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AGENCY-IMPUTATION OF AGENT'S KNOWLEDGE TO PRINCIPAL-INSURANCE CONTRACTS

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RECENT DECISIONS

AGENCY—IMPUTATION OF AGENT'S KNOWLEDGE TO PRINCIPAL—INSURANCE CONTRACTS—Defendant insurance company's soliciting agent[1] falsified applicant's warranted answers to material questions in an application for automobile casualty insurance. The applicant signed, not knowing of the nature of the answers. On the basis of these answers, defendant issued a casualty policy on applicant's automobile, containing a clause prohibiting waiver or estoppel as to any of the terms of the contract because of the agent's knowledge.[2] As a result of a subsequent accident, plaintiffs recovered judgments against applicant which applicant failed to satisfy. In an action by plaintiffs against defendant, on supplemental petition,[3] defendant admitted recovery against applicant, but claimed no effective insurance coverage. On motion to certify from judgments for plaintiffs, *held,* reversed. The parties to an insurance contract may eliminate the common law rule as to the imputation of the knowledge of an agent to his principal, and if this prevents waiver or estoppel as to terms of the contract, any avoidance provisions may be enforced as written.[4] *Fay v. Swicker,* 154 Ohio St. 341, 96 N.E. (2d) 196 (1950).

When an agent is acting within the scope of his authority, his knowledge and notice as to matters over which his authority extends will be imputed to his principal.[5] It is equally clear in cases of non-insurance contracts that provisions prohibiting waiver of terms of the contract except by specific, authorized persons will be given effect.[6] However, as to insurance contracts, the majority of the courts have been reluctant to effectuate such provisions because of the

[1] Agent had authority to solicit insurance applications and forward them to defendant's home office for approval.

[2] The pertinent clause was as follows: "Waiver or change. No notice to an agent, or knowledge possessed by an agent or by any other person shall be held to effect a waiver or change in any part of this policy, nor estop the company from asserting any right under the terms of the policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the president or secretary of the company."

[3] Ohio Gen. Code (Page, 1938) §9510-4, provides for the filing of supplemental petitions against a casualty insurer if a judgment against alleged insured has not been satisfied within 30 days after its rendition.

[4] Although the avoidance for misrepresentation provision in the policy was directed toward the insured, the plaintiffs stand in the applicant's shoes for purposes of recovery against defendant on the policy. Ohio Gen. Code (Page, 1938) §9510-4.

[5] 2 MECHEM, AGENCY, 2d ed., §1803 (1914); AGENCY RESTATEMENT §272 (1933). The theory behind the rule seems to be the policy laid down in Hern v. Nichols, 1 Salk. 289, 91 Eng. Rep. 256 (1701), where it was stated, "for seeing somebody must be a loser by this deceit it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

[6] 1 MECHEM, AGENCY, 2d ed., §§7, 741, 743 (1914); the person dealing with the agent must ascertain his authority, and if limitations on the agent's authority are set out in the contract which the third party signs, there can be no claim of estoppel or apparent authority as to the agent.

peculiar type of sale and content[7] of insurance contracts. These courts have held that such non-waiver clauses do not prevent application of the common law rule, and have then reasoned that because the principal had the knowledge of his agent and nevertheless issued the policy, the insurance contract was changed[8] under some theory of estoppel or waiver.[9] The theory behind the provisions in the principal case would seem to be to remove the rationale behind waiver and estoppel, i.e., imputation of the agent's knowledge to his principal, with the hope that courts would allow the parties to do directly that which they would not allow them to do indirectly. If the reason for striking down non-waiver clauses is valid, it would logically follow that the non-imputation of notice clause also should be held ineffectual. However, the court in the principal case upheld the latter, while in the past it had failed to give effect to the former.[10] The result in Ohio, then, is that a prohibition against the result of the imputation rule is unenforceable, but the rule itself may be removed.[11] The decision, regardless of its possible inconsistencies with prior decisions of the court, appears to be a wise one in view of the facts involved.[12] Perhaps public policy is opposed to allowing an insurance company to protect itself in all cases from the dishonest and careless acts of its agents,[13] but if the insurance policy is to be considered a contract at all, surely it should be allowed to specify, subject to the usual rules of agency, of what facts it shall have notice, provided, of course, that it shall act prudently and with good faith in regard to such a pro-

[7] See Fuller, "The Special Nature of the Wage Earner's Life Insurance Problem," 2 LAW AND CONTEM. PROB. 10 at 17 (1935).

[8] German American Ins. Co. v. Hyman, 42 Colo. 156, 94 P. 27 (1906); Lampke v. Metropolitan Life Ins. Co., 279 N.Y. 157, 18 N.E. (2d) 14 (1938); Phoenix Ins. Co. v. Grove, 215 Ill. 299, 74 N.E. 141 (1905). But cf. Commonwealth Life Ins. Co. v. Bruner, 299 Ky. 335, 185 S.W. (2d) 408 (1945); Martin v. John Hancock Mut. Life Ins. Co., 277 Mich. 249, 269 N.W. 162 (1936).

[9] Neither theory has much basis in fact, and the choice in a particular case would probably have little effect on the decision reached. VANCE, INSURANCE §140 (1930).

[10] Foster v. Scottish Union and National Ins. Co. of Edinburgh, 101 Ohio St. 180, 127 N.E. 865 (1920). Cf. Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St. 161, 92 N.E. 82 (1910), where an opposite result was reached, but which was distinguished in the Foster case because the notice involved there was notice received after the policy was issued.

[11] This result appears to follow the approach in the Foster v. Scottish Union and National Ins. Co. of Edinburgh, supra note 10, where it was stated in 101 Ohio St. 180 at 191: "Without considering whether a party to such a contract may stipulate his exemption from a broad rule of common law, it will suffice to observe that the terms of the 'non-waiver' clause are inapt to the purpose." A minority in the principal case's 4-3 decision felt, however, that both past decisions and §9586 of the Ohio General Code, which made an insurance solicitor an agent of the insurance company, forced a conclusion that the common law rule of imputation of notice could not be supplanted by contract. 20 UNIV. CIN. L. REV. 418 (1951) supports this view.

[12] Defendant insurance company in the principal case: (1) had no actual knowledge or notice of the applicant's true answers; (2) acted promptly (within 15 days) in canceling the applicants' policy when it learned the true answers, which was less than a week after the policy had been issued.

[13] Nixon v. Traveler's Ins. Co., 25 Wash. 254, 65 P. 195 (1901); Wilson v. Commercial Union Assurance Co., 90 Vt. 105, 96 A. 540 (1916); Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. (80 U.S.) 222 (1871).

vision.[14] Should the mere fact that insurance contracts are more detailed, more voluminous than others, or that an insurance company's product is more in demand, call for completely different law?[15] The finding in the principal case is not an innovation in the law of contracts or agency, and certainly does not preclude waiver or estoppel as to an insurance company in other circumstances.[16] While it seems doubtful that a majority of the courts would follow this case in light of their past decisions on non-waiver clauses,[17] the principal case sets a healthy precedent for reconsideration of the insurance corporation's status in the law of agency.

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[14] Principal case at 351: "Although it is true that there are many instances where, under the theory of estoppel or from other circumstances such as acquiescence by a principal in the waiver of conditions in a policy by an agent, it would be inequitable for a principal to be absolved from liability because the acts of the agent were not authorized in writing. . . ."

[15] Some courts seem to think so; see John Hancock Life Ins. Co. v. Warren, 181 U.S. 73, 21 S. Ct. 535 (1901), and Nixon Traveler's Ins. Co., supra note 13.

[16] Supra note 14.

[17] See Prudential Ins. Co. of Amer. v. Saxe, (D.C. Cir. 1943) 134 F. (2d) 16, cert. den. 319 U.S. 745, 63 S.Ct. 1033 (1943), where a clause prohibiting imputation of agent's notice to principal was held invalid for the same policy reason that has led a majority of the courts to hold non-waiver clauses invalid.