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Insurance--Provision for Agreement That Agent's Knowledge Will Not Be Imputed to Principal--Validity

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child to sue for the alienation of affections of his parents in a state where the statute is in effect, it seems unreasonable to contend that the existence of such statutes elsewhere indicates a public policy adverse to granting the action in a jurisdiction where no such statute exists. Furthermore, the desirability of such statutes has been strongly questioned.[22]

The fact that there is no precedent for the action at common law is an inadequate reason for leaving the problem to the legislature, as was done in the principal case. Courts have recognized other causes of action in spite of lack of precedent — for example, in cases of loss of consortium by a wife because of a negligent injury to her husband,[23] pre-natal injury,[24] invasion of the right of privacy,[25] and intentional mental disturbance.[26]

That the child has a vital interest in the preservation of the integrity of his home and family against unwarranted outside interference is clear.[27] The Ohio court should have recognized the infant's right to recover in the principal case under the court's power to expand the common law to meet the needs of society.

LARRY A. BROCK

INSURANCE — PROVISION FOR AGREEMENT THAT AGENT'S KNOWLEDGE WILL NOT BE IMPUTED TO PRINCIPAL — VALIDITY

In applying for an automobile insurance policy the applicant truthfully revealed to the agent of the insurance company that he had had several minor accidents and a cancellation of insurance by a previous insurer. The agent wrote on the application that the car-owner had had no cancellation and only "one small claim." The applicant signed the application but claims that he did not know that false answers had been

[21] See 20 CORNELL L.Q. 255, 257 (1935).

[22] See Brown, *The Action For Alienation of Affections*, 82 U. OF PA. L. REV. 472, 505 (1934); Kane, *Heart Balm and Public Policy*, 5 FORD. L. REV. 63 (1936); Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417 (1935)

[23] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied* 340 U.S. 852, 71 Sup. Ct. 80 (1950).

[24] Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams v. Marion Transit Co., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

[25] Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Friedman v. Cincinnati Local Joint Executive Board, 6 Ohio Supp. (36 N.E.2d) 276, 20 Ohio Op. 473 (1941).

[26] Prosser, TORTS § 11 (1941).

[27] See Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185 (1916); Prosser, TORTS § 101, p. 937 (1941). For statistical data demonstrating the reality of such an interest as manifested by the psychological disruption of the child and economic loss to society caused by a broken home, see Note, 28 N.C.L. REV. 397 (1950).

inserted. The policy was issued and sent to the agent but never delivered to the applicant because the company learned of the prior losses. Before the company cancelled the policy, which cancellation occurred shortly after its issuance, the driver had another accident. A provision in the policy stated that no notice to an agent should estop the insurer from asserting any rights under the policy. In a suit by one claiming under the insured's rights, the plaintiff claimed that the knowledge of the agent as to the false answers was imputed to the insurance company and therefore the company issued the policy with knowledge and could not take advantage of any agreement whereby the policy was to be void if the application proved false. *Held,* for the insurance company, because the limitation in the policy effectively changed the common law rule that knowledge of an agent received while acting within the scope of his authority and in reference to a matter over which his authority extends is imputed to his principal.[1] Judge Taft, in the concurring opinion, stated that the limitation was not only to be found in the policy, but also in the application, because of the interpretation of a clause therein.

The three-judge dissent criticizes the majority opinion as harsh and contrary to the weight of authority, pointing to the fact that the insured's dealings are confined to the agent and rarely does the insured do more than sign his name to the application.

Previous Ohio cases have questioned the wisdom of allowing a soliciting agent[2] to deal with truthful applicants who rely on him, only to have the agent's authority limited by a provision in the policy subsequently issued.[3] These cases held, as did the court of appeals in the principal case, that when the limitation appeared only in the policy it could affect only knowledge gained subsequent to the issuance of the policy, but not knowledge gained at the time of the application. Good public policy requires that an insurance company holding an agent out as its representative should be bound by what he does, even if in excess of his actual authority, for to the insured the agent is the company.[4] In *Mechanic's &*

[1] Fay v. Swicker, 154 Ohio St. 341, 96 N.E.2d 196 (1950)

[2] OHIO GEN. CODE § 9586. Soliciting agent is agent of the insurance company anything in the application or policy to the contrary notwithstanding. The majority opinion held that this section established the fact of agency and not the scope.

[3] Hartford Fire Ins. Co. v. Glass, 117 Ohio St. 145, 158 N.E. 93 (1927); Foster v. Scottish Union & National Ins. Co., 101 Ohio St. 180, 127 N.E. 865 (1920). Without discussing the affect of the position of the limitation, the majority in the principal case distinguished these cases on the fact that in both of them premiums had been paid for many years, and the principal of equitable estoppel was applicable without regard to the limitation. Under Judge Taft's view, since the application also contained the limitation, only the question of public policy should remain.

[4] Lind v. State Automobile Mut. Ins. Ass'n., 128 Ohio St. 1, 11, 190 N.E. 138, 142 (1934) *But see* Republic Mut. Ins. Co. v. Faught, 83 Ohio App. 131, 82 N.E.2d 133 (1948); Peninston v. Union Cent. Life Ins. Co., 7 Ohio Dec. Repr. 678 (1874).

Traders Ins. v. Hemmelstien,[5] where a similar limitation was under consideration, it was stated that the presumption that knowledge of an agent is imputed to his principal is thoroughly imbedded and the agency is so irrevocably fixed that nothing in the terms of the application or policy can invalidate it.[6] The public policy and law fixing the insurer's liability cannot be regarded as conferring a mere personal privilege which may be waived by agreement.[7]

In *Rhode Island Underwriter's Ass'n. v. Monarch,*[8] it was stated that even though the principal may try to relieve himself of liability by limiting the power of his agents through conditions in the policy, he can not commission an agent to act for him in a given transaction and then seek to avoid responsibility by denying that notice to the agent in such transaction is notice to the principal.[9] Other courts reach the same result without deciding the validity of such limitations, by holding as did previous Ohio cases,[10] that such limitations affect only knowledge gained subsequent to the issuance of the policy.[11]

A few jurisdictions have held, in accord with the decision in the principal case, that the insurance company could by contract abrogate the common law rule that knowledge of the agent is imputed to the principal.[12] Upon this theory, in *Curry v. Washington Nat. Ins. Co.,*[13] recovery was denied on a policy when the insurer's agent had inserted false answers in the application, even though the elderly, illiterate applicant had honestly conveyed the answers to the agent. The federal courts have generally upheld the freedom of insurer and insured to contract to avoid

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[5] 24 Ohio App. 29, 155 N.E. 806 (1926).

[6] Insurance statutes are a part of every insurance policy. John Hancock Mut. Life Ins. Co. v. Snyder, 52 Ohio App. 438, 3 N.E.2d 898 (1935); Liberty Mut. Ins. Co. v. Houck, 32 Ohio App. 429 (1922).

[7] Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N.E. 1072 (1890)

[8] 98 Ky. 305, 32 S.W 959 (1895).

[9] Helig v. Home Security Life Ins. Co., 222 N.C. 231, 22 S.E.2d 429 (1942); *accord,* Union Life Ins. Co. v. Evans, 193 Ark. 627, 101 S.W.2d 778 (1937). Insurer may not contract with applicant against knowledge being imputed to company from agent. Adams v. LaSalle Life Ins. Co., 99 S.W.2d 386 (Tex. Civ. App. 1936), makes the distinction between the right of a principal to limit the authority of his agent and his right to exempt himself from the effect of the knowledge acquired by such agent in connection with the authority so conferred. *But. cf.* Metropolitan Life Ins. Co. v. Tannebaum, 240 S.W 2d 566 (Ky. 1951).

[10] See note 3 *supra.*

[11] Prudential Ins. Co. of America v. Saxe, 134 F.2d 16 (4th Cir. 1943); Rhodes v. Mutual Ben. Health and Accident Ass'n., 56 Ga. App. 728, 194 S.E. 33 (1937); Lampke v. Metropolitan Ins. Co., 279 N. Y. 157, 18 N.E.2d 14 (1938)

[12] Kasmer v. Metropolitan Life Ins. Co., 140 Pa. Super. 46, 12 A.2d 805 (1940); Southern Surety Co. v. Benton, 280 S.W 551 (Tex. Com. App. 1926).

[13] 56 Ga. App. 809, 194 S.E. 825 (1937).

imputation of knowledge.[14] In passing upon Ohio General Code Section 9586, one federal decision stated that the statute established only the fact of agency and not the scope, and that therefore the contract limitation must prevail.[15] Another court, seemingly forgetting that the validity of the limitation was in issue, held that allowing the knowledge to be imputed would invalidly defeat the written contract by parol evidence of prior statements of the insured to the agent.[16] These views have even more support when the limitation is in the application, for then the insured is charged with knowledge at the inception of the transaction, and cannot claim, as he well might if the limitation were only in the policy, that the application was answered before he had notice of the limitation.[17] However, those cases in accord with the dissent in the principal case still appear to be in the majority, for it makes no difference when the limitation is brought to the applicant's attention if the limitation is nugatory as contra public policy.[18] This is the view taken by eminent text writers in criticizing such results as were reached in the principal case.[19]

Therefore this writer submits that where the limitation appears only in the policy it should not affect the imputation of knowledge gained prior to the issuance of the policy. Moreover, even where the limitation appears in the application, in view of common business practice between insured and agent, to uphold contractual liberty to the extent that the rule of imputation of knowledge to the principal is abrogated, would not be in accord with the dictates of good public policy.

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[14] New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837 (1886) held that it is competent for any party in the negotiation of a contract to limit his powers, provided the limitation is brought home to the knowledge of the other contracting party. Here the limitation was also in the application. This is the well settled federal rule. Provident Mut. Life Ins. Co. of Philadelphia v. Parsons, 70 F.2d 863, 867 (4th Cir. 1934); Fountain & Herrington, Inc. v. Mutual Life Ins. Co. of N. Y., 55 F.2d 120 (4th Cir. 1932)

[15] Sun Ins. Office v. Scott, 284 U. S. 177, 52 Sup. Ct. 72 (1931)

[16] Hartford Fire Ins. Co. v. Nance, 12 F.2d 575 (6th Cir. 1926); *accord,* Northern Assurance Co. v. Grand View Bldg. Ass'n., 183 U. S. 308, 22 Sup. Ct. 133 (1902). The concurring opinion in the *Hartford* case pointed out that it was a question of estopping the company from voiding the contract, and therefore not a question of varying a written contract by parol evidence.

[17] Thus in *Rhodes v. Mutual Ben. Health & Accident Ass'n.,* 56 Ga. App. 728, 194 S.E. 33 (1937), knowledge was imputed when the limitation was in the policy, but when the limitation was also in the application, as in *Curry v. Washington Nat. Ins. Co.,* 56 Ga. App. 809, 194 S.E. 825 (1937), knowledge was not imputed.

[18] Continental Life Ins. Co. v. Chamberlain, 132 U.S. 304, 10 Sup. Ct. 87 (1889); Hart v. Prudential Ins. Co. of America, 47 Cal. App.2d 298, 117 P.2d 930 (1941); Sternaman v. Metropolitan Life Ins., 170 N. Y. 13, 62 N.E. 763 (1902); Federal Life Ins. Co. v. Whitehead, 73 Okl. 71, 174 Pac. 784 (1918).

[19] VANCE, INSURANCE 445 (2d ed. 1930); 1 MECHEM, AGENCY 770 (2d ed. 1914)