Washington University Law Review

Volume 8 | Issue 3

January 1923

Effect of Provision in Policy of Fire and Theft Insurance Against Use of Automobile for the Transportation of Passengers for Compensation

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EFFECT OF PROVISION IN POLICY OF FIRE AND THEFT INSURANCE AGAINST USE OF AUTOMOBILE FOR THE TRANSPORTATION OF PASSENGERS FOR COMPENSATION.

It is a well-settled rule of law that in the absence of statutory regulation, policies of insurance are to be construed and enforced in accordance with the same principles that are applied to the interpretation of ordinary contracts. In actions brought on insurance policies, just like in actions upon ordinary contracts, it is not within the province of the court or the jury to invalidate by speculative interpretation or otherwise any provision or condition contained therein, irrespective of the wisdom or folly thereof. The function of the court or the jury is to interpret and apply the contract that the parties made for themselves.

Unless rendered ineffective by some statutory provision, the liability of the insurance company is to be measured by the terms and conditions of the policy and the general rules of law applicable. This principle is very clearly announced in the case of *Coos County v. Insurance Company*,[1] in which the Supreme Court of the United States says:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guarantee the insured against loss or damage upon the terms and conditions agreed upon and upon no other, and when called upon to pay in case of loss the insurer therefor may justly insist upon the fulfillment of these terms. *If the insured cannot bring himself within the conditions of the policy,* he is not entitled to recover for the loss. The terms of the policy constitute the

1. 151 U. S. 452.

measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract and *such violation or want of performance has not been waived by the insurer,* then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. *The courts may not make a contract for the parties, their function and duty consists simply in enforcing and carrying out the one actually made."*

For the protection of the insured, practically every State in the Union has enacted legislation avoiding the literal force of certain policy provisions, especially those dealing with the statements, representations and conduct of the insured pending the negotiations for the contract. The result of this legislation has been to convert statements and conditions which the parties agreed should be warranties into mere misrepresentations in those cases where the statutes apply. The reason for such legislation is, of course, apparent when one considers the doctrine announced by the Supreme Court of the United States in the case above referred to and the essential difference between the effect of a breach of warranty and a breach of a representation. Warranties are parcels of the contract and must be absolutely true, whether material to the risk or not, and a breach of warranty will avoid the entire policy. A representation does not have to be literally true and avoids the contract only in cases where a representation,

breached, is material to the risk and is falsely or fraudulently made.[2]

This distinction between the effect of a breach of a warranty and a breach of a representation by the insured has been recognized by the courts even after the enactment of the legislation here referred to. The courts have not changed the ruls governing a breach of a *legal warranty* in an insurance policy but have adhered to the rule that a violation of a warranty, whether material or immaterial to the risk, invalidates the entire policy unless there is evidence of waiver of the breach by the insurance company. The only question for the courts to determine in any given case is whether or not the particular breach complained of is a legal warranty and whether or not the matter in controversy is covered by the statutes. If the statutes do not apply and the particular provision in the policy is by the terms of the contract made a warranty, it must be enforced, and a violation thereof will relieve the company from liability without regard to its materiality.[3]

With these rules in mind, attention is called to the following clause which is written into the standard insurance policy:

"It is a condition of this policy that it shall be null and void if the automobile described herein shall be used for carrying passengers for compensation or rented or leased or operated in any race or speed contest during the term of this policy."

An investigation of the cases in which that question has come up for decision discloses that there is some difference of opinion among the courts of the various States with reference to the proposition involved. Because of the importance of the rule of law applied, it will be well to examine the statutes in this State to determine whether or not the decision upon that question in this State is based upon any authority.

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2. Commercial Bank v. American Bonding Co., 194 Mo. App. 224.

3. Berryman v. Ins. Co., 199 Mo. App. 503; Coos Co. v. Ins. Co., 151 U. S. 452; Hoover v. Ins. Co., 93 Mo. App. 111; Harwood v. Ins. Co., 170 Mo. App. 298.

The statutes of this State that have any bearing upon the matter at hand are *Sections 6233 and 6234 of the Revised Statutes of Missouri, 1919,* which have been on the books since 1897 and are as follows:

"*Sec. 6233. Construction of Warranties of Fact, Etc.*— The warranty of any fact or condition hereafter made by any person in his or her application for insurance against loss by fire, tornado or cyclone, which application, or any part thereof, shall thereafter be made a part of a policy of insurance, by being attached thereto, or by being referred to therein, or by being incorporated in such policy, shall, if not material to the risk insured against, be deemed, held and construed as representations only, in any suit brought at law or in equity in any of the courts of this State, upon such policy to enforce payment thereof, on account of loss of or damage to any property insured by such policy. (R. S. 1909, Sec. 7024.)"

"*Sec. 6234. Same.*—The warranty of any fact or condition hereafter incorporated in or made a part of any fire, tornado or cyclone policy of insurance, purporting to be made or assented to by the assured which shall not materially affect the risk insured against, shall be deemed, taken and construed as representations only in all suits at law or in equity brought upon such policy in any of the courts of this State. (R. S. 1909, Sec. 7024.)"

The first case involving a construction of these sections of the statutes is *Hoover v. Insurance Company,*[4] decided by the St. Louis Court of Appeals in 1902. That was a case in which suit was brought upon a policy of fire insurance which contained a provision that the entire policy shall be void if the building described be or become vacant or unoccupied and so remain for ten days. The evidence showed that the building insured became vacant and remained vacant for a period of ten days but was thereafter reoccupied and was occupied when the fire occurred. The defendant contended that the policy was void at the time that the fire occurred and that plaintiff could not recover, while the plaintiff insisted that

4. 93 Mo. App 111.

the provision in the policy relied upon by the defendant was, in view of the evidence, immaterial to the risk; that it was governed by the act of 1897, Sections 1 and 2 (being Sections 6233 and 6234, Revised Statutes of Missouri, 1919).

Judge Barclay, who wrote the opinion of the Court, says at page 118, with reference to these contentions:

"But does the fact that the loss did not occur while the building was unoccupied affect the force of the stipulation on which defendant relied? It would seem that it should, yet there stand the positive words of the contract which declare the entire policy void if the building be left unoccupied for ten days without the consent of the contracting parties. We see no just way to avert the consequence imposed by the positive terms of the policy which permit no latitude of interpretation."

Adverting directly to the interpretation of the sections of the statute relied upon by the plaintiff, Judge Barclay at page 119 says:

"It cannot be claimed successfully that the statement on which defendant relies on this appeal is defeated by provisions of the act of 1897 already quoted. The first section of that act relating to warranties or conditions in applications for insurance, has, obviously, no bearing on the facts at bar."

"The second section comes nearer to the facts of the present litigation but it does not in our opinion avoid the terms of the already quoted stipulation on which the defendant counts. The word 'condition' in the second section of the aforesaid law of 1897 clearly refers to facts existing or said or supposed to exist at the time the payment is made. The fact that the matters referred to in that section are to be deemed and construed as representations only clarifies the meaning of the word 'condition' as used in the opening lines of that section. There is nothing in that section to limit or weaken the force of the stipulation contained in the policy touching the effect of leaving the dwelling unoccupied for ten days or more without

an agreement on the subject between the interested parties. So that even if the said law of 1897 enters into the policy sued upon in this case, it does not impair the defense we have discussed."

Judge Lamm of the Supreme Court of this State places a similar construction upon a like section of the statute referring to life insurance policies and apparently approves of the decision in the case of *Hoover v. Insurance Company.*

In the case of *Mathews v. Modern Woodmen,*[5] he says:

"The phraseology is inapt to cover promises referring to the future and to be kept or broken after the policy takes effect. A provision of somewhat similar character in the statute relating to fire insurance has been construed that way. (Hoover v. Ins. Co., 93 Mo. App. 111.) If put to it, we could assign no sufficient reason why the lawmaker did not write the law to cover promissory warranties or executory agreements —the future as well as the past and present; for if an applicant conceal or misrepresent an existing fact and that misrepresentation does not avoid liability except where the matter misrepresented actually contributes to the contingency or event on which the policy is to become due and payable, no good reason at first blush occurs to us why the same statute should not have gone on to include promissory warranties, the breach of which do not contribute to the same contingency or event. But a statute may stand: *Stat pro ratione voluntas.* It will be time enough to construe the law the way plaintiff insists when, if ever, the lawmaker writes a statute so couched as to be fairly susceptible of that construction. This one is not so written."

In *Harwood v. Ins. Company,*[6] the Kansas City Court of Appeals again construed the sections of the statute in accordance with the opinion in the Hoover case. That was a case in which suit was brought upon a fire insurance policy and was

5. 236 Mo. 326, l. c. 348.
6. 170 Mo. App. 298.

defended by the insurance company on the ground that the insured violated a provision in the policy against other insurance. The following quotation from the opinion of the Court will show definitely what the point at issue was in that case (l. c. 304):

"Counsel for plaintiff contend that the agreement in so far as it related to future insurance fell under the purview of Sections 7024 and 7025, Revised Statutes of Missouri, 1909 (Sections 6233 and 6234, Revised Statutes Mo. 1919), and should be regarded as a mere representation which could not give defendant a ground of forfeiture unless it were material to the risk and that the question of such materiality is presented by the evidence as involving an issue of fact for the jury to determine.

"On the other hand counsel for defendant argue that the agreement, in its relation to the present question, was unaffected by those statutes and should be construed as a promissory warranty in the nature of a condition subsequent, and that the breach of the condition forfeited the policy, regardless of all other considerations.

"The statutes thus discussed were enacted in 1897 and appear in the Revision of 1899 as Sections 7973 and 7974."

At page 306, the Court says, with reference to the respective claims of counsel:

"Turning to the enactment of 1897 (Secs. 7024 and 7025, Rev. Stat. Mo. 1909) (Secs. 6233 and 6234, Rev. Stat. Mo. 1919), we find it has been construed by both the Supreme Court and the St. Louis Court of Appeals as having the effect of converting into a mere representation a *stipulation relating to existing facts* which before had been treated by the courts as a condition precedent *but not as affecting the construction of executory warranties.*

"This positive approval of the Hoover case makes it a binding authority which we must follow. The statutes do not cover promissory warranties or executory agreements."

It will thus be seen from a review of the authorities discussed that the provision contained in the policies of fire insurance with reference to the use of the automobile after the issuance of the policy is a promissory or executory warranty and is not covered by the sections of the statute which, as stated, affect merely matters existing at the time the policy is issued. Since then the policy prohibits the use of the automobile, after the contract is made, for the transportation of passengers for compensation, and conditions the validity of the entire contract upon the performance of this promise by the insured, and since that undertaking on the part of the insured is not covered by the statutes, the question arises, what are the rights of the parties under that provision of the policy? It seems to us that this condition must be treated like any other in the policy.

Construing a promissory warranty, the Supreme Court of the United States in the case of *Imperial Fire Insurance Co. v. Coos County*,[7] holds that a violation by the insured of a promissory warranty voids the entire policy immediately when the breach occurs and the policy cannot be brought into life again by a subsequent performance by the insured of that condition. That was a case in which suit was brought upon a fire insurance policy which contained the provision that the policy shall be void and of no effect if, without notice to the company, and permission therefor endorsed thereon, mechanics are employed in building, altering or repairing the premises named herein. The evidence showed that after the policy was issued mechanics were employed in altering the premises without the consent or permission of the insurance company, but that the fire occurred long after the mechanics had completed their work.

Justice Jackson, who wrote the opinion of the Court, states with reference to the force of the provision relied upon by the defendant:

"These terms and conditions of the policy present no ambiguity whatever. The several conditions are separate and

distinct and wholly independent of each other. The first three of the above conditions depend upon an actual increase of risk by some act or conduct on the part of the insured; but the last condition is disconnected entirely from the former, whether the risk be increased or not. * * * The condition that the policy should be void and of no effect if 'mechanics are employed in building, altering or repairing the premises named herein,' without notice to or permission of the insurance company, being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, *merely because in the opinion of the court and the jury,* the alterations and repairs of the building did not, in fact, increase the risk. The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk. * * * The condition which was violated did not, in any way, depend upon the fact that it increased the risk, but by the express terms of the contract was made to avoid the policy if the condition was not observed. * * * Under the construction we have placed upon the last condition above quoted, we are of opinion that the defendant was entitled, on the conceded facts, to have a verdict directed in its favor on the ground that the employment of mechanics to make such material alterations and repairs as were made, without the knowledge or consent of the plaintiff in error, was in and of itself such a violation of the terms of the policy as rendered it void, without reference to the question whether such alterations and repairs had increased the risk or not."

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7. 151 U. S. 452.

In *Moore v. Insurance Company*,[8] the policy contained, among other provisions, the following conditions:

"If the above mentioned premises shall become vacant and unoccupied for a period of more than ten days * * * this policy shall be void. At the time the premises were destroyed they were occupied but for a period of at least three months prior to that time they were unoccupied, although without the knowledge of either the insured or the insurer."

The Court held in that case that the conditions of the policy had been broken by the unoccupancy of the premises and that the "*parties' contract being once terminated* could not be revived without the consent of both contracting parties. *It is immaterial then whether the loss of the building is due to unoccupancy or to some other cause.*"

We have already shown above in the case of *Hoover v. Insurance Company* that the principle announced in the case of *Imperial Fire Insurance Co. v. Coos County* is recognized and approved by the St. Louis Court of Appeals.

To the same effect are the following Missouri cases: *Harwood v. Ins. Co.*,[9] and *Marcus v. Ins. Co.*[10]

In the case of *Insurance Company v. Russell*,[11] the Court, upholding a provision in the contract of insurance that "it shall be void if the property was allowed to become unoccupied and vacant," says that the Court would "not commit the folly of interpolating in or adding to the policies before them a condition that the insurer's liability was suspended during the period of unoccupancy and revived again upon reoccupancy. The parties themselves could have expressed this condition if it had been intended."

In line with these authorities, the Supreme Court of Mass-

8. 62 N. H. 240.
9. 170 Mo. App. 298.
10. 187 Mo. App. 134.
11. 65 Kan. 373.

achusetts in the case of *Elder v. Ins. Co.*,[12] the Court had before it the question of the effect upon the policy of a breach by the insured of a provision therein rendering it void if the automobile described was to be used for the transportation of passengers for compensation. The evidence showed that plaintiff's son, without the knowledge and consent of the plaintiff, did on one occasion during the term of the policy carry passengers for compensation and retain the money. The Court held that under the evidence in the case there being nothing to show a waiver of the provision by the insurance company, the plaintiff could not recover even though the automobile had been used but once, in violation of the condition in the policy, and even though at the time of the loss the automobile was not in such use * * * the Court saying concerning the effect of the condition against the use of the automobile for the transportation of passengers for hire:

"Having been embodied in the body of the policy, the warranty was not dependent upon the negotiations embodied in the application and final issuance of the contract of insurance, and the statute is inapplicable. If the automobile was used for the transportation of passengers for hire, the plaintiff stipulated that the policy should be void, and the one question remaining is whether upon the evidence it could be ruled as a matter of law that the warranty had been broken. It was agreed by the parties that with the plaintiff's knowledge and consent the plaintiff's son for compensation which he received and retained, made trips with the automobile for the accommodation of tourists, * * * and this use having been permitted by the plaintiff, there was a violation of the warranty at common law and whether the risk has been increased is immaterial. The policy, therefore, was not in force when the automobile was damaged by fire and the plaintiff cannot recover for the loss."

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12. 213 Mass. 389.

The same conclusion practically was reached by the Supreme Court of Oklahoma in the case of *Orient Ins. Co. v. Drug Co.*[13] Plaintiff in that case brought suit on a fire insurance policy on his automobile. One of the defenses set up in the answer was that previous to the fire, the automobile had been used for the transportation of passengers for compensation in violation of the condition in the policy prohibiting such use of the automobile by the insured. Plaintiff demurred to this paragraph of the answer and was sustained by the lower court. Upon appeal to the Supreme Court of Oklahoma it was held:

"If the breach of this provision in the policy as alleged constitutes a defense, then the trial court committed error in sustaining the demurrer to said paragraph.

"The foregoing appears in the body of the policy and is in fact a part of it. A warranty may be either affirmative or promissory—the former affirming the existence of certain facts at the time of the insurance, the latter requiring the performance or the omission of certain things after the taking out of the insurance. The provision under consideration is clearly a promissory warranty. The question as to whether or not the prohibitive use of the automobile increased the risk is immaterial. The defendant in the paragraph of its answer under consideration pleads a specific breach and we think it states a defense."

Conclusions contrary to these two cases have been reached by the Supreme Courts of Texas and North Carolina and the Kansas City Court of Appeals,[14] although the grounds of each decision are not the same.

In the Texas and North Carolina cases, the Courts held that the words of the contract with reference to the use of the automobile must be interpreted to mean a prohibition of constant use and not an occasional use of the automobile in vio-

13. 50 Okla. 558.
14. See note in 14 A. L. R.

lation of the provision in the policy, while the Kansas City Court of Appeals in the case of *Berryman v. Ins. Co.*,[15] held that an occasional violation of the provision of the policy here considered did not relieve the insurance company from liability, provided at the time of the loss the insured complied with the condition. That was a case in which suit was brought upon a policy of fire insurance covering an automobile. It appeared from the evidence that on one or two occasions the provision was violated but that at the time the machine was burned it was not hired. The Court held that the insurance company was liable and based its opinion upon the ground that under the statutes of Missouri the warranty against the use of the automobile for the purposes mentioned was not material to the risk and was therefore a mere representation and did not avoid the policy if the machine was not in hire at the time it was burned.

It is well to note that the general principle of law that a warranty must be literally complied with is recognized by the Court in the instant case, the Court saying that "the law is that temporary non-compliance with provisions of the policy, *unless such provision is a warranty,* will not work a forfeiture if there was compliance at the time of the loss." In so far as that statement of the Court is concerned, it is squarely in line with the opinions in the cases of *Insurance Company v. Coos County, Hoover v. Insurance Company, Harwood v. Insurance Company,* and all of the other cases discussed above.

There is a parting of the ways between the decision in the *Berryman case* and the other Missouri cases only in so far as the particular label to be placed upon the provision of the policy with reference to the use of the automobile is concerned. In the *Berryman case* the Court lost sight of the fact that the St. Louis Court of Appeals and the Kansas City Court of Appeals and indirectly the Supreme Court of Mis-

15. 199 Mo. App. 503.

souri had construed *Sections 7024 and 7025, Revised Statutes Mo. 1909* (*Sections 6233 and 6234, Revised Statutes of Mo. 1919*), to apply to facts existing at the time of the insurance and as having no bearing whatever upon promises to be performed after the policy has been obtained.

"The provision now under review," says the Court, "is called a warranty on its face. But it is not a legal warranty, in fact, it ought not be so considered in law. The statute (Sections 7024 and 7025, Revised Statutes Mo. 1909) has abolished warranties and turned them into mere representations, except the matter warranted is material to the risk. Now in view of the legal propositions we have stated, the effect of this warranty was that if the machine was not in hire at the time it was burned, there was no forfeiture and a liability was incurred. It follows that the thing warranted against was not material to the risk, thereby becoming under the statute a mere representation."

This construction is in the teeth of the early decisions of the courts of this State and may very aptly be termed "judicial legislation," in view of the interpretation given to these very statutes by our courts ever since their enactment in 1897. The legislators of this State have had many opportunities to amend the law so as to give it the force contended for by the Court in the Berryman case. Their failure to act in the face of the decisions in the Hoover and Harwood cases, *supra,* seems to us to be substantial authority for the belief that the statutes are not meant to apply to executory or future conditions to be observed by either the insured or the company.

As to the results reached in the Texas and North Carolina cases, it seems to us that the doctrine of those cases is rather a dangerous one and is in conflict with the general rules of law governing the interpretation of contracts. It should not be the function of a court or jury to interfere with plain, simple and unambiguous provisions of a contract.

Insurance companies like any other corporations have a right to select the class of people that they desire to do busi-

ness with. They have a right to insist that they will not insure persons who use their automobiles in the service car business and therefore can stipulate in their contract that their liability is conditioned upon the insured observing faithfully the provision against the use of the automobile in carrying passengers for compensation. A person taking an insurance policy must be presumed to have agreed to abide by all of its terms and provisions unless the law specifically relieves him from such an obligation, but if for any reason, whatever it may be, the parties have agreed upon certain conditions, no court or jury should be permitted to play with the rights of the respective parties. And what greater opportunity for speculation than to permit the jury to say what will or will not avoid this particular condition? What may appear to one jury as a violation of the condition may not appear so to another jury. An interpretation of this clause or condition in the policy other than as outlined above appears to us to make the plain language of the parties a speculation and renders the liability in any given case where there is evidence of use of the automobile in violation of the condition extremely uncertain and dependent upon the whim, opinion and prejudice of one set of men or another. The fact that the legislators have not passed any laws avoiding promissory warranties leads us to believe that it has been their intention that an insured ought not to be given the privilege of even a temporary non-compliance with executory warranties. It is also very likely and entirely reasonable to believe that the lawmakers have deemed it safe to permit a person to stipulate in advance what his conduct will be after he has obtained a contract of insurance, making him the only person who can deprive himself of the fruits of his contract. We are inclined to the opinion that the Massachusetts doctrine as laid down in the case of *Elder v. Ins. Co.* has the weight of sound reason and is undoubtedly supported by authority.

JOSEPH H. GRAND.