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Waiver and Estoppel in Insurance Law— The Agency Problems*

THE confusion in American case law on the general topic of waiver and estoppel in insurance law is duplicated by a similar condition in the decisions on the agency problems relating to that topic.¹ The perplexing maze of inconsistent opinions and theories is sufficient to discourage any but the boldest from attempting to state in much more than the manner of a digest the law of the entire country. While the general principles of the law of agency apply and at least are rendered lip service, an examination of the decisions will probably lead to agreement with that distinguished authority on the subject of agency, the late Professor Mechem:

"As a result of these and other reasons which might be mentioned, there has developed a popular prejudice against defenses by insurance companies, and a tendency on the part of courts to protect the insured wherever possible, which have tended to make the law respecting insurance agents a distinct branch of the law of agency. Doctrines which usually prevail are here often ignored, and rules of construction are here often extended, until it sometimes seems to be the fact that insurance litigation marks the vanishing point of many of the established principles of agency."²

As serving to explain, if not justify, this result, Professor Mechem points out certain peculiarities of the insurance business. The home office is usually distant and consequently the local agent takes on in the mind of the insured a representative character not possessed by agents

* This paper is intended as a sequel to a previous article, *Waiver and Estoppel in Insurance Law in California* (1931) 20 CALIF. L. REV. 1. For the sake of simplicity, the earlier paper treated the subject of waiver and estoppel as divorced entirely from the agency complications. The present paper is based upon and presupposes an acquaintance with the theories and suggestions made in the earlier, to which frequent reference will be made.

¹ "Upon this subject of the power of the agents to waive conditions imposing on the party insured duties proper to the protection of the insuring company, there is a world of decisions, and they are a wilderness of conflicting cases, and to attempt anything like a review of them in detail would be only to grope and wander in that wilderness, and in the end lead to bewilderment." Brannon, J., in *Maupin v. Scottish Union & National Ins. Co.* (1903) 53 W. Va. 557, 562, 45 S. E. 1003, 1005.

² 1 MECHEM, AGENCY (2d ed. 1914) 755.

in other fields. The ordinary individual makes his contract without professional advice, trusting instead to the assurances of the agent of the opposite party. Applicable more perhaps to questions of waiver and estoppel divorced from the agency complication, but not without relation to the agency questions, is the peculiar characteristic that disputes between the parties do not usually arise until after a loss has happened and it is too late to restore the parties to their original position so that to deny recovery is to disappoint expectations at a time when the opportunity for making new and more satisfactory arrangements is forever gone. Another contributing factor is the frequent severity of obscure and narrow conditions, many of which come for the first time to the actual notice of the insured after a loss.

A great deal of the more recent litigation has revolved about notices in the application or policy purporting to restrict the powers of agents and provisions whose intended operation is to make the insurance agent the agent of the insured or to abrogate the rule that the knowledge of the agent is to be imputed to the principal. Such notices and provisions are undoubtedly due to the dissatisfaction of the insurers with the liberality, if not laxity, with which the courts had formulated the doctrines of waiver and estoppel against them in the earlier litigation and the unvarying tendencies of juries to find against them on slender evidence of alleged oral transactions and of the knowledge of the agent. Another possible contributing cause is the desire to safeguard the company against the neglect or infidelity of its own agent.

Before a detailed study of the California decisions is undertaken, certain general matters, to which reference will be subsequently made, should be disposed of.

Policies frequently provide that conditions cannot be waived save by written endorsement. So far as such a provision purports to be a limitation on the insurer itself rather than upon the authority of the agent, it is nugatory.³ A person cannot by contract disable himself from subsequently modifying his contract except in writing or prevent his subsequent conduct from having the effect the law says it shall have.⁴ For instance if after the contract is made the insured acts upon an oral permission to procure other insurance, it would seem obvious

³ 5 COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 4176.

⁴ This of course is not to deny that it may be validly stipulated that certain acts of possibly equivocal character shall not be construed as waivers. For example, the California statutory fire policy provides: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of loss or damage or any requirement, act or proceeding on its part, relating to the appraisalment or to any examination herein provided for." CAL. STATS. 1927, p. 1678. See EWART, WAIVER DISTRIBUTED (1917) 290.

that the insurer cannot defend on the ground of breach of condition. In a real sense the insurer has caused a breach of the condition; he has led the insured to believe that compliance with the condition is unnecessary. Or if we take the case of an inceptional condition such as the unconditional and sole ownership clause, the written indorsement provision is also of no effect. Assuming that after the contract is made but before any loss, the insured informs the insurer of his limited interest but is orally assured that nevertheless he will still be protected, the insurer is liable. The explanation here is that since the contract is voidable from its inception, the assurance of the insurer amounts to an election to affirm.⁵ While the courts frequently put their decisions in these cases on the ground that the insurer waives the non-waiver-save-by-written-indorsement clause⁶, it would seem that the more satisfactory explanation is that the insurer cannot stipulate against the legal effect of his subsequent conduct or require that it must be evidenced in a certain way as by a writing. "Attempts of parties to tie up by contract their freedom of dealing with each other are futile."⁷

Different considerations come into play, however, when the policy provides that the agent has or shall have no power to waive except by an indorsed writing. But even if put in the form of an agreement, this can amount at most to a notice of a lack of present authority or of an intention not to vest such authority in the future. To be sure, it may serve to strike down apparent or ostensible authority. But if, at the time the agent acts, he has actual authority despite the notice, the latter is inefficacious.⁸ The same may be said of the provision that "no person, unless duly authorized in writing, shall be deemed the agent of the company." If one cannot disable himself from subsequently contracting orally or affecting his legal position by his subsequent conduct, it is impossible to see how he can disable himself from contracting or binding himself through an actually but orally authorized agent.

In the following examination of the California cases upon the agency problems it is proposed to follow in general the classification of condi-

⁵ Langmaid, *Waiver and Estoppel in Insurance Law in California* (1931) 20 CALIF. L. REV. 1, 3, 10.

⁶ See EWART, *WAIVER DISTRIBUTED* (1917) 286-288.

⁷ Holmes, J., in *Bartlett v. Stanchfield* (1889) 148 Mass. 394, 395, 19 N. E. 549, 550. It is interesting to note that waiver language is used in other analogous situations in the law as in the case of a provision in a building contract that work shall not be sublet without the written consent of the owner (*Gannon v. Shepard* (1892) 156 Mass. 355, 31 N. E. 296) and the common provision in leases that assignment shall not be made without the written consent of the lessor.

⁸ *Knickerbocker Life Ins. Co. v. Norton* (1877) 96 U. S. 234; EWART, *WAIVER DISTRIBUTED* (1917) 288-290; RICHARD, *INSURANCE* (3d ed. 1926) §§ 158, 159. For a particularly good discussion, see *Thompson v. Traders' Ins. Co. of Chicago* (1902) 169 Mo. 12, 68 S. W. 889.

tions employed in the earlier paper. The reason for this is that it is believed that the different types of conditions call for different considerations in solution of the problems involved.

I. CONDITIONS OPERATIVE CONTEMPORANEOUSLY WITH MAKING OF CONTRACT, OTHER THAN PREMIUM CONDITIONS

A. *Knowledge by Agent of Breach at Moment Contract is Made.*

With regard to printed conditions in the policy, as distinguished from statements in the application made warranties or conditions by the policy, it may be considered settled in California that the insurer is bound when the breach of condition is known at the time of issue to the agent who makes and is authorized to conclude the contract.⁹ The California decisions go on the ground that notice to the agent is notice to the principal. If, as has been suggested,¹⁰ the question is one of election, rather than waiver or estoppel, it may be said that an agent vested with authority to conclude contracts is necessarily vested with the incidental authority to make the election at the outset. If it be thought that the theory of election at the outset is untenable but that the option to avoid must be exercised promptly after obtaining knowledge of the breach of an inceptional condition, the same result follows on the ground that normally the knowledge of the agent is legally equivalent to the knowledge of the principal, who consequently must act promptly in order to avoid. In this connection it is important to bear in mind that the general rule of imputation of knowledge is not based on any theory of actual notice to the principal but rather on considerations of policy, namely, that where one seeks the advantages of doing business through agents, fairness to the other party demands that the principal be in no better position than if he were transacting business in person. Like the liability of an employer for the physical torts of his employee, the rule is merely a price the principal must pay for the advantage of acting through agents.¹¹

⁹ *Fishbeck v. Phenix Ins. Co.* (1880) 54 Cal. 422; *Allen v. Home Ins. Co.* (1901) 133 Cal. 29, 65 Pac. 138; *Loring v. Dutchess Ins. Co.* (1905) 1 Cal. App. 186, 81 Pac. 1025.

¹⁰ Langmaid, *op. cit. supra* note 5, at 3 *et seq.*

¹¹ "Many reasons have been assigned, but they are all predicated upon the injustice which would result if the principal should be permitted to put forward an agent to transact business for him and at the same time escape the consequences which would have ensued from knowledge of conditions or notice of the rights and interests of others had the principal transacted the business in person." 2 MECHEM, AGENCY (2d ed. 1914) §1802. "Policy and the safety of the public . . . forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not." Broughan, L. C., in *Kennedy v. Green* (1834) 3 Myl. & K. 699, 718.

The same result has been reached in the case of an issuing agent,¹² despite the appearance in the policy of the common statement that "no officer, agent or other representative of the company shall have power to waive any provisions or conditions of the policy except such as by the terms of the policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed to have waived * * * unless such waiver, if any, shall be written upon or attached hereto."¹³ Various theories for this result have been assigned. Sometimes it is said that notices in a policy issued later are ineffective to charge the insured with knowledge of restrictions upon the apparent authority of the agent as to those matters having to do with the very making of the contract.¹⁴ However, this argument loses its force if the restriction notice appears in the application. It is also subject to criticism when the applicant knows, as from prior experience, that the notice will be present in the policy.¹⁵ Likewise it may be argued that there cannot be apparent authority when the standard policy law provides for the insertion of the notice.¹⁶ In the two latter cases the argument must be that the restriction in the policy as a matter of construction refers to acts subsequent to the making of the contract.¹⁷ In accordance with this view it has been said that the question is not one of waiver by an agent of some matter occurring after the contract inconsistent with it; but the question is whether the principal is "estopped" by

¹² The term, "issuing agent," is used to describe one with authority to conclude contracts as distinguished from an agent who has merely authority to solicit offers or applications from the applicant.

¹³ *Raulet v. Northwestern National Ins. Co.* (1910) 157 Cal. 213, 233, 107 Pac. 292, 300. See *Sharman v. Continental Ins. Co.* (1914) 167 Cal. 117, 138 Pac. 708.

¹⁴ "It would be a stretch of legal principles to hold that a person, dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter." *Kausal v. Minnesota Farmers' Mutual Fire Ins. Ass'n* (1883) 31 Minn. 17, 22, 16 N. W. 430, 431.

¹⁵ See RICHARDS, *INSURANCE* (3d ed. 1926) 210.

¹⁶ *Ibid.* 214.

¹⁷ "A waiver is the voluntary yielding up by a party of some existing right, but until the contract is consummated, the company has no rights which are susceptible of waiver, nor can any condition be properly said to be modified or stricken from a policy until there is a policy, that is, until after the terms of the contract have been agreed upon and the policy issued. Clearly the clause in question was intended as a limitation upon the powers of agents to waive or modify the terms of the policy after it had been issued, and not upon their power to agree upon and settle the terms of the policy prior to its issue." *Continental Ins. Co. v. Ruckman* (1889) 127 Ill. 364, 373, 20 N. E. 77, 80.

conduct to enforce a forfeiture, the assertion of which is inconsistent with the principal's conduct in accepting the premium and delivering the policy as a valid one, when, if the forfeiture is not intended to be waived, the policy would be voidable at its inception.¹⁸ Occasionally it even is said that the agent may waive the nonwaiver clause. Other reasons have been urged.¹⁹ Without considering the merits of such explanations, it may be said that on the election theory the result of the decisions is more easily supported. By vesting the agent with authority to conclude contracts, the principal vests the agent with the incidental power to make the election at the outset; or being charged with knowledge through its agent's knowledge, the insurer must promptly exercise its option to avoid if it would do so at all.

However, this rule laid down as above in the California decisions has been held not to apply in the case of a mere soliciting agent not given the authority to conclude contracts.²⁰ The view was expressed that the knowledge of such solicitor, if not actually communicated to an issuing agent, is not imputable to him or to the company. No reason is assigned for departing from the rule of imputation. No such distinction is generally drawn in the law of agency between agents authorized to contract and those who merely conduct preliminary negotiations or receive offers. In the case cited not only did the solicitor have knowledge when taking the written application for fire insurance, but in the preparation of it he assured the applicant that it was proper to state that the latter was the sole and unconditional owner despite the fact that a purchaser had taken possession under contract. Thus, in effect, the insured was made responsible for the positive error of the solicitor. In other jurisdictions the knowledge of the solicitor has been imputed to the company.²¹

B. Statements in Application Made Warranties or Conditions by Policy, Known by Agent to be False. Frequently it is claimed that the applicant revealed the entire truth to the agent who incorrectly transcribed the oral answers when recording them in the application. The error may be of various types. In fraud of his company and through greed for commissions, the agent may wilfully insert a falsehood, knowing or fearing that the risk would be declined by the home office were the truth revealed to it. In reducing the more or less verbose oral

¹⁸ *Gandy v. Orient Ins. Co.* (1898) 52 S. C. 224, 29 S. E. 655.

¹⁹ *VANCE, INSURANCE* (2d ed. 1930) 437.

²⁰ *Sharman v. Continental Ins. Co.*, *supra* note 13. But *cf. Curtiss v. Aetna Life Ins. Co.* (1891) 90 Cal. 245, 27 Pac. 211.

²¹ 5 *COOLEY, BRIEFS ON INSURANCE* (2d ed. 1927) 4049; 1 *MECHEM, AGENCY* (2d ed. 1914) §1068; see particularly *Forward v. Continental Ins. Co.* (1894) 142 N. Y. 382.

statements of the applicant to a brief written condensation to fit the limited space available in the blank, the agent may make an innocent mistake. Or, believing that certain matters are too trivial to be of importance, the agent may write out answers that are not literally true but which he assures the applicant are sufficiently accurate for the purpose in hand.²² Or the agent may advise as to the meaning of certain questions and expressions.²³ Thus he may, as appears in *Sharman v. Continental Ins. Co.*,²⁴ assure the applicant that it is proper to describe his interest as unconditional and sole ownership although the applicant has put a purchaser in possession. As is well known, soliciting agents and medical examiners fill out the blanks; the medical and family history blank frequently requires the examiner to write out the answers. These persons have a more intimate knowledge than the applicant of the business of insurance, of the meaning of the questions and of the sort of information desired. The ordinary man relies, and with reason, on their advice in such matters. The applicant in good faith may well believe that the recorded answers are, for the purpose in hand, accurate abridgments of the information furnished or, when signing without reading, that the agent has truly recorded his answers. Assuming then that the applicant has acted in good faith, the question is whether the insurer shall bear the brunt of the mistakes and frauds of its own agent and of his knowledge. Like most questions where there is a division of authority, there is something to be said on both sides. The matter is well put in the following:

"Practical experience gained by the courts in the trial or review of cases of the kind under consideration, and the common knowledge that applicants are likely to regard the preparation and signing of the application more or less as a matter of form, and to rely upon the superior

²² There is a good deal of force in the remarks of Cooley, J., in *North American Fire Ins. Co. v. Throop* (1871) 22 Mich. 146, 158, 7 Am. Rep. 638, 646: "In all these cases, where the particular fact called for by an interrogatory is unimportant or nearly so, under the circumstances of the particular case, it is very easy for the assured to be led to suppose that such interrogatory, which he knows was prepared generally and for the purpose of meeting the cases in which it would be of practical importance, was not to be relied upon in his own case; and if the insurer himself, or his agent, drafts an answer to such interrogatory, in which he treats it as immaterial and does not observe strict accuracy in his statement of facts, the assured might well suppose that he would be thought captious and hypercritical if he should insist upon answers exactly correct, when the party seeking the information, and who alone was interested in it, was satisfied with statements less accurate, and which, with full knowledge of the facts, he had written out to suit himself."

²³ Thus a question in an application for life insurance as to the existence of other insurance may be explained by the agent as applicable only to insurance of like character and not referring to fraternal insurance. *Continental Life Ins. Co. v. Chamberlain* (1889) 132 U. S. 304.

²⁴ *Supra* note 13.

knowledge and good faith of the agent, perhaps, justify the adoption of a rule to protect the applicant against his own folly in failing to read the application, or have it read to him, before he signs it; but the courts should not lose sight of the fact that the adoption of this rule in effect renders it impossible for the insurance company to know upon what basis its policies are issued, or at least upon what basis they must be settled, since that knowledge rests exclusively in the bosom of a jury not yet impaneled. The real strength of the insurer's objection to the rule seems to lie, not in its effect to charge the company with the consequences of its agent's fraud or negligence, but in the fact that it requires the company to submit to the arbitrament of a jury upon parol evidence,—which may be perjured, and is very likely to be mistaken,—a question of fact which the application signed by the applicant, in effect, stipulates shall be determined solely by reference to the application. Obviously, however honestly the insurer intends to deal, and does deal, with applicants, and however great confidence it may justly repose in its agents, sound business principles and the dictates of common prudence render it imperative, if possible, to guard against the danger incident to parol evidence, and to make the written application the exclusive evidence of the applicant's answers.

"At the best, the rule operates to protect an honest applicant against the consequences of his own carelessness in failing to read the application before he signed it, at the expense of the insurer, which, without any fault whatever on its part or the part of its agent, may be obliged to submit to the claim of a dishonest or mistaken, but plausible, applicant, or beneficiary, who is able to convince a court or jury of the truth of his claim, notwithstanding that, by the terms of the application signed by the applicant, it was in effect agreed that no such claim should be made, and that the policy should be issued upon the basis of the answers as written in the application,—an instrument which was signed by the applicant for the purpose, and only for the purpose, of verifying its statements and adopting them as his own."²⁵

To hold the company in this case of a soliciting agent not authorized to conclude contracts, it is necessary to rely upon the rule that the knowledge of the agent is to be imputed to the principal. But there is an exception to this rule. Since it is designed for the protection of innocent third parties, it has no application when the third person is not innocent but is acting in bad faith or in collusion with the agent to deceive the principal.²⁶ The rule and its exception are well stated in a Michigan case.²⁷

In the foregoing situations the earlier as well as some of the later California cases take the position that the company cannot set up the breach of warranty which was in effect caused by its own agent.²⁸ Does

²⁵ Note, L. R. A. 1915A 279. See Price, *How Far Does Knowledge of an Agent Affect the Defense of Fraud in an Action on a Life Insurance Policy?* (1924) 18 ILL. L. REV. 377.

²⁶ 2 MECHEM, AGENCY (2d ed. 1914) §1826.

²⁷ *Mudge v. Supreme Ct., I. O. F.* (1907) 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N.S.) 279.

²⁸ *Menk v. Home Ins. Co.* (1888) 76 Cal. 50, 14 Pac. 837, 18 Pac. 117; *Wheaton v. North British & Mercantile Ins. Co.* (1888) 76 Cal. 415, 18 Pac. 758 (held, that agent undertaking to fill in application is agent of insurer, not of insured who signed application without reading); *Curtiss v. Aetna Life Ins. Co.*,

the problem differ in substance from that already discussed, that is, the case of a fire insurance policy issued on oral application by an agent who is aware that the insured is not the unconditional and sole owner? The statements in the written application made "warranties" by the terms of the policy are in effect nothing but conditions of the same character as the unconditional and sole ownership clause. There are two possible distinguishing features. (1) In the latter case the agent is usually an issuing agent with power to contract and not a mere solicitor. (2) It may be said that in the latter case the attention of the insured is not specifically directed to the clause before he accepts the policy, whereas in the former he is specifically required to answer questions and usually to sign and vouch for the accuracy of the recorded answers. The first distinction seems of no significance if the knowledge of the solicitor is to be imputed to the insurer. There is more weight in the second.

Largely to avoid the result of such decisions as those referred to in the preceding paragraph, insurers have resorted to two different devices. First they inserted a statement in the application to the effect that the insurer's representative should be deemed the agent of the applicant. This device has generally failed both in California²⁹ and elsewhere³⁰ on the ground that agency is a matter of fact and not of stipulation. The second device was to insert in the application some

supra note 20 (soliciting agent. But *cf.* *Sharman v. Continental Ins. Co.*, *supra* note 13.); *Bayley v. Employers' Liability Assurance Corp.* (1899) 125 Cal. 345, 58 Pac. 7, *rev'g* (1899) 6 Cal. Unrep. 254 (also misleading conduct by agent causing applicant to believe it unnecessary to add to printed statement in application form); *Parrish v. Rosebud Mining & Milling Co.* (1903) 140 Cal. 635, 74 Pac. 312; *Lyon v. United Moderns* (1906) 148 Cal. 470, 83 Pac. 804 (medical examiner wrote down that applicant had not had pleurisy, although the latter had stated orally that he had had slight attack.); *Schwartz v. Royal Neighbors of America* (1910) 12 Cal. App. 595, 108 Pac. 51; *Pacific Employers Ins. Co. v. Arenbrust* (1927) 85 Cal. App. 263, 259 Pac. 121 (holding acts of one who is really agent of company are acts of company despite stipulation in application that he is agent of insured).

²⁹ *Layton v. New York Ins. Co.* (1921) 55 Cal. App. 202, 202 Pac. 958; *Pacific Employers Ins. Co. v. Arenbrust*, *supra* note 28.

³⁰ *JOYCE, INSURANCE* (2d ed. 1917) §508; *VANCE, INSURANCE* (2d ed. 1930) 444. In *Continental Ins. Co. v. Pearce* (1888) 39 Kan. 396, 402, the following appears: "This is but a form of words to attempt to create on paper an agency, which in fact never existed. It is an attempt of the company, not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when in fact such relation never existed. (*Insurance Co. v. Myers*, 55 Miss. 479.) We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority."

such statement as the following: "Inasmuch as only the officers at the home office of the company * * * have authority to determine whether or not a policy shall issue upon any application, and as they act on the written statements, answers, warranties and agreements herein made, no statements, promises or information made or given by, or to, the person soliciting or taking the application for a policy, or by or to any person, shall be binding on the company or in any manner affect its rights, unless such statements, promises or information be reduced to writing and presented to the company at the home office." The insurance companies doubtless have two objects in the use of such a provision. They desire to withdraw from the jury the determination of the usually doubtful questions whether the agent had actual knowledge of the truth and whether the written statement, usually recorded by the agent, is a correct transcription of the oral answers. The other object is to avoid responsibility for the fraud or error of agents, usually solicitors and medical examiners, not only in transcribing oral answers but in interpreting the meaning of the questions and determining the proper answers to be recorded from the information furnished. In either case it is an attempt to abrogate a rule of agency law. While the former device of attempting to make the insurer's agent the agent of the insured is more bald, the latter is but a flank attack designed to bring about the same result. If successful, in substance it charges the insured with fraud, errors and mistakes of the insurer's agent and relieves the principal. There seems little practical difference between the two methods. If the attempt is successful, the result seems harshest and most unjust where the error relates to medical and family history in those cases where, as is common, the application specifically requires the medical examiner to record the answers. Certainly in the latter case the examiner must be regarded as the agent of the insurer. Boiled down to its essence the question is whether one engaged in transacting business through agents can validly stipulate against the errors and frauds of his own agents in the course of business committed to their charge and the rule of policy imputing knowledge of the agent, a rule designed for the protection of innocent third persons dealing with the agent. In many and probably most American jurisdictions the answer is in the negative.³¹ In *Sternaman v. Metropolitan Life Ins. Co.*, the court said:³²

"Sound public policy prohibits the company from stipulating for immunity from the consequences of its own negligence, or, what is the same thing, the negligence of its agent. *Rathbone v. Railroad Co.*, 140 N. Y.

³¹ VANCE, *INSURANCE* (2d ed. 1930) 445-450; see Note (1888) 9 Am. St. Rep. 232, by Freeman upon *New York Life Ins. Co. v. Fletcher* (1886) 117 U. S. 519, 6 Sup. Ct. 837.

³² (1902) 170 N. Y. 13, 23, 62 N. E. 763, 766.

48, 35 N. E. 418. The manner of conducting the examination was, of necessity, intrusted to the judgment of the medical examiner to a great extent. His judgment might influence him to take down the answers in a general or in a particular way. In exercising his judgment he determined that certain answers were too trivial to be recorded. In making that determination he was not acting for the insured, but for the company; for it had furnished him with a blank, and had invested him with power to take down the answers, and hence with power to decide how they should be taken down. If he was negligent or failed to do his duty in this regard, the company could not, by an agreement made in advance, cast the burden upon the insured, who did not select or employ him. His negligence was its own negligence, and it could not by contract make it the negligence of the insured, or relieve itself from the legal consequences thereof. * * *

"The insured also agreed that 'no information or statement not contained in this application and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declarations and warranties made therein.' The facts sought to be proved were contained in the oral statements made to the medical examiner, but, assuming that recorded statements only were meant, the result would be an agreement that the company might perpetrate a fraud upon the insured by issuing a policy and accepting premiums thereon, knowing all the time that the contract was void, or voidable at its election. The law does not permit this; for it declares that the company is estopped from taking advantage of such a contract, because it would be against equity and opposed to public policy."

In California, while no opinion really discusses from the standpoint of public policy the clause abrogating the rule of imputation of knowledge, its validity seems to be taken for granted.³³ And yet in all the opinions involving it, there are qualifying statements that leave one in some doubt whether the clause is entirely efficacious. Because of the importance of the question the writer begs leave to consider the cases in some detail.

In *Iverson v. Metropolitan Life Ins. Co.*³⁴ the application stated that the applicant had not had certain complaints or diseases, including apoplexy; the falsity of this statement, known to the soliciting agent, was not reported to the "general" agent or to the home office. It does not appear whether the applicant wrote out the answer himself. While the court admitted there would have been a "waiver" if the home office

³³ It is worth comment that in *Mooney v. Cyriacks* (1921) 185 Cal. 70, 195 Pac. 922, rescission of an automobile sales contract was permitted because of fraudulent statements made orally by the agent despite the appearance in the written contract of the following provision: "It is expressly understood and agreed that no statements, agreements, understandings or representations of any kind or nature, have been made, or exist, other than those in this agreement contained." 185 Cal. at 79, 195 Pac. at 926. It must, however, be admitted that the problems are different. In the insurance case the insured is endeavoring to enforce the contract, while here the purchaser is seeking to rescind it. Nevertheless, it remains true that the attempt by the seller to relieve himself entirely from the effect of his agent's fraud was nugatory.

³⁴ (1907) 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N.S.) 866.

had known the truth, it took the position that the knowledge of the solicitor could not be imputed to the company, since the solicitor had neither the actual nor ostensible authority to waive the truthfulness of the answer. Knowledge of the agent was knowledge, it was said, only in those matters which were within the scope of the agent's authority to act. The application gave clear notice that the agent had no authority to waive the truthfulness of the answers. Angelotti, J., concurred solely on the ground that the application stated that the company should not be chargeable with the knowledge of the solicitor, a slightly different view also concurred in by the rest of the court.³⁵ While the agent had no authority to conclude the contract, it by no means follows on ordinary agency principles that his knowledge obtained in the course of his employment or possessed by him and present in his mind while taking the application is not to be treated as knowledge of the principal. The rule of imputation of knowledge is not based upon the fact that the agent has been authorized to acquire such knowledge on behalf of his principal, but is a positive rule of law founded upon public policy. However, since in the *Iverson* case the applicant had suffered a partial paralysis and at the time of the application was still seriously ill from the stroke, it is probable that there was either collusion with the agent to deceive the company or at least an absence of good faith, sufficient to bring the case within the exception to the doctrine of imputation of knowledge. While the case is not flatly rested on this ground yet the following statements from the opinion are significant and might serve as a basis for distinction:

"Counsel for appellants cites us to cases where the company has been held bound by the conduct of its soliciting and other special agents. But these are cases where either the agents had ostensible authority to act in the matters in question there or had deceived the insured; been guilty of some misrepresentation or perpetrated some fraud upon him, the insured not being in fault and acting in good faith, without notice of any limitation upon the authority of the agent. But the case at bar presents none of these situations. It is not claimed that the agent perpetrated any fraud on the insured; that he represented he would or had authority to waive the truthfulness of any statements in the application or the accompanying warranty

³⁵ Cf. *McKay v. New York Life Ins. Co.* (1899) 124 Cal. 270, 56 Pac. 1112; *La Marche v. New York Life Ins. Co.* (1899) 126 Cal. 498, 58 Pac. 1053. In the former case the soliciting agent obtained the signature of the plaintiff to an application by falsely representing that it called for a different kind of policy. In the latter the facts were the same except that the applicant signed a blank form upon the agent's agreement to fill it up in accordance with the oral arrangement. After receipt of the policies they were returned and successful actions were maintained for recovery of the premiums. While these cases are distinguishable from the *Iverson* case, since the actions were not on the policies, yet the court recognized that the solicitors were the agents of the companies, which could not retain the premiums secured through their agents' frauds, despite a provision in the application similar to that in the *Iverson* case.

respecting its truth. * * * In the case at bar there is no question of fraud, deception, or misrepresentation practiced by the agent."³⁶

*Madsen v. Maryland Casualty Co.*³⁷ seems to go even further. The soliciting agent filled out an application for accident insurance stating that the applicant was not deaf, although he was very deaf. The application was neither signed nor read over by the insured and when the latter got his policy he did not read it. The provision with regard to knowledge of the agent was in the policy but; so far as appears, not in the application. In other states it has been frequently held that a notice in the policy but not in the application does not serve to give notice to the insured of the limited authority of the agent as to inceptional conditions and warranties.³⁸ It does not even appear that the applicant ever made any oral statements with regard to his hearing. It was held that by accepting and retaining the policy, to which a copy of the application was attached and made a part of the policy, the insured was bound by its terms. In what respect the situation differs from the case of a breach of an inceptional condition in a fire policy, known to the agent at the time of issue, is left unexplained.³⁹ However, in the opinion we find the following qualifying statement: "There is no pretense or claim that any fraud was practiced upon the plaintiff."⁴⁰

In *Porter v. General Accident, Fire & Life Assurance Corp.*⁴¹ the applicant orally revealed the truth concerning an eye trouble but the agent wrote "no exceptions" to the printed question about certain diseases. The insured was denied permission to shelter himself under the plea of "equitable estoppel" because of the agent's knowledge.⁴² Bearing in mind the possibility that the agent may well have thought that the trouble was too trivial to be called for by the question and that his conduct in writing the answer as he did was misleading to the insured, the decision works considerable hardship in defeating legitimate expecta-

³⁶ 151 Cal. at 752, 91 Pac. at 611.

³⁷ (1914) 168 Cal. 204, 142 Pac. 51.

³⁸ See pages 95-96, *supra*.

³⁹ In *Enos v. Sun Ins. Co.* (1885) 67 Cal. 621, 8 Pac. 379, there was a breach of an inceptional condition in a fire policy relating to occupancy. It was held that where the policy contained a provision that "this company shall not be bound by any act or statement which is not contained in the written application, or indorsed on this policy," notice to the agent of the truth would not bind the insurer. It does not appear whether the agent was a soliciting or issuing agent.

⁴⁰ 168 Cal. at 206, 142 Pac. at 52.

⁴¹ (1916) 30 Cal. App. 198, 157 Pac. 825. The application stated that "the company is not bound by any knowledge of or statements made by or to any agent unless written hereon." *Ibid.* at 200, 157 Pac. at 826.

⁴² Yet note the following statement: "And even though the statements be filled out by an agent upon a form furnished by the company, they are (*at least in the absence of any fraud practiced upon the applicant*) of the same binding force upon the applicant as though he had himself written them out in longhand and signed them." 30 Cal. App. at 204, 157 Pac. at 827 (*italics added*).

tions. If one may judge by the ordinary conduct of such agents, they are delegated to reduce the answers in writing and to advise as to the meaning of the questions. The insured sees only the agent. It is not too much to say that the ordinary person relies on the advice and conduct of the agent and can hardly be thought to be careless in so doing unless it can be said that the discrepancy between the truth and the written statement is glaring. Considerations of space alone forbid lengthy and detailed answers in the blanks.

Purporting to follow the *Madsen* and *Iverson* cases came *Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co.*⁴³ The application stated that the applicant was a capitalist and that his habits of life were correct and temperate. "Capitalist" was written down by the soliciting agent, whereupon ensued considerable discussion as to its correctness since the applicant was a professional gambler. Finally the insured accepted this designation. A similar discussion took place with regard to the statement of habits. The agent practically represented that this referred to the use of intoxicants, while the actual irregularity related to sexual matters of which the agent had knowledge. Assuming that the applicant was in good faith, we have a case where the parties have agreed upon the meaning of certain words. The remarks of Professor Vance are applicable:

"The insured knows exactly how the policy is written, but since both the parties have agreed upon the interpretation to be given to the facts that are fully known to both, both are concluded by the agreed interpretation. Putting it otherwise, both parties are estopped in any subsequent proceedings to question the truth of what they have agreed to be true. The insurer usually denies the authority of the agent to make such an interpretation, but manifestly under such circumstances the law must regard the agent representing the insurance company as the alter ego of the company. * * * So long as such misinterpretation occurs in the course of the representative's employment, it is binding on the company whether specifically authorized or not."⁴⁴

In the case itself, and herein is a difference between this and the cases relied upon, there was apparently no provision in either application or policy with regard to imputation of knowledge. There was in the policy, but not in the application so far as appears, a provision that the terms of the contract could not be waived nor altered by any agent. The court held that such soliciting agent could not estop the company. Perhaps, however, the significance of the case hinges upon the following statement by the court: "Jewell [the applicant] knew that the word [capitalist] was a euphemism behind which lurked his real business."⁴⁵

⁴³ (1916) 172 Cal. 261, 156 Pac. 481.

⁴⁴ VANCE, *INSURANCE* (2d ed. 1930) 522. See RICHARDS, *INSURANCE* (3d ed. 1926) §168, and particularly *Parker v. North American Accident Ins. Co.* (1917) 79 W. Va. 576, 92 S. E. 88.

⁴⁵ 172 Cal. at 261, 156 Pac. at 483.

In *Layton v. New York Life Ins. Co.*,⁴⁶ after a full disclosure by the applicant, the medical examiner wrote down incorrect answers. It does not appear that either the application or policy contained the knowledge restriction clause. The court said:

"But it has been held in this state that when the insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely a medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, even though it is so stipulated in the application. (*Lyon v. United Moderns*, 148 Cal. 470, 475 * * * ; *Westphall v. Metropolitan Life Ins. Co.*, 27 Cal. App. 734, 739 [151 Pac. 159].) Notwithstanding the justice of this rule, it is the statement of only a part of the law of the case, and is subject to the limitation that there must be no complicity on the part of the insured, actual or implied. The element of continued good faith enters into such transactions. The policy of insurance in this case was almost immediately delivered to Layton. It was his duty to read it, and we may assume that he did so. He knew, therefore, that the application and the certificate of the medical examiner, each of which was an integral part of the policy and the consideration therefor, contained two very material and vital statements that were false. His legal and moral duty was then to notify the company of the fraud that had been perpetrated. By his silence he virtually approved of the act of the medical examiner and became responsible for it. By his conduct he made Dr. Cleland his agent as well as the agent of the company, and the forfeiture of the policy is the result. * * * Where one holds a policy, referring in apt terms to the warranties and representations contained in the application annexed, for a reasonable time, he is conclusively presumed to know the contents of the contract, and the untruthful answers plainly written in the application. He is thereby estopped to assert that he had no knowledge on the subject. (*Modern Woodmen v. Angle*, 127 Mo. App. 94, 116 [104 S. W. 297, 304].) Even though the false answers were written by the examiners of the company without the knowledge of the assured, but the latter has the means at hand to discover the falsehood, and negligently omits to use them, he will be regarded as an instrument in the perpetration of the fraud, and no recovery can be had on the policy."⁴⁷

Assuming, as the court did, that the company was originally estopped, so that, if the insured had died shortly after the issue and before he had had the policy "a reasonable time," there could have been a recovery, the result is strange. If it be granted that at the outset by operation of "estoppel" there was a non-voidable contract, no reason is afforded why, even upon a later discovery of the "fraud," the insured would be under a duty to disclose it to the company and afford it an opportunity for rescission. If a general sales agent, with a secret restriction upon his authority forbidding him to sell to A, nevertheless does so contract with A, who is ignorant of the restriction, must A upon a later discovery of

⁴⁶ (1921) 55 Cal. App. 202, 202 Pac. 958. Accord on similar facts: *Goldstone v. Columbia Life & Trust Co.* (1917) 33 Cal. App. 119, 164 Pac. 416.

⁴⁷ 55 Cal. App. at 205, 202 Pac. at 960.

the fraud of the agent before there has been performance give the principal a chance to rescind? This argument of the court does not appear to be made where there is a breach of an initial condition of a fire policy, although an examination of the policy would disclose the fact to the insured. Furthermore the opinion of the court seems to disregard the possibility that an actual reading of the application upon receipt of the policy may not convince the insured of the "fraud" of the agent. If the applicant is led to believe when the agent fills in the application and the applicant signs that the statement is sufficiently accurate for the purpose in hand, why will he be convinced upon a later receipt and reading that the statement is false and that the agent is perpetrating a fraud upon his principal? Also assuming that the insured is not cognizant of the falsity of the recorded answers when he signs the application, why is he not justified in assuming upon delivery of the policy with the attached application that the application was written as contemplated by him and why is he negligent in not examining it? If the doctrines of election and imputation of knowledge are applied, the company failed to exercise its option to avoid within the proper time. Any subsequent rescission would require mutual assent. It may be added, however, that in the principal case the discrepancy between the truth and the written statement was so glaring that had the applicant read it before signing he would have immediately discovered its untruthfulness.

One other but slightly different case requires attention. In *Westphall v. Metropolitan Life Ins. Co.*⁴⁸ the application contained the knowledge restriction clause and also a provision that when nothing was added to the statements the "declaration" was true without exception.⁴⁹ In the declaration was the printed statement: "I have never had * * * fits * * * except" Nothing was written in the space after the word, "except." There was no evidence that the solicitor or medical examiner knew that the applicant had been afflicted with epilepsy. It was contended that the insured did not read the printed statement and that it was not read to him for the purpose of securing his answer. The court found that there was no evidence that the insured did not read and know the contents of the application when he signed it. In holding that the trial court did not err in refusing to allow evidence that the medical examiner did not put any oral questions as to the dis-

⁴⁸ (1915) 27 Cal. App. 734, 151 Pac. 159.

⁴⁹ *Williams v. Metropolitan Life Ins. Co.* (1924) 139 Va. 341, 123 S. E. 509, (1925) 23 MICH. L. REV. 543, holding *contra*, is similar on its facts except that, so far as appears, it was not stated in the application that where nothing was added to the printed declarations it was true without exception. The case went on the ground that where the application discloses that a question is not answered, the insurance company cannot complain on the basis of concealment, breach of warranty or misrepresentation.

eases mentioned in the statement, the court said that "the affirmative form of the application and statements therein were not such as to require any questions on the part of the medical examiner."⁵⁰ But clearly such a form contemplates the putting of a question. If the medical examiner, who customarily asks questions in order to fill out the blanks, actually does ask questions as to numerous matters and then fails to inquire about fits and other diseases mentioned in the same printed statement, the normal reaction of the ordinary individual is that he is not asked for information about those matters and that they are regarded as immaterial by the medical examiner. Bearing in mind the way in which such applications are filled and the reliance placed by the applicant on the examiner to inquire for the desired information, and the unquestioning way in which applicants sign, such forms of application are apt to prove a trap for the unwary. However, again there are qualifying statements in the opinion:

"There might be circumstances partaking of fraud in procuring an applicant's signature which, upon being shown, would estop the company from pleading the false statement as a defense to an action to recover upon the contract. Thus, it has been held that where the applicant, in response to questions asked by the agent, gave a true account of attacks of disease or subject of inquiry and the agent, deeming it unimportant, failed to insert the full statement or inserted an answer contrary to that made, and induced the applicant to attach his signature thereto without reading it, the company, notwithstanding the false answer so inserted, is nevertheless bound. Such appears to be the holding in *Lyon v. United Moderns*, 148 Cal. 470."⁵¹

It must be admitted that in the type of cases just discussed there is grave danger of perjured or mistaken testimony with regard to such questions of fact. It seems, however, no greater than when it is claimed that an agent had issued a fire policy upon oral application with knowledge of breach of an inceptive condition. Also it is doubtless true that the jury out of sympathy and upon slender evidence will be apt to find for the plaintiff upon these disputed questions of fact. However, insurers must take the risks of the jury system as well as other litigants. Naturally the insurer wishes to guard itself against the frauds and errors of its agents, but granting that the agent is guilty of such fraud or error while the applicant has acted in good faith, on ordinary principles the company should be responsible.⁵² Whether greater care in the selection and superintendence of agents or a practice of requiring applicants to write their own answers without assistance on the part of any agent of the company is feasible and would operate to prevent the evils of which the insurers complain may be debateable.

⁵⁰ 27 Cal. App. at 740, 151 Pac. at 162.

⁵¹ *Ibid.* at 739, 151 Pac. at 161.

⁵² In the Layton case, *supra* note 46, the medical examiner, according to the report, seems to stand convicted by his own testimony.

C. *Knowledge of Breach Acquired by Agent After Inception of Contract and Before Loss.* No California cases have been found relating to this problem.

If, as has been indicated in the first paper, the insurer upon obtaining knowledge of the breach must act promptly if it would avoid the contract, the question is whether the knowledge of the agent is to be imputed to the principal. When the agent in the particular territory is in charge of the principal's business there, it seems proper to make the imputation. Such an agent is the one to whom the insured would normally make communication of the facts. Even if it be conceded that the agent is not himself authorized to make the election by reason of notice restrictions in the policy or application, it does not follow that he has not at least apparent authority to receive the communications for transmittal to the company.⁵³

D. *Knowledge of Breach Acquired by Agent After Loss.* In the only California case on the agency problem,⁵⁴ the agent was informed after a loss of a breach of the unconditional and sole ownership clause. After holding that the act of procuring the insured to make an affidavit of the nature of his interest did not constitute an estoppel, since such conduct did not cause sufficiently prejudicial reliance, the court added that it could not be a case of waiver because of the policy provision that "no officer of the company shall be held to have waived unless the waiver was indorsed in writing." Even on the election theory great promptness is not imperative, for the loss has already occurred and furthermore the act of the agent is not indicative of an election to affirm, since it is more consistent with the desire to obtain complete information before reaching a decision. Hence the case is of slender authority on the agency problem. Yet if the particular agent is actually authorized to handle the settlement and adjustment of claims, there seems no reason why as incidental thereto he would not have authority to elect to affirm the contract.

II. FIRST PREMIUM CONDITIONS

After finding that the particular agent had actual authority to deliver policies on credit despite the condition of prepayment in the policy, the court in *Farnum v. Phenix Ins. Co.*⁵⁵ held that the non-waiver-save-by-written-indorsement provision in the policy applied only to "waivers" after delivery of the policy as a consummated contract. An insurance

⁵³ See *Stipcich v. Metropolitan Life Ins. Co.* (1928) 277 U. S. 311, 48 Sup. Ct. 512.

⁵⁴ *McCormick v. Springfield Fire & Marine Ins. Co.* (1885) 66 Cal. 361, 5 Pac. 617.

⁵⁵ (1890) 83 Cal. 246, 23 Pac. 869.

company, it was said, cannot so limit its capacity to contract by a general stipulation against waivers of conditions or a provision requiring its contract to be in writing as to disable itself to make through agents an oral contract not forbidden by the Statute of Frauds.⁵⁶ As the first premium condition is not a true condition for the reasons previously assigned⁵⁷ the "waiver" language of the policy may be thought inapplicable. Furthermore conceding the particular provision to be a limitation upon the agent rather than upon the company itself⁵⁸ it amounts to a mere notice and if actually untrue is nugatory.⁵⁹

In a later case the insurer was held largely upon the authority of the *Farnum* decision. However, the court said:

"The agents of the defendant were not authorized by defendant to take anything except money in payment of premiums. They did consent to take the note in question, in lieu of money, the effect of which, according to the evidence, was that they became individually liable to the defendant for so much money, less their commissions.

"It was in effect, so far as defendant was concerned, a payment of the premium to the agents, who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents, and not an extension of the time of payment."⁶⁰

It is submitted that the two sentences of the first paragraph are inconsistent except on the assumption that the meaning is that the agent did have authority to extend credit but that upon doing so he became responsible for the payment by virtue of an agreement between himself and the company. If the agent had neither actual nor apparent authority to extend credit, no contract was made, since the agent would be modifying without authority the counter-offer of the insurer.⁶¹ Without its consent the insurer cannot be forced to take the obligation of the agent in lieu of payment by the applicant merely upon the agreement of the agent with the applicant that the former would assume payment to the insurer.⁶²

⁵⁶ A similar holding is to be found in *Berliner v. Travelers' Ins. Co.* (1898) 121 Cal. 451, 53 Pac. 922.

⁵⁷ Langmaid, *op. cit. supra* note 5, at 14.

⁵⁸ The provision was: "The use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." 83 Cal. at 251, 23 Pac. at 870.

⁵⁹ In *Vierra v. New York Life Ins. Co.* (1931) 66 Cal. App. Dec. 1336, 6 P. (2d) 349, the application provided that if payment of the premium in cash was made with the application and the applicant was later determined to be an acceptable risk, then the insurance should take effect from the time the policy was applied for. A note for the premium was given the agent, who assured the applicant that it was satisfactory. Although the policy was sent to the agent, the applicant died before delivery. Judgment against the company seems based on the fact that the agent had *actual* authority to accept a note in lieu of cash, despite an agency restriction notice in the application.

⁶⁰ *Griffith v. New York Life Ins. Co.* (1894) 101 Cal. 627, 639, 36 Pac. 113, 117.

⁶¹ Langmaid, *op. cit. supra* note 5, at 14.

⁶² *Tomsecek v. Travellers' Ins. Co.* (1902) 113 Wis. 114, 88 N. W. 1013; 1 *MECHEM, AGENCY* (2d ed. 1914) 762-764.

III. CONDITIONS BECOMING OPERATIVE AFTER INCEPTION OF CONTRACT AND BEFORE LOSS, OTHER THAN PREMIUM CONDITIONS

A. *In General.* The first two cases to be considered would seem to involve attempted restrictions upon the insurer itself rather than upon the agent. In *Gladding v. California Farmers' Mutual Fire Ins. Ass'n*⁶³ there was a provision that "the use of general terms, or anything less than a distinct specific agreement expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." After the contract had been made a local agent consented in advance to a change in the use of the premises involving an increase of hazard. It was held that the mode of waiver, provided for in the policy, was the measure of the power, and, if so, no officer of the company was authorized to consent to an increase of risk in any other manner. The parties, it was said, were competent to stipulate that a condition could not be waived save by indorsement. So far as the case can be considered to decide that the insurer may by contract prevent itself from later "waiving," it must be considered wrong. It has been repeatedly recognized that parties to a written contract cannot by stipulation in that contract divest themselves of competency to make a new contract modifying the former.⁶⁴ Likewise there seems no reason for upholding the validity of a provision that a condition cannot be excused by a later oral permission to dispense with its performance. If, on the other hand, the court meant merely that the limitation was notice of the agent's lack of authority to "waive" save by written indorsement, then, providing that the lack of actual authority is kept good, the case upholds the attempted restriction of the agent's authority to waive save in the manner designated. However, it is difficult to reconcile *West Coast Lumber Co. v. State Investment & Ins. Co.*⁶⁵ Here the policy provided that it would be void in case of a change of title "without the written consent of the company endorsed hereon." After a change of interest had occurred and before a loss the agent assured the insured that he was still protected. It was held that the company was estopped. An attempt apparently was made to distinguish the *Gladding* case, for after an allusion to it occurs this passage:

"I find no such provision in the policy here. It does provide that certain things shall avoid it unless the consent of the company is indorsed thereon * * * but there is no clause expressly requiring a waiver of any of the rights of the company to be in writing, or to be assented to by any particular officer, or in any specified manner."⁶⁶

⁶³ (1884) 66 Cal. 6, 4 Pac. 764.

⁶⁴ In *Mackintosh v. Agricultural Fire Ins. Co.* (1907) 150 Cal. 440, 447, 89 Pac. 102, 105, it was said: "There can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing."

⁶⁵ (1893) 98 Cal. 502, 33 Pac. 258.

⁶⁶ *Ibid.* at 509, 33 Pac. at 260.

The court seems to be in error in assuming that in the *Gladding* case there was a restriction specifically directed to the agent.

More recent decisions seem to render nugatory the agency restriction notice employed in modern policies such as the statutory fire policy.⁶⁷ In *Arnold v. American Ins. Co.*⁶⁸ it was claimed that the policy had become void by reason of the presence of a small quantity of gasoline. It appeared that there had been an earlier small fire and immediately thereafter the gasoline was removed. The adjuster was informed about the facts but made no objection and proceeded to adjust the loss and presumably the insurer paid. It was held that the conduct of this agent in leading the insured to believe that he was still protected prevented the insurer from setting up the breach of condition when sued for a later loss. With regard to the agency restriction notice the court said:

"We do not consider at all material in this connection the presence of the printed stipulation to the effect that no officer, agent, or representative of the company shall have the power to waive or be deemed to have waived conditions of the policy, unless such waiver shall be written or attached thereto. Such provisions existed in the policies in some of the cases cited, and were not considered effectual to prevent the conduct of the officers of the company from constituting a waiver or estoppel on the company. The doctrine is that the company has knowledge when its proper officer has the knowledge, and if with such knowledge it leads the insured to rely upon his policy as a valid policy, notwithstanding the breach of condition of which it knows, it will not be heard to allege such breach against a claim for a subsequent loss, accruing at a time when, from the conduct of the company, the insured had every right to believe that his property was protected by the policy."⁶⁹

Possibly the explanation of the case is that since the adjuster had actual authority to adjust the loss and to raise objections to the claim, his conduct, reasonably leading the insured to believe either that there had not been a breach of condition or that it would not be taken advantage of and consequently that he was still protected, must be regarded as the act of the company. In other words there was conduct of an agent within the scope of his actual authority causing prejudicial reliance.⁷⁰

The above quoted language of the *Arnold* case was largely responsible for the decision in *Bank of Anderson v. Home Ins. Co. of N. Y.*⁷¹

⁶⁷ ". . . and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except by writing indorsed hereon or added hereto, and no person unless duly authorized in writing, shall be deemed the agent of this company." Cal. Stats. 1927, p. 1673.

⁶⁸ (1906) 148 Cal. 660, 84 Pac. 182.

⁶⁹ *Ibid.* at 668, 84 Pac. at 185.

⁷⁰ The authority of the case is weakened by the fact that the court decided that the existence of the small quantity of gasoline did not constitute a breach of condition.

⁷¹ (1910) 14 Cal. App. 208, 111 Pac. 507.

Here an issuing agent, authorized to make indorsements, orally agreed to make the proper indorsement permitting other insurance, but failed to do so. On the suggested explanation of the *Arnold* decision the case is distinguishable. While the agent had authority to make indorsements, it does not necessarily follow that he had authority to bind his company by an oral agreement to do so; to hold that it does means that the agency restriction notice is futile.⁷²

In many jurisdictions the courts have distinguished between inception and subsequent conditions, holding that while the agency restriction notice is inapplicable to the former, it is applicable and effective as to the latter.⁷³ If the conclusion reached in the earlier paper is correct,⁷⁴ the case is not one of election where a subsequent condition is involved and the reasons pointed out for disregarding the agency restriction notice when there is a breach of an inception condition do not apply. It is of course true that an agency restriction notice, even if couched in contractual language, is not a matter of contract but merely serves as notice of limitations on authority to avoid the possibility of apparent or ostensible authority. If the notice is not true in fact at the time it is given and at the time the agent acts, or where true when given is not true when the agent acts, the notice is ineffective. However, if the notice is truthful at both times, it is difficult to see on principle why it should not be effective to accomplish the insurer's purpose. Permission to violate a condition or a promise made after violation in order to bind the principal must, according to agency law, be made by an agent with authority. Is it impossible to give an agent authority and at the same time couple the authority with the limitation that it must be exercised in a particular way, as in writing?

Despite certain language in accord with the California cases last cited, *Mackintosh v. Agricultural Fire Ins. Co.*⁷⁵ is distinguishable. After the policy had issued an additional sum was charged by and paid to an issuing agent for permission to increase the hazard. The court said that this was "in effect a new contract executed between the parties, a contract which the law does not require to be in writing."⁷⁶ Al-

⁷² But see *West v. Norwich Fire Ins. Soc.* (1894) 10 Utah 442, 37 Pac. 685. In *Sowell v. London Assurance Corp.* (1916) 32 Cal. App. 443, 163 Pac. 242, after a breach of the change of interest condition, the agent indorsed approval of the assignment of the policy and the property to an assignee who merely took the remaining interest of the original insured. There was no written indorsement waiving the prior change of interest. In holding the insurer liable, no reference was made to any clause in the policy limiting the power of the agent.

⁷³ JOYCE, *INSURANCE* (2d ed. 1917) §436; see particularly *Medley v. German Alliance Ins. Co.* (1904) 555 W. Va. 342, 47 S. E. 101.

⁷⁴ See Langmaid, *op. cit. supra* note 5, at 17.

⁷⁵ *Supra* note 64.

⁷⁶ *Ibid.* at 448, 89 Pac. at 105.

though in other parts of the opinion the court speaks of waiver, it would seem that the decision can be more securely rested on the theory that it was not a case of waiver at all and hence that the agency restriction notice with regard to waiver had no application.

B. Assignment of Insured Premises and of Policy. It has already been stated⁷⁷ that an "assignment" of a fire policy, when it is intended to insure the "assignee" rather than merely make damages for a loss to the "assignor" payable to the "assignee," requires a new contract between the insurer and the "assignee" in order to be effective. Possibly such a new contract may be supported by promissory estoppel only. The question will then be whether the agent had authority to make such a new promise.

In the early case of *Shuggart v. Lycoming Fire Ins. Co.*,⁷⁸ besides a change of title condition in the fire policy, there was also a provision that it could not be "assigned" without the insurer's indorsed consent to the transfer of the property. Furthermore it was stated in the policy that no agent was authorized to waive conditions without special authority in writing. After a transfer of the property the local agent orally agreed to make an indorsement. Recovery was denied on the ground that there was no evidence that the agent was authorized in writing or that he had been accustomed to "waive" without written indorsement. Both the written indorsement and written authority clauses seem to be treated as effectual. However, if the written indorsement clause be interpreted to be a limitation on the insurer itself, the objections previously considered apply. The written authority clause can at most amount to a notice that the insurer does not give agents authority except in writing. Yet if this was not true when the policy was issued or if the agent was later orally authorized to "waive," the insurer should be as liable as if it had been an individual insurer acting personally.

A recent decision⁷⁹ in a district court of appeal presumably arose under the statutory fire policy with its agency restriction clause. The court contented itself with the remark: "It is well settled in California that forfeiture clauses of an insurance policy may be orally waived."⁸⁰

C. Suspension of Risk Provisions. While a suspensory clause is strictly not a condition, the problem is treated here for the sake of convenience. *Reid v. Northern Assurance Co.*⁸¹ appears to be the only California case dealing with the agency aspect. Despite the usual clause

⁷⁷ Langmaid, *op. cit. supra* note 5, at 26-27.

⁷⁸ (1880) 55 Cal. 408.

⁷⁹ *Linsky v. Scottish Union & National Ins. Co.* (1924) 68 Cal. App. 688, 229 Pac. 1017.

⁸⁰ *Ibid.* at 689, 229 Pac. at 1018.

⁸¹ (1923) 63 Cal. App. 114, 218 Pac. 290.

denying the authority to waive save by written indorsement, it was held that the agent had authority to bind the insurer by "estoppel." If, as has been suggested,⁸² the case is one of a new contract, supported by consideration, modifying the former, the problem is neither waiver nor estoppel. Hence the provision denying the power to waive is not applicable unless the term, "waive," may be interpreted to include "modify."

IV. SUBSEQUENT PREMIUM CONDITIONS

In *Knarston v. Manhattan Life Ins. Co.*,⁸³ there was apparently no agency restriction clause in the policy. It was held that a "general agent" of a life insurance company had power, unless limitations and restrictions were communicated to the third person, to waive and dispense with the conditions of the policy, on the ground that such was within his apparent authority.⁸⁴

But where a life insurance policy contained a provision that no forfeiture could be waived save by an agreement in writing signed by the president or other named officers whose authority would not be delegated, it was held that a general agent not authorized to enter into contracts could not waive the forfeiture by the acceptance of an overdue premium.⁸⁵ The company, it was said, was entitled to limit its agent's authority and there was no opportunity for the doctrine of ostensible authority, when such notice was given to the third person. If, as has been suggested,⁸⁶ the acceptance of the overdue premium amounts to a new contract, the result is sound where the agent has no authority to accept overdue premiums. If he has such authority, he really has authority to enter into such a new contract. Ratification of the agent's receipt of the premium would accomplish the same result.

V. CONDITIONS OPERATIVE AFTER LOSS

On the questions herein arising the California decisions seem to be unanimous that the clause in the policy limiting the power of the agent to waive in writing is ineffective, either on the ground that the provision itself may be waived⁸⁷ or that the provision does not apply to conditions

⁸² Langmaid, *op. cit. supra* note 5, at 29-30.

⁸³ (1899) 124 Cal. 74, 56 Pac. 773.

⁸⁴ For the facts of this case and a criticism thereof, see Langmaid, *op. cit. supra* note 5, at 31-32.

⁸⁵ *Belden v. Union Central Life Ins. Co.* (1914) 167 Cal. 740, 141 Pac. 370. Nor can he waive the forfeiture by an offer to accept a premium later. *Cayford v. Metropolitan Life Ins. Co.* (1907) 5 Cal. App. 715, 91 Pac. 266. See also *Upton v. Travellers' Ins. Co.* (1919) 179 Cal. 727, 178 Pac. 851, 2 A. L. R. 1597.

⁸⁶ Langmaid, *op. cit. supra* note 5, at 31.

⁸⁷ *Carroll v. Girard Fire Ins. Co.* (1887) 72 Cal. 297, 13 Pac. 863. There was a provision that no condition could be waived save by the president or secretary in writing. *Held*, that the condition as to obtaining a certificate of a magistrate was waived by proceeding to arbitration without objection during the time within which such certificate was to be procured.

operative after a loss.⁸⁸ While little reason is assigned for interpreting the restriction clause not to apply to this type of condition, it is suggested that the result frequently at least may be defended on the ground that the agents did in truth have actual authority to do the acts that operated as a waiver or estoppel. These agents, including adjusters, may be vested with plenary authority to deal with the insured with reference to the latter's claim and if as incidental to such dealing they in any way cause the insured to refrain from complying with proof conditions, their acts are the acts of the company. In other words the notice of the lack of authority may not be true. Thus a particular agent may be vested with the duty of informing the insured that he has no claim by reason of a breach of an initial or subsequent condition. If he informs the insured that the company denies liability, the insured may be induced to refrain from making the proofs because he believes they will be useless. Supposing there to have been no breach of that condition, it would seem clear that the company cannot now take advantage of the breach of the proof condition.⁸⁹

⁸⁸ *Wheaton v. North British Mercantile Ins. Co.*, *supra* note 28 (delay in presenting preliminary proofs); *McCullough v. Home Ins. Co.* (1909) 155 Cal. 659, 102 Pac. 814 (conduct indicating sworn proofs not necessary); *Frank & Co. v. New Amsterdam Casualty Co.* (1917) 175 Cal. 293, 165 Pac. 927 (liability insurance; written notice of injury waived by assuming control of litigation); *Lee v. United States Fire Ins. Co.* (1921) 55 Cal. App. 391, 203 Pac. 774 (refusal of agent to allow plaintiff to sign proofs of loss and denial of liability); *Enfantino v. United States Fire Ins. Co.* (1931) 66 Cal. App. Dec. 1002, 3 P. (2d) 331 (denial of liability within the sixty days period for proof). See also *Francis v. Iowa National Fire Ins. Co.* (1931) 112 Cal. App. 565, 297 Pac. 122.

⁸⁹ VANCE, *INSURANCE* (2d ed. 1930) 439: "With regard to such conditions as are to be fulfilled after a loss has taken place, the agent is usually a representative having the full powers of the principal—in effect, a vice-principal—and the policy can no more do away with the legal significance of his subsequent acts than if they were done by the principal himself."

S. B. Warner, *The Effect of a Provision in an Insurance Policy Limiting the Authority of an Agent to Alter the Contract* (1917) 6 CALIF. L. REV. 203, makes a spirited argument for the "validity" of agency restriction notices in insurance policies. He includes California as one of the states upholding such notices. It is respectfully submitted, however, that some of the California cases cited, and certain others which are not, do not sustain his position if that position be that such notices are always efficacious to accomplish the purposes the insurers apparently have in mind. Warner does not attempt to discriminate between different types of conditions to which different considerations may well apply, as the present writer has endeavored to show. In his argument, Warner refers to other kinds of contracts that he contends are analogous, notably the building contract that provides that no extra work shall be paid for unless ordered by the architect in writing. This amounts to a notice that the architect has no authority to modify an already existing contract except by written agreement. Its nearest resemblance in the insurance cases is to the case of a waiver of a subsequent condition.

CONCLUSION

As the writer pointed out in his earlier paper on the subject of waiver and estoppel, it is believed that sufficient attention has not been directed either by courts or text writers in their study of that topic to the distinctions properly to be taken between different types of conditions in insurance policies. It is also thought that these diverse types call for separate treatment of the agency problems connected therewith. Clarity will not be gained so long as the agency questions are lumped together without appreciation of these significant distinctions. Speaking with proper modesty, the writer is firmly of the opinion that, while his theories of the proper solution of the various problems may be erroneous, yet these differences do exist and must be heeded. A recognition of this will furnish the foundation upon which a clearer analysis may proceed, ultimately leading us out of the chaos which courts and other writers freely admit.

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