 N. W. 622.

<sup>175</sup>The parol evidence rule will prevent proof of a contemporaneous parol waiver of the terms of a contract. *Calmenson v. Equitable Mut. Fire Ins. Co.*, (1904) 92 Minn. 390, 100 N. W. 88; *Union Mut. Life Ins. Co. v. Mowry*, (1877) 98 U. S. 544, 24 L. Ed. 674. It does not prevent proof of facts creating an estoppel. *Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

<sup>176</sup>Considered in connection with non-waiver clauses, footnotes 199-203.

<sup>177</sup>Estoppel requires good faith on the part of the insured. *Mudge v. Supreme Court I. O. F.*, (1907) 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N.S.) 279, 119 Am. St. Rep. 686. Waiver, being merely the voluntary relinquishment of a right, should not be affected by the conduct of the other party.

<sup>178</sup>*Ewart, Waiver Distributed 7; Ewart, Waiver in Insurance Cases*, (1905) 18 Harv. L. Rev. 364; *Ewart, Election in Insurance Cases*, (1912) 12 Col. L. Rev. 619; *Ewart, Waiver or Election*, (1916) 29 Harv. L. Rev. 724; *Ewart, "Waiver" in Insurance Law*, (1928) 13 Iowa L. Rev. 129; *Ewart, Waiver in Insurance Law*, (1926) 35 Yale L. J. 970. Cf. *Ewart, Professor Williston's Review of Waiver*, (1927) 11 MINNESOTA LAW REVIEW 415.

When an agent delivers an insurance policy and collects the premium, with knowledge of circumstances which will prevent effective insurance, the court frequently has said that there is a "waiver" of the particular clause in the policy which relieves the company from liability.<sup>179</sup> The objection to the use of this term, apart from its general ambiguity, is that there can be no right to avoid the policy until it has taken effect as a contract, and the "waiver," used in the sense of a relinquishment of that right, must therefore be either promissory, or else an expression of intention not to insist upon it, contemporaneous with the delivery of the policy. In either case, the parol evidence rule should prevent proof of it to vary the terms of the instrument.<sup>180</sup> On the other hand, estoppel, which the Minnesota court has found in a few cases,<sup>181</sup> is not affected by the parol evidence rule,<sup>182</sup> and may be supported upon the theory that the company's agent, by delivering the policy to the insured, has represented to him as a fact that it contains nothing to invalidate the insurance, and that the insured, in reliance upon this representation, has accepted the policy and paid the premium.<sup>183</sup>

<sup>179</sup>*Brandup v. St. Paul Fire & Marine Ins. Co.*, (1880) 27 Minn. 393, 7 N. W. 735; *Wilson v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1886) 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; *First Nat'l Bank v. American Central Ins. Co.*, (1894) 58 Minn. 492, 60 N. W. 345; *Anderson v. Manchester Fire Assur. Co.*, (1894) 59 Minn. 182, 60 N. W. 1095, 64 N. W. 241; *Quigley v. St. Paul Title Ins. & Trust Co.*, (1895) 60 Minn. 275, 62 N. W. 287; *Kells v. Northwestern Live Stock Ins. Co.*, (1896) 64 Minn. 390, 67 N. W. 215, 71 N. W. 5; *Andrus v. Maryland Cas. Co.*, (1904) 91 Minn. 358, 98 Minn. 200.

<sup>180</sup>*Union Mut. Life Ins. Co. v. Mowry*, (1877) 96 U. S. 544, 24 L. Ed. 674; *Thompson v. Insurance Co.*, (1881) 104 U. S. 252, 259, 26 L. Ed. 765; *Gray v. Insurance Co.*, (1898) 155 N. Y. 180, 49 N. E. 675; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, (1878) 125 Mass. 431; *National Mut. Ben. Ass'n v. Hickman*, (1887) 86 Ky. 256, 5 S. W. 565; *Germania Ins. Co. v. Bromwell*, (1896) 62 Ark. 45, 34 S. W. 83; *Mobile Life Ins. Co. v. Pruett*, (1882) 74 Ala. 497. See Vance, *Handbook of the Law of Insurance*, 2d ed., 530; *Calmenon v. Equitable Mut. Fire Ins. Co.*, (1904) 92 Minn. 390, 100 N. W. 88.

<sup>181</sup>*Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Bemis v. Pacific Coast Cas. Co.*, (1914) 125 Minn. 54, 145 N. W. 622; *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207.

<sup>182</sup>*Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

<sup>183</sup>"Plaintiff had a right to expect a policy that would permit the other insurance which the defendant knew he desired and intended to procure; and when the policy came to him, he had a right to assume that it was such as he had applied for, and that the company waived any conditions in the policy apparently inconsistent with his right to procure the other insurance." *Brandup v. St. Paul Fire & Marine Ins. Co.*, (1880) 27 Minn. 393, 7 N. W. 735.

On one theory or another, the court has held the company liable upon the policy in a large number of cases where the agent had knowledge of facts which would prevent the insurance from being effective, at the time the policy was delivered.<sup>184</sup> Except in the case of brokers,<sup>185</sup> the agent is held to be the representative of the company in all matters connected with the taking of the application.<sup>186</sup>

<sup>184</sup>*Brandup v. St. Paul Fire & Marine Ins. Co.*, (1880) 27 Minn. 393, 7 N. W. 735; *Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Wilson v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1886) 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; *Whitney v. National Masonic Acc. Ass'n*, (1894) 57 Minn. 472, 59 N. W. 943; *First Nat'l Bank v. American Central Ins. Co.*, (1894) 58 Minn. 492, 60 N. W. 345; *Anderson v. Manchester Fire Assur. Co.*, (1894) 59 Minn. 182, 60 N. W. 1095, 64 N. W. 241; *Quigley v. St. Paul Title Ins. & Trust Co.*, (1895) 60 Minn. 275, 62 N. W. 287; *Kells v. Northwestern Live Stock Ins. Co.*, (1896) 64 Minn. 390, 67 N. W. 215, 71 N. W. 5; *Otte v. Hartford Life Ins. Co.*, (1903) 88 Minn. 423, 93 N. W. 608; *Andrus v. Maryland Cas. Co.*, (1904) 91 Minn. 358, 98 N. W. 200; *Hartley v. Pennsylvania Fire Ins. Co.*, (1904) 91 Minn. 382, 98 N. W. 198; *Price v. Washington Life Ins. Co.*, (1904) 92 Minn. 251, 99 N. W. 810; *White v. Standard Life & Acc. Ins. Co.*, (1905) 95 Minn. 77, 103 N. W. 735, 884; *Finn v. Modern Brotherhood of America*, (1912) 118 Minn. 307, 136 N. W. 850; *Bemis v. Pacific Coast Cas. Co.*, (1914) 125 Minn. 54, 145 N. W. 622; *Olsson v. Midland Ins. Co.*, (1917) 138 Minn. 424, 165 N. W. 474; *Zimmerman v. Bankers Cas. Co.*, (1917) 138 Minn. 442, 165 N. W. 271; *Gruberski v. Brotherhood of Amer. Yeomen*, (1921) 149 Minn. 49, 182 N. W. 716; *Kearns v. North Amer. Life & Cas. Co.*, (1921) 150 Minn. 486, 185 N. W. 659; *Mack v. Pacific Mut. Life Ins. Co.*, (1926) 167 Minn. 53, 208 N. W. 410; *Jepson v. Central Business Men's Ass'n*, (1926) 168 Minn. 19, 209 N. W. 487; *Schmitt v. United States Fidelity & Guaranty Co.*, (1926) 169 Minn. 106, 210 N. W. 846; *Schmitt v. Massachusetts Protective Ass'n*, (1927) 170 Minn. 60, 212 N. W. 5; *Bullock v. New York Life Ins. Co.*, (1930) 182 Minn. 192, 233 N. W. 858; *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207; *Hafner v. Prudential Ins. Co.*, (Minn. 1933) 247 N. W. 576.

Many of these cases make no reference either to waiver or estoppel. See for example *Zimmerman v. Bankers Cas. Co.*, (1917) 138 Minn. 442, 165 N. W. 271, holding merely that where the agent falsifies the application without the knowledge of the applicant, the error is chargeable to the insurer. Some element of waiver or estoppel is necessary, however, if the policy provides that the insured warrants the truth of all statements made in the application, and that it shall be void if they are false. See *Otte v. Hartford Life Ins. Co.*, (1903) 88 Minn. 423, 93 N. W. 608.

<sup>185</sup>By statute, *Mason's 1927 Minn. Stat. sec. 3757*, a broker is the agent of the insurance company for the collection of premiums. He is not the agent of the company for other purposes, and knowledge which he acquires in negotiating for the insurance is not imputed to the company. *Gude v. Exchange Fire Ins. Co.*, (1893) 53 Minn. 220, 54 N. W. 1117; *Fredman v. Consolidated Fire & Marine Ins. Co.*, (1908) 104 Minn. 76, 116 N. W. 221. Cf. *Zenith Box & Lumber Co. v. National Union Fire Ins. Co.*, (1920) 144 Minn. 386, 175 Minn. 894. A contrary rule is applied in some other states. See *Welch v. Fire Ass'n of Philadelphia*, (1904) 120 Wis. 456, 98 N. W. 227.

<sup>186</sup>*Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Mahoney v. Minnesota Farmers Mut. Ins. Co.*, (1917) 136 Minn. 34, 161 N. W. 217; *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207. Cf. *Pettit v. State Ins. Co.*, (1889) 41 Minn. 299, 43 N. W. 378.



Any information which he acquires while acting within the scope of his authority<sup>187</sup> will be imputed to the company.<sup>188</sup> If the agent, after the applicant has stated the facts, falsifies the application without the applicant's knowledge, the responsibility for the act is upon the company.<sup>189</sup> If, on the other hand, the applicant knew at the time he signed the application that the agent had inserted false answers, the responsibility is his, as well as the agent's, and the company may set up the misrepresentations to avoid the policy.<sup>190</sup> This result lends color to the estoppel theory, since the applicant clearly is not justified in relying upon any "representation" of the agent in such a case.<sup>191</sup>

The effect of all these decisions is to permit the insured to recover, in an action at law, upon a written contract which does not

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<sup>187</sup>Information acquired by the agent while acting outside the scope of his authority will not be charged to the company. *St. Paul Fire & Marine Ins. Co. v. Parsons*, (1891) 47 Minn. 352, 50 N. W. 240 (information acquired in the course of other employment, in no way connected with the agency); *Shaughnessy v. New York Life Ins. Co.*, (1925) 163 Minn. 134, 203 N. W. 600 (information acquired by soliciting agent through personal acquaintance with applicant, not connected with taking of application).

<sup>188</sup>*Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Wilson v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1886) 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; *Andrus v. Maryland Cas. Co.*, (1904) 91 Minn. 358, 98 N. W. 200; *Kelly v. Citizens Mut. Fire Ass'n*, (1905) 96 Minn. 477, 105 N. W. 675; *Bemis v. Pacific Coast Cas. Co.*, (1914) 125 Minn. 54, 145 N. W. 622; *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207.

<sup>189</sup>*Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Whitney v. National Masonic Acc. Ass'n*, (1894) 57 Minn. 472, 59 N. W. 943; *Otte v. Hartford Life Ins. Co.*, (1903) 88 Minn. 423, 93 N. W. 608; *Olsson v. Midland Ins. Co.*, (1917) 138 Minn. 424, 165 N. W. 474; *Zimmerman v. Bankers Cas. Co.*, (1917) 138 Minn. 442, 165 N. W. 271; *Kearns v. North Amer. Life & Cas. Co.*, (1921) 150 Minn. 486, 185 N. W. 659.

<sup>190</sup>*Mattson v. Modern Samaritans*, (1904) 91 Minn. 434, 98 N. W. 330; *Bratley v. Brotherhood of Amer. Yeomen*, (1924) 159 Minn. 14, 198 N. W. 128; see *Zimmerman v. Bankers Cas. Co.*, (1917) 138 Minn. 442, 165 N. W. 271.

In *Shaughnessy v. New York Life Ins. Co.*, (1925) 163 Minn. 134, 203 N. W. 600, the application was filed out by a medical examiner, who inserted false answers to the questions without reading them to the applicant. She signed the application without reading it. It was held that she could not recover. "She had the opportunity and the ability to read it, and, in these circumstances, the law does not permit a party to avoid his contract by showing that he did not know what it contained." Apparently the basis of the decision is that the applicant, knowing the state of her health, must have knowledge that false answers would be inserted in an application made out under such circumstances. See the references to the case in *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207, and *Hafner v. Prudential Ins. Co.*, (Minn. 1933) 247 N. W. 576.

<sup>191</sup>See Vance, *Handbook of the Law of Insurance*, 2d ed., 524.

authorize recovery. They have been subjected to vigorous criticism, upon the ground that such issues properly should be referred to the equity side of the court, where parol evidence will be withdrawn from the consideration of the jury,<sup>192</sup> and that they place a premium upon false testimony, and compel the insurance company, in spite of all it can do, to insure risks which no underwriter would accept.<sup>193</sup> Notwithstanding these objections, the principle of these cases is well established in Minnesota and the great majority of other states.<sup>194</sup> It should be noted that the rule of the federal courts is to the contrary, since they refuse to admit parol evidence to show that the insured was misled by the company's agent.<sup>195</sup> The unfortunate result is that a removal to federal court upon the basis of diversity of citizenship will mean a change in the applicable law.<sup>196</sup>

Attempts on the part of the insurance companies to escape responsibility for the misconduct of their agents by provisions in

<sup>192</sup>Richards, *Parol Waiver Under the New York Fire Policy*, (1912) 12 Col. L. Rev. 134; Richards, *Election in Insurance Cases*, (1913) 13 Col. L. Rev. 51; Price, *How Far Does Knowledge of an Agent Affect the Defense of Fraud in an Action on a Life Insurance Policy*, (1924) 18 Ill. L. Rev. 377; note, L. R. A. 1915A 279.

<sup>193</sup>See the concurring opinion of Stone, J., in *Hafner v. Prudential Ins. Co.*, (Minn. 1933) 247 N. W. 576: "This decision . . . establishes a rule of decision law which compels life insurance companies to insure the lives of some persons afflicted with disease bound to end fatally and soon. The result is plainly against public policy and abhorrent to the whole theory of life insurance, and to the practice of all reputable underwriters—a theory of sanity and a practice of safety courts should sustain rather than thwart. Here we are imposing an unintended, anomalous, and dangerous liability in spite of every precaution that honest, law-abiding insurers can take. It is imposed against, and in spite of, explicit condition precedent to liability, by reason solely of what interested persons testify was or was not done by the soliciting agent, who had no power to waive any condition of the policy. The process is so simple and so easy, and its rewards so generous, that the result is a premium for perjury, of which our law already offers too many in its various facilities for the success of synthetic causes of action and defenses."

Mr. Justice Stone also dissented in *Enge v. John Hancock Mut. Life Ins. Co.*, (1931) 183 Minn. 117, 236 N. W. 207, a case where the agent falsified the application, upon the ground that the policy contained a condition that it should not take effect unless the applicant was in good health on the date of the policy. See discussion in (1932) 16 MINNESOTA LAW REVIEW 422.

<sup>194</sup>Vance, *Handbook of the Law of Insurance*, 2d ed., 507.

<sup>195</sup>*Northern Assur. Co. v. Grand View Bldg. Ass'n*, (1902) 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *Lumber Underwriters v. Rife*, (1915) 237 U. S. 609, 35 Sup. Ct. 717, 59 L. Ed. 1140; *Aetna Life Ins. Co. v. Moore*, (1913) 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356.

<sup>196</sup>Since a question of general commercial law is involved, the federal courts are compelled to follow the federal rule, rather than the state law. *Aetna Life Ins. Co. v. Moore*, (1913) 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; *MacKelvie v. Mutual Ben. Life Ins. Co.*, (C.C.A. 2d Cir. 1923) 287 Fed. 660.

the application or the policy have been comparatively unsuccessful. A clause in the policy providing that the soliciting agent, in taking the application, shall be deemed the agent of the applicant, and not of the company, has been held to be totally ineffective, as contrary to fact.<sup>197</sup> Although the question has not been passed upon directly in Minnesota, it seems clear that a similar clause in the application would have no more effect.<sup>198</sup> Stipulations to the effect that the agent shall have no power to waive any term or condition of the policy have met with somewhat better success.<sup>199</sup> If such a provision is a general one, extending to all agents of the company, or if it is made applicable to general agents, as distinguished from mere solicitors, it is well settled that it is not effective, since the company can act only through such agents, and it will not be permitted to disable itself by such a limitation upon its own power to contract.<sup>200</sup> As restricted to inferior agents, who have not full contracting powers, such as solicitors, such a stipulation may serve as notice to the insured that the agent with whom he is dealing has no power to vary the terms of the contract, and so prevent any "waiver" with apparent authority.<sup>201</sup> Even for this purpose, the

<sup>197</sup>*Kausal v. Minnesota Farmers Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

<sup>198</sup>*Mason's* 1927 Minn. Stat. secs. 3516, 3380; Vance, *Handbook of the Law of Insurance*, 2d ed., 144; *Sternaman v. Metropolitan Life Ins. Co.*, (1902) 170 N. Y. 13, 616, 62 N. E. 763, 63 N. E. 1122, 57 L. R. A. 318, 88 Am. St. Rep. 625; *Continental Ins. Co. v. Pearce*, (1888) 39 Kan 396, 18 Pac. 291, 7 Am. St. Rep. 557. See (1932) 16 MINNESOTA LAW REVIEW 422, 423.

<sup>199</sup>See Warner, *The Effect of a Provision in an Insurance Policy Limiting the Authority of an Agent to Alter the Contract*, (1918) 6 Cal. L. Rev. 203.

<sup>200</sup>*Lamberton v. Connecticut Fire Ins. Co.*, (1888) 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *St. Paul Fire & Marine Ins. Co. v. Parsons*, (1891) 47 Minn. 352, 50 N. W. 240; *Andrus v. Maryland Cas. Co.*, (1904) 91 Minn. 358, 98 N. W. 200; *Leland v. Modern Samaritans*, (1910) 111 Minn. 207, 126 N. W. 728; see *Wilkins v. State Ins. Co.*, (1890) 43 Minn. 177, 45 N. W. 1; but see *Goldin v. Northern Assur. Co.*, (1891) 46 Minn. 471, 49 N. W. 246. In *Bowman v. Surety Fund Life Ins. Co.*, (1921) 149 Minn. 118, 182 N. W. 991, a provision that "agents" should have no power to waive was held not applicable to the medical director of the company.

<sup>201</sup>*Wilkins v. State Ins. Co.*, (1890) 43 Minn. 177, 45 N. W. 1; *Goldin v. Northern Assur. Co.*, (1891) 46 Minn. 471, 49 N. W. 246. In the first of these cases the policy provided that none of its terms could be waived except by the secretary of the company. A local agent assumed to waive the provision of the policy that the insurance was not to take effect until the payment of the first premium. The policy was delivered, but not read. It was held that the agent had no authority, actual or apparent, to waive the terms of the policy.

It would seem that such a non-waiver clause in the policy cannot have any effect upon transactions occurring before delivery of the policy. See Vance, *Handbook of the Law of Insurance*, 2d ed., 434. The point never has been raised in Minnesota. The provision, however, usually is inserted in the application.

provision will be interpreted to apply only to those conditions and terms in the policy which relate to the formation and continuance of the contract of insurance, and not to those conditions, such as notice and proof of loss, which are to be performed after the loss has occurred.<sup>202</sup> And even though the stipulation may prevent a "waiver," it does not affect the responsibility of the company for any wrongful conduct of the agent, in the course of his employment, sufficient to set up an estoppel.<sup>203</sup>

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<sup>202</sup>C. S. Brackett & Co. v. General Acc. Fire & Life Assur. Corp., (1918) 140 Minn. 271, 167 N. W. 798; Reilly v. Linden, (1921) 151 Minn. 1, 186 N. W. 121; see Hartley v. Pennsylvania Fire Ins. Co., (1904) 91 Minn. 382, 98 Minn. 198.

<sup>203</sup>Enge v. John Hancock Mut. Life Ins. Co., (1931) 183 Minn. 117, 236 N. W. 207.