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Volume 14  
Issue 3 *Medicolegal Symposium*

Article

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1965

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### Recommended Citation

Kenneth Montlack, Insurance Companies' Liability for the Acts of Agents, 14 Clev.-Marshall L. Rev. 580 (1965)

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## *Insurance Companies' Liability for the Acts of Agents*

*Kenneth Montlack\**

THE FORMERLY PREVALENT VIEW that a party to an insurance contract is bound by his representations in all respects has been modified.<sup>1</sup> Today, an increasing variety of acts or declarations by the insurance *agent* will shift the liability to the insurance company. The company is held to be estopped<sup>2</sup> from pleading the insured's contract violations which were due to the actions of the insurer's agents. Because the general rules of agency apply to insurance agents,<sup>3</sup> the company is responsible for those acts of a licensed agent performed within the scope of his authority.<sup>4</sup> Thus the two problem areas in determining the extent of the principal's (*i.e.*, insurer's) liability are the identity of the agent and the scope of authority, real or apparent, for different agents.

### Who Are Agents

The agency question arises most frequently when anyone attempts to bring together the insurance company and the insurance applicant. In that regard, one who solicits insurance or collects a premium for a company (or aids in either capacity) is considered an agent for the insurer.<sup>5</sup> But the mere act of submitting an application for insurance,<sup>6</sup> or collecting stipulated commissions under contract from an insurance company,<sup>7</sup> does not of itself show an agency relation with the insurer. By the

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<sup>1</sup> Millard, Can a Beneficiary Collect on an Insurance Policy After the Agent Places a False Answer in the Application?, 35 So. Calif. L. Rev. 506 (1962).

<sup>2</sup> *Ibid.*, 509-511.

<sup>3</sup> Stovall, Authority of Insurance Agents to Bind the Company, 14 Baylor L. Rev. 413 (1962).

<sup>4</sup> Benoy, Ohio Insurance and Negligence Law, 147 (1937).

<sup>5</sup> *Bekken v. Equitable Life Assur. Soc'y. of United States*, 70 N. D. 122, 293 N. W. 200 (1940).

<sup>6</sup> *American Casualty Co. of Reading v. Ricas*, 179 Md. 627, 22 A. 2d 484 (1941).

<sup>7</sup> *American Nat'l. Ins. Co. v. Poole*, 24 Tenn. App. 596, 148 S. W. 2d 14 (1941).

same token, solicitation of insurance without the company's knowledge or later ratification cannot bind the insurer.<sup>8</sup>

The insurance broker, usually a representative of the insured,<sup>9</sup> may also bind the company if his acts are directed towards the insurer's purposes;<sup>10</sup> his status in such cases is a question of fact which may be resolved by parol testimony outside of the written contract terms.<sup>11</sup> Here the alleged "agent's" past actions are significant indications of his present status vis-à-vis insured and insurer.<sup>12</sup> Similarly, when a broker acts as agent for both the insured *and* the insurer during negotiations with the company, information known to the broker, and normally imputable by an agent to his principal, is considered as knowledge of the company.<sup>13</sup>

The law's protective attitude towards the insured results, in part, from the superior position of the insurance company over the applicant. Thus, notice to the insured is an important factor in establishing the insurer's defense. For this reason a designation in the policy including or excluding someone as agent for the company is valid only from the time when the insured receives the policy.<sup>14</sup> Although a solicitor may let one of several companies issue a policy for a given applicant, the representative is considered to be the agent for that insurer.<sup>15</sup> It should be remembered that these rules, while oversimplified when cited out of context, are applied in complex factual situations, and further complicated in that the "agent" is usually an *agency* dealing with several insurance companies under contract.

### Scope of Authority: The General Agent

The American agency system, through which the independent businessman invests his own money, pays his own expenses, and hires his own employees, is largely responsible for

<sup>8</sup> *Hartline v. Mut. Ben. Health & Acc. Ass'n.*, 96 F. 2d 174 (5th Cir. 1938).

<sup>9</sup> Freedman, *Richards on Insurance*, 1544-45 (5th ed., 1952).

<sup>10</sup> *Midwest Transfer Co. v. Preferred Acc. Ins. Co.*, 342 Ill. App. 231, 96 N. E. 2d 228 (1951).

<sup>11</sup> Freedman, *op. cit. supra*, n. 9.

<sup>12</sup> *Sioux City Inv. Co. v. Hartford Fire Ins. Co.*, 190 Iowa 1135, 181 N. W. 446 (1921).

<sup>13</sup> *Midwest Transfer Co. v. Preferred Acc. Ins. Co.*, *supra* n. 10.

<sup>14</sup> *Mutual Ben. Life. Ins. Co. v. Robison*, 58 F. 723 (8th Cir. 1893).

<sup>15</sup> *Heinze v. Eve*, 97 Ohio App. 451, 127 N. E. 2d 57 (1954).

the success of the private insurance institution.<sup>16</sup> Due to the necessity of insurance in our economy and the key role played by the agent or agency, the states have exercised regulatory power in this area. The Ohio Code, typically, outlines standards of ethics and competence for its licensed agents<sup>17</sup> and provides for enforcement of these rules by the Superintendent of Insurance.<sup>18</sup>

Ordinarily, this general agent or agency, acting as the major avenue of communication between insurer and applicant, has broad powers to deal with the insured. These powers usually include the authority to accept risks on behalf of the company, agree upon terms in the contract, and issue, renew or modify terms in an existing contract.<sup>19</sup>

As between the general agents of various types of insurance companies, different criteria are applied in determining scope of authority. The recording agent for life insurance companies has the right to issue policies<sup>20</sup> and collect premiums thereon,<sup>21</sup> but may not waive the insurer's right to depend on an executed policy.<sup>22</sup>

A fire insurance general agent has been held to enjoy extensive authority. He may, by words or acts, waive policy conditions and forfeitures, unless the insured has received notice as to restrictions on the agent's contractual power.<sup>23</sup> Absent such notice, a countersigning agent retains the right to modify the policy; therefore, under the majority rule his knowledge of facts which constitute,<sup>24</sup> or will shortly constitute,<sup>25</sup> grounds for forfeiture are imputed to the insurance company, resulting in a waiver of those terms.<sup>26</sup> Some decisions continue to reflect the

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<sup>16</sup> Freedman, *op. cit. supra*, n. 9 at 1400.

<sup>17</sup> Ohio Rev. Code § 3905.02.

<sup>18</sup> *Ibid.* § 3905.04.

<sup>19</sup> Holland v. Interstate Fire Ins. Co., 229 Ark. 496, 316 S. W. 2d 707 (1958).

<sup>20</sup> Wyche v. Trinity Universal Ins. Co., 198 S. W. 2d 158 (Tex. Civ. App. 1946).

<sup>21</sup> *Ibid.*

<sup>22</sup> Westbrook v. Millers Mut. Fire Ins. of Texas, 374 S. W. 2d 248 (Tex. Civ. App. 1963).

<sup>23</sup> Miller v. Monticello Ins. Co., 50 Tenn. App. 363, 361 S. W. 2d 496 (1961).

<sup>24</sup> Wyatt v. State Farm F. and Cas. Co., 78 Wyo. 228, 322 P. 2d 137 (1958).

<sup>25</sup> McKinney v. Providence Washington Ins. Co., 144 W. Va. 559, 109 S. E. 2d 480 (1959).

<sup>26</sup> *Ibid.*

view that allowing imputed knowledge of such facts as waiver of the relevant policy terms encourages fraud by the agent and insured.<sup>27</sup> Again, the trend towards a liberal definition of agency rules seems to indicate a protective attitude with respect to the mass of laymen who must negotiate with trained insurance personnel—in an area which is increasingly recognized as a necessity.

Given this broad area of agency authority, the courts have maintained the basic contract defenses available to companies, where no prejudice to the insured would result. The effects of express provisions in a policy limiting the agent's authority, in areas generally considered to be within his scope of authority, are operative only after issuance of the policy.<sup>28</sup> Likewise, good faith negotiations between agent and insured will not constitute a waiver as to the insurer's statute of limitations defense.<sup>29</sup>

If the policy or application contains a stronger provision expressly barring the agent from waiving certain conditions, this term will be upheld.<sup>30</sup> Agents acting for company purposes, but clearly in excess of the normal authority, will not bind the insurer,<sup>31</sup> but the company may not defend against waiver or estoppel on the basis of undisclosed instructions to the agent,<sup>32</sup> or normal office procedure,<sup>33</sup> which are contrary to the agent's acts.

### Scope of Authority: Solicitor and Adjustor

The solicitor's duties are limited to policy negotiations with the applicant,<sup>34</sup> therefore, the insurer is responsible for a lesser range of acts. In *Thomas v. Fields*,<sup>35</sup> the Ohio Supreme Court held that Ohio Revised Code Section 3929.27, reciting an agency relation between the insurer and the solicitor who deals with

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<sup>27</sup> *Chismore v. Anchor F. Ins. Co.*, 131 Ia. 180, 108 N. W. 230 (1906); *Spalding v. New Hampshire F. Ins. Co.*, 71 N. H. 441, 52 A. 858 (1902).

<sup>28</sup> *Employer's Liability Assur. Corp. v. Madric*, 183 A. 2d 182 (Del. 1962).

<sup>29</sup> *Continental Ins. Co. v. Fire Ass'n. of Phila.*, 152 F. 2d 239 (6th Cir. 1945).

<sup>30</sup> *Spiegel v. Metropolitan Life Ins. Co.*, 188 N. Y. 2d 486, 160 N. E. 2d 40 (1959).

<sup>31</sup> *Freedman*, *op. cit. supra*, n. 9 at 1583.

<sup>32</sup> *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615 (1894).

<sup>33</sup> *Warren v. New York Life Ins. Co.*, 37 F. Supp. 358 (D. C. La. 1941).

<sup>34</sup> *Royal Ins. Co. v. Silberman*, 24 Ohio Cir. Ct. R. (N. S.) 511, 34 Ohio Cir. Dec. 737 (Ohio App. 1904).

<sup>35</sup> 196 N. E. 2d 103 (Ohio, 1964).

the application, does not continue throughout the duration of the policy; nevertheless, the company was held liable for the soliciting agency's fraudulent acts, which occurred after approval of the application and issuance of the policy. The court reasoned that the issuer, by allowing the solicitor to occupy a position from which it could deceive the insured, was thereby estopped from denying its responsibilities as principal.

Within this extensive area of insurance company liability, even the long-standing rule that the soliciting agent has no power to waive terms in the policy has been challenged.<sup>36</sup> The United States Court of Appeals, in *Gettins v. United States Life Insurance Co.*,<sup>37</sup> held that the question of the agent's waiver of an application term (requiring a medical examination as a prerequisite to coverage under the policy) was a factual issue for the jury to determine. This decision is significant because most policies (drawn by the insurance company, of course) prescribe that application items, as well as applicant's truthful responses, are conditions to the insurer's obligations. An earlier Ohio decision held that the solicitor's failure to complete an application within a reasonable time before the insured's death waived the policy requirement of a medical examination.<sup>38</sup>

Here also, *notice* of the solicitor's authority (or lack of it) is a crucial issue. Insurer's liability will be decided on the reasonableness of the applicant's assumption that the agent was in fact authorized.<sup>39</sup> The company's responsibility in these situations is founded on the doctrine of apparent or ostensible authority.<sup>40</sup> In theory, such liability results from the principal's actions in allowing the agent to act so as to lead the "ordinary, reasonable" man to believe that the agent was within his scope of authority.<sup>41</sup>

In reality, though, apparent authority seems to stand as a catch-all source of liability where the court is faced with a choice between placing the loss upon insured or insurer. Many courts hold that even where an agent's declaration, contrary to

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<sup>36</sup> *House v. Billman*, 340 Mich. 621, 66 N. W. 2d 213 (1954).

<sup>37</sup> 221 F. 2d 782 (6th Cir. 1955).

<sup>38</sup> *Peponis v. John Hancock Mutual Life Ins. Co.*, 370 Ohio L. Abs. 386, 47 N. E. 2d 251 (1942).

<sup>39</sup> *Lamb v. General Associates, Inc.*, 173 Wash. 322, 374 P. 2d 677 (1962).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Id.*

a policy bar on his power to waive, does not constitute a waiver, his acts may accomplish that result.<sup>42</sup> Other courts now hold the insurer liable for unauthorized acts of the agent on the ground that as between two innocent parties (insured and insurer) a loss should be borne by the one who was the "occasion" of the loss, even if that party was not at fault in any respect.<sup>43</sup> This comes close to a strict liability position vis-à-vis the insurer.

However, the insurance companies may defend themselves on forfeiture clauses where the application, premium note, or the insured himself, acknowledges restrictions on the solicitor's authority in a given matter.<sup>44</sup> Even here it has been held that the agent's misleading, incorrect or incomplete answer to an applicant's question will estop the insurer from denying the solicitor's authority as to the contract term affected.<sup>45</sup>

The solicitor's role usually ends with the procuring of the policy. This point is important in judging which facts known to the agent are imputed to the insurance company. In the absence of fraud or explicit restrictions on the agent's authority in the application, all facts recited to a solicitor are imputed to the insurance company,<sup>46</sup> however, imputed knowledge of facts which constitute grounds for forfeiture does not necessarily result in waiver of the applicable policy terms. Thus, when the solicitor found the applicant to be in bad health, such information was imputed to the insurer, but the agent himself remained powerless to waive requirements of good health.<sup>47</sup>

The position of the fire insurance solicitor is clearly defined. Dealing with insurance on tangible items such as coverage of buildings, his authority extends to receipt of application, forwarding of same to the company, delivery of policy to the insured, and collection of premiums.<sup>48</sup> He has no authority to agree upon, change, or waive the terms of the policy; and his knowledge in the area relating to the policy is not imputable to

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<sup>42</sup> Freedman, *op. cit. supra*, n. 9 at 1581.

<sup>43</sup> *Wilson v. Hicks*, 40 Ohio St. 418 (1884).

<sup>44</sup> *Employers' Mut. F. Ins. Co. v. Cunningham*, 253 S. W. 2d 393 (Ky. 1952); *Haman v. Pyramid L. Ins. Co.*, 347 S. W. 2d 449 (Mo. App., 1961).

<sup>45</sup> *Owen v. American Home Assur. Co.*, 153 F. Supp. 928 (D. C. Cal. 1957).

<sup>46</sup> *Reserve L. Ins. Co. v. Bearden*, 96 Ga. App. 549, 101 S. E. 2d 120 (1958).

<sup>47</sup> *John Hancock Mut. Life Ins. Co. v. Luzio*, 123 Ohio St. 616, 176 N. E. 446 (1931).

<sup>48</sup> *Holland v. Interstate F. Ins. Co.*, *supra* n. 19.

the insurer.<sup>49</sup> As with all types of insurance activity, these general rules will not protect a fire insurance company where, through expansion of the solicitor's power to act, the insurer increases his implied or apparent authority.<sup>50</sup>

The adjuster enters the picture at a later stage, following the report of a claim, but, like the solicitor, his role is only incidental to the operation of the policy. Normally the adjuster has no authority (actual or apparent) to waive contract conditions or forfeiture clauses.<sup>51</sup> Where, however, the company allows this agent to continually bypass policy provisions relating to contract conditions, etc., it will be estopped from asserting such clauses.<sup>52</sup> Here ratification of originally unauthorized acts of the adjuster will be inferred from the company's careless failure to supervise the claims investigations. But, as in other areas of insurance dealings with the public, the insurer can be bound through the adjuster's bad faith investigation,<sup>53</sup> or failure to fully report crucial facts,<sup>54</sup> even though the principal's fault is not alleged.

### Torts of the Agent

There seems to be little difference between insurance companies' liability for agents' torts and the responsibilities placed on other businesses in constant communication with the public. The plaintiff must show that the tortfeasor was agent to the insurer, and was acting within the scope of his authority during commission of the tort.<sup>55</sup> The majority of states holds that proof of agency depends on evidence that the insurer had the right to direct the agent's acts.<sup>56</sup> In suits arising from automobile injuries caused by the agent, the issue of scope of authority is generally a factual question, resolved on the basis of the agreement between insurer and agent as to agent's transportation,<sup>57</sup> or insurer's reasonable expectations as to his mode of travel.<sup>58</sup>

<sup>49</sup> *Ibid.*

<sup>50</sup> Freedman, *op. cit. supra*, n. 9, at 158.

<sup>51</sup> Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 46 L. Ed. 213 (1902).

<sup>52</sup> *Ibid.*

<sup>53</sup> Royal Transit v. Central Surety and Ins. Corp., 168 F. 2d 345 (7th Cir. 1948).

<sup>54</sup> Johnson v. Hardware Mut. Casualty Co., 109 Vt. 481, 1 A. 2d 817 (1938).

<sup>55</sup> 36 A. L. R. 2d 269 (1954).

<sup>56</sup> *Ibid.*, 263-264 (1954).

<sup>57</sup> *Id.*, 270-278 (1954).

<sup>58</sup> *Id.*



Of the intentional torts which the agent may commit, assault, battery and slander are most likely to plague the company. The insurer escapes liability for the assault and battery of its agent where the tortious act is related to the agent's performance of his duties only by time and place.<sup>59</sup> In effect, the plaintiff must relate the injury-causing act to the very character of the agent's authorized duties. In this sense the company is not responsible for the tort, criminal in nature, which evidences that the agent has abandoned his normal intent to further the insurance company's purposes.<sup>60</sup> Another element which often proves important in determining the insurer's liability is the reasonableness of the victim's reliance on the agent's authority to do the tortious act.<sup>61</sup>

Actionable slander occurring within the agent's scope of authority is charged to the insurer, under the majority rule.<sup>62</sup> Some jurisdictions have restricted the insurer's liability, prescribing that the tort must occur with the company's express authorization or ratification.<sup>63</sup> These decisions have no special import in terms of insurance business, alone, but would seem to indicate the court's hesitancy to attach slander responsibility to a principal.

### Conclusion

The law's increasing willingness to extend protection to the applicant or insured at the expense of the insurance company results from a growing appreciation of the necessity of insurance, the technical nature of the insured's contractual obligations and rights, and finally, the insurer's ability to bear (or redistribute) the costs of increased liability. Assessing this trend, the writer believes that workable and equitable answers to the problems of insurance agency are being provided. Only through continued awareness of the individual's need for economic security, can the courts achieve that balance between contractual rights and public duties which is fundamental to any great business institution.

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<sup>59</sup> 22 A. L. R. 2d 1230 (1952).

<sup>60</sup> *Anderson v. Metropolitan Life Ins. Co.*, 128 Misc. 144, 218 N. Y. S. 494 (1926).

<sup>61</sup> *Tate*, *Insurance Company's Liability for Agent's Assault*, 2 B. C. Ind. and Com. L. R. 339-342 (1961).

<sup>62</sup> 55 A. L. R. 2d 831 (1957).

<sup>63</sup> *Ibid.*, 846 (1957).