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Fire Insurance: Standard Policy; Construction; Entirety of Policy; Waiver and Estoppel

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would have a "much greater probitive force than when made by the stockholder himself," in case of a dispute among the stockholders.

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Fire Insurance; Standard Policy; Construction; Entirety of Policy; Waiver and Estoppel

In a decision rendered January 8, 1929, the Wisconsin Supreme Court in the case of *C. J. Struebing* v. *American Insurance Company, Newark, New Jersey,* 222 N.W. 831, sustained the Wisconsin standard policy enacted in the year 1917, R. S. 203.01. The 1917 enactment replaced the 1895 enactment of the standard fire policy. The 1895 policy was upheld in *Temple* v. *Niagara F. Ins. Co.,* 109 Wis. 372, 85, N.W. 361; *Bourgeois* v. *Northwestern Nat'l Ins. Co.,* 86 Wis. 606, 57 N.W. 38, in which the standard policy act was referred to as bringing order out of chaos. Prior to its enactment, there were as many different contracts of insurance as there were companies, and that the standard policy is a step in the right direction is not to be doubted. Under it there could be practically only one form of policy. The standard fire policy was held to be a statutory law as well as a contract, and should be treated and construed accordingly; that it was the only contract of insurance which the parties had the power to make, and being the law as well as a contract, its provisions were binding upon the parties.

The principal issue in the Struebing case concerned the 'other insurance' provision.[1] "Unless provided by agreement in writing, added hereto, this company shall not be liable for loss or damage occurring (a) while the insured shall have any other contract. of insurance, whether valid or not, on the property covered in whole or in part by this policy."

November 22, 1922, defendant issued plaintiff a standard policy of insurance against loss by fire, covering certain buildings and personal property. It was never provided by agreement in writing, as required by said policy, that plaintiff might have other insurance. March 26, 1926, plaintiff procured another policy of insurance from the Theresa Mutual Fire Insurance Company covering personal property on the premises covered by defendant's policy. On March 4, 1928, the dwelling house covered by defendant's policy was wholly destroyed by fire, and personal property then located therein was also wholly destroyed.[2]

The court in quoting the other insurance provision of the policy says: "There was no agreement in writing added to the policy author-

[1] Lines 32 to 37 inc. of the 1917 policy.

[2] *In C. D. Struebing* v. *American Ins. Co.,* 222 N.W. 831.

izing any other contract of insurance on the property covered in whole or in part by the policy in the defendant company, and the plaintiff procured another policy of insurance from the Theresa Company covering personal property on the premises covered by the defendant policy, this would suspend the liability in the policy of the defendant."[3]

The ruling that the other insurance suspended the policy, follows the same rule of suspension laid down in *Blue Mounds Farm Supply Co.* v. *Farmers Mutual Fire Ins. Co.*, Wis. 219 N.W. 357, where it is said that "the doctrine with respect to suspension . . . . appears to be in accordance with the tendency of modern judicial decisions . . . . also in accordance with the provisions of the standard fire policy of the state, which establishes the public policy of the state generally." But, it appears the suspension conclusion is also reached in determination and definition of the word *while* in the other insurance provision—that *while* means "during the time that; as long as, etc." The policy suspended is merely lulled, is not a dead policy or an ended policy, but suspended during the time the violation exists. If the violation is removed, the policy then revives to its original effect.[4]

The court further follows its original decision, holding that the policy in question was "entire and indivisible."[5] This means that where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other item or items, the policy should be regarded as entire and indivisible. This same principle is followed by the Illinois Supreme Court in *Capps* v. *National Union Ins. Co.*, 149 N. E. 249, numerous authorities cited in the third paragraph of the opinion.

It was argued that within R. S. Sec. 209.06, paragraph 2; "No warranty incorporated in a contract of insurance relating to any fact prior to a loss shall defeat or void such policy . . . . unless such breach existed at the time of the loss," the other insurance provision of the policy was a warranty, and as such, controlled and precluded the defendant's defense of other insurance. Also, that said Sec. 209.06. paragraph 2, was in conflict with the other insurance provision of the standard policy, Sec. 203.01. The court points out that the other insurance provision is not a warranty, but a mere *suspension* of liability, and also quotes *Clement on Insurance*, bk. 2, p. 136, the term *warranty*

[3] *Gnat v. Westchester Fire Ins. Co.*, 167 Wis. 274, 167 N.W. 250.

[4] *Fireman's Fund Ins. Co.* v. *Jackson (Ga.)*, 131 S.E. 539.

[5] *Hinman* v. *Hartford Fire Ins. Co.*, 36 Wis. 159 N.W.; *Schumitsch* v. *American Ins. Co.*, 48 Wis. 26, 3 N.E. 595; *Dohlantry* v. *Blue Mounds Ins. Co.*, 83 Wis. 181, 53 N.W. 448; *Worachek* v. *New Denmark Mutual Home F. Ins. Co.*, 102 Wis. 81, 78 N.W. 165; *Burr* v. *German Ins. Co.*, 84 Wis. 76, 54 N.W. 22; *Carey* v. *German-American Ins. Co.*, 84 Wis. 80, 54 N.W. 18; *Bloomer* v. *Cicero Mutual Fire Ins. Co.*, 183 Wis. 407, 198 N.W. 287.

is defined: "A warranty in an insurance contract is a statement made therein by the insured, which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statement be literally true," explaining that the warranty definition does not reveal a *statement* which must be literally true to entitle the insured to recover, and that the provisions of the policy set out what is necessary to authorize other contracts of insurance, "requires an agreement in writing, added to the policy."[6] The Wisconsin court since the first enactment of the standard fire policy, has always held its provision cannot be legally waived except in the manner provided by the terms of the policy, "in writing, added to the policy." The court also points out that the 1917 standard policy was enacted subsequent to Sec. 209.06, and if any conflict existed between the two, then the later enactment would prevail over the former, but says, "as shown, there is no conflict between the statutes."

It is further argued that the phrase, "whether valid or not," of the other insurance provision, was unintended; and in a long discourse on the subject of "other insurance" conditions, its purpose and the purpose of the legislature in the enactment of the standard policy, it is stated this enactment creates a public policy directed against over insurance and to remove temptation of incendiarism, and that the inclusion of the words, 'whether valid or not,' "relieved the Insurance Company from the burden of proving the validity of the other insurance."[7]

The court emphasizes that one of the principal objects of the enactment in the standard fire policy and the other insurance provision contained therein "is intended to create a situation in which the insured shall bear a part of the risk, in order to stimulate care and diligence in the protection of the property."

In September, 1926, the Theresa Company had levied an assessment against policy holders including the plaintiff. Its by-laws provided if the policy holder for sixty days after receiving the notice of assessment, failed to pay, he shall 'forfeit and lose his rights' in the company. The plaintiff notified of said assessment, the amount thereof, failed and neglected for more than sixty days to pay the same. Shortly after the loss the plaintiff sent the Theresa Company the amount of the assessment and the Theresa Company returned an amount proportional to the amount of its insurance on destroyed property to the amount of the property undestroyed. Plaintiff asserted that the nonpayment

[6] *Stillman v. North River Ins. Co.*, 192 Wis. 204, 212 N.W. 67; *Welch* v. *Fire Assoc.*, 120 Wis. 456, 98 N.W. 227.

[7] *Phoenix Fire Ins. Co.* v. *Copeland (Ala.)*, 8 So. 48; *Donogh* v. *Farmers' Fire Ins. Co. (Mich.)*, 62 N.W. 721; *Continental Fire Ins. Co.* v. *Hulman*, 92 Ill. 145; *Phoenix Ins. Co.* v. *Lamar (Ind.)*, 7 N.E. 241; *Clement on Insurance Book 2*, p. 104.

of the Theresa assessment rendered the Theresa policy void, and being void, constituted no other insurance at the time of the loss within the meaning of defendant's policy. Construing "forfeit and lose his rights" with R. S. Sec. 202.11 (3) and Sec. 202.13, the court holds that the nonpayment of the assessment merely suspended the Theresa policy, that as an invalid policy at the time of the loss, it was other insurance "whether valid or not" within the defendant's policy. And that the statute, Sec. 202.11 and 202.13 sets out the manner in which a member of a mutual company may withdraw, i.e. by notice and surrendering the policy "with a request for its cancellation written thereon." Evidently the court makes a wide distinguishment between a policy that is merely suspended and one that is ended—a suspended policy is an invalid policy, while an ended policy is of no force whatever.

The by-law, "forfeit and lose his rights" is construed with Sec. 202.11 (3) as a purpose of stimulating the payment of the assessments.

The local agent informed of the loss, notified the defendant, and the defendant's adjuster shortly thereafter visited the premises with a view to adjusting the loss. Informed of the existence of the Theresa policy, comparing the items therein, with the defendant's policy, the adjuster ascertaining these facts, requested plaintiff to procure a list of valuation of personal property destroyed in the fire, which the plaintiff furnished. During negotiations, plaintiff and adjuster signed a 'non-waiver' agreement, which reserved both the question of waiver and liability under defendant's policy. The adjuster made report to the defendant company, and defendant then examined the insured under oath in accordance with the examination under oath provision of the policy. Defendant then denied liability. This act and conduct on the part of the defendant and its adjuster was assigned as a waiver of its right to take advantage of the other insurance defense interposed, that the defendant was estopped, that the policy was suspended, or plaintiff had violated any of the conditions of defendant's policy. In deciding this issue, the court refers to lines 78 to 88 inc. of the standard policy, on the subject of waiver[8] held that waiver of the policy must be "in writing added thereto." Reference is then made to the 'non-waiver' agreement, and it is held a valid and legal document, and not, as the trial court said, a "jug handled agreement," and that not only pursuant to the provisions of the policy but also the 'non-waiver' agreement, "no legal waiver of the defense interposed was effectuated." Lines 151 to 153 inc., are then quoted, "The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that

[8] *Spohn* v. *Johnson,* 190 Wis. 446, 209 N.W. 725; *Stillman* v. *North River Ins. Co.,* 192 Wis. 204, 212 N.W. 67.

remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same," and the purpose of this provision is that it "furnishes reliable evidence to the company with respect to the actual loss, and as to all the facts and circumstances involved in and surrounding the loss," and it is held that the examination and investigation are contemplated by the express provision of the *statutory policy,* and are a part of the legislative agreement. This wording clearly sustains the standard policy provision. The court says that if under the facts detailed, the defendant was estopped, then the standard form of policy "would serve the purpose of a snare to entrap the insurance company into a waiver," and says, "such is not the case." *Oshkosh Match Works* v. *Manchester Fire Ins. Co.,* 92 Wis. 510, is cited as sustaining the right of the Insurance Company to an examination under oath of the insured after loss, and without waiver of its rights in so doing.[9]

Prior to the adoption of the Wisconsin standard fire policy, the conducting of an examination under oath was held as a waiver. *Oshkosh Gas Light Co.* v. *Germania Ins. Co.,* 71 Wis. 54. In the enactment of the standard fire policy the rule changed.[9]

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Husband and Wife; Liability of Wife's Estate for Expense of Last Sickness; Funeral

Lichtenberger v. *Central Wisconsin Trust Co.,* 222 N.W. 218. While the deceased, Nellie Cox Phalen, was suffering from her last sickness, her sister, one Jane Lichtenberger, was requested by the husband of the deceased to perform the services of a nurse, under the promise that Mr. and Mrs. Phalen would pay her well therefor. The services were performed and subsequent to the death of the deceased, claiment filed her bill, which was allowed by the lower court. From this decision an appeal is taken. Counsel for the trust company contends that this debt is not properly chargeable to the estate of the deceased because it was not her debt but the debt of the husband. On the other hand, claimant's counsel contends that the debt became properly chargeable to the wife's estate, citing *Schneider* v. *Estate of Breier,* 129 Wis. 441 as their authority for such contention.

Section 313.16 Wis. Stat. reads: "If, after the amount of the claims against any estate shall have been *ascertained* by the court,...." Interpreting this statute, the court says that the claims against any estate are those *allowed* by the court. This interpretation does not give to

[9] *Aetna Ins. Co.* v. *Itule (Ariz.),* 218 Pac. 990; *Connecticut Fire Ins. Co.* v. *George,* 153 Pac. 116; *Shapiro* v. *Security Ins. Co.,* 152 N.E. 370, are also cited in support of the same rule.