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LEGAL NOTES

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STATUTE REQUIRING APPLICATION TO BE ATTACHED—EFFECT OF ATTACHING EXTRA PAPER: *Nacchio v. New York Life Insurance Company*, (C.A. 3, Dec. 30, 1952) 200 F. 2d 770. The insured applied to New York Life in November 1947 for a $7,500 life policy which was issued as applied for and the proceeds were paid without question when he died some months later. On December 29, 1947, the insured applied for an additional $3,000 and under the New York Life rules another examination was not required. The $3,000 policy in dispute contained a copy of Part I of the application for this policy and also Part II of the application for the $7,500 policy. There was apparently no tie-in between Part II of the first policy and Part I of the second policy except that copies of both applications were physically attached to the second policy.

Part I of the application attached to the second policy provided that the insurance should not go into effect if the applicant had consulted or been treated by a physician since his last medical examination or since the time of making the application if no medical examination was made. The insured consulted a physician two days after applying for the second policy and was in the hospital when the policy was delivered on January 10, 1948, to his brother.

After the insured's death on April 6, 1948, the New York Life refused to pay the face amount of this policy on the basis of the condition precedent as to consultation with a physician. The beneficiary claimed that this provision could not be relied on by reason of a Pennsylvania statute requiring the entire application to be attached to the policy. It was agreed by opposing counsel that since there was no tie-in to Part II, this document technically was not properly a part of the contract.

The district court and, on appeal, the Court of Appeals held that the terms of the statute had been complied with and that the action of the New York Life in including in its policy the extra piece of paper, which was not properly a part of the policy, did not affect the situation.

DATE OF LAPSE—POLICY NOT EFFECTIVE UNTIL DELIVERY: *Pyramid Life Insurance Company v. Williams*, (Arkansas Supreme Court, Oct. 27, 1952) 251 S.W. 2d 1010. The two life policies were dated March 21, 1949, and became effective upon their delivery three days later. The application specifically provided that the insurance should not take effect until the first premium was paid,

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but also provided that the due date of premiums as specified in the policy should control regardless of the date of delivery. The insured died after the policies had lapsed for nonpayment of premiums if the date fixed in the policies was controlling, but prior to lapse if the date of delivery was controlling as to future premium payments.

The trial court held that the policies had not lapsed but, on appeal, the Supreme Court of Arkansas reversed this judgment, holding that the policy date controlled as to premium payments and hence termination. The Court, Robinson, J., stated:

> The date of the issuance of the policy as provided therein prevails as to the date when the premium is due; otherwise it would be impossible to determine the due date of the premium by an examination of the policy. In fact, it would always be a question for a jury to determine and neither the insurance company nor the insured would know for certain whether the payment of the premium by a given date would keep the policy in force.

This decision is in accord with most of the decisions, even in the absence of a special provision in the application on the point.

DOUBLE INDEMNITY—WAIVER AND ESTOPPEL—INSURER'S FAILURE TO INFORM INSURED POLICY WAS NOT ISSUED AS APPLIED FOR: *Woodmen of the World Life Insurance Society v. Counts*, (Arkansas Supreme Court, Nov. 3, 1952) 252 S.W. 2d 390. The beneficiary applied for a life policy on behalf of his son, including double indemnity. The insured was not eligible for double indemnity under the insurer's underwriting rules because he was of draft age. Prior to the delivery of the policy the president of the Society wrote a letter to the applicant informing him that his application for membership had been approved, saying nothing about the failure to include double indemnity. The policy was shortly thereafter delivered but there was no proof that it was read either by the insured or by the beneficiary.

A few weeks thereafter the insured was accidentally drowned and the Society admitted liability for single indemnity but denied that it was liable for the accidental death benefits which were not included in the policy as issued. The trial court and, on appeal, the Arkansas Supreme Court held that the action of the Society's president had served to waive the by-laws and underwriting rules prohibiting the issuance of double indemnity to persons in the class of the insured and the insurer was estopped to deny that such benefits were included. There was one dissent.

KILLING OF INSURED BY HEIR—INHERITANCE OF POLICY PROCEEDS: *Strickland v. Wysowatcky*, (Colorado Supreme Court, Oct. 27, 1952) 250 P. 2d 199. The insured was killed by her husband, who was her sole heir. He was convicted of voluntary manslaughter and sentenced to the state penitentiary. The sole assets of the estate consisted of life insurance proceeds. The administrator of the insured's estate commenced this action to determine whether the husband, guilty of voluntary manslaughter in the killing of the insured, could inherit the policy proceeds. There was a Colorado statute providing that a person convicted of murder in the first degree or second degree could not inherit.

The trial court and, on appeal, the Colorado Supreme Court held that the husband could inherit even though the entire assets of the estate consisted of life insurance and even though presumably the husband could not have taken the proceeds as beneficiary. The Court thus answered the contention that the situation should be regarded the same as if the insured was named as beneficiary under a policy:

It is also urged that, inasmuch as the estate in this case consists of the proceeds of a life insurance policy, the situation should be treated in the same way as if Cole were the beneficiary of the life insurance policy. The first answer to this contention is that to do so would be to do violence to the facts in this case. Whereas the amount payable under a policy upon the death of an insured to a named beneficiary is payable in the amount specified in the policy, undiminished by any claims of others, in an estate proceeding the heir takes only after creditors have been satisfied and also subject to a sharing in the net amount with other heirs. It might well be that the various claims against an estate of the size in the instant case would substantially reduce the net amount payable. It is only because Cole happens to be the sole heir under the law of descent and distribution, due to the fact that his wife left no lineal descendants, that the argument of counsel appears even plausible.

PREMIUM TAXES—RETALIATION: *Massachusetts Mutual Life Insurance Company v. Parkinson*, (Illinois Supreme Court, Jan. 22, 1953) 110 N.E. 2d 256. Parkinson, then Insurance Director of Illinois, sought to impose retaliatory taxes against Massachusetts Mutual in addition to the directly imposed 2 percent premium tax. The basis of the claim was that it was possible under Massachusetts law for a life insurance company similar to Massachusetts Mutual to pay on a reserve basis and pay more than 2 percent. However, at the time the Massachusetts tax law was changed as of January 1, 1944, there were two Illinois companies doing business in Massachusetts and neither was paying more than a 2 percent premium tax. By the terms of this law an Illinois company thereafter admitted to Massachusetts would pay only on the basis of a 2 percent premium tax.

The Massachusetts Mutual brought this action to restrain payment of the disputed tax into the state treasury and to obtain a refund. The lower court held that there should be retaliation because if there had been an Illinois company doing business in Massachusetts prior to 1944 and with the same character of business as Massachusetts Mutual it would have paid more than a 2 percent premium tax. On appeal, however, the Supreme Court of Illinois reversed, holding that the court should not only look at the language of the foreign statute but should also appraise the way it operated. Since it did not operate as to any Illinois company so as to impose more than a 2 percent premium tax and could not so operate in the future, the Massachusetts Mutual was held not subject to any retaliatory burden.

Previously the New Hampshire and the Kansas courts, interpreting similar retaliatory provisions, had reached a like conclusion.

AGENT AS BENEFICIARY—CONFIDENTIAL RELATIONSHIP: *Fifield v. Crowe,* (Michigan Supreme Court, Dec. 9, 1952) 335 Mich. 228, 55 N.W. 2d 808. After the annuitant's first husband died the New York Life agent handled the payment of the proceeds of insurance on his life and later sold the widow two deferred annuity contracts. A sister and a niece were then named as beneficiaries. Some months later the annuitant decided she would change the beneficiaries and name the agent to receive any death benefits. The agent remained as beneficiary until the annuitant's death 15 years later. In the meantime the annuitant had married twice.

The original beneficiaries brought this action against Crowe, the agent, claiming that they were entitled to the proceeds in that the beneficiary designation was procured through fraud and that the agent occupied a confidential relationship to the annuitant and hence should not have permitted his designation as beneficiary. The trial court and, on appeal, the Supreme Court of Michigan held for the agent on the basis that there was no confidential relationship and no fraud but that the annuitant obviously intended to permit the agent to remain as beneficiary.

MISREPRESENTATION AS TO OCCUPATION AND HABITS—PROFESSIONAL GAMBLER: *DeBellis v. United Benefit Life Insurance Company,* (Pennsylvania Supreme Court, Jan. 5, 1953) 372 Pa. 207, 93 A. 2d 429. The insured applied for a $5,000 life policy with double indemnity, stating that his full name was "Mr. Rinaldo Joseph DeBellis." He said that his present occupation was a salesman selling medicine, that his habits were correct and temperate and that he had not consulted a physician in the last ten years. The facts were that the insured was serving parole under the name of "Joseph DiLucas" at the time he applied for the insurance, that he was only thinking about being a medicine salesman at the time and that, rather, he was a baseball pool and football pool salesman and was engaged in gambling, that his habits were not correct and temperate by the usual standards and that he had been treated for gunshot wounds nine years before he applied for the insurance.

The insured was stabbed to death shortly after the policy was issued and his body was left, wrapped in a blanket and securely tied, under a railroad bridge.

The named beneficiary commenced this action to recover the face amount and later asked that double indemnity be paid also. The United Benefit defended on the basis of material misrepresentation. The trial court and, on appeal, the Supreme Court of Pennsylvania held that the misrepresentations were material and that the named beneficiary was not entitled to recover.

WAR EXCLUSION—UNDECLARED WAR: *Beley v. Pennsylvania Mutual Life Insurance Company,* (Pennsylvania Supreme Court, Feb. 14, 1953) 95 A. 2d 202. The life policy issued on May 1, 1945 provided:

> In the event that the Insured engages in military or naval service in time of war, the liability of the Company shall be limited to the return of the premiums paid hereunder, unless the Insured shall have previously secured from the Company a permit to engage in such service.

The double indemnity benefit excluded death resulting from "(*d*) Military, air or naval service in time of war" and also "(*e*) Any work in connection with actual warfare. . . ." The insured received no permit for war service.

The insured was killed in action in Korea March 7, 1951, while serving with the United States contingent of the United Nations forces. The company claimed that the insured was engaged in military service "in time of war" and refused to pay more than the limited amount provided for death under such circumstances. The beneficiary claimed that the insured did not die "in time of war" and sued for the face amount of the life policy plus the double indemnity benefit. The trial court found that the state of war did exist at the time of the insured's death and entered judgment accordingly. On appeal to the Pennsylvania Superior Court, that Court reversed, holding the company liable for the single and the double indemnity benefits. (See *TSA* IV, 831.) On further appeal, the Supreme Court of Pennsylvania, two Justices dissenting, affirmed the judgment of the Superior Court on the basis that the action being waged in Korea is not a "war" within the constitutional or legal sense of the word, stating:

> The existence or nonexistence of a state of war is a political, not a judicial, question, and it is only if and when a formal declaration of war has been made by the political department of the government that judicial cognizance may be taken thereof; when so made it becomes binding upon the judiciary.

The Court also held that the double indemnity exclusion of "any work in connection with actual warfare" referred to civil work, not military service, and that a state of war did not exist at the time of the insured's death even though the end of the war with the Axis powers had not been officially proclaimed.

The Pennsylvania Mutual is attempting to secure a hearing of this case by the United States Supreme Court and also a hearing by that Court in a companion case, *Harding v. Pennsylvania Mutual Life Insurance Company*, (Pennsylvania Supreme Court, Feb. 14, 1953) 95 A. 2d 221, likewise decided adversely to Pennsylvania Mutual. A digest of the Superior Court's opinion in the *Harding* case is found at *TSA* IV, 830–31.

DOUBLE INDEMNITY—AVIATION EXCLUSION—MILITARY EXCLUSION: *Western Reserve Life Insurance Company v. Meadows*, (Texas Court of Civil Appeals, March 6, 1953) 256 S.W. 2d 674. The five life policies issued in 1932 provided that the accidental death benefit should be void "if the Insured shall be in military, naval, or allied service in time of war at the date of the accident" and they also provided that double indemnity should not cover death resulting directly or indirectly from "Participation in aeronautics."

In August 1951 the insured, then a lieutenant colonel in the Army Engineers Corps and engaged in the construction of an air base in Alaska, met his death there in an airplane accident. He was traveling as a passenger under official orders at the time of the crash. The company admitted liability for single indemnity but denied liability for double indemnity on the basis that the insured was participating in aeronautics and also that he was in the military service in time of war, both being excluded risks.

The trial court and, on appeal, the Texas Court of Civil Appeals held that under the circumstances the insured was not participating in aeronautics within the meaning of the policy exclusion. In reaching this conclusion, the Court reviewed many other cases in point, most of which were unfavorable to the position of the insurance company. The courts also held that the undeclared war in Korea did not constitute war within the meaning of the exclusion clause, and the fact that at the time peace treaties had not been signed with Japan and Germany did not alter the situation.

STATE LIFE FUND—REJECTION OF ALL COLORED APPLICANTS: *Lange v. Rancher*, (Wisconsin Supreme Court, Jan. 6, 1953) 262 Wis. 625, 56 N.W. 2d 542. Rancher, a colored resident of Wisconsin, applied for a $1,000 policy in the State Life Fund of Wisconsin under date of April 19, 1949. His application was promptly returned on the basis that the Fund did not insure members of any non-Caucasian race because their death rate so exceeded that of white persons that they must be classed as substandard risks and the Legislature had never provided for the writing of substandard risks. Rancher then commenced an action in the Federal District Court, claiming that his constitutional statutory rights had been violated.

Some weeks thereafter Lange, Insurance Commissioner, who administers the State Life Fund, brought this state court action, seeking a construction of the statute in this regard. The trial court held that the Wisconsin statute does not require that negroes be insured on the same basis as whites and that Lange, who had rejected their applications, as his predecessors in office had done, did not abuse his discretion and that the statute so construed was constitutional.

While admitting that the mortality rate of colored persons exceeded that of white persons, yet the Supreme Court of Wisconsin held that the Insurance Commissioner was in error in his action in summarily excluding all negroes on the ground of higher mortality rate of negroes generally. The Court held that he must consider negro applicants individually and if the individual has a life expectancy comparable to that of acceptable white applicants, he must be granted insurance.

The Chief Justice wrote a dissenting opinion, holding that negro lives obviously were substandard and that the Insurance Commissioner could not be required to insure in the Fund any substandard risks.