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Insurance - Binding Slips or Memoranda - Their Effectiveness as Temporary or Interim Insurance

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found, although the power is conferred to them.[23] It is submitted that by the wording of our statutes,[24] the holder to the fee in these public lands would be awarded compensation by the state without regard to whether the land is being used in a governmental or proprietary capacity by the owner.

BENNY A. GRAFF

INSURANCE—BINDING SLIPS OR MEMORANDA—THEIR EFFECTIVENESS AS TEMPORARY OR INTERIM INSURANCE—The defendant had issued a conditional receipt for premium deposit to an applicant for a life insurance policy.[1] On the back of this receipt was a clause providing that in the event of rejection of the application the deposit had to be returned to the applicant. The application was rejected by the insurance company. The insurance agent did not attempt to return the premium payment to the applicant until two days after her death, which occurred seventeen days after the initial deposit.

Plaintiff beneficiary brought an action to recover the full amount of the insurance. On appeal, the Supreme Court of Arkansas *held,* two justices dissenting, that the defendant was not liable since the policy clearly meant that there would be no protection until the deceased was accepted as insurable. The dissent claimed there was sufficient ambiguity in the policy to allow an interpretation of the policy as providing a period of interim insurance until rejection of the policy by returning the deposit to the applicant. *The Nat'l. Life and Acc. Ins. Co. v. Baker,* 354 S.W.2d 1 (Ark. 1962).

A conditional or binding receipt has been accepted as providing a present period of interim insurance until either ac-

23. N.D. Cent. Code § 32-15-04 (3) "Property appropriated to public use, but such property shall not be taken unless for a more necessary public use than that to which it has been appropriated already, . . ."

24. N.D. Cent. Code § 32-15-04 "The private property which may be taken under this chapter includes: (3) Property appropriated to public use . . ." and § 32-15-01, "Private property shall not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner."

1. "If . . . (2) the proposed insured is, on the date of said deposit and on the date of any required medical examination, insurable and acceptable in the opinion of the Company's authorized officers . . . then upon the death or bodily injury of the proposed insured prior to the date of issue and within thirty-one days of the date of said deposit, the Company will pay the benefit, if any, which would have been payable under the provisions of said policy had its date of issue been the date of said deposit." The Nat'l. Life and Acc. Ins. Co. v. Baker, 354 S.W.2d 1, 2 (Ark. 1962).

ceptance or rejection by the insurer.[2] Such interim coverage has been allowed even without payment of an advance premium.[3]

Early cases allowed recovery by the beneficiary only where there was a later acceptance.[4] Later cases allowed recovery where the decision had not yet been made by the insurance company although the conditions to coverage were met.[5]

The practice of taking advance premiums without providing protection until certain conditions are met, or until a formal acceptance is given, has been considered contrary to public interest.[6] It has been termed an unworthy practice,[7] and a device calculated to deceive.[8]

Ambiguity in a policy usually results in an interpretation of terms most favorable to the insured.[9] Therefore an ambiguous "binding receipt" clause has been construed as providing interim insurance.[10] Several decisions have allowed recovery where the rejection was not made known to the applicant by prompt return of the deposit.[11]

Uncertainty still exists in the case law in respect to the construction of binding receipts;[12] however, there has been

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2. Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio 441, 31 N.E.2d 88 (1940); See Pennsylvania Lumbermen's Mut. Life Ins. Co. v. Holt, 32 Tenn. 559, 223 S.W.2d 203 (1949); See generally 12 APPLEMAN, INSURANCE LAW AND PRACTICE, § 7221 (1941).

3. Harris v. Sachse, 160 Pa. Super. 607, 52 A.2d 375 (1947).

4. The Mutual Life Ins. Co. of New York v. Young's Admr. 90 U.S. 85 (1874); Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913). "If not accepted the binding slip ceases **eo instanti** to have any effect. It does not insure of itself . . . ."

5. Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947); Hinkle v. New England Mut. Life Ins. Co. of Boston, 147 F. Supp. 547 (S.D. Iowa 1957).

6. United Founders Life Ins. Co. v. Carey, 247 S.W.2d 295 (Tex. Civ. App. 1961).

7. Francis v. Mutual Life Ins. Co. of New York, 55 Ore. 280, 106 Pac. 323 (1910) "It is a practice unworthy of a great business corporation." (dictum).

8. Western and Southern Life Ins. Co. v. Vale, 213 Ind. 601, 12 N.E.2d 350 (1938) ". . . by a device calculated to deceive, the applicant is defrauded out of so much of the premium paid as would provide insurance for the period between the application and acceptance and delivery of the policy." (dictum).

9. Mutual Life Ins. Co. of New York v. Hurni Packing Company, 263 U.S. 167 (1923); Newfoundland American Ins. Co. v. Suesz, 289 F.2d 694 (10th Cir. 1961); Manufacturer's Cas. Ins. Co. v. Goodville Mut. Cas. Co., 403 Pa. 603, 170 A.2d 571 (1961).

10. Ransom v. Penn Mut. Life Ins. Co., 43 Cal.2d 420, 274 P.2d 633 (1954); American Nat'l Ins. Co. v. J. C. Thompson, 44 Tenn. App. 627, 316 S.W.2d 52 (1957).

11. Reck v. Prudential Ins. Co. of America, 116 N.J.L. 444, 184 Atl. 777 (Ct. Err. & App., 1936); Douglass v. Mutual Benefit Health & Acc. Ass'n., 42 N.M. 190, 76 P.2d 453 (1938); Moore v. Palmetto State Life Ins. Co., 222 S.C. 492, 73 S.E.2d 688 (1952). **Contra**, Leube v. Prudential Ins. Co. of America, 147 Ohio 450, 72 N.E.2d 76 (1947).

12. See 60 Harv. L. Rev. 1165 (1947).

much criticism of the view that they provide only conditional insurance.[13]

It is submitted that by these conditional acceptance provisions insurance companies are trying to protect themselves at the expense of their applicants. They take the premiums but try to withhold protection. The binding clause is properly interpreted as ambiguous on its face.

North Dakota recognizes that anyone who solicits insurance in a bona fide manner serves as an agent and can bind his principal;[14] furthermore, North Dakota recognizes that such an agent has the implied authority to write temporary policies.[15] In addition North Dakota generally construes ambiguous policies against the insurer.[16]

No North Dakota case has directly construed the meaning of a conditional "binding receipt." It seems that the better reasoning would permit our courts to accept the position of the dissent in the principal case and consider ambiguous binding receipts as providing unconditional interim insurance until complete rejection of the application is made.

R. JON FITZNER

SALES—WARRANTIES—DISCLAIMER OF IMPLIED WARRANTIES —PROHIBITION OF AS AGAINST PUBLIC POLICY—Plaintiff purchased one of defendant-dealer's automobiles, signing the standard contract of the Automobile Manufacturers Association which warranted that the vehicle was free from defects in parts, agreed to replace those parts if found defective, and provided that the warranty was in lieu of all other warranties, express or implied. The buyer brought this action to rescind the purchase because of a breach of the implied warranty of

13. See generally Havighurst, LIFE INSURANCE BINDING RECEIPTS, 33 Ill. L. Rev. 180 (1938); Western and Southern Life Ins. Co. v. Vale, 213 Ind. 601, 12 N.E.2d 350 (1938); Francis v. Mut. Life Ins. Co. of New York, 55 Ore. 280, 106 Pac. 323 (1910); Starr v. Mut. Life Ins. Co. of New York, 41 Wash. 228, 83 Pac. 116 (1905).

14. Fargo Nat'l Bank v. Agricultural Ins. Co., 184 F.2d 676 (8th Cir. 1950).

15. Michigan Idaho Lumber Company v. Northern Fire and Marine Ins. Co., 35 N.D. 244, 160 N.W. 130 (1916); Ulledalen v. United States Fire Ins. Co., 74 N.D. 589, 23 N.W.2d 856 (1946) Agent allowed to insure during the lapse of time between the time of application and the issuing of the policy.

16. Minnesota Mut. Life Ins. Co. v. Marshall, 29 F.2d 977 (8th Cir. 1928); Beauchamp v. Retail Merchants Ass'n. Mut. Fire Ins. Co., 38 N.D. 483, 165 N.W. 545 (1917); Persellin v. State Automobile Ins. Ass'n., 75 N.D. 716, 32 N.W.2d 644 (1948) ". . . where the terms of an insurance policy will bear two interpretations, that one will be adopted which sustains the claim for indemnity."