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NOTES

EFFECT OF DELAY IN PASSING ON INSURANCE APPLICATIONS

A pertinent development in the last decade of American insurance law has been the growth of the doctrine that an insurer is vested with the duty of passing upon applications for insurance within a reasonable time. The origin of the doctrine is traceable to the decisions of Carter v. Manhattan Life Insurance Co.,1 Duffie v. Bankers' Life Ass'n. of Des Moines,2 and Boyer v. State Farmers' Mutual Hail Insurance Co.3 These cases were among the first to assert that an insurer must act upon applications for insurance promptly or suffer the consequences of its dilatory conduct.4

Plaintiffs who previously sought relief against an insurer in this type of action were summarily dismissed from the courts because of their failure to establish an ex contractu liability. The application being a mere offer, no actionable contract of insurance could be inferred from the insurer's neglect to act upon it; the legal effect of the insurer's silence was a rejection rather than an acceptance of the application.5

The Carter, Duffle, and Boyer cases circumvented this legal pitfall by imposing a duty which was not contractual but which sounded in tort. The challenge had been given, and other courts were quick to answer it.6 The adoption by the courts of the principles underlying recovery in these early cases has been swift and revolutionary in effect; today precedent is not lacking for imposing upon the insurer the duty to act promptly upon applications for life, hail, fire, health and accident, automobile liability, and other types of insurance policies. However, this new conception of an insurer's duty has not achieved its niche in American jurisprudence without a struggle. Even today some jurisdictions cling tenaciously to the doctrine that there can be no recovery in the absence of an ex contractu liability.7 Where recov-

1 11 Hawaiian Rep. 69 (1897).
2 160 Iowa 191, 139 N.W. 1087 (1913).
3 286 Kan. 442, 121 Pac. 329 (1912).
4 These cases are considered by some writers as embodying the moral justification for recovery.
6 Within the last decade the following jurisdictions have adopted this new conception of an insurer's duty to those from whom it solicits its business: Alabama, Colorado, Idaho, Iowa, Kansas, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Texas, Washington and Wisconsin. The foregoing are the jurisdictions where recovery has been allowed.
7 Among the jurisdictions where recovery has been denied under any theory are Arkansas, Connecticut, Minnesota, Mississippi and West Virginia. As
ery is permitted at least three major theories for predicking liability upon the insurer prevail: (a) Tort. The tort theory, favorite of the courts, simply imposes a duty upon the insurer to act upon an application within a reasonable time. Failure so to act is negligence, from which flows damages for the plaintiff when actual loss is established. The theory has been vigorously assailed on the ground that the common law recognizes no duty upon the insurer to act promptly, and that the duty should be created only by legislative action. (b) Franchise theory. The insurer's duty to act promptly is justified on the ground that the insurer acts under the franchise from the state, given solely because the public interest requires that the citizens of the state be indemnified against certain specific contingencies. (c) Quasi-contract. The Wisconsin court in *Kukuska v. Home Mutual Hail-Tornado Insurance Co.*, awarded damages to a plaintiff who had made application for hail insurance and whose growing crops had been destroyed by hail on the day that notice of rejection of the application had been given. Approximately twenty-three days had elapsed between solicitation of the application and notice of rejection. The delay was held unreasonable in view of the imminence of loss by hail, the brevity of the hazardous period, and the fact that the necessity for prompt action in this type of insurance transaction is common knowledge. A duty resting upon the insurance company to act upon the application within a reasonable time was proclaimed by the court. But the duty was not precisely labelled, the court refusing to commit itself further than to

9 "This court as presently constituted cannot perceive how a tort liability can be predicated until and unless some legal duty devolved upon the insurance company to either accept or reject an application for insurance within a reasonable time. This legal duty must arise by virtue of some express provision of the statute or from the contractual relation existing between the parties, whereby a legal, not a moral duty, devolves upon the insurance company to act within a reasonable time upon an application submitted." Metropolitan Life Ins. Co. v. Brady, 94 Ind. App. 651, 174 N.E. 99 (1930). See as cases allowing recovery in tort: De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 Pac. 1049 (1924); Security Ins. Co. v. Cameron, 85 Okla. 171, 205 Pac. 151 (1922); Dyer v. Missouri State Ins. Co., 132 Wash. 378, 232 Pac. 346 (1925).

10 "The legislative policy, in granting this (the franchise from the state), proceeds upon the theory that chartering such association is in the interest of the public to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects, and supervises their business. Having solicited applications for insurance, and having obtained them and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish, or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon, or suffer the consequences flowing from their neglect so to do." Duffie v. Bankers' Life Ass'n, supra note 2.

204 Wis. 166, 235 N.W. 403 (1931).
comment: "It seems to be more in accord with ordinary legal concepts to say that it is a quasi-contractual duty." The Kukuska case indicates that the Wisconsin court is wary of an outright submission to any single theoretical basis for granting relief, but seems more concerned with the justice of the particular case presented for its review.

In Wallace v. Metropolitan Life Insurance Co., a subsequent Wisconsin case, plaintiff-beneficiary sued for damages caused by defendant company's dilatory conduct in passing upon an application for a life policy. The company's medical report disclosed that the applicant had been afflicted with leakage of the heart at the date of application for the policy. Plaintiff's claim to damages was summarily dismissed by the court as being purely speculative. The court refused to invoke the principles underlying recovery in the Kukuska case. Whereas, reasoned the court, the momentary imminence of the loss had given rise to the duty in the Kukuska case, here the nature of the risk involved was such that the applicant's physical disability precluded any showing of actual loss caused by the company's delay. The Wallace case should not, however, be regarded as a repudiation of the doctrine of the Kukuska case as the latter might have application to life, or any other type of insurance. Limited to its own facts, the Wallace case is obviously just. It would seem, however, that the same duty to act promptly which is imposed upon one who indemnifies against loss by hail may be imposed upon one who indemnifies against loss caused by death, since in each situation actual loss may follow the insurer's neglect to pass upon the application promptly.

The sharp divergences of the courts on theoretical grounds indicate that no single satisfactory theory for recovery has as yet been advanced, and that the predication of liability on the insurer has apparently never been more than morally justified. Undoubtedly the considerations which have motivated the courts in granting relief are the following:

(a) The insurance company "has pre-empted the field," solicited the application, received premium payments in most cases, and during the

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21 "If we say that it is contractual, that is, that there is an implied agreement under the circumstances on the part of the insurer to act within a reasonable time; or having a duty to act, the insurer negligently fails in the performance of that duty; or that the duty springs out of a consensual relationship, and is therefore in the nature of a quasi-contractual liability, is not vitally important. Each view finds some support in the cases. It seems to be more in accord with ordinary legal concepts to say that it is a quasi-contractual duty. The legal consequences may be somewhat different in each case; no doubt that they would be widely variant under a system of pleading different than that which prevails here. The consequent liability to respond in damages is the same in each case."

22 212 Wis. 346, 248 N.W. 435 (1933).

23 Actual loss, e.g., may result when the applicant has been approved by the company's medical examiner as a good "life risk" and meets his death by accidental means.
negotiations has been the party making the overtures. Thus it is no more than just that the company either accept or reject the application within a reasonable time. (b) The average applicant considers himself "protected" if he receives no notice of the rejection of his application. (c) The bargaining power of the applicant is insignificant in comparison with that of the insurance company. (d) The social doctrine that insurance companies are better able to bear the loss than the applicant.

The key to a successful solution of the problem is apparently in legislative action which will require an insurance company to accept or reject an application within a specified period or suffer the penalty of having a contract of insurance declared effective by statutory provision. A North Dakota statute\(^{24}\) incorporating such a provision has already been declared constitutional. The United States Supreme Court held that the statute did not interfere with the liberty of insurance companies to contract, since the freedom of the company to decline to insure was retained.\(^{15}\) While the North Dakota statute is limited in effect to hail insurance transactions, it seems that a statute broader in scope would afford a proper solution of the problem presented in this note.

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\(^{24}\) 1 N.D. Comp. Laws (1913) Sect. 4902: "Every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application by telegram, and in that event the insurance shall not become effective. Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force prior to the expiration of said twenty-four hours." Upheld as constitutional in Wanberb v. Fire Ins. Co., 46 N.D. 369, 179 N.W. 666 (1920).