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INSURANCE - FAILURE TO ACT PROMPTLY ON APPLICATION - TORT LIABILITY OF INSURER

INSURANCE — FAILURE TO ACT PROMPTLY ON APPLICATION — TORT LIABILITY OF INSURER — Although mere delay in passing upon an application for insurance cannot, as a rule, be construed as an acceptance of the offer for a contract of insurance,[1] in recent years some courts have held insurance companies liable in tort where there has been delay in acting upon the policy and the loss sought to be insured against has occurred in the meantime.[2] Plaintiff, to sustain a cause of action in tort,

[1] Handlier v. Knights of Columbus, 106 Neb. 267, 183 N. W. 300 (1921); Miller v. Ill. Life Ins. Co., 255 Ill. App. 586 (1930). *Contra*, Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986 (1899); Stearns v. Merchants Life and Casualty Co., 38 N. D. 524, 165 N. W. 568 (1917). See cases cited in 75 A. L. R. 952 (1931) and VANCE, INSURANCE, 2d ed., sec. 64 (1930).

[2] Carter v. Manhattan Life Ins. Co., 11 Haw. 69 (1897); Boyer v. State Farmers' Mutual Hail Ins. Co., 86 Kan. 442, 121 Pac. 329, 40 L. R. A. (N. S.) 164, Ann. Cas. 1915A 671 (1912); Duffie v. Bankers' Life Ass'n, 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25 (1913); Wilken v. Capital Fire Ins. Co., 99 Neb. 828,

must prove negligence on the part of the insurer, or its agents,[3] and that the policy would have been issued to the applicant but for the negligence.[4] The suit must have been brought by the applicant, or in the case of life insurance by the personal representative of the deceased applicant, and not by the beneficiary under the anticipated policy.[5]

However, many courts have refused to recognize this view, finding too many logical hurdles to surmount.[6] It is elementary that there are three essential elements which must concur in order to found an action in tort — a duty, a breach of that duty, and injury resulting naturally therefrom.[7] It is elementary also that an application for insurance is only an offer for a contract;[8] and heretofor, at least, no one believed that there was any legal duty on the part of the offeree to act promptly in accepting or rejecting an offer.[9] Courts have evolved various theories

157 N. W. 1021 (1916); Johnson v. Farmers' Ins. Co., 184 Iowa 630, 168 N. W. 264 (1918); Wallace v. Hartford Fire Ins. Co., 31 Idaho 481, 174 Pac. 1009 (1918); Security Ins. Co. v. Cameron, 85 Okla. 171, 205 Pac. 151 (1922); Columbian Nat. Life Ins. Co. v. Lemmons, 96 Okla. 228, 222 Pac. 255 (1923); Fox v. Volunteer State Ins. Co., 185 N. C. 121, 116 S. E. 266 (1923); De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 Pac. 1049 (1924); Dyer v. Mo. State Life Ins. Co., 132 Wash. 378, 232 Pac. 346 (1925); Strand v. Bankers' Life Ins. Co., 115 Neb. 357, 213 N. W. 349 (1927); Kukaska v. Home Mutual Hail-Tornado Ins. Co., 204 Wis. 166, 235 N. W. 403 (1931); American Life Ins. Co. v. Nabors, (Tex. Civ. App. 1932) 48 S. W. (2d) 459; Royal Neighbors v. Fortenberry, 214 Ala. 387, 107 So. 846 (1926); Brown v. Mo. State Life Ins. Co., 124 Okla. 155, 254 Pac. 7 (1927); Lewis v. Brotherhood of Locomotive Firemen & Enginemen, 220 Ala. 270, 124 So. 889 (1929).

[3] Strand v. Bankers' Life Ins. Co., 115 Neb. 357, 213 N. W. 349 (1927); Meyer v. Central States Life Ins. Co., 103 Neb. 640, 173 N. W. 578 (1919).

[4] Carter v. Manhattan Life Ins. Co., 11 Haw. 69 (1897); Duffie v. Bankers' Life Ass'n, 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25 (1913).

[5] Stray v. Western States Life Ins. Co., 163 Wash. 329, 300 Pac. 1046 (1931); Royal Neighbors v. Fortenberry, 214 Ala. 387, 107 So. 846 (1926). It has been argued that if any cause of action exists, it should be in the proposed beneficiary, since he is the one who has suffered the loss (Funk, "The Duty of an Insurer to Act Promptly on Applications," 75 UNIV. PA. L. REV. 207 (1927)), but the cases seem quite uniform in holding that the action is in the personal representative of the applicant. In one case, however, the action was apparently brought by the beneficiary and recovery was allowed; there is no discussion of this question. American Life Ins. Co. v. Nabors, (Tex. Civ. App. 1932) 48 S. W. (2d) 459.

[6] Nat. Union Fire Ins. Co. v. School Dist. No. 55, 122 Ark. 179, 182 S. W. 547 (1916); Interstate Business Men's Accident Ass'n v. Nichols, 143 Ark. 369, 220 S. W. 477 (1920); Swentusky v. Prudential Ins. Co., 116 Conn. 526, 165 Atl. 686 (1933); Bradley v. Fed. Life Ins. Co., 295 Ill. 381, 129 N. E. 171 (1920); Savage v. Prudential Life Ins. Co., 154 Miss. 89, 121 So. 487 (1929); Metropolitan Life Ins. Co. v. Brady, (Ind. App. 1930) 174 N. E. 99; American Ins. Co. v. School Dist., 182 Ark. 158, 30 S. W. (2d) 217 (1930).

[7] BOHLEN, STUDIES IN THE LAW OF TORTS 33 (1926).

[8] VANCE, INSURANCE, 2d ed., sec. 59 (1930).

[9] In Giddings v. Ins. Co., 102 U. S. 108 at 110, 26 L. ed. 92 (1880), the court

in attempting to establish a duty,[10] but it is clear that if one is to be created in this situation insurance contracts are to be treated differently from other contracts.

Even assuming that there is a duty on the part of the insurer to act promptly, it is hard to see that any injury has been caused by its breach. The cause of action which will accrue as a result of the negligent delay will come into existence as soon as the delay is unreasonable. If the applicant is still able to get other insurance at that time, he can hardly be said to have suffered any damage. If the loss sought to be insured against has occurred (so that he cannot get other insurance) since the cause of action accrued, it can hardly be said that the negligence of the insurer caused the damage.

An added difficulty stands in the way of recovery in cases of life insurance where the applicant has died and the policy has not been issued because of the delay of the company, *viz.* the doctrine that tort actions do not survive the death of the injured party.[11] Where no statute provides for the survival for this type of action, at least one court has denied liability.[12] It has been said that the action survives, since, though it sounds in tort, it is founded upon an implied contract to act within a reasonable time.[13] In other cases the question either has not been raised [14] or it is governed by a statute.[15] If a statute does not permit such a suit, it is clear that the tort could not be dressed in quasi-

in dictum said, "The presentment of the application to the agents . . . , and its receipt by the [insurance] company, in nowise committed or bound the latter to anything. It was competent for the company to pause as long as they might deem proper, and finally to accept or reject the application as they might choose to do." See also 1 WILLISTON, CONTRACTS, sec. 91 (1920).

[10] It has been said that to hold the company liable "is in effect to hold, as equity holds, that that which ought to have been done was done," Carter v. Manhattan Life Ins. Co., 11 Haw. 69 at 79 (1897); that the company is acting under a franchise from the State and, having solicited insurance and having received payment of premiums, it is under a duty to accept or reject, Duffie v. Bankers' Life Ass'n, 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25 (1913); that since the policy is dated from the day of the application, the company should not be allowed to prolong the period for which it is giving no risk, Strand v. Bankers' Life Ins. Co., 115 Neb. 357, 213 N. W. 349 (1927); that the retention of money by the company beyond a reasonable time deprives the applicant of its use which is a valuable property right and the deprivation of such right is a wrong, Strand v. Bankers' Life Ins. Co., supra; that the payment of the premium creates a contractual relation between the applicant and the company, Am. Life Ins. Co. v. Nabors, (Tex. Civ. App. 1932) 48 S. W. (2d) 459; that the insurance business is affected with a public interest, Strand v. Bankers' Life Ins. Co., supra.

[11] 3 SCHOULER, WILLS, 6th ed., sec. 2188 (1923).

[12] Bradley v. Federal Life Ins. Co., 295 Ill. 381, 129 N. E. 171 (1920).

[13] Columbian Nat. Life Ins. Co. v. Lemmons, 96 Okla. 228, 222 Pac. 255 (1923).

[14] Carter v. Manhattan Life Ins. Co., 11 Haw. 69 (1897); Fox v. Volunteer State Life Ins. Co., 185 N. C. 121, 126 S. E. 226 (1923).

[15] In the Duffie case the action clearly survived under the Iowa Code (1931), sec. 10959.

contract so as to survive,[16] and to say that the tort is founded on an implied contract is carrying a rather tenuous argument a long way.

It is apparent, however, that in these situations, particularly where an applicant for life insurance has done all that he can and then has been accidentally killed, some courts feel there should be some relief for the plaintiff. Only a few of the cases allowing recovery have discussed the problem at length and then, as a rule, only the one phase regarding the duty of the insurer to act promptly has been considered. In the recent case of *Munger v. Equitable Life Assurance Society*[17] a federal court for the first time passed directly on this question. In a very thorough and exhaustive opinion Judge Otis considered the question from all angles and denied recovery where the applicant for life insurance died before the company took any action.

Although some courts have allowed recovery, it would seem that the question is really one for the legislature.[18] Granted that the conduct of the insurer creates a general type of risk of harm to the interests of a sufficiently large number of people to create a legal duty,[19] still the courts must give damages for injury not proximately caused by the breach of such duty in order to compensate the plaintiff at all. Faced with such a problem, one would expect the courts to feel incompetent to legislate judicially to this extent.

In these cases, as a practical matter, the applicant, or his estate, because of the delay of the company has not been covered by the anticipated insurance. He has lost the thing sought to be insured and has not the compensation which he would have had if the company had acted. It is said that the applicant could have got insurance elsewhere, but to many that might be a heavy burden. On the other hand, the negligence of the company in these cases is, as a rule, the negligence of the agent who has delayed in sending in the policy, so that the company has never had an opportunity to pass on it. Further, though a contract of insurance is admittedly a contract of adhesion,[20] thus differing from the usual contracts between individuals where both parties have the same opportunities for negotiation, it is doubtful whether it should be treated so much differently from other contracts as to require the company offeree to act on an offer promptly. It is said that insurance companies are affected with a public interest, hence their contracts should be treated differently. But a bank would hardly be thought to be liable for any delay in determining whether to make a loan; nor

[16] WOODWARD, QUASI CONTRACTS, secs. 7, 8, 9 (1913).

[17] (D. C. W. D. Mo. 1933) 2 F. Supp. 914.

[18] See Swentusky v. Prudential Ins. Co., 116 Conn. 526, 156 Atl. 686 (1933).

[19] However, since the number of reported cases is so small in this field, it is doubtful whether a sufficient number of people are affected to create a duty.

[20] VANCE, INSURANCE, 2d ed., 201 (1930).

would an employer be liable for delay in passing on an application for employment. The West Virginia court,[21] in denying recovery, said, "It is of as much importance to the public that a person and his dependents have support during his lifetime (by wages or money) as that his beneficiaries have a competency (thru insurance) after his death."

However, if the public interest is so great in these cases as to demand that insurance companies act promptly on applications for insurance, it is competent for the legislature to pass a statute declaring that in the event of unreasonable delay a tort liability will be imposed, damages to be the amount of the face value of the policy applied for, or that the insurer shall be bound unless it notifies the applicant of its rejection within a specified time. A North Dakota statute[22] of the latter type regarding certain kinds of emergency insurance has been held a valid exercise of the police power.[23] If the public interest is deemed sufficiently great to justify the legislature in passing such a bill in reference to other types of insurance, it is reasonable to believe that it will be upheld.

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[21] Thornton v. Nat. Council, etc., 110 W. Va. 412 at 415, 158 S. E. 507 at 508 (1931).

[22] 1 N. Dak. Comp. Laws (1913), sec. 4902.

[23] Wanberg v. Nat. Union Fire Ins. Co., 46 N. D. 369, 179 N. W. 666 (1920).