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Insurance—Unearned Premiums

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THE COURT OF APPEALS, 1953 TERM

performance may also result in reversal, for the right to have appraisers receive all pertinent evidence offered is fundamental.³²

The instant case also held that the insured need not submit to a new appraisal, for the defect in the award was due to no fault of claimant, and in the absence of a showing of claimant's bad faith, he may maintain a suit on the policy.³³

Unearned Premiums

In *Bohlinger v. Zanger*,³⁴ the court encountered a problem created by the statutory liquidation of an insurer while unearned premiums were in the hands of a broker. The decision centered on the definition of the broker's status when he accepts premium payments from the insured; it was held that in so acting, the broker is agent for the insured³⁵ and therefore need not remit the unearned premiums to the appointed liquidator to await formal distribution among the creditors, but may return them directly to the insured.

The majority relied on the accepted practice among brokers to refund unearned premiums to the insured upon cancellation of the policy, where the broker has not yet made his remittance to the insurer. The court could see no need for different treatment where cancellation prior to the broker's remittance is accomplished by a statutory liquidation of the insurer.

But the dissent pointed out that such a practice is largely irrelevant, for it is essentially the product of bookkeeping convenience, and in the normal order of things, entails no legal implications. But, it was argued, the situation is radically altered when the cancellation results from insolvency of the insurer, for the rights of other creditors must now be determined.

It is clear that for purposes of "placing risks or taking out insurance" the broker acts as agent for the insured.³⁶ But it does not follow inexorably that he remains the agent of the insured for purposes of accepting premium payments. Decisional law has been uniform in treating the broker as agent for the insurer

32. *Strome v. London Assur. Corp.*, *supra* note 26; *De Groot v. Fulton Fire Ins. Co.*, *supra* note 31. For a general discussion of the powers and duties of appraisers, see 7 COUCH, *op. cit.*, *supra* note 15, § 1576-1580.

33. *Aetna Ins. Co. v. Hefferlin*, 260 Fed. 695 (9th Cir. 1919).

34. 306 N. Y. 228, 117 N. E. 2d 338 (1954).

35. INSURANCE LAW §§ 111, 121, 125. The latter section provides that an insurance broker is "responsible in a fiduciary capacity for all funds received or collected." The court found that in view of the statutory and common law principle that the broker, when acting for the insured, is deemed the agent of the insured, § 125 must be construed as creating a dual agency status: as trustee for the insured to return unearned premiums, and as agent for the insurer to remit the earned portion.

36. INSURANCE LAW § 111.

for delivery of the policy and collection of the initial premium, from which has evolved the maxim that "payment to the broker is payment to the insurer."³⁷ This thesis has been recognized and adopted in the statute as well.³⁸

Cases in other jurisdictions have held that this rule also applies to situations where the insurer subsequently becomes insolvent,³⁹ *i. e.*, that the broker accepts premiums on behalf of the insurer and must transmit them to the liquidator.

As the dissent herein indicates, if the rule that payment to the broker is payment to the insurer applies in the absence of insolvency, no reason emerges why it should not apply in the instant case. The majority decision lends itself to the inequitable result that those insured customers whose brokers, for any reason, have delayed in transmitting their accounts to the insurer share in a special private liquidation, unconcerned with the rights of other creditors, while an insured whose premium has been forwarded to the insurer must await a formal distribution by the liquidator for refund of unearned premiums, subject to the interests of other creditors.

Finally, if the situation were reversed, and the *broker* were insolvent, or if he were to convert the premiums to his own use the rationale of the present decision would impel the result that the loss be thrown on the insured. For if the broker is agent for the *insured*, rather than for the insurer, for purposes of collecting premiums, the loss is a matter of indifference to the insurer, which may treat the policy as cancelled. It is doubtful that the court would adhere to the implications of its present position in such a case.

37. See, *e. g.*, *Minett v. Forester*, 4 Taunt. 541, 128 Eng. Rep. 441 (1811); *Mord v. Hartford Acc. & Ind. Co.*, 245 N. Y. 279, 157 N. E. 138 (1927); *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. 309 (1890); 2 COUCH, *op. cit.*, *supra* note 15, 1297, and cases cited therein; COUCH, *INSURANCE LAW* (1945 Cum. Supp.) vol. 1 at 486-487, n. 3.

38. *INSURANCE LAW* § 121; *Report of Joint Legislative Committee on Revision of the Insurance Laws*, N. Y. LEG. DOC., No. 101, p. 13 (1939); 1 PUBLIC HEARING OF JOINT COMMITTEE FOR RECODIFICATION OF THE INSURANCE LAW, p. 161 (1937). Thus, for the purpose of placing insurance the broker is agent of the insured, § 111; for delivery of the policy and collecting the premium, he is agent for the insurer, § 121; see, *e. g.*, *Hermann v. Niagara Fire Ins. Co.*, 100 N. Y. 411, 3 N. E. 341 (1885).

39. *Minett v. Forester*, *supra* note 37; *Goldschmidt v. Lyon*, 4 Taunt. 534, 128 Eng. Rep. 438 (1812); *Maloney v. Rhode Island Ins. Co.*, 115 Cal. App. 2d 238, 251 P. 2d 1027 (1953). In the latter case it was clearly held that the broker was obliged to remit to the statutory liquidator both earned and unearned premiums, the court finding an actual agency status; *Id.* at 244-245, 247, 251 P. 2d at 1031-1032.