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Insurance: Does Failure to Submit Proof of Loss within a Specified Time Defeat Recovery under the Terms of a Fire Insurance Policy

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of the rule, since the applicant was himself an agent for the defendant company, and the "ambiguous wording" was on the back and not incorporated within the application form, the court would seem to have extended the application of the rule much farther than is warranted.

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INSURANCE: DOES FAILURE TO SUBMIT PROOF OF LOSS WITHIN A SPECIFIED TIME DEFEAT RECOVERY UNDER THE TERMS OF A FIRE INSURANCE POLICY?

Assured's failure to give immediate written notice and to submit written proof of loss to the insurance company was held, in the case of *Moyer v. Merchants Fire Insurance Company*,[1] to prevent recovery under the terms of a policy which provided that in case of loss the assured was to give immediate *written* notice of that loss and within sixty days to furnish the company with a *written* "Proof of Loss signed and sworn to by the insured." There was a further provision that "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the terms of this policy shall have been complied with . . . ."[2] There was no provision, however, which called for forfeiture of the policy in case of non-performance of the conditions.

In her petition, plaintiff Lula E. Moyer alleged that she had notified defendant of damage caused to plaintiff's building by a fire, and that defendant's agent personally inspected the building and examined the loss. However, there was no evidence that plaintiff had given immediate *written* notice to the company of any loss, but only that either she or her daughter called or talked to a brother who was employed by a local agent of the company, and that she talked with someone at the office of the Western Adjustment Company. Failure to perform these conditions in the manner and within the time specified in the policy resulted in the court's denying recovery.

On this question of submission of proof of loss, there are two distinct lines of authority. One holds that submission of proof by the holder of the policy *within the time limit stated in the policy* is a condition precedent to the right of recovery.[3] The other line of authority, although also making the submission of proof a condition precedent to liability, holds that failure to submit proof *within the time stipulated* is not, in and of itself, fatal to the assured's recovery. Under this second view, which represents the generally accepted rule,[4] failure to submit proof within the time stipulated will not avoid the policy or work a forfeiture, in the absence of a provision to that effect in the policy.

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[1] 133 N.E.2d 790 (Ohio Common Pl. 1952), *aff'd*, 134 N.E.2d 176 (Ohio Ct. App. 1954).

[2] It will be noted that this wording is in conformity with the 1943 form of the New York standard fire insurance policy which changed the 1918 form by substituting the word "unless" for the word "until". NEW YORK INSURANCE LAW, § 168, as added by c. 671, LAWS 1943, effective July 1, 1943.

[3] See, *e.g.*, San Francisco Savings Union v. Western Assur. Co., 157 Fed. 695 (N.D. Calif. 1907); White v. Home Mutual Ins. Co., 128 Cal. 131, 60 Pac. 666 (1900).

[4] See, *e.g.*, Niagara Fire Ins. Co. of New York, N.Y. v. Raleigh Hardware Co., 62 F.2d 705 (4th Cir. 1933); Indian River Bank v. Hartford Fire Ins. Co., 46 Fla. 283, 35 So. 228 (1903); St. Paul Ins. Co. v. Owens, 69 Kan. 602, 77 Pac. 544 (1904); Steele v. German Ins. Co., 93 Mich. 81, 53 N.W. 514 (1892); Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N.W. 97 (1900); Nance v. Oklahoma Fire Ins. Co., 31 Okla. 208, 120 Pac. 948 (1912); Dakin v. Queen City Fire Ins. Co., 59 Ore. 269, 117 Pac. 419 (1911); North British Ins. Co. v. Edmundson, 104 Va. 486, 52 S.E. 350 (1905); Raleigh Hardware Co. v. Williams, 106 W. Va. 85, 144 S.E. 879 (1928); Welch v. Fire Ass'n, 120 Wis. 456, 98 N.W. 227 (1904).

In the case of *Smith Insurance Agency v. Hamilton Insurance Company*,[5] the only ground upon which the defendant insurance company denied liability was that proof of loss had not been rendered to it within the time stipulated by the terms of the policy. Holding for plaintiff, the court said:

> "The policy does provide that the insured shall furnish the proofs of loss within sixty days after the fire, unless the time be extended by the company. But there is no provision forfeiting the policy for failure to comply with this requirement." [Where there is no forfeiture clause] ". . . failure to furnish such proof of loss within the given time does not wholly destroy all right of recovery, but only delays right of action; but action upon it cannot be brought until such proof is furnished."[6]

As between the decision of the *Moyer* case and that of the *Smith* case, it would seem that the latter is the more realistic approach to the problem.

The purpose of the notice of loss is to acquaint the insurer with the fact that a loss has occurred and to permit it the opportunity of making a proper investigation. The giving of proof of loss is a more formal requirement designed not alone to allow the insurer the opportunity to determine the extent of its liability, but also to afford it a means of detecting any fraud that might have been perpetrated upon it. It is therefore greatly to the insurer's advantage, if there is any question or doubt as to the validity of the claim of loss, to have the proof submitted within the specified time. But a late submission of the proof does not deny the insurer an opportunity of determining the extent of its liability, nor does such late submission render impossible the detection of fraud. Consequently, it does not follow that a late submission of proof of loss should work to avoid the policy. Yet, the courts of New York, for example, hold that failure to submit written proof within the time specified in the policy results in forfeiture. To emphasize this fact and obviate the possibility of a different interpretation being put forth by an assured, the word "unless" in the 1943 fire insurance policy form provided by statute in New York was substituted for the word "until" as previously used in the 1918 form in the phrase "No suit or action . . . shall be sustainable . . . until all the terms of this policy shall have been complied with . . . ."[7] While the word "until" might imply that a suit could be maintained after the proof is submitted, even though it was late, it was felt the word "unless" would clearly rule out the possibility of that interpretation.

In *Peabody v. Satterlee*,[8] a case requiring that written proof of loss be submitted within sixty days, plaintiff mailed the proof within that time but it was not received by the insurer until after the sixty days had elapsed. The facts in this case showed that the proof of loss was drawn up by a Mr. Hawley as attorney in fact for the assured, and mailed thirty-two days after the loss by fire had occurred. The insurer rejected this proof thirty-nine days after the loss as not having been executed, signed, and sworn to by the assured in accordance with the terms of the policy. Fifty-nine days after the loss occurred, the assured sent the properly executed proof of loss by registered mail to the insurer who received it sixty-one days after the loss had taken place. Finding for defendants, the court held:

> "A condition of a fire policy, requiring insured to furnish proofs of loss within a certain time, is broken when the insurer does not receive them until after such time, though insured mailed them before the time had expired."[9]

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[5] 69 W. Va. 129, 71 S.E. 194 (1911).

[6] *Id.* at 131, 71 S.E. at 196.

[7] VANCE, LAW OF INSURANCE, § 161, pp. 899, 901 (3d ed. 1951).

[8] 166 N.Y. 174, 59 N.E. 818 (1901).

[9] *Id.* at 174, 59 N.E. at 818.

California follows this rule, and in a case in which the policy in question provided that no suit was to be brought *until* the terms of the policy were complied with, the court held that failure to perform in time caused forfeiture, even though the policy contained no forfeiture clause.[10] After discussing the various constructions given by the courts to the words "until" and "unless", the California court indicated that it could see no real difference in meaning between them, stating:

> "It would seem to require a microscopic inspection to discover a substantial difference in [their] meaning . . . ."[11]

The California Insurance Code, Section 550, reads:

> "In case of loss upon an insurance policy against fire, an insurer is exonerated if notice thereof is not given to him without unnecessary delay by an insured or some person entitled to the benefit of the insurance."

Also, the California standard fire insurance policy form, adopted in 1949 and amended in 1950, has the sixty-day provision for proof of loss in writing to be rendered to the insurer, and also provides that:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with . . . ."[12]

As can be seen by these three samples, California, as well as New York, follows the minority rule which requires strict compliance with the provisions of the policy as regards notice and submission of proof of loss within the stipulated time, failure to meet these requirements resulting in a forfeiture.

It would seem that those courts denying recovery have resolved the problem of proof of loss in an unnecessarily harsh manner. Agents are very often deemed and represented by insurance companies to be "friends of the family" and as persons who will be of assistance in the event of emergencies. If these representations are true, then it would appear that these provisions requiring written notice, and the manner in which they must be prepared to be acceptable to the company, should be carefully explained to the assured to obviate the possibility of forfeiture for failure to perform a simple ministerial function. What is being exchanged in these aleatory contracts in the payment of the premium for the insurer's acceptance of the risk of loss. When a loss arises, it would seem that the high ideals of justice are not being faithfully and honorably served where courts permit the insurer to escape liability on the sole basis of the assured's unfortunate omission to perform a technical requirement that is easily overlooked, the failure more often than not arising out of the assured's inability to understand the terms of the policy, or his ignorance of the importance and purpose of the condition. This does not mean to deny the insurer his right to require more than merely the payment of the premium in exchange for his acceptance of the risk of loss, but it does mean to suggest that courts and legislatures should either: 1) consider substantial performance of the terms of the contract (as required in construction contracts, for example)[13] as sufficient, or 2) unless there has been some effort, beyond the mere handing over of the policy, on the part of the insurer to explain orally to the assured what these conditions mean and how they are to be performed in the event of loss,

[10] White v. Home Mutual Ins. Co., 128 Cal. 131, 60 Pac. 666 (1900).
[11] *Ibid.*
[12] California Insurance Code, § 2071 (1950).
[13] Rowe v. Gerry, 112 App. Div. 358, 98 N.Y. Supp. 380 (1906).